

Transforming Community Services

A trade union guide

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British
Association of
Occupational
Therapists



Transforming Community Services – Joint Union Advice and Guidance

Contents

1	About this guide	4
2	Transforming Community Services – main points	5
3	NHS as Preferred Provider	6
4	Possible models for service delivery	7
5	Workforce implications	10
	Key Reference Documents	15
	Appendix 1 Social enterprise – what to ask and why	16

1 About this guide

1.1 The Transforming Community Services (TCS) programme, introduced at the start of 2009, aims to implement the government's vision for primary and community care in England.

1.2 The Department of Health published the key document 'Transforming Community Services: Enabling New Patterns of Provision' in January 2009 to aid primary care trusts (PCTs) in setting up a clear separation between their commissioning and provider functions, as well as outlining timetables for action and the organisational forms to be considered by PCTs for service delivery.

1.3 When Transforming Community Services was first announced by the government, the NHS trade unions and the TUC produced 'Transforming Community Services: A Trade Union Guide' aimed at trade union representatives and officers to help them through the TCS process. The NHS trade unions and the TUC had, and continue to have, strong concerns that TCS may lead to fragmentation of NHS services and increased use of the private sector to deliver public services for private profit by encouraging PCTs to commission services from a range of different providers. This then poses a real threat to the NHS as well as to the job security of staff working within it.

1.4 This guide is a supplement to that first trade union publication and aims to update trade union representatives and full-time officers with details on recent developments and changes to government policy on TCS, not least the government's statement that the NHS is its 'preferred provider', as well as further advice on how staff and trade unions should be engaging with PCTs, strategic health authorities (SHAs) and potential new providers on this process.

1.5 Staff working in primary and community care settings across England are already feeling the impact of TCS, although different PCTs are at different stages of implementation. Work on TCS across England is ongoing and the potential impact on the employment conditions and job security of PCT staff continues to be a concern.

1.6 We continue to campaign for effective staff and trade union engagement and consultation in decision-making throughout the process. It is important that all unions, whether affiliated to the TUC or not, continue to work together to ensure that changes in their local health services represent the best interests of both NHS patients and staff. Involving trade union members throughout this process will be critical to ensuring that staff voices are heard.

2 Transforming Community Services – main points

2.1 By now, PCTs should have split their provision of services from their commissioning arm, with commissioning forming a contractual relationship with providers.

2.2 The next stages required PCTs, following consultation with staff and trade unions, to draw up business plans for 'transforming' local services: setting out how they will increase patient choice, improve service provision and provide contestability and competition. PCTs should also consider options for organisational forms and describe further plans for trade union consultation for implementing the business plan related to the provider services.

2.3 The original deadline for this (October 2009) was amended during summer 2009 in a letter to SHAs and PCTs from NHS chief executive David Nicholson. The letter stated that PCTs were still required to develop commissioning plans for priority community services by October 2009, and that provider organisations must be ready by this date, but that SHAs were now able to determine the timetable for the development and assurance of PCTs' proposals regarding future organisational form.

2.4 However, in the NHS Operating Framework for England for 2010/11, the government reintroduced a deadline, of end of March 2010. The document states: "To provide certainty for staff and a stable foundation for service transformation, by March 2010 PCTs must have agreed with SHAs proposals for the future

organisational structure of all current PCT-provided community services".

2.5 All decisions will be taken locally by PCT boards, with oversight by strategic health authorities – SHAs will need to approve final business plans. It is still essential that PCTs engage at an early stage with staff and trade unions, as set out in the TCS document, on the organisational options.

2.6 In addition to local engagement (PCTs with local staff sides), SHAs will share PCT plans with trade unions through the regional Social Partnership Forum to ensure there is effective communication and strategic joint working. This should form part of the SHA assurance process, through which PCTs must obtain approval for their plans. In the recently published document, Transforming Community Services – the assurance and approvals process for PCT-provided community services¹, *the DH states: "We also expect SHAs to engage constructively with Regional Social Partnership Forums on workforce issues arising from this guidance."*

2.7 The government has also set up the Cooperation and Competition Panel² (CCP) as a further means of ensuring that PCT and SHA decisions fall within the scope of the DH's 'Principles and Rules for Co-operation and Competition'. The Panel investigates potential breaches of these principles and rules, and makes independent recommendations to the Department of Health and Monitor on how such breaches should be resolved. It also reviews proposed mergers, and advises on the wider development of co-operation, patient choice and competition within the NHS. The NHS trade unions and the TUC have concerns that the CCP is being used by some providers to try to undermine the NHS as preferred provider policy.

