

Royal College of Nursing response to NHS Improvement consultation on the proposed extension to the review of subsidiaries

With a membership of around 435,000 registered nurses, midwives, health visitors, nursing students, health care assistants and nurse cadets, the Royal College of Nursing (RCN) is the voice of nursing across the UK and the largest professional union of nursing staff in the world. RCN members work in a variety of hospital and community settings in the NHS and the independent sector. The RCN promotes patient and nursing interests on a wide range of issues by working closely with the Government, the UK parliaments and other national and European political institutions, trade unions, professional bodies and voluntary organisations.

The RCN welcomes the chance to respond to the NHS Improvement consultation on proposals to revise the framework for the review of subsidiaries. This review provides an important opportunity to strengthen the approval process before subsidiaries can be implemented.

Key issues

The RCN does not support moves by NHS organisations to create separate companies, either wholly owned or in partnership with private, untendered providers, in order to avoid tax or remove staff from NHS employment under national terms and conditions, potentially creating unfair and unsafe working conditions for staff.

RCN members have expressed on-going concern at the emergence of subsidiary companies and the risk which they pose to clinical staff. At RCN Congress 2018, RCN members adopted a resolution which “condemns and deplores the transfer of NHS Staff to limited companies”.

Data from NHS Improvement indicates that there are 41,000 nursing vacancies in the NHS in England.¹ Low pay and deteriorating working conditions caused by staff shortages and increasing demand for services are severely affecting the recruitment and retention of nurses. Any attempt to further undermine their position by undercutting NHS terms and conditions would be wholly unacceptable and would risk patient safety by exacerbating the current recruitment and retention issues.

RCN members report that in recent years Foundation Trusts from across England are increasingly establishing subsidiary companies or exploring the option of doing so. The number of subsidiary companies is rapidly increasing. In 2017, the Department of Health reported “NHS Improvement is aware of 39 subsidiaries consolidated within the accounts of foundation trusts as of 31 March 2017”.² By

¹ NHS Improvement, Quarterly performance of the NHS provider sector: quarter 3 2017/18, February 2018. Available here: <https://improvement.nhs.uk/resources/quarterly-performance-nhs-provider-sector-quarter-3-201718/>

² House of Commons Hansard, NHS Trusts: Subsidiary Companies, 14 November 2017. Available here: <https://hansard.parliament.uk/Commons/2017-11-14/debates/480394F9-CED8-4C8F-BDA9-4890BBAB43A1/NHSTrustsSubsidiaryCompanies>

2018, NHS Improvement reported there were 65 subsidiary companies of sufficient size and/or controlling influence to register in foundation trust accounts.³

The functions of these subsidiary companies vary considerably. They include providing laundry or cleaning services, managing estates, performing 'back-office' functions such as HR, finance and IT, and delivering pharmaceutical services. Although the majority of Foundation Trusts setting up wholly owned subsidiary companies have not to date sought to transfer clinical services, the RCN is aware of instances where clinical and nursing staff have been transferred and is of particular concern. For example:

- Yeovil District Hospital NHS Foundation Trust (YDH), in collaboration with an American company, Ambulatory Surgery Incorporated (ASI), established a company called Day Case UK, the purpose of which was to undertake day surgery previously provided by YDH as an NHS provider.
- SW Clinical Services Limited provides outpatient pharmacy services, the Stratford Clinic - a private consulting and day surgery clinic and Health2Home - a personal online service of health information and recommended products to treat conditions.

It is our view that the likely rationale for establishing these subsidiary companies is to reduce costs and any profits generated by these companies can be passed back to the Trust to support other services. However, these reductions are invariably likely generated from two sources:

- The NHS Trusts avoid VAT payments by purchasing goods and services through the subsidiary company. This means there is no net benefit to the public finances.
- NHS staff are often transferred into the subsidiary company and although they will retain the same terms and conditions of service, any new staff employed by the subsidiary will have no such rights. This leaves a significant loophole in which a subsidiary can employ staff outside of the terms and conditions set through Agenda for Change.

The creation of subsidiary companies does not appear consistent with the promotion of an integrated health economy currently being undertaken through sustainability and transformation plans. Rather than encouraging greater collaboration amongst healthcare providers, the expansion of subsidiary companies, with creation of smaller competing entities, is likely to lead to increased fragmentation. As the voice for nursing in the UK, the RCN recognises the importance of teamwork and collaboration across the nursing family (which remains the largest component of the NHS workforce) and between nursing staff and other professional and support teams. Any fragmentation, arising from the expansion of subsidiary companies, weakens this.

