

Transforming Community Services

A trade union guide

British
Association of
Occupational
Therapists



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Transforming Community Services – Joint Union Advice and Guidance

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1 Introduction

The Transforming Community Services (TCS) programme is a major element in the vision for Primary and Community Care set out in the NHS Next Stage Review and has a potential impact on the employment conditions and job security of Primary Care Trust (PCT) staff.

This guide is aimed at trade union representatives and full-time officers who should be engaging with PCTs and strategic health authorities (SHAs) on these issues. It identifies the key processes within the TCS programme; describes the consultation process; and provides you with the questions you should be asking of PCTs, SHAs and any potential new providers.

The Department of Health (DH) has launched a Transforming Community Services (TCS) document to support PCTs in making their own local decisions on the governance and organisational models of community services in their area. The full TCS document is available at: www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_093197

These models are intended to support the policy drive to separate PCT provider functions from their commissioning functions. The options available to PCTs are described in detail in Section 4 of this guide.

The TCS document underlines the importance of engagement with staff and trade unions in making strategic decisions about local services. It recognises that changes to governance and organisational structures have important implications for NHS staff which should be fully thought through, well communicated to staff and supported by robust consultation arrangements with trade unions. It states that staff retention and motivation will depend on fair treatment, in terms of protection of terms and conditions, training and development as well as meaningful involvement in the change process.

(See TCS Chapter 3, Page 19 'Guiding Principles')

2 Joint union guidance

The NHS trade unions and the TUC have strong reservations that the TCS process may lead to fragmentation of NHS services and increased use of the private sector to deliver public services for private profit. This then poses a real threat to NHS job security and of potential job losses.

However, we believe that staff and trade union involvement and consultation in decision-making is vital to ensure that changes to local health services represent the best interests of both NHS patients and staff. The DH is also committed to ensuring appropriate and effective consultation occurs locally and the TCS guide describes DH expectations for both PCTs and SHAs in relations to consultation and communication with staff and trade unions. *(See TCS Chapter 4 Pages 22 and 23 'What PCT's need to do', Appendix 2, Page 77 and elsewhere in the document)*

The NHS trade unions, in liaison with the TUC, have produced this short joint union guidance for staff side representatives. It explains the main aspects of the TCS guide and provides some pointers and assistance in how trade union representatives and members should respond to local proposals and changes.

It is important that all unions, whether affiliated to the TUC or not, work together to ensure that changes in their local health services represent the best interests of both NHS patients and staff. Involving trade union members throughout this process will be critical to ensuring that staff voices are heard.

3 Transforming Community Services – main points

- TCS is part of a wider government strategy to improve community services and the commissioning of community services where PCTs contract with – or 'commission' – different providers to deliver local services.
- TCS is about transforming the governance and organisational structures of community services through a two-stage process.
- **By April 2009**, provision of services will be split from commissioning in each PCT, with commissioning functions taking on a contractual relationship with provider organisations – the PCT provider function remains accountable to the PCT board.
- **By October 2009**, following consultation with staff and trade unions, PCTs should have drawn up business plans for transforming local services, setting out how they will increase patient choice, improve service provision and provide contestability and competition. They will also consider options for organisational forms and describe further plans for trade union consultation for implementing the business plan related to the provider services. (See TCS Timetable Chapter 4 Page 25)
- **There is no requirement for PCTs to have transferred out provider services at this stage. There is, however, a requirement for trade union consultation at each of these two stages.** *(See TCS 'Engaging Staff' Chapter 4 Page 23)*

- The options for organisational forms include:
 - PCTs retaining provider services through an arms length structure
 - community foundation trusts, social enterprises
 - integration with other NHS organisations
 - contracting with integrated care organisations or non-NHS bodies.

(See Section 4 of this Guide for further details).

The DH is clear, however, that they are not prescribing any ideal form from the centre. *(See TCS Chapter 4 Page 21, 'Options for Organisational Forms')* However, trade unions are concerned that pressure may be put on PCT's to divest themselves of providing services and to contract them out to the private sector or other non-NHS organisations with the resultant threat to job security and potential job losses.