¹Available at www.dh.gov.uk/dr_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_112146

²See website: www.ccpn.org.uk

3 NHS as Preferred Provider

3.1 During summer 2009, the NHS health trade unions and the TUC held meetings with the Secretary of State for Health and his ministers to express concern about the drive towards privatisation of healthcare. This led to a keynote speech by the Secretary of State at the King's Fund on 17 September 2009 where he made it clear that the NHS was the government's "preferred provider".

3.2 A letter³ from David Nicholson to SHAs and PCTs followed on 13 October 2009, confirming the policy.

3.3 This was a significant policy change, which meant that commissioners should not go straight to the market when commissioning providers. The DH, following discussion with the Social Partnership Forum (SPF) (comprised of NHS Employers, trade unions and the Department of Health) expects all PCTs to follow principles including:

- NHS and existing providers should be engaged at an early stage of service development
- NHS providers should have the opportunity to bid for any opportunities that are developed
- early and substantial engagement of existing providers is expected
- early and substantial engagement of staff and their trade union representatives, where applicable, is expected
- decisions are taken locally, but within clear national guidelines.

3.4 The DH remains committed to supporting and promoting social enterprise

as one model of organisation of healthcare provision. However, the statement that the NHS is the preferred provider and should be given a fair opportunity to improve services should provide more options to staff, who in some parts of the country have been pressurised into social enterprise under threat that their service will be put out to tender.

3.5 As a direct result of the preferred provider policy, the NHS trade unions worked with the DH to ensure that existing DH guidance documents reflect the policy and to ensure that staff engagement remains paramount. The following documents have been revised or withdrawn:

- *Necessity not Nicety* – a document which portrayed NHS commissioning as a purely commercially driven activity and that actively encouraging private providers into healthcare provision – has been superseded by *Commercial Skills for the NHS*.
- *PCT Procurement Guide* has been completely rewritten
- *NHS Standard Contract* has been updated to include firmer commitments to staff engagement and protections and to include the provisions of the *NHS Staff Passport*
- *Principles and Rules for Co-operation and Competition* have been revised.
- *Transforming Community Services: Further guidance on the assurance process for PCT proposals on community services is a new document that aims to support SHAs in their role to assure PCT proposals for community provider organisational forms. (Further details on these documents can be found on page 15).*

³www.dh.gov.uk/en/Publicationsandstatistics/Lettersandcirculars/Dearcolleagueletters/DH_107126

4 Possible models for service delivery

4.1 The NHS Operating Framework 2010/11 states that the DH “will not prescribe solutions” regarding organisational form for provider. However, trade unions are concerned that some of the options are being limited by the DH.

4.2 Direct PCT provision

The Operating Framework states that “direct provision by PCTs will remain an option where it meets our tests and is partnered by strong commissioning”. The guidance on the SHA assurance process states that “PCTs should principally be commissioning organisations. Circumstances may make it appropriate for some PCTs to continue the direct provision of services, but this will not be the norm. Proposals to do this will pass the tests when the provider is able to demonstrate the provision of exceptionally good services that are sustainable and support pathway change. Continued direct provision should not detract from the PCT’s core role of commissioning, which should be of the highest standard. Direct provision will also be appropriate where it enables greater innovation in the delivery of integrated services, such as in a partnership arrangement with a local authority or local primary care organisation but again must also be matched by strong commissioning.” On 25 March 2010, the DH published the initial list of names of six PCTs given approval in principle to continue as Direct Provider Organisations for the duration of the next Comprehensive Spending Review (ie four years).

4.3 Social enterprises

The Operating Framework states that “Social enterprise ‘right to request’ schemes provide a further option”. This is reinforced by Transforming Community Services – the assurance and approvals process for PCT-provided community services, which states that “Social enterprise ‘Right to Request’ schemes will continue to provide a further option for community services, building on the ‘first wave’ of 20 announced in November 2009. An assurance framework already exists for the right to request, which is administered through SHAs and guidance already exists for the right to request.” Of the 20 potential social enterprises some have been successfully challenged by staff, while very few represent whole-service social enterprises, with some covering specific aspects of public health or prison health care.