In this context, the RCN welcomes the current review of the framework for the reporting and scrutiny of proposals for the creation of subsidiaries. The review

³ NHS Improvement "Consultation on our proposed extension to the review of subsidiaries" October 2018, p. 6

provides an important opportunity to improve oversight of decisions to create and change the remit of subsidiary companies. Enhanced scrutiny is needed to ensure subsidiaries are not created as a means of avoiding tax obligations, or removing staff from NHS employment on national terms and conditions. It would also ensure that the provision of essential services is not undermined.

The RCN also welcomes the NHS Improvement's decision to ask providers to 'pause' plans for wholly-owned subsidiaries. There is however concern that the pause has not been applied uniformly. It would be helpful for NHS Improvement to reissue guidance confirming the pause applies where trusts had not taken the decision to go ahead with a subsidiary company at the point when the pause came into effect.

Recommendations

The RCN takes the view that:

- Proposals for the creation of all subsidiary companies should be reported to NHS Improvement, regardless of their size, legal structure, value or purpose.
- Plans for the creation of subsidiary companies should be published, accompanied by detailed business plans, and impact assessments.
- Any proposals to establish a subsidiary company should be classified as a significant change, which is deserving of a full review by NHS Improvement, and must be reported in advance to the relevant clinical commissioning group.
- Proposals which lead to 'material changes' to an existing subsidiary should also be treated as a reported transaction and submitted to NHS Improvement, and relevant local decision makers for review. This should include any extension in the functions or range of services provided by subsidiaries.
- Proposals to reduce terms and conditions following a transfer and any failure to meet future pay awards or other changes to Agenda for Change terms and conditions should be classified as a 'significant' change which is deserving of a full review. Any proposals which include this change must be proactively communicate to every member of staff impacted, and relevant unions.
- The risk factors covered by Board Certification should be extended. Trusts should be expected to:
 - Publish a detailed and evidence-based business case for any proposals, which confirms that any proposals would enhance value for patients and maintain quality services.

- Demonstrate that alternative arrangements were considered alongside the creation of a subsidiary and that the proposals will deliver a collaborative and sustainable approach to service delivery.
- Provide a detailed explanation of the tax arrangements within the subsidiary.
- Demonstrate that there has been full engagement with staff and their trade unions when formulating proposals for a subsidiary and that staff support the proposals.

The RCN also takes the view that:

- Where any subsidiaries are created, a Retention of Employment Model should be adopted. NHS staff should be seconded to the subsidiary and remain on Agenda for Change terms and conditions.
- NHS Improvement should work with the Department for Health and Social Care to ensure that the NHS Pension Scheme continues to apply not only to staff who transfer to the subsidiary company but also to new recruits.

Responses to survey questions

Question 1: Do you agree that all subsidiary proposals should be reported to NHS Improvement regardless of value?

Yes

The RCN agrees that all subsidiary proposals should be reported to NHS Improvement, regardless of their size, legal structure, value or purpose. NHS Improvement should prepare detailed guidance for trusts when considering the creation of subsidiary companies to encourage greater consistency across NHS Trusts and Foundation Trusts.

The guidance should advise Trusts that:

- Proposals for the creation of subsidiary companies should be published, and be accompanied by a detailed business case. This information should also be shared with staff side trade unions at an early stage.
- Trusts should explain the rationale for establishing subsidiary companies.

Question 2: What criteria or threshold do you think should make the creation of a subsidiary a 'reportable' transaction?

The RCN takes the view that the creation of **any** subsidiary should be classified as a reportable transaction for NHS Improvement purposes.

Question 3: Do you agree that a 'material change' to a subsidiary should also be reported as a transaction?

Yes

The RCN agrees that any 'material changes' to an existing subsidiary should be reported as a transaction.

Question 4: How do you think a 'material change' should be defined?

A 'material change' should be defined in broad terms. For example, any decision to expand the range of the services provided by existing subsidiaries, beyond the services identified in the original specification should be treated as a material change. All material changes should be reported to NHS Improvement for review.

