Maximising private patient revenue

Harnessing the income generation potential of private patient units (PPUs)

With the combination of the NHS budget pressures, the intended relaxation of the non-NHS income rules and competition being placed at the heart of the Government’s reforms, the possible financial contribution of a private patient unit (PPU) cannot be ignored by NHS organisations.

We have seen a steady increase over recent years of PPUs being developed by NHS organisations. A robust private patient service offering can benefit the NHS through access to new facilities and new services and by helping to recruit and retain consultants who often want to align their private practice alongside their NHS work.

Lately there has been an increasing trend for PPUs to either “partner” with the private sector or have the PPU run by an external operator. Involving the private sector in the running of a PPU has many potential advantages for the NHS including:
- access to capital investment
- enhanced services
- enhanced brand image
- access to international markets
- recruitment / retention of key consultants
- promotional expertise
- management focus
- access to insurer networks

This booklet provides an overview of the main considerations and issues that NHS organisations should consider in developing or reorganising a PPU.
Structuring: considerations for your project

Think ahead

Whether you are looking to develop a PPU or re-organise your current PPU, it is imperative that you identify your main objectives at an early stage and consider and evaluate all the options available to you.

Collaboration

One of the main considerations is the extent to which you wish to work collaboratively with the private sector in establishing and running the PPU. Your decision on how much to involve the private sector will impact upon the arrangements you will need to put in place.

There is considerable flexibility to allow you as much or as little input into service provision as you require, and the level of participation you wish to have will influence how you structure the collaborative arrangements which establish and underpin the PPU.

There are a number of practical approaches to developing a PPU, each with their own advantages, disadvantages, risks and rewards. For example you might wish to:

- lease the PPU to a third party to run the business on behalf of the Trust
- establish a corporate joint venture PPU with your private sector partner to create a profit sharing business
- run the PPU yourself and bring in specialist services from third parties on a contractual basis

Bespoke hybrid models which combine both contractual arrangements and corporate vehicles are also options for you to consider.

A critical factor for all of the PPU partners to consider are the tax/VAT implications of the structure chosen as well as any accounting implications that each might have.

*We can discuss your individual requirements and the options available to you.*
Your powers

The legal structures that may be available to you may be limited depending on whether you are a NHS trust or a foundation trust. For example, the vires position of NHS trust participation in corporate joint ventures is more complicated than is the case where a contractual structure is the chosen method.

If you are a NHS foundation trust, while you have more freedom you will need to consider the implications of the current private patient income cap as it applies to your trust. However the recent changes in the Health and Social Care Act 2012, when enacted, will provide further freedom to generate non-NHS income and make this an issue only for the largest of proposed PPU’s.

We can guide you through your available options.

Procurement and governance

You should give thought to whether EU procurement rules will apply from the outset. The application of the procurement regime will depend on the structure of the arrangements between the NHS organisation and any “partner” that the NHS organisation may collaborate with in respect of the management and operation of the PPU.

There are useful exemptions to the procurement rules that might apply to your project to streamline or minimise any procurement.

It will be important to ensure that appropriate time and resources required to meet any obligations under the EU procurement law/guidance are factored into the project.

You will also need to consider any internal governance arrangements to satisfy your Board that best value is being achieved in the transaction. Even if the EU procurement rules do not apply or are limited in their application to the proposed arrangements it still may be necessary for you to undertake some form of market analysis/benchmarking exercise to determine that you are achieving value for money.
Competition

Consideration should be given to whether any joint venture between you and a ‘partner’ might trigger competition law restrictions, for example through increased concentration in a local market with a consequent reduction in competition and choice for patients. Depending on the nature and scale of the arrangements envisaged, they may qualify for review by the Office of Fair Trading (OFT) as a ‘merger’. There is no requirement to notify ‘mergers’ to the OFT although the consequences of failing to do so when appropriate can be significant, including potentially unwinding the transaction.

The recent OFT market study into the private healthcare market has resulted in the reference of the market to the Competition Commission for further investigation and as a consequence greater scrutiny of PPU arrangements can be expected.

We can assist you in considering whether your proposed arrangements may qualify for notification and review by the OFT and preparing the notification and any appropriate submission to them.

Regulatory and compliance issues

Internal approvals and governance arrangements must also be considered by the participants’ boards.

For NHS foundation trusts the mandatory guidance and best practice advice set out in Monitor’s Compliance Framework and the “Risk Evaluation for Investment Decisions” should be adhered to. Monitor will need to be satisfied with the proposals and, in particular, that the arrangements are structured to remain within the powers of a NHS foundation trust. For all NHS organisations the Transactions Manual needs to be complied with.