The NHS trade unions are concerned that requests to form social enterprises are being taken by senior management in some PCTs without any engagement or support from staff. Through the SPF, we have ensured that staff engagement forms part of the SHA assurance process and that staff must be made fully aware of the implications of a move to a social enterprise before any decisions are made.

Transforming Community Services – the assurance and approvals process for PCT-provided community services states: “Proposals will need to demonstrate that they... are as a result of early and effective staff and trade union engagement and that there is staff support for the organisational form being proposed”.

On an individual PCT level, the NHS trade unions have been working closely

to ensure that decisions are not made without staff engagement and where this has occurred to campaign to ensure that the decision making process is rolled back.

Talks are currently underway between the DH and HM Treasury to extend eligibility for the NHS Pension Scheme to new starters within a social enterprise.

We also have produced a best practice checklist (*see appendix at end of this document*) that trade union representatives and officers can use when a social enterprise is being developed. The checklist will help to ensure that all the relevant information is available for staff before they make any decisions on their future employment and terms and conditions.

4.4 Community foundation trusts

When the TCS document was first launched, the NHS trade unions and many staff saw Community Foundation Trust (CFT) as an option that would help to retain staff within the NHS in the long term. However, in the SHA assurance guidance the government moves away from allowing a large number of PCT provider arms to become CFTs. The guidance states: "Community Foundation Trusts are likely to be an option for a very few areas, as in many places other options will be more appropriate and can be implemented at pace".

On 25 March 2010, the DH published the names of eight PCTs approved to move to the first stage of becoming CFTs (seeking and achieving NHS Trust status by July 2010). Some PCT community services are being aggregated to create CFTs and it is likely that, as the assurance process proceeds, some PCTs may choose to combine with the proposed CFTs.

4.5. Integration with an NHS acute or mental health provider

Integration with an NHS acute or mental health provider (sometimes referred to as vertical integration) has seen interest from a significant number of PCTs. Initially, the trade unions believed that this option appeared to be the least likely to be favoured by the DH due to the creation of what could be seen as a monopoly provider in a local area. However, NHS Chief Executive David Nicholson was reported by the Health Service Journal as saying in a speech that he saw "vertical integration" as "a real opportunity to improve services right across whole pathways". He was also quoted as saying that "the idea that at a time when we are facing real financial challenge, that we'll start creating a whole new set of NHS organisations is nonsensical."

A number of PCTs are using integration with an acute trust as a holding option – where provider services are placed under the management of the acute trust in the short term, until a decision is made about the long-term options for organisational form.

In the *SHA Assurance Guidance* the DH states that "Forms which bring community services together with NHS hospital or mental health services may provide a focus on admissions prevention and integrated pathways, particularly for patients with long-term conditions or those requiring intermediate care services."

4.6. Integration with another community-based provider

Integration between provider arms of PCTs where they continue to be provided by a PCT is a form of continuing direct provision. In the original TCS document the DH stated that it would be “inappropriate” for new trusts to be formed, unless they were foundation trusts. This suggested that PCT provider arms would not be able to merge unless it was as a first step towards becoming a community foundation trust. However, many PCTs are negotiating to merge their provider arms.

Transforming Community Services – the assurance and approvals process for PCT-provided community services – states that “PCTs may decide that some community services would be better provided through integrated models that include primary care (eg GP practices and consortia), social care, third or independent sector providers.”

The integration of primary and social care remains a priority for the government. In the NHS Operating Framework the DH states that “NHS organisations must continue to develop working arrangements with local authorities, partnership is no longer an optional lever – this is absolutely imperative if we are to achieve gains across public services.” It also states in relation to “workforce flexibility” that in order “to enable the NHS workforce to respond to changing demands and to avoid redundancies organisations must support workforce flexibility and mobility by enabling the easier transfer of employees between different employers within local health and social care economies”.

At present, wholesale merger of PCTs with local authorities has been minimal, though joint partnership arrangements for specific services are more common. Government initiatives such as Total Place are encouraging working across whole areas between public bodies including health services and local authorities.

The DH announced in April 2009 16 integrated care pilot sites. They would be run over two years with the aim to pilot new clinically-led models of integrated care. The organisations taking part in the pilots include PCTs, local authorities and social enterprises.