- *Chapter 7, Page 40 of the TCS guidance makes clear that, "while evaluating the options for organisational form, PCTs need to take into account any impact on the retention of staff of the form selected. Some forms may lend themselves better than others to factors that are important to staff."*
- While PCTs do not have to divest themselves of the provision of community services, there must be clear arm's length separation between commissioning and provision with a contractual relationship between the two, so new governance structures will need to be established. *(See TCS Chapter 6 Page 34 and elsewhere)*

- PCTs will be expected to examine and appraise options for all organisational forms – including direct provision - and their plans will be judged against suitability for local circumstances. PCTs will carry out an evaluation of the viability of each potential model and attendant financial or service risks. This will be done on a service by service level. *(See TCS Chapter 6 page 35)*
- PCTs should be consulting with staff and trade unions on the organisational options for future organisations. *(See TCS Chapter 7 page 40)*
- All decisions will be taken locally by PCT boards, with oversight by strategic health authorities – SHAs will need to approve final business plans. *(See TCS Chapter 9 page 60)*
- In addition to local consultation (PCTs with local staff sides), SHAs will share PCT plans with trade unions through the regional Social Partnership Forum to ensure there is effective communication and strategic joint working. *(See TCS Chapter 1 Page 13)*
- This exercise could lead to services being transferred to the private sector or other non-NHS provider organisations. Staff Sides will wish to ensure that all options for maintaining direct NHS provision of services and that NHS jobs are defended.
- Staff Sides will need to engage, ideally on a joint union basis, with all union members to develop views on the future options. Membership involvement is essential to ensure staff voices are heard. If the preferred option is for continuing direct NHS provision of services, staff sides may wish to campaign for this outcome.

4 Possible new models for service delivery

Key points from Chapter 7 of the TCS Document:

Arms-length PCT provider units

PCTs may retain accountability for provider services by maintaining services in a 'provider unit' within the organisation. They will need to develop new governance arrangements that ensure a formal separation between their commissioning and provider functions. This could entail a provider services unit that hosts all PCT provider services, led by a strategic provider board.

What this means for staff – staff would continue to be employed by an NHS organisation, and as such be covered by the NHS terms and conditions and negotiating machinery and have access to the NHS pension scheme. New starters will be appointed on NHS terms and conditions and will be entitled to join the NHS pension scheme.

Social enterprises

PCT staff can use their 'right to request' to set up a social enterprise. PCTs will be obliged to consider requests and if approved by the SHA, a contract for an initial three years will be given.

What this means for staff – TUPE transfer will protect existing NHS terms and conditions, but staff will not be covered by the NHS negotiating machinery and, as

such, all future changes or improvements to NHS terms and conditions and pay are not automatic. New starters will be on organisation specific terms and conditions, which should be overall no less favourable than the terms and conditions of transferred employees. This right is enshrined in a Code of Practice on Workforce Matters produced by the Cabinet Office covering the public sector as a whole. The TCS guidance circulated by the Department of Health makes it clear that the provisions of the Code must be followed.¹

Transferred staff will be able to stay in the NHS Pension Scheme, providing they continue to deliver NHS funded work and the social enterprise organisation is not bought by another non-NHS organisation. This arrangement will not apply to any future employees of the social enterprise – the social enterprise organisation will need to provide access to a pension scheme for any new staff.

Polyclinics / GP-led health centres

Polyclinics or GP-led health centres

¹ The Code of Practice sets out an approach to workforce matters in public sector contracts involving a transfer of staff from a public sector organisation to a new service provider, or in which staff originally transferred out from the public sector organisation as a result of an outsourcing are TUPE transferred to a new provider under a retender of a contract. The Code is designed to prevent the emergence of a 'two-tier workforce', dividing transferees and new joiners working beside each other on the same contracts.

http://archive.cabinetoffice.gov.uk/opsr/workforce_reform/code_of_practice/index.asp

bring together family doctors, nurses, AHPs, specialists and other services more usually associated with hospitals, such as diagnostic testing, minor surgery, blood tests and X-rays. These could be run by large private companies or consortia of GP's.

What this means for staff – staff transferred to a GP practice as practice staff will continue to have access to the NHS pension scheme, but may not necessarily have access to the NHS Injury Benefit Scheme nor to early retirement on grounds of redundancy. TUPE transfer will protect existing NHS terms and conditions, but staff will not be covered by the NHS negotiating machinery and as such all future changes to NHS terms and conditions and pay are not automatic.

If the polyclinic or health centre is run by a private company then it is likely staff will not have access to the NHS pension scheme.

Community foundation trusts

Community foundation trusts would provide those community services currently run by PCTs. It is likely that a community foundation trust will be established through a consortium of PCTs. Applications to establish a community foundation trust will need to be approved by the SHA.

What this means for staff – transferred staff will retain NHS terms and conditions (subject to the additional flexibilities that apply to all foundation trusts) and retain full membership of the NHS pension scheme. New starters will be appointed on NHS terms and conditions and will be entitled to join the NHS pension scheme.

NHS integration

● **Vertical integration**

This is where PCT provider-arm function is integrated with a local acute service. It may involve the outright merger of an acute trust with a PCT provider arm or a looser alliance of primary and community services through multi-disciplinary team working and joint management.