If you wish to obtain any borrowing in relation to a potential joint venture, you must ensure that you remain within your statutory limits. In that context you should consider whether any security already granted by you may prevent you from or limit the amount of scope of additional borrowings. If you are granting any security over land in relation to a joint venture, currently you must have regard to the Protected Property regime.
Employment

Will any employees of the NHS organisation need to transfer to or be seconded into the joint venture? There are ways of structuring arrangements in order to minimise staff movements. If TUPE is likely to apply on commencement (or on an exit of the arrangements) there will be important due diligence and risk share issues to be considered.

Whichever structures are being considered, the potential for organisational change and the related transfer and redundancy consultation obligations must be considered and factored into your timescales.

Pension issues, and their impact on the joint venture financial model, should also be considered. The potential to avoid such costs, and the resulting effect on the joint venture model may also be a matter for consideration.

Combining several workforces and the various terms upon which each cohort of staff is employed is a process not to be underestimated. This process must also be combined with management of workforce expectations and staff side engagement that will be required for any successful venture of this nature.
**Property issues**

You will need to consider how any of your assets to be used in the PPU will transfer or their use be licensed.

Land rights permitting the provision of services from the chosen sites and documenting the property arrangements will also be required.

**Other considerations**

There are many other issues to consider in structuring arrangements of this kind, including:

- How to ensure transferring staff retain their NHS pensions
- How liability and risk should be allocated between the joint venture partners
- Structuring and documenting contractual relationships with other specialist third parties
- Funding arrangements
- NHSLA or other insurance cover

*We are very familiar these and other issues which may arise. We would be happy to arrange an initial meeting with you to explore relevant issues and help you create a plan that will meet your objectives.*
Project phasing

Key tasks and documents

**Phase 1: Authority to proceed**
- Production of options appraisals/business case in relation to a PPU
- Procurement/Competition approach considered
- Board Approval to proceed
- Confidentiality agreement between partners (once a partner is selected following an appropriate competitive procedure)

**Documents**
- Option papers, initial advice on structuring/including input from tax advisers
- NDA
- Workshops/seminar with directors

**Phase 2: Principle transaction terms**
- Agreed outline principal terms of transaction, including: structure, commercial terms, employment and premises issues

**Documents**
- Memorandum of Understanding/Heads of Terms
- Financial models
- Outline business plan

**Phase 3: Regulatory consents**
- Identify necessary regulatory notifications/approvals and consents required, including: Monitor, OFT, CQC etc

**Documents**
- Prepare and submit applications to relevant regulators where necessary

**Phase 4: Due diligence**
- Conduct comprehensive due diligence (legal, financial, commercial and clinical) Identify potential issues to success of joint venture

**Documents**
- Legal/Financial/Commercial/Clinical due diligence reports

**Phase 5: Documentation of joint working**
- Negotiation and agreement of all transaction specific documentation including joint venture agreement, property documentation, SLAs etc

**Documents**
- Joint venture agreement
- Licence to occupy premises
- Sub-contracts/SLAs
- Governance arrangements for joint venture
- Briefing papers for board sign-offs
- Ancillary documents

**Phase 6: Completion**
- Completion of joint working arrangements, transfer of assets, IP etc. commencement of services and any transfer of staff

**Documents**
- Board resolutions and interaction with regulators (as applicable)
- Finalisation of documents
- Any necessary filings

**Phase 7: Post-completion**
- All legal challenges associated with running the PPU in ordinary course
We work with our clients on all aspects of their PPU projects. Some of the ways we can help are:

- Understanding what your objectives are in order to identify the right approach and structure for your project
- Plotting your project plan and letting you know where we expect peaks of work
- Providing guidance on the procurement and competition issues arising out of your project
- Providing input to business cases and offering workshops and seminars for your executive and non-executive directors to ensure compliance with good governance
- Providing guidance on the regulatory and governance aspects of your project
- Carrying out all necessary due diligence on all aspects of your project using our tailored and standardised approach to streamline and focus your enquiries
- Drafting and negotiating the documents for the joint venture (or any other arrangement to be used), including the memorandum of understanding, joint venture agreement, leases, licences or other property documents and contracts with third parties
- Providing you with guidance on the matters that will need to be considered by you following completion of the project. For example, if personnel from your organisation are to be appointed directors of a joint venture company through which the PPU will operate, you will need to be familiar with your statutory fiduciary duties as company directors.
Like to know more?

To find out more about maximising private patient revenue please call one of our team on the attached teamsheet.

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