It is important for trade union reps to note that where a local authority is lead commissioner in a joint arrangement with a PCT, they may not be obligated to use the NHS Standard Contract and as a result the Code of Practice on Workforce Matters in Public Sector Service Contracts – the two-tier workforce agreement.

The Department of Health is keen to encourage the use of the two-tier workforce agreement and so in a number of circumstances where a local authority has refused to implement it, the DH has refused continued membership of the NHS pension scheme for any of the transferred staff. Although the DH’s promotion of the two-tier workforce agreement is a positive move, the potential impact on staff facing transfer needs to be highlighted.

Trade union reps should find out if the local authority is acting as commissioner, and if so check that they will be implementing the Code of Practice on Workforce Matters in Public Sector Service Contracts. If the local authority is refusing to implement it, trade union reps need to highlight to staff being transferred that

they may not be entitled to stay in the NHS pension scheme. The PCT should be asked to put pressure on the Commissioner to include the code of practice.

4.7. Private sector or non NHS/ independent sector

Private sector provision remains an option for primary care services. However, to date there appears to have been little interest from the private sector in taking over whole PCT provider arms, rather than individual services.

Talks are currently underway within government to discuss the possibility of staff transferring out of the NHS to be able to remain part of the NHS Pension Scheme.

5 Workforce implications

5.1 Commercial Skills for the NHS

The successor document to *Necessity Not Nicety, Commercial Skills for the NHS* signals a clear shift away from the pro-market drive of the original document towards one where incumbent NHS providers and staff are engaged with and help inform future commissioning decisions.

Regarding the improvement of existing services, p7 of the document states that “In many cases, this would be taken forward through cooperation between commissioner and provider in undertaking service reviews, engaging staff in redesign and service improvement. Any agreed outcomes would be implemented as contract variations or addressed upon expiry. Should underperformance be evident where the NHS is the incumbent provider, that provider will be given two opportunities to improve before a decision is taken on whether to engage with other potential providers.”

The document also outlines that staff engagement is essential when making decisions. It states on p7: “Crucially, commissioners and providers need to work together with staff to channel their energy and commitment into improving services. Ensuring staff own and lead the process of service change and adopt best practices (eg the NHS Institute’s ‘Productive’ programmes) is a key success factor.”

The document reinforces this further on p8, where it states that “Early and substantial engagement of staff and their trade union representatives, where

applicable, is required and is principally the responsibility of employers” and on p10: “NHS providers and their staff can expect to be engaged constructively by their commissioner(s) to work in partnership with them in addressing concerns about the performance of services and required service improvements, giving them fair and reasonable opportunities to improve and lead change.”

5.2 Standard Contract

The NHS standard contracts cover agreements between PCTs and all types of provider delivering NHS funded services. The revisions to the contracts have come about as a result of detailed discussion and amendment by the NHS Staff Passport sub-group of the NHS Social Partnership Forum. The revisions form part of the work undertaken following the launch of the NHS Staff Passport aimed at underpinning the staff rights laid out in the NHS Staff Passport and represent a significant success in partnership working.

The NHS trade unions, through the SPF, have ensured that the NHS standard contracts have a more robust workforce section (Schedule 11). Following trade union pressure in 2009 the DH agreed to include that providers must adhere to the Code of Practice on Workforce Matters in Public Sector Service Contracts, which helps prevent a two-tier workforce by ensuring that new starters within an organisation working on NHS contracts receive broadly comparable terms and conditions to those staff that were transferred under TUPE. This includes the Cabinet Office Statement of Fair Practice (‘Fair Deal on Pensions’).

Clause 11.1 states: “Whenever applicable the Provider shall comply with the

Cabinet Office Code on Workforce Matters together with Annex A: “A Fair Deal for Staff Pensions”. This requires that TUPE shall apply to all staff transfers (including block transfers) and transferring staff shall be offered membership of a pension scheme which is broadly comparable to the NHS pension scheme. Other staff who are appointed to work on the Services alongside transferred NHS staff should be offered fair and reasonable terms and conditions that are overall no less favourable than those of their transferred colleagues throughout the term of this Agreement.”

The revised contract now also includes that providers must have regard to the NHS Constitution, which would include the staff pledges, as well as ensuring that staff are covered by the provider’s indemnity insurance.