What this means for staff – transferred staff will retain NHS terms and conditions and retain full membership of the NHS pension scheme. New starters will be appointed on NHS terms and conditions and will be entitled to join the NHS pension scheme.

● **Horizontal integration**

This is where more than one PCT provider-arm function is integrated and may involve merger with one or a number of PCT provider arms. This may be a first step towards creating a community foundation trust.

What this means for staff – transferred staff will retain NHS terms and conditions and retain full membership of the NHS pension scheme. New starters will be appointed on NHS terms and conditions and will be entitled to join the NHS pension scheme.

Integrated Care Services

This is where joint health and social care services are established. This may be through joint management arrangements between health and social care functions or formally through integrated care organisations or the creation of a “care trust” model.

What this means for staff – transferred staff will retain NHS terms and conditions

and retain full membership of the NHS pension scheme. New starters will be offered either NHS or local authority terms and conditions and may be entitled to join either the NHS or Local Government pension scheme (dependent on individual circumstances)

Private sector or non NHS/ independent sector

This would be as a result of the PCT deciding to transfer individual services, or bundles of services to a private company (or to a community or voluntary sector provider) through the process of tendering and contracting. Unions have real concerns about this privatisation model as experience to date shows that staff job security, guaranteed pay terms and conditions improvements, trade union recognition and their NHS pension can all be lost as a result of transferring out of the NHS. It also means that services can become fragmented, particularly if a series of different organisations run individual services.

5 Workforce implications

Appendix 2 of the TCS guidance sets out the key employment aspects which need to be considered by PCTs when taking forward organisational change. This is an important part of the TCS document, as it provides key information about the way change will be managed and considers the impact on staff. *Appendix 2 is attached at the end of this guidance.*

This section looks at each part of the Appendix 2, highlights the main points and suggests key questions which should be considered by trade unions and discussed with PCTs and SHAs.

Development of proposals and trade union consultation

Key points of TCS document

- The TCS guidance states repeatedly that “early consultation and engagement with staff and their representatives, is a requirement in any initial consideration, appraisal and development of proposals for the future delivery of services provided by PCT provider arms”. So if your PCT challenges your request for trade union involvement and consultation in this process, you can refer them to the TCS document and this paragraph in particular. (*see TCS Page 77*)
- Section 3 of the TCS guidance (*see page 19*) entitled Guiding Principles is clear that “Staff employment rights and interests matter – the workforce implications...must be carefully considered and consulted on with recognised trade unions.”

Further to this it also states that “Staff and their trade unions should be engaged early and fully consulted on future arrangements – they should be substantially involved in debating the issues and their views considered before any decisions are made”.

- PCT business and workforce plans, in relation to their intentions for provider function, are shared with the trade unions through the local Joint Staff Committees or local Social Partnership Forums. (see *TCS Appendix 2, Page 77*)

The joint trade union view

- PCTs and SHAs should make sure that a consultation process with trade unions is put in place to ensure a high level of engagement, in order to discuss proposed changes and to allow staff side to play a proper role, including time to seek views from and report back to members.
- Staff sides should also make full use of any local Social Partnership Forum arrangements to proactively seek information and discuss workforce and consultation plans.
- PCTs and trade unions should agree a timetable and process for consultation to ensure there is trade union input and involvement in any proposed changes, including new employment model(s).
- Trade unions should encourage members to make their voices heard in the consultation process. Members should be aware of all the potential implications of a proposal and have the opportunity to discuss these, as well as possible alternatives. The consultation process should be used to raise any concerns and if necessary to

mobilise opposition to proposals that would be against patient and staff interests.

- In the event that the consultation process is running into difficulties and/or there is no consensus emerging on the best way forward, staff sides should seek to agree with the trust how these problems will be resolved, if necessary by extending the timetable for decision-making.

Mechanisms for consultation

● **SHA level**

The SHA has an oversight and review role during this process. All PCTs must bring their plans and intentions for service provision to the SHAs. Trade union representatives involved in regional SHA work should try to ensure that this happens on a systematic basis. (see *TCS Appendix 2, Page 77*) This information is to be shared with trade union officers through the regional Social Partnership Forums, where the trade unions regionally will have the opportunity to comment on the workforce plans and service reviews.

