

Joint union response to Gloucestershire SubCo consultation

As the three largest recognised trade unions representing staff of Gloucestershire Hospitals NHS Foundation Trust; Unison, Unite the Union and the Royal College of Nursing (RCN) have serious misgivings about the proposal to transfer approximately 750 staff in Estates and Facilities, Sterile Services and Procurement Materials to “SubCo,” a wholly-owned limited company.

We welcome the fact that the Trust has formally consulted on the establishment of the company, and acknowledge that this is more than some other NHS Trusts who have made similar proposals have done. This document represents our official response to this consultation and in particular to the two main documents concerning SubCo which have been made available to us:

- SubCo Consultation Document (4 December 2017)
- Visioning the Future: Business Case for set-up of an Estates and Facilities Subsidiary company (November 2017, Version 2.0c – 18-page summary version)

However despite it now being at the end of the consultation period, and only a short time before the final board decision and proposed date of transfer, fundamental questions about the nature of the proposal remain unanswered.

These unanswered questions, combined with some of what we do know about the proposal, our experience of similar existing companies elsewhere in England, and our concerns about whether subcos are consistent with the wider strategic direction of collaboration in the NHS means that **Unison, Unite and RCN are opposed to the SubCo proposal** in its present form. To date we have collected over 700 signatures from Trust staff in support of this position, and intend to collect more to submit to the Board before any final decision is taken.

The reasons for our objections are outlined in this document, which was authored in close collaboration with local members, contacts and stewards. It includes direct quotes from staff who stand to be directly affected, outlining their views and experience of the subco proposal and the consultation process.

Unanswered Questions

Many aspects of the SubCo proposal remain unclear, including the name of the company itself. Whilst this may seem like a trivial point it contributes to the sense that this process has been rushed in advance of the 2018-19 financial year, and is being implemented on a “do it first, deal with the difficult questions afterwards” basis.

Other important unanswered questions include:

- What will the pay, pension arrangements, annual leave and sickness absence entitlement for new starters be?
- How has the Trust arrived at the figure of up to £35m projected savings over ten years?

- How much of the anticipated savings are accounted for by tax savings, how much by savings on staffing costs, and how much by efficiencies?
- Is the Managed Equipment Service in theatres, currently managed by Genmed, in scope for transfer to SubCo or not?
- Is the figure of 750 in-scope staff definitely correct? The figures of 900, and 675 plus 65 Bank staff have also been quoted at different times.

Terms and Conditions

“I feel undervalued and I feel it is always the lower paid workers that are picked on. The process has not been good. We have asked many questions and a lot of them have not been answered. The ones that have been are not always the same – we have had mixed messages on several subjects.

“I signed a contract to work for the NHS and that is where I want to stay. The whole process is nothing more than a tax dodge... I feel sorry for our future generations at Gloucestershire for not being able to make a fairly good wage and pension, or work for the NHS.”

Our primary concern is for the terms and conditions of NHS staff, both present and future. It is clear that post-transfer the Trust intends for SubCo to begin recruiting new staff on terms outside of those nationally-agreed as part of Agenda for Change.

Unison, Unite and RCN are all committed to upholding Agenda for Change which, whilst not perfect, is supported nationally by NHS Employers and ensures a level of fairness and consistency for staff across the NHS.

The creation of subcos with separate terms and conditions undermines this and runs the risk of creating unfair differences between different areas, and unequal pay structures which systematically discriminate between predominantly male and predominantly female jobs.

Inevitably, the recruitment of new staff on non-Agenda for Change terms and conditions will create a two-tier workforce which will have a detrimental effect on morale as staff find that they are working alongside colleagues who are receiving different benefits for the same job.

It is difficult to comment on specifics about the terms and conditions for new starters as we do not yet know what they are other than that they won't include access to the NHS Pension Scheme. However we are particularly concerned about non-pay elements.

Our experience of the new starter contracts offered by other subcos across England is that the pay, terms and conditions are significantly worse than the terms on offer under Agenda for Change. In most cases staff in their first year of employment in an NHS subco will receive only the statutory minimum provisions in areas such as sick pay, maternity pay and annual leave.

