

# HEALTH AND SOCIAL CARE INTEGRATION

## LEGAL AND COMMERCIAL ISSUES

### ISSUES SUMMARY

#### CARE MODELS

Partnering Organisations need to consider what care model would achieve integration in consideration of the need of their population and the profile of their local economy.

#### CONTRACTS

Partnering Organisations need to consider the suite of contracts needed to implement commissioning and delivery integration. These include:

- Heads of terms or memorandum of understanding
- Joint venture / collaboration agreements
- Section 75 agreement
- Alliance contracts (if applicable)
- Commissioning contracts (sub-contracts – if applicable)
- Framework agreement (possibly)
- Partnership Commissioning and Provider Boards' Terms of Reference
- Information Sharing Agreements /Protocols (GMS, PMS, APMS).

#### GOVERNANCE

Partnering Organisations need to consider the appropriate governance arrangements to support the new care delivery models. Early consideration must be given to the options available as it is essential that potential barriers are identified and fully understood before the integration process can take place. This will help ensure the best possible outcome for all parties involved.

Interim arrangements must also be considered as these allow the process to be tested and reviewed prior to committing to a system which may later prove unsuitable.

Existing arrangements (for example the Better Care Fund arrangements) may be taken into consideration when looking at governance models, to explore how they could be adapted and widened in scope to implement the new care models. This approach has the advantage of making good use of governance models which have already been tested and build on existing collaborations and established relationships.

#### LONG TERM STRATEGY

Partnering Organisations need to agree long term commissioning and delivery strategies to ensure that their shared objectives, outcomes, values and principles are maintained during any and all implementation phases.

Issues to be dealt with at the outset should include:

- Resolution of disputes and powers of Boards to deal with these issues
- Exit strategies
- Sanctions and expulsion mechanisms
- Join-in arrangements
- Contract duration, renewals, variations and termination (ensuring service continuity)
- Contract novation (if applicable)
- Identify working practices and other commercial relationships that support the services' delivery
- Identify key stakeholders
- Identify any elements of risk.

NHS partners also need to submit their Sustainability and Transformation Plans (STPs) by June 2016. It is important to ensure alignment between the strategic direction of the Partnering Organisations (in the context of their locally agreed plans) and the STPs. Please note that the STPs must also cover better integration with local authority services, including, but not limited to, prevention and social care, reflecting local agreed health and wellbeing strategies. Local authorities should be engaged with these proposals.

### ELS SUPPORT

ELS can support you with designing bespoke models of care to suit your specific requirements and advise on all the legalities of implementing the chosen care model.

ELS can provide legal support to draft and negotiate all of the relevant contracts, Terms of Reference and other relevant documents and assist with the auditing of existing contracts with relevant suppliers and allocation of risk.

ELS can assist with the designing of governance models and the drafting of all necessary documents (including amendments to the constitutions, Terms of Reference, Schemes of Delegation, review of committee structures, etc.)

ELS can provide legal support to document these strategies in the appropriate contracts and other supporting documents as well as ensuring compliance with applicable national guidance and statutory duties.

## PROCUREMENT

Partnering organisations need to comply with the applicable procurement legislation (regardless of whatever integrated care model is implemented).

The Public Contracts Regulations 2015 now apply to both local authorities and NHS organisations.

ELS can provide advice and support with all aspects of procurement legislation and the drafting of all tender documentation for both Healthcare and Social Care organisations.

## PUBLIC CONSULTATION

Partnering organisations must comply with their statutory consultation duty to consult the key stakeholders to avoid their decisions being challenged via judicial review.

ELS can advise on all public consultation matters and draft all relevant consultation documents (if required).

## INTEGRATED COMMISSIONING

Health and Social Care commissioners must agree the delegation of functions and any pooled fund arrangements as part of any section 75 agreement (section 75 of the NHS Act 2006).

CCGs will need to confirm whether primary care commissioning has been delegated to it by NHS England.

The necessary governance arrangements need to be agreed and in particular the legal status of the Partnership Commissioning Board (i.e a working group or a joint committee).

Due consideration must be given to how much integration is required, what is the appetite for risk and how much control is required by each partner involved.

ELS can advise on all section 75 arrangements and draft bespoke robust section 75 agreements.

## PAYMENT MECHANISM

Partnering organisations need to agree the payment mechanism for the integrated model.

NHS services are free at the point of delivery. Local authorities have the power to charge for services (this power cannot be delegated).

The pricing structure must be agreed, i.e:

- Block
- Tariff
- Capitation
- Bonuses.

ELS can support with the following:

- Carrying out of due diligence to determine costs of service provision and proposed changes
- Advising on risk/share and pooling principles
- Advising on Monitor/NHS England guidance on local variations or modifications of payments.