Clause 1.2 states: “The Parties shall have regard to the NHS Constitution including without limitation its pledges to patients and service users, the public and staff and the guiding principles of the NHS.”

A new section has been added on Third Party Rights (Schedule 44). Clause 11.11 states: “Persons employed by the Provider shall have the right to enforce this Agreement as shown in clause 44 (Third Party Rights).” Schedule 44 now means that where a provider is not adhering to the terms of the contract, staff, through their trade unions will have a mechanism through which to enforce the contract “as far as it confers a benefit on them”. So, for example, if a provider is not applying the two-tier workforce agreement and the commissioner does not enforce it, staff trade unions now have a lever through which they can ensure the relevant clause is enforced.

Previously if the Code of Practice on Workforce Matters was not being adhered to and the commissioning PCT chose not to enforce it, a member of staff would have no means of recourse.

The NHS Contract for Community Services will cover all agreements between Commissioners (Primary Care Trusts and where appropriate, local authorities) and providers of community and out of hospital services.

It is therefore very important that trade union representatives ensure that when the PCT is not the lead commissioner they press for the use of the NHS standard contract or ensure that the relevant clauses are still contained within the new contract in order to protect staff.

5.3 Staff Passport

In November 2009, the SPF launched the *NHS Staff Passport*. The passport is an online toolkit designed to provide NHS staff facing transfer with an easy-to-use, practical guide to the minimum employment standards and rights they can expect when being transferred either to another NHS provider or outside the NHS to a provider who is contracted to offer NHS services.

The NHS Staff Passport is also a tool for commissioners to evaluate potential new providers of NHS services in terms of their commitment to employment standards and rights. It states: "Commissioners are responsible for ensuring that any potential new provider (and hence potential new employer) provides evidence that they are both able and committed to meeting the employment standards outlined in this NHS Staff Passport. This should be reflected in the relevant tender processes and documentation, including the terms

of any subsequent service contract. The responsibility applies equally to any change of service delivery linked to the development of a social enterprise and is underpinned by Department of Health policy guidance to commissioners and employers."

Negotiations to create the staff passport achieved some greater protection for NHS staff. Staff transferred to social enterprises will be able to stay in the NHS pension scheme if they continue to work for NHS-funded services. Where members are transferred to social enterprises or the private sector, and continue to work for NHS-funded services, this will count as continuous service if members later return to direct NHS employment. Talks remain ongoing regarding all transferred staff being able to retain membership of the NHS pension scheme.

5.4 PCT Procurement Guide for health services

The revised *PCT Procurement Guide* provides a framework for decisions by PCTs as commissioners regarding procurement.

The guide states on p1 that "PCTs, are expected to comply with this guidance as part of the 2010/11 Operating Framework. This guidance applies to commissioning of NHS-funded healthcare services and is applicable wherever a PCT is:

- the lead commissioner
- a joint signatory to the contract
- acting on behalf of another PCT(s) or local authority under delegated commissioning authority
- awarding contracts under Practice Based Commissioning.

The guide also emphasises that there is not a policy requirement that all health services must be put out to tender. It states on p1 that “The guidance does not introduce any general policy requirement that all NHS services should be subject to competitive tendering. It remains a matter for PCTs to determine when and how to use procurement as a tool for securing commissioning requirements and the onus is therefore on PCT boards to demonstrate a rationale for their actions and decisions (eg Tender/No Tender decisions).”

The revised PCT Procurement Guide also helps trade unions representatives who are faced with PCT commissioners refusing to engage with trade unions representing staff working in provider organisations in the mistaken view that this would constitute a conflict of interest and jeopardise the commissioning of services.

Annex A: Provider Engagement states “Provider engagement is an ongoing and integral part of the commissioning cycle and will involve both current and potential providers. It does not stop and start with procurement exercises.”

Referring specifically to conflicts of interest, p21 of the guide states that “PCTs should engage with providers and potential bidders regarding commissioning intentions. A PCT can engage with staff side unions when deciding on service specifications and procurement approaches in order to inform their thinking. See Annex B for further details. It is not a conflict of interest for staff side unions to be involved in discussions regarding potential future service models etc, however, it would be a conflict of interest, if these bodies were involved in procurement decisions. Any information shared with parties as part of the

procurement process must also be shared with other parties to a procurement.”