In addition to this the enhanced rates of pay offered by NHS subcos during unsocial hours as well the window in which unsocial hours payments can be earned have been greatly reduced. One NHS subco in the North of England that was created to provide facility management services are offering unsocial hours payments at the rate time plus 40%, and these can only be earned between 10pm and 6am. When employed on an Agenda for

Change contract the equivalent member of staff earns unsocial hours enhancements in a longer window and at a higher additional rate.

The NHS has a long-established reputation as an employer with generally favourable non-pay Terms & Conditions, including pensions, annual leave and sickness absence pay. The establishment of a subco offering inferior terms in some or all of those areas could within the space of a few years destroy that reputation in Gloucestershire, and in a worst-case scenario lead to working as a domestic, porter or member of hospital catering staff being perceived as an option of last resort.

Section 2.2 of the summary business case refers to the potential of SubCo “to help address the recruitment challenge.” If the terms and conditions offered to be new starters are to be in any way similar to those in existing subcos, the effect is likely to be to worsen these difficulties rather than address them. Regrettably one now only has to look at the large parts of the social care sector plagued by poor rates of recruitment and retention to see examples of the sorts of problems that this perception can cause for employers.

Annex 10 of Agenda for Change enables the Trust to introduce a local Recruitment and Retention Premium (RRP). If the Trust is struggling to recruit to certain roles this option could be implemented without any need to create a subco.

We note that there has been very little recruitment to the “in-scope” areas in the past few months, and hope that this is not because the Trust intends to launch a recruitment drive on inferior terms and conditions once SubCo is established.

TUPE and Terms and Conditions for Existing Staff

“There is no thought about the people who have to be forced to go through this change ...I do not believe the contracts we hold now will not change. I do feel there will be conflict among staff – morale is low amongst staff. This will just add to that. I do not believe a word!”

As well as the immediate detriment to new starters, we are concerned about the longer-term risk that SubCo poses to existing staff who will transfer to it under TUPE.

The consultation document states that *“in addition to this statutory protection, the Trust has already committed to maintain Agenda for Change Terms and Conditions for staff who transfer to SubCo for the lifetime of their employment either with the Trust, or SubCo.”*

In practice this amounts to little more than the protection which is ostensibly provided by TUPE. Our extensive experience in dealing with TUPE transfers as trade unions suggests that the long-term legal protection it offers employees is very weak because, as the consultation document acknowledges, the new employer can vary terms & conditions as long as they have an “Economic, Technical or Organisational” (or ETO) reason for doing so.

It is very likely that the management of SubCo would be able to meet those criteria at some point in future, and whilst varying contractual terms may not be the Trust’s intention at present, future SubCo managers or current managers faced with future financial pressures may decide that it is necessary, especially if the SubCo is not delivering the projected savings.

In such circumstances we are sceptical about the legal enforceability of any commitment to maintain conditions for the lifetime of employment. Just as a contract of employment does not in practice prevent an employer from varying terms and conditions (provided that certain criteria relating to consultation etc are met), we do not believe that any such commitment as part of this process will do so, no matter how robustly-worded or well-intentioned.

The consultation document also states that “*AFC Terms and Conditions may change in the future and in those circumstances you would be affected in the same way as any Trust employee*”. This would presumably include any future NHS pay awards.

We would welcome this “dynamic” interpretation of the question of future changes to collective agreements; however this question, for many years legally controversial, was settled in the European Court of Justice in the case of *Alemo-Herron v Parkwood Leisure (2013)*, which ruled in favour of the “static” interpretation. Trade unions were disappointed by this ruling and would have preferred for things to be otherwise, but it is now part of the employment law landscape that we have to accommodate ourselves to.

Therefore we would request any TUPE measures letter to include a clear commitment that SubCo will implement any future amendments to Agenda for Change including NHS pay awards and any future restructuring of Agenda for Change pay bands as part of their contractual terms of employment.

VAT and Changing Rationale over Time

“I feel that the future of the NHS is not good. The way this has been handled has been very poor. Answers to questions have not been provided... We do not want to work for SubCo. We signed a contract to work for the NHS, which we are proud to work for.”