## COMPETITION

Broadly speaking, collaborations between organisations which do not involve competition between service providers are unlikely to give rise to competition issues.

However, any mergers between providers require review by the CMA / Monitor and sharing of sensitive information may be breaching competition law.

Commissioners must be aware that provision of financial assistance in a way that distorts (or threaten to distort) competition could amount to unlawful state aid.

ELS can advise on all aspects of competition law and assess whether merger control issues arise, advise on and draft information sharing agreements needed to regulate data sharing and assess whether any proposed financial assistance could constitute unlawful state aid and if so, whether an exemption applies.

## INFORMATION SHARING AND DATA PROTECTION

Partnering organisations will need to consider how information and patients' records are going to be shared and ensure information governance processes are in place to allow lawful sharing of information.

Ideally, an integrated patients' records system should be put in place. Consideration should be given to whether it is possible to integrate information management and technology systems.

Registration with the Information Commissioner's Office (ICO) is required in the context of sharing data (the DPA 1998 requires every Data Controller who processes data to register with the ICO – unless exempt).

ELS can advise on all aspects of information sharing, data protection legislation, ICO requirements, and the common law duty of confidentiality. ELS can assist with the drafting of the appropriate information sharing agreements to regulate access to patients' records and data sharing.

## CQC

Partnering organisations need to be mindful of the CQC's registration requirements. Will existing registrations need to be amended, or are new ones required?

A new delivery vehicle is likely to need a new CQC registration.

Registration requirements will also be relevant in the event providers' regulated activities increase or decrease.

Compliance with the requirements of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014.

## LEGALITIES

Partnering organisations need to consider their powers to enter into arrangements to create joint venture vehicles (i.e. the ACO), delegate functions to one another, pool resources, apply charges and incentives, etc

## WORKFORCE

Partnering organisations will need to consider and plan staff transfer or secondment arrangements, as well as Local Government and NHS Pension Scheme membership.

Job roles, workforce planning and joint appointments (if any) also need to be considered and the necessary employment and HR checks carried out and supporting documents put in place.

ELS can advise on how to comply with CQC's registration requirements and duties under the 2014 Regulations as well as drafting clear policies and processes to meet the Fundamental Standards.

ELS can assist with the conduct of legal assessment of powers.

Some of the issues ELS advises on include:

- Local authority powers to set up a legal entity as set out in the Local Government (Goods and Services) Act 1970, Local Government Act 1972 and Local Government Act 2003
- Impact of the service re-design on the providers' governance and continuity of services under their licence
- Impact on Governance and Finance ratings of Foundation Trusts
- The requirements applicable to Accountable Care Organisations, such as a provider licence and CQC's registration
- Providers' and Commissioners' accountability for their statutory functions.

ELS can advise on all aspects of employment law including:

- TUPE
- Prepare staff sharing or secondment agreements
- Consultation in respect of TUPE and/or redundancies
- Obtaining employing body or direction employer status to maintain pension scheme membership
- Review of employment and HR policies and processes.

## ASSETS

Partnering organisations will need to consider how to deal with assets in the context of service re-design, including:

- Available premises, location (including any access requirements), any works required to ensure compliance with statutory duties, costs, public sector estate
- Interest in premises (freeholds, leaseholds, PFI, licences to occupy)
- Available facilities and assets (such as IT) and how these can be unified and interface between the various parties
- Any changes required to any current disposal strategy to ensure that all relevant properties will be considered for the purposes of the integrated health project
- The relevant authority is required to enter into legal agreements for the disposal/ acquisition of property and whether the governance procedures of the other parties conflict
- Whether there are any third party interests in the assets and whether any assets could be appropriate for joint/shared use
- Ownership and licences to use IT hardware and software and the ability to share use with other parties.

## INDEMNITIES AND INSURANCE

The necessary insurance cover must be held and this must be appropriate for the type and volume of services to be delivered.

Sufficient cover is to be ensured in respect of directors' and officers' liabilities.

## APPROVALS

The internal and external governance obligations must be complied with (for example, Cabinet's approval, Monitor's approvals for the providers, CQC requirements, compliance with National Guidance, internal boards' approvals, Governors' approval for Foundation Trusts, etc.).

ELS can advise on all property matters and produce the necessary property documents, carry out legal disposals/ acquisitions/licences to ensure that the assets are held and/or are accessible by the appropriate parties. ELS advises on vires and all post completion formalities to ensure that property is registered where appropriate and any Trust declarations and/or appropriate restrictions are entered at the Land Registry as well as tax position in relation to the purchase/disposal of assets when choosing the appropriate joint venture vehicle (e.g. tax breaks for charities) and SDLT position.

ELS can draft all necessary warranties, indemnities and liability provisions in the contracts.

ELS can advise on the approval requirements and processes and early assessment of approvals and prepare the relevant board papers and business cases.