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The advantages and disadvantages of LLPs and Mutuals in Primary Care

There are currently only four types of business vehicle permitted to hold GMS contracts.

These are:

1. Individual GPs (who have unlimited liability)
2. Unlimited liability partnerships including at least one GP (the most common structure)
3. Limited partnerships including at least one GP
4. Companies limited by shares including at least one GP shareholder

There are statutory mechanisms enabling a GMS contract to be transferred between types 1, 2 and 3, but no statutory mechanism enabling a transfer to or from type 4. The rules for PMS are slightly different, but given the right of PMS contractors to return to GMS the difference is not material for the purposes of this note.

The current options for practices to limit their liability are restricted. They could transfer a GMS contract into a limited partnership, but these entities require at least one partner to have unlimited liability for all the risks of the business. Since only a subset of the partners have limited liability, this would create obvious difficulties in a GP partnership. Using a Company limited by shares would limit the exposure of all the shareholders to the value of their capital, but this is not normally available to practices as there is no mechanism to transfer the GMS contract into the company.

Limited Liability Partnerships (LLPs)

LLPs retain the central feature of partnerships, being that partners both own and manage the business. In a company, by contrast, ownership and management are split between the shareholders and directors. Partnerships are often the preferred business vehicle in the professions because the alignment of ownership and management encourages close collaborative working. This in turn facilitates the transfer of tacit skills and good risk management on which the reputation of the profession relies.

LLPs bring several advantages over other kinds of partnership:

1. LLPs are registered legal entities and are therefore capable of contracting in their own name. This means that important assets such as the surgery freehold or lease can be held in the name of the LLP rather than individual LLP member's names. When a

member joins or leaves an LLP, there is no need to change the lease or the land registry title, because the member is not named on it. Discussions amongst members would then change from being whether or not to ‘buy-in’ to the surgery, to whether or not to contribute capital to the LLP.

2. The liability of LLP members is limited to their capital contribution. There are ways this can be circumvented such as by a mortgagor requiring personal guarantees, but members know that their liability is limited except where they have agreed otherwise. By contrast in traditional partnerships all partners have unlimited liability except where they have agreed to limit it. The most common ways of doing so are to take out insurance (such as professional indemnity cover) or to have contractual limits to liability in service contracts. In this way it is possible to create structures which arrive at similar levels of risk, but they start from opposite extremes

3. In an LLP a member is not responsible or liable for another member’s misconduct or negligence. This is an inevitable consequence of the limited liability status since this removes the joint and several liability inherent in an unlimited liability partnership. Some argue that this can reduce the level of collaboration between LLP members, but this has not generally been the experience of other professions.

4. There is considerably more formality around LLPs. Unlimited liability partnerships can be created and dissolved with no documentation, whereas LLPs cannot exist unless they are registered at Companies House. This increased formality eliminates some of the uncertainty around whether a partnership has been created or dissolved, which is at the heart of many GP partnership disputes. However, Companies House requires LLPs to file and disclose information about their membership and accounts which is normally kept private in an unlimited liability partnership.

Mutuals and Social Enterprises

There are a variety of legal structures which enable employee and community ownership of, and involvement in, a business. These are usually known collectively as social enterprises. The only form of social enterprise which is currently open to primary care is a Community Interest Company Limited by Shares (“CIC-CLS”). Since the same ownership rules apply to a CIC-CLS as to an ordinary company limited by shares, it is not possible to use it to broaden employee and community involvement in the practice.

If other social enterprises were to be permitted to hold GMS and PMS contracts, they would most likely include Companies limited by Guarantee (“CLG”), Community Benefit Societies (“BenComs”) and Industrial Provident Societies (IPS).

The primary difference between the various different types of enterprise comes down to who they ultimately seek to benefit:

- Partnerships and LLPs look to provide financial benefit (profit) for the partners/members
- Companies limited by shares look to provide financial benefit (profit) for the shareholders

- CLGs look to provide financial and non-financial benefit to a defined purpose and are often charities
- BenComs look to benefit the community
- IPS's seek to benefit their members

If social enterprises were able to hold GMS and PMS contracts, they would have similar advantages to LLPs. They all generally have legal personality and so can hold assets and contracts, they have limited liability by default, and they are regulated and must be registered. Social enterprises come with the additional disclosure requirement beyond those of LLPs, to ensure that their social purpose is being complied with.

A further possible advantage with social enterprise is that it might make it easier to integrate across other elements of healthcare, since it would be easier to involve the care and voluntary sectors in a social enterprise such as a BenCom.

Transitioning issues

If LLPs and mutuals were permitted to hold GMS and PMS contracts, this would not resolve the question of how to move existing GMS and PMS contracts into them. As LLPs and mutuals are distinct legal entities, they would suffer from the same procurement problem as Companies limited by shares currently do. This is that procurement law states that public bodies must tender all contracts above a certain value. Because GMS and PMS contracts do not generally have a fixed term, their cumulative value normally exceeds this threshold. Since moving a contract from one legal entity to another is technically a termination and re-grant, the re-grant would by default have to occur through a tender process. There are exceptions to the public tender rule, but it is a matter of some debate whether these exemptions can be applied to GMS and PMS contracts.

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