It is clear that the emphasis placed on the reasons for establishing SubCo has varied over time. Earlier in the process it was clear that VAT savings were the primary motivation – for example in the SubCo Q&A document the first answer given to the question of why it is being proposed is that “*the SubCo model allows us to make savings by paying less VAT than we do currently.*”

Since the formal consultation period has been entered the VAT aspect has been emphasised much less, with “may enable some taxation gains” listed as the last of six potential financial benefits of SubCo in the consultation document. An increasing emphasis has been placed on non-financial benefits.

It is clear from similar proposals at other Trusts, for example at Yeovil District Hospital NHS FT, that in the short to medium term by far the largest savings come from VAT, despite the various attempts to disguise or even hide this fact. Only modest cash releasing savings come from staff-related changes in the short term and there are no actually identified savings from other sources or benefits from additional income.

We believe that VAT savings remain one of the major incentives for the proposal, but that this aspect is being deliberately downplayed in order to reduce the risk of SubCo being denied VAT-exempt status under the Contracting Out Directive by HMRC.

The Department of Health wrote to all NHS trust finance directors on 28th September 2017, in a letter entitled “Tax Avoidance issues in the NHS,” discouraging all trusts from pursuing tax avoidance schemes; reminding them that “the fees chargeable to the tax advisors represent a direct leakage out of the health system” and that tax avoidance “involves operating in the letter but not the spirit of the law.”¹

With 39 active NHS subsidiary companies now in existence, the issue is rising up the national political agenda, with questions having recently been asked in the House of Commons² and House of Lords:³

Lord Hunt: “I also raise with the Minister a disturbing trend being forced on NHS foundation trusts by NHS Improvement, which is designed to take thousands of staff out of NHS employment and, as worrying, out of the NHS pension scheme. This is a growing trend to set up wholly owned subsidiary companies to run a lot of non-clinical services within trusts.

“Clearly, it is a VAT fiddle—it is designed to reduce VAT payments—although the Department of Health has to make up to the Treasury the VAT return, so it is a false economy by the health service.... I find it deplorable that this can be encouraged by bodies responsible to the Minister. Staff are being encouraged to come out of the NHS pension scheme. That is absolutely disgraceful.”

Lord O’Shaughnessy: “The noble Lord, Lord Hunt, made a point about subsidiary companies. I am not aware of that issue but I will certainly investigate it.”

- Exchange between Lord (Philip) Hunt of Kings Heath and Health
Minister Lord (James) O’Shaughnessy, 30th November 2017

Trade unions recently organised a meeting in Parliament with Labour MPs on NHS Trusts establishing subcos. The meeting was attended by MPs from the South West including Karin Smyth MP, David Drew MP and Ben Bradshaw MP who are all fully aware of the approach being taken by Gloucestershire Hospitals NHS Foundation Trust.

There has also been considerable media interest in the issue of NHS subsidiary companies both nationally in publications such as the Guardian (30th October 2017), Private Eye (December 2017) and the Health Service Journal (January 2018), and locally on BBC Gloucestershire, Heart Radio and the Gloucestershire Gazette (November 2017) and BBC Points West (December 2017).

The significance of this growing awareness amongst politicians and the media is that the possibility of the Contracting Out Directive rules being changed, and therefore the tax savings which the Trust is hoping to make being partly or wholly reduced, is substantially more likely.

We are very concerned about the possibility that in the event of this happening, SubCo managers may feel compelled to seek to make savings by other methods and will be legally able to cite an Economic reason for reducing the terms and conditions of transferred staff.

¹ Appendix

² Hansard, Health questions 14th and 29th November

³ Hansard, NHS: Staff debate, 30th November 2017

Whilst this may represent a “worst-case” scenario for staff, we believe that it is at least equally as likely as the future of risk-free savings and operational improvements envisaged in the summary business case and consultation document.

Scrutiny and Secrecy

“The whole process of consultations has been very poor, for example at times when it has not been possible for everyone to attend. This has all been done in small groups – I’m sure they’ve done it this way to keep us all apart. As we don’t know what other people’s feelings are about subco they are feeding us utter rubbish by saying people are positive about the changes...”

