

26th February 2018

Dear Gloucestershire Hospitals NHS Foundation Trust Directors,

Re: SubCo – urgent outstanding questions

We are writing on behalf of Keep Gloucestershire's NHS Public, the campaign group who in 2011/2 successfully brought an injunction and Judicial Review in the High Court to halt and reverse the decision to transfer community hospitals and 4,000 NHS staff into a new 'social enterprise' company, ensuring instead that staff and assets remained within the NHS.

We set out below some urgent questions in five areas – assets, financial assumptions, tax, staff, and governance - regarding the proposal coming before the Extraordinary meeting this Wednesday (28th February) for the 'go-live' of a Subsidiary Company.

We recognise that you may already have the answers to some of these questions, but wanted to ensure that all Trust directors were given the opportunity to ask *all* these questions of the Trust executive. We have researched them with the help of OurNHS openDemocracy, the respected NHS news & research platform, and with and other experienced NHS campaigners and solicitors.

It is our view that – given the problems there have been elsewhere - the Trust risks being negligent in its stewardship of public money and assets if it does not ensure all these questions are satisfactorily answered *before* signing off any arrangement.

We believe that public need to be given these answers themselves, before a decision is made. To this end we support the call by David Drew MP, unions and others to – at the very least - pause the scheme so that proper public information and consultation can take place.

Implications of the scheme for assets (including buildings)

1. What assets will be transferred (including, but not limited to, freehold and leases in respect of buildings and equipment) and what is their value?
2. What proportion of the liabilities relating to those assets will also be transferred?
3. What proportion of the projected £35m (over 10 years) tax savings are dependent on transferring the Trust's legal rights over its assets in some way to the SubCo?
4. If transferring assets, is the Trust going to select an organisational form for the SubCo that is, by law, subject to an asset lock? If not, why not?
5. What restrictions has the Trust placed on the SubCo selling, assigning the lease, or subletting any property transferred to it from the Trust, to a third party such as a private healthcare provider? (ie, what restrictions has the Trust placed on such further transfer of interests, beyond the standard minimalist restrictions in commercial leases)?
6. Have any of the assets being disposed of/transferred (or leases sold), been on the asset register and identified as [relevant to the provision of Commissioner Requested Services](#) at any point? If so, has consent been sought and obtained from both the CCG and from NHSI for the disposal/transfer of assets to a third party (ie the company)? If not, why not?

(continued overleaf)

Robustness of other financial assumptions

1. If assets are transferred, will the SubCo have to pay the 3.5% capital charge to government on those assets, as GHNHSFT currently does?
2. Does the Trust know **for definite** whether the SubCo will be able to borrow money for capital investment without being prevented by Treasury limits on government expenditure/

- capital expenditure (bearing in mind that NHS borrowing / investment from the private sector currently still hits up against these limits)? If it does know, what is the answer?
3. Does the Trust/Company expect to receive any loan financing from NHSI contingent on this arrangement?
 4. What assessment has the Trust made of the impact of the SubCo on its financial risk rating and net surplus?
 5. Does the Trust expect to raise private patient income from any of these arrangements?

Robustness of projected tax savings

1. Has the Trust a) requested and b) received confirmation that these tax saving arrangements are permissible and robust, as it undertook to do in written communications with staff, from the relevant authority (eg HMRC and GCC)? If not, can the Trust confirm when it expects and answer, and if it expects to agree the deal before the answer?
2. Is the Trust aware that the largest public in-sourcing to date, UnitingCare in Cambridgeshire, collapsed and the National Audit Office and NHSE investigations both noted that one of the major reasons for the collapse was a significant misunderstanding of its VAT position which increased annual costs, post-contract signing, by £5m/year? Does the Trust consider there is any risk of a similar situation here?
3. What's the breakdown in projected tax savings between VAT and other forms of taxes (including local taxes?)
4. Are these projected savings, net of increases in tax liabilities that may be incurred by the SubCo arrangements e.g. corporation tax, capital gains and stamp duty?

Staff terms and conditions

1. Why does the Trust not appear to have conducted an Equalities Impact Assessment, given that this is recognised in court as the best way to ensure its General Duty under the 2010 Equalities Act is met, and particularly given the substantial equal pay claims that have arisen as a result of other SubCos where increased pay flexibility/shift to so-called market rates appears to have given rise to gender and other inequalities in pay?
2. Will transferring staff be given written guarantees specifically that they will remain covered by Agenda for Change pay, terms and conditions, as it develops through national bargaining over time, over the lifetime of their employment, and how can these guarantees be meaningful given the weakness of TUPE legislation?
3. Has the Trust approached the Department of Health to request permission for new SubCo staff to join the NHS pension scheme, permission which DH guidance suggests may be granted if sought? If not, why not?

Governance and accountability

1. What will be the company structure of the SubCo?
2. Why has the full business case not been made available (in electronic or hard copy form) to governors, unions, staff or the public, as it has been in other Trusts for example [Northumberland](#)? Why has the options appraisal not been made available?
3. Does the Trust consider that Gloucestershire Health & Social Care Overview and Scrutiny Committee supports the SubCo? If so, what evidence do they have for assuming this support? Why were questions at the last HOSC to Deborah Lee regarding SubCo, met with the statement that the SubCo was not an appropriate matter for the HOSC to discuss, given that the HOSC function permits councillors to scrutinise anything they think could affect local health services?
4. We note that that there has not been any meaningful consultation with the local community in Gloucestershire on these proposals, as evidenced by your attitude to formal scrutiny by

the GCC HOSC. On what statutory basis have you concluded that such consultation is not required? Please give urgent consideration to this issue and provide a detailed response. A failure in proper process often provides a basis for legal challenge.

5. What powers is the Trust formally reserving in respect of the SubCo, beyond the statutory and regulatory requirements?

We look forward to hearing from you,

James Beecher, Chris Stockwell, Caroline Molloy and Hannah Basson, Keep Gloucestershire's NHS Public

Cc: Local press and radio, local councillors, local and national political parties, national campaign networks, local and national unions