● **PCT level**

PCTs are the employers and as such have a legal responsibility to consult directly with trade unions on matters affecting staff. The TCS document goes further, however, and commits PCTs to involve local staff sides in discussions well before any decisions on options. PCT trade union representatives need to get involved in this process, working in collaboration with the full-time officer. (see *TCS Appendix 2, Page 76*)

Key questions for you to ask PCTs and SHAs about reorganisation – for PCTs and SHAs

- » Has there been a review of community services, prior to any decisions being made?
- » How were staff and trade unions involved in that review?
- » How are staff and their trade unions going to be consulted on the changes?
- » How will regional Social Partnership Forums ensure there is effective communication and strategic joint working with trade unions?
- » How will the PCT ensure that the proposed changes will be 'patient led'; support integration between health and social care services; support the development of community based services; and improve public access to local services?
- » Will the proposed reorganisation improve the ability of PCTs to plan services on behalf of their populations?
- » Will the reorganisation increase clinical engagement and staff involvement in the planning of services?
- » How will services be maintained during the reorganisation so that patient care is not compromised and staff are kept motivated?

Key questions for you to ask the PCT about transfer of services out of the NHS

- » What is the evidence base that delivering community health services outside the NHS will be more beneficial than direct provision?
- » What is the contract price? How does this compare to the cost of existing PCT provision of these services?
- » How long will the contract run for and what will happen if the PCT assesses that services are not being delivered as contracted for?
- » What will happen to staff and services if the new provider collapses?
- » When the contract comes up for renewal, will the new provider have to compete against other private, voluntary or NHS providers? What will happen to staff if the contract is not renewed?

Equality

Key points of TCS document

- This section states that no employees should receive less favourable treatment on the grounds of age, gender, marital status, race, religion, creed, sexual orientation, colour disability, working patterns, or trade union membership. It goes on to urge employers to undertake equality impact assessments to evaluate the impact of change. (see *TCS Appendix 2, Page 77*)

The joint union view

- Equality impact assessments must be undertaken as part of any options appraisal. It is a strong trade union belief that equality impact assessments should be jointly undertaken in the spirit of partnership, in order to assess and record the likely impact of any changes to different groups in the workforce and to anticipate any adverse impacts. The NHS Employers guide to conducting equality impact assessments can be downloaded from: www.nhsemployers.org/excellence/excellence-1871.cfm and individual unions may wish to provide members with further guidance on this issue.
- Non-NHS providers will also be covered by the public sector duties through their contractual relationship with the NHS. It is important that staff sides monitor contractual arrangements to ensure that public sector duties are included.

Key questions for you to ask the PCT

- » What are the plans for carrying out equality impact assessments on the proposed changes?
- » How will new providers commit to the principles of equality and diversity for staff and patients?
- » How will new providers commit to carrying out the public sector duties?
- » What mechanism does the new provider have in place to support workforce data collection, which records race, gender, age, disability of staff linked to payroll information?

NHS Constitution

Key points of TCS document

- All organisations providing NHS services are obliged to have regard to the NHS Constitution (see *TCS Appendix 2, Page 77*). The Constitution sets out the six NHS values (respect and dignity, compassion, working together with patients, commitment to quality of care, improving lives, and everyone counts). It also sets out pledges relating to the management of change promising that change will be clinically driven and locally-led, that patients will be involved and will see the difference first (existing services will not be withdrawn until new and better services are available). It also sets out the legal employment rights of staff, alongside pledges to staff and staff responsibilities.

Lord Darzi's May 2008 document, *Leading Local Change*, aimed to set parameters on how changes should be brought about, and contained five pledges to patients and the public:

- change will always be to the benefit of patients
- change will be clinically driven
- all change will be locally-led
- you will be involved: the local NHS will involve patients, carers, the public and other key partners
- you will see the difference first: existing services will not be withdrawn until new and better services are available to patients so they can see the difference.

Joint union view

- The Constitution should be the touchstone of any organisational change in the NHS. Staff sides should refer to the Constitution throughout any change process or negotiations on organisational change.

Key questions for you to ask the PCT

- » How will the PCT ensure that the NHS Constitution is followed during the process of change?
- » How will the PCT ensure that the Constitution is upheld by new providers?
- » Are Lord Darzi's pledges being fulfilled?

Protection of pay and terms and conditions

Key points of TCS document

- In the event of any change in employer and the transfer of staff, the Transfer of Undertaking (Protection of Employment) Regulations (TUPE) will apply.² Under TUPE, staff will transfer on current terms and conditions and can only be changed in certain, narrow circumstances. Transferred employees must be informed and consulted about the transfer of their employment via their trade union representatives and all collective agreements will transfer to the new provider. (see *TCS Appendix 2, Page 78*)
- New starters working alongside transferred staff will be protected by the Cabinet Office Code of Practice on Workforce Matters. This states that the new provider will offer employment on fair and reasonable terms which are, overall, no less favourable than those transferred employees. The service provider will also offer reasonable pension arrangements. (see *TCS Appendix 2, Page 80*)

² In certain circumstances although there may be a transfer of undertakings it may be agreed that staff can be retained in NHS employment but seconded to the new employer. This is sometimes known as 'Retention of Employment' (ROE) and it extensively used in Private Finance Initiative and Independent Sector Treatment Centre transfers. However, the DH has placed a temporary ban on such secondments subject to a review. For further information read the Transaction Manual on the DH website or seek advice from your union full time officer.