Some changes to existing subsidiaries are of such importance that they should be classified as 'significant' and therefore deserving of a full review. This should include:

- Any proposal to vary pay and terms and conditions following a transfer
- Any failure to observe future pay awards or uplifts or to respect other changes to Agenda for Change terms and conditions.

Such requirements would support good employment relations and avoid workplace disputes, which can damage workforce morale. It would also ensure that subsidiary companies are not used as vehicle to reduce costs, by removing staff from national terms and conditions.

As stated above, the proposed creation of any subsidiaries should also be classified as 'significant' and deserving of a full review.

Reviews should be completed before a subsidiary is established or any changes to existing subsidiaries are implemented.

Questions 5 & 6: Do you agree that a panel review is an appropriate way to determine whether a proposal for a subsidiary should be classified as 'material' or 'significant' and reviewed accordingly?

Do you agree with the proposed make-up of the panel? Yes/No If you do not agree, who should be included on the panel?

As stated above, the RCN takes the view that the establishment of **all** subsidiaries should be considered as significant and meriting a full review. This would mean

there is no need for a panel review to determine whether a proposal should be classified as 'material' or 'significant'.

Question 7: What risk factors should the board certification cover?

The RCN is concerned that decisions to create subsidiary companies are often driven by a wish to lower costs by avoiding tax obligations or reducing pay and conditions. While existing NHS who are transferred to a subsidiary may retain the same terms and conditions of service, any new staff employed by the subsidiary or individuals who change jobs once employed by subsidiary will have no such rights.

Failure to engage with staff and unions and to secure their support for proposals can also damage workforce morale.

Such strategies can have significant implications:

- For the Treasury through reduced fiscal returns
- For existing and future staff through the creation of a two tier workforce, leading to reduced pay and poorer working conditions
- For patient care and service delivery due to increased difficulties for subsidiary companies to recruit and retain staff

The expansion in the numbers of subsidiary companies also has the potential to:

- Undermine constructive employment relations and social partnership
- Conflict with wider policy objectives to integrate and promote collaboration across the whole health economy
- Waste scarce public resources through expenditure on external consultancy charges or where other subsidiaries seek to sell their advice.

In order to mitigate these risks, NHS Improvement should take a robust approach when reviewing proposals for the creation of new subsidiary companies or changes within existing subsidiaries, and should provide guidance to support decision-making.

The risk factors covered by Board Certification should incorporate all the factors listed in Appendix 8 of the existing transactions guidance as well as the requirements listed on page 8 of the consultation. Trusts should be expected to:

- Demonstrate they have completed a thorough, due diligence review before submitting proposals to a subsidiary company or to change the scope or remit of an existing subsidiary.
- Publish a detailed and evidence-based business case for any proposals, which confirms that any proposals would provide value for patients and

maintain quality services. When preparing the business case, trusts should also demonstrate fair and transparent valuation of assets and that there are sufficient barriers to innovation/efficiency in the status quo which can only be surmounted by recourse to a subsidiary company.

- Demonstrate that alternative arrangements were considered alongside the creation of a subsidiary and that the proposals will deliver a collaborative and sustainable approach to service delivery.
- Provide a detailed explanation of the tax arrangements within the subsidiary.
- Demonstrate that there has been full engagement with staff and in their trade unions when formulating proposals for a subsidiary and that staff support the proposals.

The RCN notes with concern that many of these requirements have not been met by the existing subsidiary companies established prior to this review. In order to ensure a consistent approach is adopted, we would recommend that all existing subsidiary companies should be reviewed again to assess whether they meet the new regulatory framework.

The RCN also takes the view that:

- Where any subsidiaries are created, a Retention of Employment Model should be adopted. NHS staff should be seconded to the subsidiary and remain on Agenda for Change terms and conditions
- NHS Improvement should work with the Department for Health and Social Care to ensure that the NHS Pension Scheme continues to apply not only to staff who transfer to the subsidiary company but also to new recruits. Subsidiary companies can apply for the NHS pension scheme to apply to transferred staff, under a Direction from the Secretary of State, but there is a concern that managers decide not to make this offer to staff, preferring instead a cheaper auto enrolment option. Access to the NHS pension scheme also does not apply to new joiners.

Wider considerations

A health and social care system under strain

It is critical to consider the future role for subsidiary companies within the context currently facing the health and social care system. Fundamentally, successive Governments in England have not made funding decisions for the health and social care system based on a robust, transparent assessment of population need. This means that commissioners are faced with impossible choices, and members of the public requiring support may not have their needs met.