5.5 Transforming Community Services: The assurance and approvals process for PCT-provided community services

This new document aims to support SHAs in their role to assure PCT proposals for community provider organisational forms. The document is useful to trade union reps as it forms the basis of the assurance process at SHA level overseeing PCT proposals for future organisational forms and contains strong guidance on the levels of staff engagement that organisations are required to carry out. It states: “Proposals will also need to demonstrate effective and early staff and union engagement and good workforce practice, including the application of the NHS Staff Passport. They will also need to demonstrate the extent to which staff wish to be involved in an organisation as stakeholders as well as employees.”

It also states that “It is important that early and effective staff and trade union engagement in developing proposals remains an integral part of the process in this accelerated timetable. Failure to engage could jeopardise the success of the proposals.”

Further FAQs to accompany the guidance have been developed.

See www.socialpartnershipforum.org

5.6 Key questions

Alongside the questions included in the original joint trade union guide we have included below a list of supplementary questions that you may wish to ask your PCT or SHA about any future reorganisation.

Key questions for you to ask the PCTs and SHAs about reorganisation

- » Will the preferred provider statement and principles be adhered to, including: Will any proposed changes to service delivery be fully discussed to assess the suitability of an NHS provider option? Will current providers be given the opportunity to identify and rectify any issues with current service provision?
- » How will staff support for the specific proposals to change service delivery be measured?
- » How will patients and the public be involved in decision-making (as set out in TCS p35)?
- » Will the SHA assurance process be followed, including: Will the PCT be able to demonstrate staff engagement and support?
- » Will the impact on staff be assessed? If so, how? If not, why not?

Key questions for you to ask the PCT about transfer of services out of the NHS

- » Will the NHS Standard Contract be used to procure services from other providers? If not, why not?
- » What will trade union involvement be in the procurement process?
- » Will the employment standards contained in the NHS Staff Passport be met after staff have transferred?
- » After transfer, how will the track record of providers in meeting the employment standards contained in the NHS Staff Passport be assessed?

Key Reference Documents

(web links)

Transforming Community Services

unison.org.uk/file/HC-05-09%20TCS%20attachment.pdf

Transforming Community Services: Enabling New Patterns of Provision

dh.gov.uk/dr_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_093196.pdf

Transforming Community Services: The assurance and approvals process for PCT-provided community services

dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_112147

Commercial Skills for the NHS

dh.gov.uk/dr_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_114573.pdf

PCT procurement guide

dh.gov.uk/dr_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_114740.pdf

Standard Contract

dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_111203

NHS Operating Framework 2010/11

dh.gov.uk/dr_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/@sta/@perf/documents/digitalasset/dh_110159.pdf

NHS Staff Passport

socialpartnershipforum.org/StaffPassport

David Nicholson letter to SHAs and PCTs

dh.gov.uk/dr_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_107127.pdf

Secretary of State's letter to Brendan Barber

unison.org.uk/acrobat/letter_BrendanBarber.pdf

NHS Constitution

dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085814

Social Enterprise – Making a Difference: a guide to the Right to Request

dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_090460

Transfer of Undertakings (Protection of Employment) Regulations

www.berr.gov.uk/files/file20761.pdf

Cabinet Office Code of Practice

archive.cabinetoffice.gov.uk/opsr/workforce_reform/code_of_practice/index.asp

Appendix 1

Social enterprise – what to ask and why?

The NHS trade unions and the TUC are growing increasingly concerned about the process for the setting up of social enterprises to deliver healthcare as part of the Transforming Community Services programme.

The government introduced the 'right to request' scheme for NHS staff, whereby groups of NHS staff could propose the formation of a social enterprise for their service, and their Primary Care Trust (PCT) had to consider their suggested plans.

However, it now seems that in an increasing number of cases the 'right to request' scheme is being used as a lever by senior management within PCTs to push staff towards an organisational form of provider services that staff do not wish to be a part of.

The government has recently published "Transforming Community Services: The assurance and approvals process for PCT-provided community services". Following pressure from the NHS trade unions through the NHS Social Partnership Forum the approvals and assurance process for PCT proposals now contains robust mechanisms for staff engagement. This is particularly relevant when PCTs are developing proposals around social enterprises. The document states "In developing the vision, values and mission for a social enterprise, it is important to involve staff, service users and other stakeholders. This should also involve the unions that represent staff and the Local Involvement Networks. Their buy in to this process and support will be key to success. Proposals for Social Enterprises will therefore need to test the extent to which staff involved in the social enterprise are supportive of the proposals going forward."