“I attended a meeting in December where I asked if we could please have some feedback from other trusts who have gone down this route. They said ‘yes, we will get this.’ It is now 2nd February and there has been no feedback. As Gloucestershire’s largest employer it is not good for future generations. I for one will not have the loyalty I have now if I’m working in a subco.”

Although we welcome the fact that the Trust has engaged in some form of official consultation period, and that this is more than many other trusts making similar proposals have done, many aspects of the consultation process have left a lot to be desired.

It is our view that we are entitled as staff representatives to be consulted over the case for change, not just on the implications of one particular option. If the case rests on tax treatment as was initially claimed, then options may be limited. If this is no longer the case and simply incidental to making improvements in the quality of the service or to address specific workforce issues, then many other options to achieve this should be seriously considered.

We believe that the 18-page summary version of the business case which has been shared with us is not the full document, and lacks essential detail – for example the risk assessment is only five sentences long and does not identify a single specific risk. Similarly no alternative options other than the creation of SubCo appear to have been seriously considered. If a more thorough business case has been published, then why has it not been shared as part of the consultation process?

Trust Board meetings discussing this issue have been held in closed session and have not, as would normally be the case, been open to staff, journalists or the public to observe. Our proposal for a trade union representative to directly address the Board in order to outline our concerns and to answer questions, first made in October 2017, has been consistently denied, and union officials have been denied access to the hospital sites to meet with affected members on at least one occasion.

The proposal has also not been subject to detailed scrutiny at forums where it ought to have been, such as the Health and Social Care Overview Scrutiny Committee (HSCOSC) and the Sustainability and Transformation Partnership Social Partnership Forum (STP SPF).

The claim of commercial confidentiality must be contested. This is a project that involves no bodies outside the public sector in any capacity other than as advisors. It is about what happens entirely within the public sector utilising public money.

The usual test for commercial confidentiality in respect of information held by a public body is that its release would be likely to prejudice commercial interests, which is some trading activity. It is also clear that to justify refusing to disclose information the risk of prejudice should be more than a hypothetical or remote possibility; there must be a real and significant risk. None of that applies – with the sole possible exception of the sums paid to advisors such as KPMG and DAC Beachcroft.

However this relates to a relatively minor aspect of SubCo, and if the trust feels that this particular information is commercially sensitive then it ought to be simple enough to redact documents and/or hold brief parts of Board meetings in closed session, rather than cynically cite it as a reason to avoid public scrutiny of the entire proposal.

Procurement and the ‘Teckal’ Exemption

“This is the edge of the verge and the beginning of privatisation in Gloucestershire Hospitals Trust. It represents a race to the bottom. We have seen that this model does not work. Carillion is a national example of this.

“The CEO of Gloucestershire Hospitals is behaving undemocratically by not allowing the unions to participate in this process, and by telling all staff in an email that the unions have been ‘scaremongering’. This process is being carried out in a very underhanded way, and should be viewed with suspicion. If it goes ahead it will be to the detriment of the NHS and its staff.”

In order to be able to award contracts to a separate legal entity without putting it out to competitive tender the trust is relying on the ‘Teckal’ exemption. The business case rightly acknowledges that the SubCo will only be able generate up to 20% of its income from sources other than the trust if it wishes to use this exemption.

However no consideration appears to have been given to the fact that the ‘Teckal’ exemption derives from a European Court of Justice ruling in 1999 which was codified into the 2014 EU Procurement Directive, and that in light of Britain’s exit from the EU its own future is highly uncertain. Public sector procurement is an area of law that seems likely to change either through the ongoing exit negotiations between Britain and the EU, or through future trade agreements with other countries.

It is well-known that litigious private companies operate within the health sector in England, and that they have shown themselves to be willing to challenge for the right to bid for NHS contracts in the courts. If SubCo’s income from external sources strays above 20%, or if the law concerning the application of the Procurement Directive in the UK changes, the contract for the in-scope services could be won by a private or third-sector party. These are serious risks which ought to be considered.

