

WHC (2020) 018

WELSH HEALTH CIRCULAR



Llywodraeth Cymru
Welsh Government

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Date of Expiry / Review Ongoing

For Action by:

All health boards

Action required by: *Ongoing*

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Enclosure(s): Guidance - Last Person Standing support

1. Sustainability of practices continues to be a priority for Welsh Government, NHS Wales and the General Practitioners Committee (GPC) Wales alike. Premises as a whole is a key consideration throughout the contract reform programme and a commitment has been made to undertake further work to address the wider premises issues relating to the provision of General Medical Services (GMS).
2. In the short term, it was jointly recognised that there is a need to address Last Person Standing (LPS) for individuals who are experiencing an immediate threat to the continued viability of their practice.
3. As part of the GMS Contract for 2019-20, the Welsh Government agreed to provide guidance outlining the expectation on Health Boards to consider support in an LPS case in relation to Third Party Developer (3PD) properties in Wales, where Health Boards have been involved in the development from the outset (as opposed to those premises where any element of ownership has been transferred).
4. Health Boards' approach to all such support will be monitored through the usual performance monitoring channels.
5. Health Boards should note that, contentious or particularly complex cases may need specific Welsh Government engagement in order to discuss specific support arrangements (including Welsh Ministers' consent).

Guidance – Last Person Standing support

Background

Last Person Standing (LPS) scenarios and the resulting issues for contractors and sustainability of services was a key priority throughout the 2019-20 GMS Contract discussions. The pressure on GPs who find themselves in these circumstances, along with the risk to sustainability of services in the area, is recognised.

Substantial work has been undertaken previously by NHS Wales Shared Services Partnership (NWSSP) and Health Boards (HB) to explore options to support GP leasehold property options along with identifying barriers to leasehold premises. We are aware that there are a range of options available to HBs in terms of the support offered to practices where sustainability is a concern, including where premises is a factor. Welsh Government is not in a position to endorse a single option above any other and HBs should continue to use their discretion and consider specific circumstances on a case by case basis. However, it is helpful to provide a summary of some of those options currently available under existing governance and GMS contractual arrangements.

The circular also sets out the expectation on HBs to provide support for Third Party Developer (3PD) properties in Wales, in those instances where the HB has been involved in the development from the outset (as opposed to those premises where any element of ownership has been transferred).

There is no intention to mandate the options set out within this circular across the GMS estate as the support or involvement which practices require will differ across Wales. HBs will continue to have the ability for strategic decision making including the rationalisation of services where this is appropriate. The options set out are suggested for use in exceptional circumstances following consideration of specific detail on a case by case basis.

Existing Property Options

The options outlined below represent some of the support arrangements currently available for HBs to use. They are not intended for global use across the whole estate in Wales and satisfaction of a number of agreed criteria (trigger mechanism) will be required, with HBs considering the merits and specifics of each case, the only exception being for a small number of 3PD properties (see below).

Option 1 – Side Letters

The side letter does not constitute a contract but is a statement of the HBs intentions to provide assurance to the GP tenant that the HB will continue to reimburse market rents under the Premises Costs Directions and will provide support if the GP tenant can no longer fulfil its obligations under the GMS contract or it experiences issues that make the use of the premises unsustainable.

Whilst non-contractual, there continues to be merit to invoking this option given the wider options available and the assurances that these various options provide.

Option 2 (a) and (b) – Rental “Guarantee” Agreements and Joint Agreements

(a) The Rental “Guarantee” Agreement

This guarantees the rental element only of the lease, with all other lease obligations remaining with the GP tenant. This option can be instigated through a collaborative agreement agreeing the terms, duration of the “guarantee”, how the property will be used and how partners will be assigned or removed from the agreement as partnership composition changes.

It must be noted, that any form of rental guarantee will constitute a new contractual agreement, although this would not usually confer any property rights to the HB and there will be a number of obligations the GP tenant must comply with (e.g., leasehold covenants and obligations) in order for the “guarantee” to remain in force.

Any agreement of this kind will be subject to WHC (2015) 031 and may have IFRS16 implications. On that basis, careful consideration of the financial and legal implications, through professional advice should be sought by all parties prior to any agreement being put in place.

(b) Joint Agreement

In circumstances where a contractor is seeking to terminate their contract or where a longer term agreement may not be appropriate at that time, support may take the form of a joint agreement focussing on how the contractors “exit” will be managed and the premises made available by the existing contractor to a replacement

contractor (alongside other commitments from the existing contractor to co-operate with the retendering and handover process generally).

It is hoped that any exit could be co-ordinated so that a replacement contractor takes over from the existing contractor without a break in service. However, should a break in service be unavoidable, and the existing contractor rents the relevant premises under a lease which must continue beyond the likely termination date for their GMS contract, the parties may discuss whether the joint agreement also needs to deal with continued reimbursement of some or all of the rental payments for a short, agreed period linked to the timetable for the appointment of a replacement contractor. For the avoidance of doubt this is a temporary/short term arrangement to manage a contractor's exit for the purpose as set out above.