We know that many staff within the proposed first wave of Social Enterprise (SE) applications published in December 2009 were not aware that they faced the potential transfer to a social enterprise or if they were aware, they had not been consulted over any of the decisions taken.

It is therefore essential that trade union representatives and officers ensure that PCTs are developing proposals in line with the assurance and approval guidance and are not side-stepping staff engagement and support.

The government has committed to working with social enterprises and sees them as the chosen vehicle through which it would like to provide many public services. However, in what the government is promoting as staff-led organisations – staff support is paramount.

We believe that patient care must remain the priority in the delivery of NHS services and that staff are best placed to know how services should be delivered.

We have put together the checklist below in the form of a series of questions that trade union representatives should use to ensure that their PCT plans for social enterprises are able to demonstrate staff support.

1. What is the problem are you trying to solve through setting up a social enterprise?

We believe that contrary to guidance in the Department of Health's document: 'Transforming Community Services: Enabling New Patterns of Provision' some PCTs are deciding on the form the provider organisation should take before they know what services will be delivered. We believe that there needs to be a justifiable reason for why this model would be able to solve the problems of the previous model of service delivery.

2. What difference would SE make to the quality of patient care? What is the evidence?

We believe that any move from the NHS provider model to social enterprise should be about improving quality of care for patients. We have strong doubts that this has been taken into account in the recent announcements of the first wave of social enterprises. In many cases it is being presented as a means to escape tendering or as an alternative to foundation trust status. We would be interested to see evidence that suggests that social enterprises can improve patient care.

3. Is the organisation viable in the long term? What are the risks of failure to staff, patients and the services?

We are very concerned that staff are being pressurised into forming social enterprises without proper consideration being given to the risks of business failure, particularly at a time of financial uncertainty. There remain unanswered questions about what happens if a social enterprise fails mid-contract.

4. Has there been full consideration of genuine alternatives to SE?

Under Transforming Community Services, PCTs were asked to give early consideration to both social enterprise and foundation trust models. PCT directly-provided services are being ruled out arbitrarily as an option in some areas, despite the fact that page 21 of TCS says: "There is a range of potential options for providing community services – from PCT directly-provided services (which will continue to be an option where well-managed and more business-like), to Community Foundation Trusts."

5. Can the changes, redesign or potential improvements be achieved through a different organisational form within the NHS?

We would like to know the level of consideration given to other provider model options, such as horizontal or vertical integration before social enterprise is developed and the level of detail available about the reasons behind the final decision.

6. What model of SE is being developed? Has there been full consideration of all models of SE?

There are a number of legal forms that social enterprise can take as listed in 'TCS – Enabling New Patterns of Provision'. If a final decision has been taken to form a social enterprise, following full staff engagement, then staff should continue to be involved in the decision-making process for deciding which form to adopt and be made aware of the potential implications that each form has on, for example, their involvement in the future of the organisation or protections around the social objectives of the social enterprise.

7. How have patients and the public been involved?

In 'Social Enterprise – Making a Difference' the government states that staff will be given "the opportunity to innovate and redesign services in flexible new ways, through independent organisations, with the aim of improving outcomes and delivering services that are responsive to the needs of the communities and people they serve." The public should be consulted on any substantial moves towards forming social enterprises as it will have an impact on the services they receive. Staff side representatives may want to contact Local Involvement Networks and their Health Overview and Scrutiny Committees about changes taking place.

8. Has there been a formal staff impact assessment and what are the consequences for staff transferring to SE? Has staff been made aware of them?

Some potential SEs are producing FAQs for staff about transferring to a new organisation, but there is evidence that these are failing to spell out all of the potential consequences for staff. In order for the FAQs to have credibility a staff impact assessment through a scoping exercise should be conducted with trade unions. This should assess the possible impact on staff and could include the effects on pay, terms and conditions, pensions, workplace policies on grievances, trade union recognition and job security.