Equal Pay

One of the advantages of Agenda for Change is that it has largely protected NHS employers from facing the very high volume of equal pay claims which have been commonplace in other parts of the public sector such as local government.

Cordia, an arms-length subsidiary company owned by Glasgow City Council, has been the subject of protracted legal action against it by employees supported by the Unison and GMB unions, on the question of whether employing staff through a wholly-owned subsidiary relieves the council of its liabilities under Equal Pay legislation.

Clear rulings at Employment Tribunal and Employment Appeal Tribunal have made it clear that it does not, and in January 2018 the council finally agreed to concede on the legal arguments and begin negotiating settlements with employees. News reports estimate the cost to the council as being “up to £50m”.⁴

Should SubCo begin employing staff on non-Agenda for Change terms which systematically favour predominantly male jobs over predominantly female jobs it runs the risk of repeating this mistake. Trade unions will support members who we believe have valid Equal Pay claims.

Pensions

“I feel disgusted and let down. In the near future I feel there will be no NHS – it will all be privatised. What is going to happen if SubCo goes under, like Carillion? Hundreds of jobs will be gone. Everybody in the NHS has worked hard to keep the NHS great.”

We remain very concerned about the impact of subcos on the viability of the NHS Pension Scheme. The current employer contribution rate in the NHS Pension Scheme is 14.38%. The summary business case suggests that new employees will be enrolled in the government’s NEST auto enrolment pension scheme. The benefits offered by the NEST scheme are incomparable to that offered by the NHS Pension Scheme as the minimum requirement for employer contribution in NEST is 1% of pensionable pay.

Even if new employees were to receive a 3% contribution into the NEST scheme (which is the average contribution being made by NHS subcos) it still remains a stark contrast to the 14.38% employers are required to contribute in the NHS Pension Scheme

As the current NHS pension regulations do not allow NHS subcos to offer new employees access to the NHS pension scheme, it is the trade unions’ view that the Trust is seeking to use this inconsistency in the regulations to make financial saving through significantly cutting employer pension contributions for new staff.

If this model is adopted on a wide scale by acute trusts throughout England who face similar financial pressures, the effect could be to threaten the current terms of the NHS Pension Scheme, which has already been changed in 2008 and 2015 because of government concerns about its viability. This has implications for all NHS staff.

We do not agree with the assertion which has been made in several staff briefings that some Estates staff may prefer to give up access to the NHS Pension Scheme in exchange for a higher rate of basic pay because young people are generally not interested in pension schemes.

⁴ “Female council workers secure multi-million pound victory after long-running equal pay dispute”
http://www.heraldscotland.com/news/15316671.Female_council_workers_secure_multi_million_pound_victory_after_long_running_equal_pay_dispute/

It is far more likely that younger staff and those at lower Bands, who have been most acutely affected by the real-terms pay cuts of the last decade, may feel that they have no choice but to stop paying pension contributions in order to meet the rising cost of living.

Efficiency and Non-Financial Benefits

Without having access to further information it is not possible to fully evaluate the claims about the operational benefits of SubCo. The objectives are also unclear as the Trust position on what they intend to achieve (apart from tax savings) has changed over time. We would welcome the opportunity to discuss how the required objectives could be achieved by alternative approaches.

However we remain generally sceptical about these benefits, as some cited in Section 2 of the summary business case such as “commercial approach to estate management,” “focus on clinical care and patient safety,” and “clearly defined improvement objectives” would be good practice anyway. As SubCo would inherit the existing management and staff structures, it would correspondingly inherit any operational problems or inefficiencies.

Although the consultation document and summary business claim that SubCo will lead to greater efficiency, it seems equally if not more likely that the division of the Trust into two separate structures, with in-scope service areas identified on the basis of where the tax advantages are, will cause operational problems rather than solve them.

Section 4.1 of the summary business case argues that SubCo will enable the Trust to focus on managing the business and leaving the Trust to focus on healthcare. This is not in line with the One Team approach elsewhere in the NHS and verges on the insulting to loyal NHS staff.

Section 2.3 of the summary business case refers to opportunities to generate income but without any evidence at all and no financial benefits are claimed.