Key questions for you to ask the PCT

- » What are the contractual procedures for ensuring that TUPE and the Code of Practice are implemented by new providers?
- » What are the contractual procedures for ensuring that TUPE and the Code of Practice are monitored and enforced after the transfer has taken place?

Human resources (HR) policies and practices / continuous professional development / staff engagement / workforce planning

Key points of TCS document

- Where staff transfer outside the NHS, contracts should set out expectations with regard to access to training and all statutory requirements (eg health and safety, equal opportunities legislation) which should be enshrined in contracts (*see TCS Appendix 2 Page 83*).
- New provider organisations will also be expected to show that they have an appropriate HR strategy and workforce plan within their business model which underpins their capacity and capability to deliver any prospective contract (*see TCS Appendix 2 Page 83*).
- Providers will be expected to demonstrate a commitment to promote equality of access to Continuous Professional Development (CPD) (*see TCS Appendix 2 Page 83*).
- Providers will be expected to carry out staff surveys at least once a year and respect all statutory rights in relation to union membership. They will also have to set out their approach to the continuing recognition of existing trade unions, in line with the principles set out in the NHS Constitution and 2007 NHS Partnership Agreement (*see TCS Appendix 2 Page 84*).
- Employers will be responsible for planning their workforce based on PCT's service commissioning plans and will be expected to share their workforce plans with PCTs (*see TCS Appendix 2 Page 85*).

Joint union view

- It is important that staff sides pose challenging questions about provider plans for recruitment and retention, staff and trade union engagement, training and development, equality and diversity and workforce planning. You should ask for proof of experience and track records in HR practice, carer development and CPD and of working with trade unions.
- In the event that your employer fails to properly engage with trade unions and staff despite local pressure to do so, local representatives should contact their union full time officers to gain support for this process.

Key questions for you to ask the new provider

- » What impact will this transfer have on the place of work or pattern of work for affected staff?
- » How will the provider avoid two-tier employment arrangements, i.e. where new staff are on poorer terms and conditions to TUPE's staff? What does their terms and conditions package for non transferring staff look like?
- » Will the new provider commit to Agenda for Change and the Knowledge and Skills Framework?
- » Will the new provider honour future improvements to NHS pay and conditions of employment and other collective agreements for TUPE transferred staff? If not how do they intend to ensure that TUPE'd staff maintain relativities with NHS staff?
- » What will be the budget and arrangements for supporting training and CPD? What appraisal system will the new provider be implementing?
- » Will the new provider play its part in taking students on placements, providing work for newly qualifying professionals, and play a full role in local workforce planning?
- » How will the provider access HR expertise?
- » Will staff remain members of the NHS pension scheme, and still have access to injury benefits? How will the pension arrangements for other employees compare?
- » Will the provider offer full professional liability insurance?
- » Will the provider have a scheme similar to the NHS Injury Benefits Scheme?
- » Does the new provider have a strategy for maintaining a safe working environment, which encompasses health and safety structures and risk assessments.
- » Will the new provider continue to recognise the existing health trade unions and retain appropriate negotiation and consultation arrangements to ensure proper partnership working?

Key Reference Documents (web links)

Transforming Community Services

[http://www.dh.gov.uk/en/
Publicationsandstatistics/Publications/
PublicationsPolicyAndGuidance/
DH_093197](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_093197)

Next Stage Review

[http://www.dh.gov.uk/en/
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PublicationsPolicyAndGuidance/
DH_085825](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085825)

NHS Constitution

[http://www.dh.gov.uk/en/
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PublicationsPolicyAndGuidance/
DH_085814](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085814)

Social Enterprise - Making a Difference: a guide to the Right to Request

[http://www.dh.gov.uk/en/
Publicationsandstatistics/Publications/
PublicationsPolicyAndGuidance/
DH_090460](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_090460)

Transfer of Undertakings (Protection of Employment) Regulations

<http://www.berr.gov.uk/files/file20761.pdf>

Cabinet Office Code of Practice

[http://archive.cabinetoffice.gov.uk/opsr/
workforce_reform/code_of_practice/index.
asp](http://archive.cabinetoffice.gov.uk/opsr/workforce_reform/code_of_practice/index.asp)