In turn, this then places more pressure on other services, particularly general practice and accident & emergency services. This means that funding for health services is spent supporting individuals whose needs would be better met in the community, if the provision was there. Overall, this is a poor use of public funds, and value for money would be better achieved if it was calculated to meet population demand, rather than the arbitrary figure currently selected by Government. While we recognise budget limitations exist, we need to establish the baseline of need to ensure we are meeting these needs.

Making short-term cost saving decisions in this climate risks further embedding of approaches which do not deliver safe and effective care; and without comprehensive population-need and workforce data, decisions about provision and resource cannot be made effectively.

Nursing workforce shortages

There are not enough registered nurses and healthcare support workers to deliver safe and effective care in health and social care settings throughout England and the wider UK. A lack of accountability at Government level, an absence of national workforce strategy or planning, combined with the removal of the bursary for nursing students in England has meant that the supply of registered nurses is not sufficient. The RCN is also concerned that Brexit and changes to immigration rules may have a detrimental effect on staffing levels.

The impact of this is that nurses report working unpaid overtime to fill gaps, additional stress caused by a high-pressure environment, and describe occasions when vital care is left undone. Data shows that while the number of registered nurses is declining, the number of care workers is increasing. We are concerned that inappropriate substitution of skills leads to poorer outcomes for patients.

We are concerned that proposals related wholly-owned subsidiaries will further impact upon this challenge.

Risks to retention strategies

The success of any proposal for changes to the health system at provider level is entirely dependent on there being a fully funded, skilled and available workforce to deliver it. We would like to draw NHS Improvement's attention to the context which the nursing workforce is facing, and highlight the importance of addressing these

issues. Although many of these issues have been caused by the failings of national governments, there are many opportunities for local providers to alleviate some of the pressures and recognise the value of nurses and other professionals working in challenging circumstances.

Across England, many providers have begun focussing on retaining existing registered nurses, and we have concerns that further introduction of wholly-owned subsidiaries will disrupt these strategies and limit the ability of them to have the intended impact.

At national level, the Royal College of Nursing is calling on the Government to begin to address this by producing a comprehensive, fully-costed (and funded) workforce strategy for health and social care. This strategy should be based upon an independent assessment of population need, rather than affordability. Only by understanding this need, and making an operational plan for resourcing this demand, will the Government be able to have credible conversations with its citizens with regard to addressing the funding gap. Once this is undertaken, the impact of these types of proposals can be better understood, meaning that assurances can be gained related to risks and impact.

Recommendations:

- The Government should undertake an assessment of population need for health and social care services, and use this as the basis for calculating the national service provision and resource required to meet this need. Providers and commissioners have a clear role to play in undertaking these assessments at local level and communicating their requirements to national government. This will provide a better position for starting discussions about how to address the funding gap, and will put both NHS Improvement and providers in a stronger position to understand the impact of these proposed changes.
- Based on this, the Government should produce a national workforce strategy for health and social care, and then take steps to ensure that adequate numbers of staff are recruited and trained. Without this strategy, the impact of these type of changes on the nursing workforce cannot be identified, putting nursing roles and therefore patients at risk.
- Providers should take immediate steps to address challenges with retaining nursing staff in all settings. Retention issues contribute to staffing levels which cannot deliver safe and effective care. Providers are finding this challenging on an individual level, so there is a role for NHS Improvement to understand what incentives or interventions can demonstrate a good response, and then support providers to undertake these. Increased usage of wholly-owned subsidiaries puts retention strategies at risk of disruption, with potentially damaging results on the nursing workforce and the patients in their care.
- Robust workforce data covering all types of setting is not available, and this must be addressed. The creation of further subsidiaries puts areas of the

health service outside the requirements for mandatory data collection and reporting. Without this data, proper scrutiny cannot be undertaken. We recommend that providers be required to collect data from all settings (regardless of subsidiary arrangement), which includes long-term outcomes data, cost of clinical interventions, and quality of life measures, amongst other indicators.

About the Royal College of Nursing

The RCN is the voice of nursing across the UK and the largest professional union of nursing staff in the world.

For further information, please contact:

Hannah Reed, National Officer Team Leader (Hannah.Reed@rcn.org.uk, 020 7647 3835).

**Employment Relations Department
Royal College of Nursing
November 2018**