2.3 also claims that establishing SubCo will “enable more money to be reinvested in core services,” however the projected savings of £35m over ten years, even if the most optimistic expectations are met, go only a small way to offsetting the Trust’s current annual deficit.

We are not confident that any savings which are realised will be reinvested in this way rather than used to reduce the deficit, which as the consultation makes clear in its introductory paragraph is one of the main incentives for this proposal in the first place.

Collaboration and the Sustainability and Transformation Partnership

The One Gloucestershire document which was published in November 2016, which remains the most up-to-date version, refers repeatedly to greater collaboration between the three NHS Trusts in Gloucestershire including possible Joint Estates and Joint Workforce strategies. No reference to subcos is made.

A major change in delivery models undertaken unilaterally by one NHS Trust undermines these aspirations, and is in direct contravention to the political direction of greater collaboration implied by NHS England in initiatives such as the Carter Review and Five Year Forward View.

Future Operating Model for Procurement

The Department of Health has set out the Future Operating Model for all NHS England procurement which includes the further implementation of the nationally categorised products scheme, published in June 2017. This is going to substantially increase the amount of procurement done through NHS Supply Chain when the current contract comes to an end in September 2018.

We are concerned that ordering a significant amount of trust consumables and equipment through the subco (or Genmed) model may undermine the stated national objective of providing value for the taxpayer by compromising the strength of NHS in negotiating the most favourable terms in any future contact agreement with Supply Chain and any other suppliers.

What Next?

Unison, Unite and RCN remain opposed to the SubCo proposals because they further fragment the NHS, which appears to be contrary to national policies being promoted by NHS leaders. We oppose the subco approach as it creates a two tier workforce which we believe is also inconsistent with national policies which support Agenda for Change. We also have concerns about the risks posed by basing a major change on foundations, such as tax savings, that may be easily undermined.

We note that senior Trust managers including Chief Executive Deborah Lee and Director of Estates and Facilities Neil Jackson have stated on numerous occasions throughout this process, including in staff briefings and governors meetings, that the establishment of SubCo will not go ahead without the support of the staff concerned.

We hope that this document, coupled with the staff petition opposing SubCo which we have instigated and which we will submit to the Trust Board before its final decision is taken, will suffice to demonstrate that the proposal does not enjoy this support.

However if this is not accepted we would welcome an anonymous ballot of all in-scope staff, with wording agreed between management and unions, to determine whether the staff concerned do in fact support transferring to SubCo, or whether they would prefer to remain as NHS employees.

We note that North Bristol Trust has very recently withdrawn its plans to proceed with setting up a subco in Southmead hospital following significant dissatisfaction among staff and unions. We maintain that it is in the long-term interests of the Trust as well as its staff to follow North Bristol's example rather than persisting with its current plans in the face of such clear, widespread opposition.

The Northumbria Example and a Possible Compromise

There does remain an obvious compromise position, which would be for the Trust to follow the example established by Northumbria Healthcare Facilities Management, an NHS subco which offers its new starters Agenda for Change terms and conditions, access to a pension which is genuinely comparable to the NHS Scheme, and a clear contractual "dynamic" link to future Agenda for Change pay bargaining.

Whilst this would not be ideal in our view, it would be preferable to the creation of a two-tier workforce with new starters on inferior terms and conditions. It would also leave transferring staff in a considerably more secure position, relatively free from the fear of proposed cuts to their terms and conditions.

This would also enable the Trust to realise the proposed VAT savings and any non-financial benefits whilst minimising the negative impact on staff. The Northumbria example demonstrates that it is practically possible.

If the Trust were to amend its plans to allow for this possibility as an outcome of this consultation, each union will be in a position to consult members on whether to accept this as a compromise position.

We have already seen the NHS trade unions in Wigan, Harrogate and Bradford taking initial steps to initiate industrial disputes with other NHS Trusts who are attempting to establish NHS subcos. If we are not notified of any substantial amendment to the proposal as it currently stands in advance of the final board decision, each union will consult our members on whether to take a similar approach. We hope that situation can be avoided.

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Appendix – Letter from DoH to NHS Trust Finance Directors