**#SayNoToSubCo – Using the new guidance**

Following a short consultation period, NHS Improvement issued revised [guidance](https://improvement.nhs.uk/documents/3509/Addendum_to_transactions_guidance_FINAL_CORRECTED.pdf) for trusts looking to set up subsidiary companies in November 2018.

The guidance means that all plans for new subsidiaries have to be reported to NHS Improvement – where they will be scrutinised firstly by a panel and then potentially as part of a more detailed review – along with any “material” changes to an existing subsidiary.

The guidance does not go as far as UNISON wanted; for instance, it does not insist on trusts demonstrating staff approval before setting up a subsidiary and it does not require trusts to make their business cases public.

More importantly, since being published it has become increasingly clear that the way the guidance is enforced means that many of the same problems remain with the way that subcos are being established, such as a lack of meaningful engagement with staff and a failure to be transparent about business plans.

As an addition to the union’s wider political and industrial campaigning, UNISON is continuing to keep up the pressure with national NHS bodies to make sure that the guidance is interpreted in the most robust way.

In the meantime, branches can still refer to aspects of the guidance to strengthen arguments against the imposition of new subcos or dangerous changes to existing ones.

The sections below cover some of the key areas of the guidance (with page references) that can be used to argue that trusts should at least follow best practice or, ideally, abandon plans altogether.

**NHS Constitution**

UNISON has experienced considerable difficulty in obtaining information about plans to set up subsidiaries, many of which have been progressed in secret without any staff consultation. Any trust considering plans for a subsidiary should be expected to hold early and well-informed discussions with staff, as required by the [NHS Constitution](https://www.gov.uk/government/publications/the-nhs-constitution-for-england) which is now referred to explicitly in the guidance (page 20).

**Tax avoidance**

Many trusts that have recently set up subsidiaries have done so to benefit from paying reduced levels of VAT. The guidance reiterates the government’s stated position that “tax avoidance arrangements should not be entered into under any circumstances” (page 6) but this has not previously proved sufficient to stop trusts from going down this route. However, the guidance does go further by adding a more detailed expectation for trusts to base their plans on more than just tax avoidance: it states that trusts should be clear in making the business case for a subsidiary “that the commercial rationale is not dependent on the subsidiary enabling a different VAT treatment from that of the current trust arrangements” (page 13).

**Business case**

UNISON continues to offer assistance to branches when it comes to analysing trust business cases. Many previous subsidiary plans have gone ahead on the basis of extremely flimsy cases, if they existed at all. The new guidance makes it a requirement for trusts to produce a business case for all subsidiary proposals. The financial element of the business case should be underpinned by long-term projections which provide sufficient detail for the underlying financial assumptions to be understood and for subsidiary proposals to be compared with alternatives (pages 13-14).

The guidance states that the level of detail in the business case should, as a minimum, be sufficient to answer a long list of questions in Appendix 2 (pages 19-22).

Some of the most important questions are as follows:

* “Has there been a detailed options appraisal of the alternatives for addressing these challenges and is there a clear rationale for selecting the subsidiary transaction?”
* “Does the options appraisal consider the long-term environment and any potential changes (eg cross-provider co-operation through sustainability and transformation partnerships)?”
* “Does this rationale set out why it is the best option for patients, the trust and the wider system?”
* “How is the trust board assured that the subsidiary will have the ability to attract and retain staff with the appropriate skills and experience to deliver the service requirements both immediately and over the life of the business plan?”
* “Does the business case outline a robust and comprehensive workforce strategy for the subsidiary?”
* “Has the trust engaged staff in decisions that affect them and the services they provide as set out in the NHS Constitution?”
* “Does the business case outline plans to comply with any consultation requirements, including staff consultations?”
* “Have senior trust clinicians been involved appropriately in the decision-making process for the subsidiary transaction? Have they raised any concerns in relation to the subsidiary transaction and if so have these been addressed?”
* “Does the business plan demonstrate financial viability for both the trust and the subsidiary over the forecast period?”
* “Is there a clear commercial strategy for the transaction that is not dependent on any VAT benefits associated with the transaction?”

It is unlikely that any of the recently established subsidiaries would have been able to answer all of the above questions satisfactorily (and the guidance includes a further 30 questions on top of these). So it is important that trusts are reminded that they should overcome these obstacles before proceeding with their plans. Where possible, branches should look to make a formal written response to the business case and to generate media opportunities around this.

Branches should also aim to attend board meetings where any business case is discussed and to contest any decisions to have such consideration in private. In many recent cases UNISON has been denied access to the business case on the false grounds that it is commercially confidential. Since these cases must be prepared before any tender or other commercial process can begin, this claim should be challenged immediately so that a proper discussion of the plans can take place.

**Use of private consultants**

Many trusts have incurred eye-watering consultancy costs in the process of setting up subsidiaries. While the new guidance would not block trusts from seeking advice from elsewhere in the public sector, it does reiterate previous government guidance that “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” (page 6).

The various risks that trusts must demonstrate they have considered (as part of a board certification for NHS Improvement) include the need for trusts to have “conducted appropriate enquiry about the probity of any partners involved in the proposed subsidiary” and the related “reputational risk” (page 17). This may provide another route to challenge a trust that was intending to use consultants from the private sector.

**Additional requirements for non-foundation trusts**

The guidance applies to both foundation trusts and non-foundation trusts. However, for non-foundation trusts there is a reminder of the additional hurdles they face if attempting to establish a subsidiary. The legislation demands that the business case of a non-foundation trust must demonstrate to the Secretary of State that their subsidiary will be income generating, and also that it “does not, to any significant extent, interfere with the performances of its functions or its obligations under NHS contracts” (page 5). Any non-foundation trust looking to set up a subsidiary should be reminded of these rules before they try to proceed.

**“Material” changes to existing subsidiaries**

The new guidance also applies to “material” changes to existing subsidiaries. What constitutes “material” will be determined by NHS Improvement and although they do not give an exact definition, they do state (on page 2) that: “Examples of changes that may be material include asset sales or transfers, and changes to the subsidiary’s risk profile including those to *the terms and conditions of employment of staff*, the ownership share of the subsidiary, or the scale or scope of the activities of the subsidiary.”

This means that any attempt by an existing subsidiary to alter staff terms and conditions should be considered a “material change” and therefore subject to the same requirements as a proposal for a new subsidiary, as outlined above. Recruitment and retention are almost certain to suffer if terms and conditions are altered, so the hardest question in the guidance for a trust to answer in their business case is likely to be this one: “How is the trust board assured that the subsidiary will have the ability to attract and retain staff with the appropriate skills and experience to deliver the service requirements both immediately and over the life of the business plan?”

**Further information**

For more information and resources on UNISON’s campaigning in this area visit

[www.unison.org.uk/our-campaigns/say-no-2-subcos](http://www.unison.org.uk/our-campaigns/say-no-2-subcos/)

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