A contractor is likely to be eligible for one such agreement only, with any agreement reached lasting for no more than a maximum of twelve months in duration, beginning with the date on which the agreement takes effect¹. Any such payments (if available) would be subject to the contractor continuing to comply with the terms of its lease (and its obligations under the joint agreement) and on the existing and replacement contractor i) agreeing the terms of the assignment of the existing lease or sublease, and ii) meeting all related costs.

Should use of this support mechanism need to go beyond the agreed twelve month period, HBs should consider providing support under an alternative route, subject to the conditions and advice required. Any joint agreement which goes beyond the twelve month period will amount to a contractual agreement and thus be subject to WHC (2015) 031 and IFRS 16 and therefore professional advice should be sought and timeframes agreed at the outset.

Option 3 – Put/Call Option Agreement

The Put/Call Option Agreement enables either the HB or the GP tenant to request the assignment of a lease to the HB. This is usually a “last resort” and would require careful consideration of case specific detail, appropriateness of use along with financial and legal implications.

¹ The commencement and length of any agreement is a matter to be agreed as between the parties to, and for, each individual agreement. Where an agreement is made for a period of less than 12 months in length, the parties may wish to include a clause providing the option to extend the term of that agreement up to a total of 12 months.

Through this agreement, property rights will be conferred to the HB. As such, HBs will need to seek professional expert advice to ensure all financial and legal implications have been considered including the application of WHC (2015) 031 and IFRS 16.

Key Principles and Expectations

In accordance with their statutory powers, a HB is usually unable to provide support beyond the duration of a GMS contract. HB's have, at their discretion, a number of support arrangements including those outlined above, that could be invoked, including a "joint agreement" or assignment of a lease (subject to conditions and due process).

Any HB intervention or support is not available on demand with each case requiring consideration based on its specific detail. Whilst not an exhaustive list of relevant criteria to be considered for support to be granted, some of the key principles that should be considered are:

- The practice is able to clearly evidence difficulty in recruiting additional partners;
- The practice must be at risk of relinquishing its GMS contract in the near future (and options such as recruitment drives/initiatives, mergers and exit management have been fully explored and validly ruled-out);
- Any decision must have regard to the HB's premises strategy, but will not necessarily be limited by it (although there must be a need for primary medical services to continue from those practice premises);
- In all cases the practice viability must have the potential to be clearly enhanced by any HB support;

An application for support may be made by any eligible practice that holds a GMS contract with NHS Wales for the supply of GP services. The practice will be required to provide all appropriate information to the HB in order for assessment of the application. Where a practice fails or refuses to provide appropriate information a HB can refuse or defer considerations of the application until this information is provided.

If support is to be considered, it will be conditional upon the following (in addition to any other conditions the HB considers appropriate):

- Practices are required to provide all relevant financial (including practice accounts) and premises-related information to the HB after requesting assistance. HBs will treat this information as confidential but the practice must agree that the HB can allow other organisations to access that information in connection with their statutory functions (for example, with Welsh Government officials in respect of seeking approval for a support arrangement);
- Practices must, wherever possible, have provided advance notice to Health Boards of any difficulties leading to an application for support in this context; this may include, but is not limited to, any application under the sustainability matrix;
- Any arrangement representing value for money and being consistent with the HB's statutory powers.

Where an eligible practice satisfies the criteria and any other relevant conditions, the HB will consider whether support or assistance could be offered to the practice. It is expected that the practice will involve the LMC in this process and that factors such as the Estates Strategy of the HB, strategic direction for the provision of services in the area along with wider activity (e.g. mergers or new builds) will be taken into account.

Any support does not affect existing entitlements of GMS contractors under the NHS (General Medical Services – Premises Costs) (Wales) Directions 2015 and could take various forms.

In cases of eligible 3PD premises requiring support and where that 3PD premises development has had HB involvement from the outset and is of strategic importance, an assumption will be made that the criteria has been satisfied and HBs are expected to offer support, which could include a “joint agreement”, without the requirement for the practice to provide evidence of meeting those criteria. However, HBs are entitled to request any information (as outlined above) which will assist them in assessing the level of support to be made available.

HB's approach to all such support will be monitored through the usual performance monitoring channels.

Other issues which HBs will need to consider

HBs will need to ensure that any support is consistent with, and helps it to achieve, its statutory functions including, but not limited to, the HB's obligations under the NHS (Wales) Act 2006 and the NHS (General Medical Services – Premises Costs) (Wales) Directions 2015. The practice will also be expected to engage with the HB about future plans for delivery of services in that area including succession plans.

In instances where HBs are dealing with a novel, contentious or particularly complex cases, they should seek advice from Welsh Government prior to any decision being made. This will enable a consistency of application across Wales and to develop this process further if required.

HBs should note that, in some circumstances, they may also need consent from the Welsh Government before committing to any support. Accountancy advice will also need to be taken from HBs financial teams to determine the impact of IFRS16 and any other relevant reporting standards.

Professional Advice

Both the Contractor, prior to requesting the HB consider an application for support, and the HB, once such a request has been made, should obtain independent legal and financial advice from suitably qualified professionals.

Appeals process

Any disputes that cannot be resolved at a local level must be referred to the Local Assessment Appeal Panel in line with the existing process described in the revised GP Sustainability Assessment.