9. Does the Board accept that staff support is critical to whether to proceed?

In our view, the answer must be 'Yes' but few PCTs have put any mechanism in place to assess the level of staff support. In some cases a ballot has been used, although where this is used it is vital that the question not be set by the employer alone. Such testing of support is particularly important in proposals for whole provider unit SE where with so many staff and so many different locations, significant resources must be put into such testing. Another principle here is that staff should be able to make informed independent decisions, not 'managed' decisions.

10. What level of staff engagement has there been in developing an SE model? When were staff first involved?

We would suggest that as a supposed means to allow staff greater autonomy and decision-making power, a social enterprise will fail and cannot be sustained without full staff engagement throughout its formation and afterwards. We suggest that there should be a template devised by management and staff side that sets the standard for staff engagement.

11. How is staff support for the project being established?

In "Social Enterprise – Making a Difference: a guide to 'right to request', government states that: "Through the creation of social enterprises, we are enabling staff to set up and lead new organisations, which will empower staff and improve services to patients and users." We therefore think that it is essential that staff are fully involved and engaged with throughout the decision-making process if this statement is to be realised.

The guide also states that: “In developing your vision, values and mission [for the social enterprise] you will need to involve your staff, service users and other stakeholders. This should also involve the Unions that represent your staff and the Local Involvement Networks, which have replaced Patient and Public Involvement Forum. Their buy in to this process and support will be key to your success.” We know that in some areas this is not happening and firmly believe that social enterprises (or any other business models) would not succeed where staff feel disengaged from the decision-making process.

12. Who is driving the move towards SE? Is it being led by senior management or the board?

‘Social Enterprise – Making a Difference’ states that, “Through the creation of social enterprises, staff will be enabled to set up and lead new organisations that can both empower staff and improve services to patients and users. This is intended to create the conditions where NHS staff can innovate and lead rather than being told what to do.” We believe that proposals around a number of social enterprises run counter to this statement – with staff being ‘told what to do’ by management and boards keen to form social enterprises regardless of staff attitude. We are keen to ensure that staff are involved from the beginning and any fears or doubts are addressed.

13. Is there a joint steering group developing the project? Is it representative and accountable? Is the process open and transparent?

We believe it is essential to ensure that staff are involved throughout the decision-making process – not only to ensure they feel part of the process but also to address their concerns. Trade unions should be regarded as partners in the development of the project. Whilst they may be wary or even opposed to SE, the trade unions’ role is to ensure that staff interests are fully considered. We believe that trade union involvement is essential to ensure that staff job security and terms and conditions are protected, whatever the outcome.

14. Are other staff that may be affected being consulted? Are staff across the whole organisation being engaged or just in the section that is proposed to move?

It is important that any staff that may be affected, whether directly or indirectly, by the creation of a social enterprise, are consulted and not just those directly

affected e.g. staff delivering services to a PCT but employed by a neighbouring trust(s), must be included in the consultation process.

15. What governance arrangements will be in place in the SE model? Will these include protections/rights of staff?

It is essential that governance structures and clear lines of responsibility are established prior to setting up a social enterprise. The alternatives need to be explained and staff and other service users engaged in choosing the model and therefore the form of governance. Staff need to be reassured that they will not be personally liable in the event of business failure and that the staff passport provisions are in place and enforceable.

16. What is the SHA assessing when signing off proposals from PCTs as part of the assurance process? Does SHA assurance include regional trade unions in partnership?

We are concerned that there is a lack of consistency between SHAs in their social enterprise assurance process. Given the risks involved with starting a new business we are keen to ensure that the assurance process is as robust as possible, in order to protect the delivery of health services and staff. We are also keen to ensure that staff have been fully engaged with the development of the social enterprise model and believe that this should form part of the SHA assurance process. In some regions, the SHA has set up joint assurance processes through their social partnership forum, whereas elsewhere there is simply a light-touch reporting arrangement to the Regional SPF. In our view there should be a common standard of SHA assurance conducted in partnership with trade union and employer partners.

17. What assessment has been made of the impact of SE on equality and diversity regarding both staff and the local community? Are there any risks to services currently provided?

It is essential that an equality impact assessment has been undertaken to assess the effect that a social enterprise may have on staff and patients. We know from experience that outsourcing can often be detrimental to certain groups – both as staff and as patients. A national template could be developed to assist organisations to undertake this responsibility.

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the public service union

unite
the UNION