

Has NHS Improvement given green light for Subcos?

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The new round of proposals by NHS trusts and foundations to launch “wholly owned subsidiaries” comes after a series of strikes and battles last year challenged and defeated similar moves, most conspicuously at Wrightington Wigan and Leigh FT, where a succession of strikes eventually forced a change of policy.

In the late summer of 2018 NHS Improvement, seeking to avoid further bruising clashes, announced there would be a review of the guidance issued to trusts on how to carry out such changes, and urged a pause in any further creation of subsidiaries.

By November, [fresh guidance](#) was published, which was seen by the unions as putting fresh hurdles in the way of trusts seeking to hive off their staff. The document stated that it was outlining

“a new framework that changes the way subsidiaries are reported to and approved by NHS Improvement from 26 November 2018.”

But it also rather ominously went on:

“This framework strikes a balance between assuring us [NHSI] and respecting NHS freedoms and the ability of the NHS to innovate.”

Indeed the tone is almost apologetic:

“We recognise that this updated approach increases the regulatory burden on some providers and we commit to reviewing the approach after one year to consider whether it is still appropriate and proportionate.” (1.3)

The focus of the new guidance was on the obligation of each trust to produce a convincing business case, which “must demonstrate to the Secretary of State that the subsidiary is income generating” (1.2). Up to now business cases have been of poor quality, and little more than flimsy fig-leaves to conceal a hope of escaping VAT costs by establishing companies that can claim exemption.

The powers of trusts to set up such companies are based on legislation and [guidance](#) brought in by the New Labour government back in 2006. This stipulates that an income generation plan

- must be **profitable** and provide a level of income that exceeds total costs...
- the profit made from the scheme ... must be used for improving the **health services**
- and the goods or services “must be **marketed outside the NHS,**”

The guidance emphasises that “[Services] being provided for statutory or public policy reasons are not income generation” ...

“the general legal power of NHS trusts to do anything that appears necessary or expedient in connection with their functions does **not** allow them to form or participate in companies for the

purposes of core NHS healthcare provision. Trusts should not seek legal advice at the public expense on this issue.” (2.1)

It also refers to more recent DHSC 2017 guidance and [Treasury advice](#) which make clear that:

“tax avoidance arrangements should not be entered into under any circumstances. We expect all NHS providers to follow this guidance when considering any new arrangements or different ways of working. ... trusts should not spend money on private sector consultancy support in the development of tax avoidance arrangements as this represents active leakage from the healthcare system.”

However the NHSI guidance is very tentative in spelling out what will be done where these principles appear to be breached. In lesser cases, “we request evidence in the form of a certification that the parent trust board has satisfied itself in relation to key areas of risk.” This certification “should be submitted to and agreed with us before the trust enters into any legally-binding arrangements in relation to the subsidiary transaction.”

Weak language like “requests” and “should be” implies little commitment to restricting trusts’ actions.

In more serious cases “we undertake a further detailed review”.

Despite the weak language it is clear that creating subsidiary companies currently requires the consent of the Secretary of State. And if the NHSI review panel rates the risk of a proposal as Red rather than amber or green “we can use our regulatory powers to stop the transaction if required” (p12).

So the fact that three new proposals are being pushed forward now, despite the opposition of staff, suggests NHSI has given them a green or amber light and the plans have been rubber stamped by Matt Hancock.

The government and NHSI have not learned the lessons of last year’s strikes and confrontation – and are headed for more, similar confrontations – yet again making a nonsense of NHS England’s rhetoric earlier this year about “integration” and seeking to scrap the sections of the 2012 Act which require competitive tendering.

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