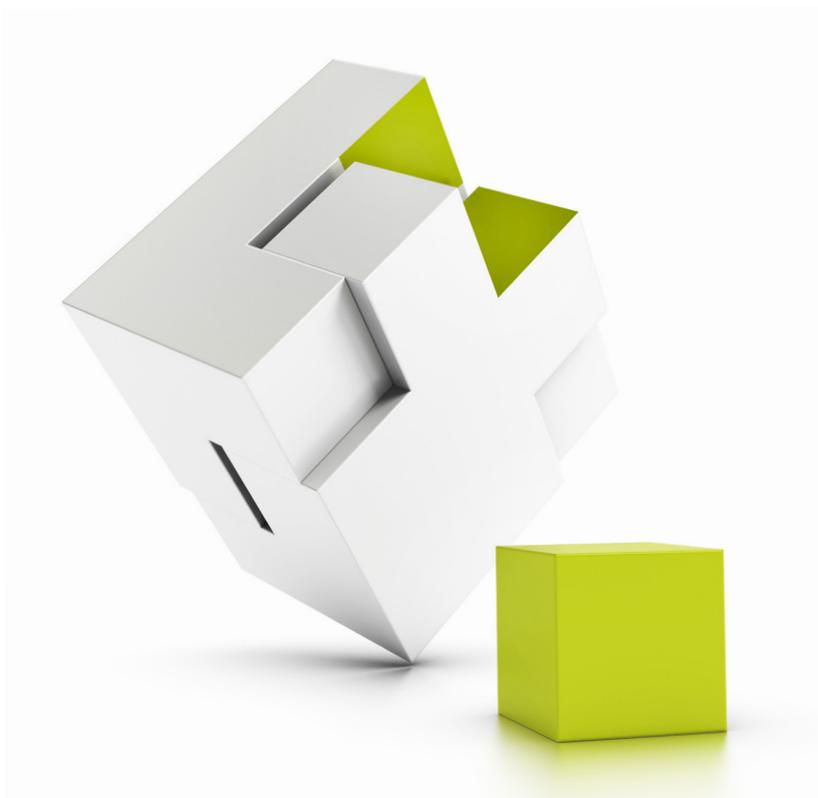


HEMPSONS



New care models:

Governance **between** organisations



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The NHS Five Year Forward View clearly sets out the challenges ahead for the health and care sector. For the NHS to meet the needs of future patients in a sustainable way we need to close three gaps: the health and wellbeing gap, the care and quality gap, and the funding and efficiency gap.





To do so, we can no longer carry on delivering care in the same way that we have always delivered it. Success will require us all to think beyond our statutory and organisational borders about new care models to meet the needs of the people we serve.

Working in partnership across traditional institutional boundaries will therefore become increasingly important if we are to deliver the care that the public expects and deserves, and ensure the viability of the NHS provider sector. In addition to being demonstrably well run as individual organisations, NHS providers will have to excel at working in partnership with others in their local health and social care system.

Working in partnership is nothing new but, equally, it is not as widespread as it could be. Partnerships can bring considerable benefits for patients, the public, staff and boards but they also present new challenges of leadership and direction: of good corporate governance.

This publication, jointly produced by Hempsons and NHS Providers, addresses the key challenges of delivering good governance between organisations which are working collaboratively together. It deliberately focuses on more collaborative models of delivery, rather than structural transactions about which there is more existing guidance and support.

We hope this publication provides a range of helpful considerations for boards which are about to embark on a new venture or collaboration and that it will stimulate debate within the sector.

Chris Hopson, Chief Executive, NHS Providers

Introduction

How do we develop sustainable vehicles for the delivery of healthcare closer to home? Who else do we need to involve? How should we look to shape our organisation to meet the challenges of the future?

These are some of the questions the leaders of NHS provider organisations are seeking to answer as they look to deliver healthcare in a more integrated and more sustainable way. Perhaps less prominent in their thoughts, but nevertheless important, will be how to control and direct new vehicles for service delivery in the longer term. The debate so far, has rightly, centred mainly on the need for primary, secondary and social care to work together better, but new care

models will be delivered either by single organisations or by organisations working together and how well these organisations are led and directed will be of crucial importance.

Part and parcel of that leadership challenge will be to consider how boards of directors can exercise control over services for which they are accountable, but do not necessarily deliver directly through their own organisation. At present there is no strong evidence to suggest that there is 'a right way' to ensure good governance between organisations where organisations are working together through partnerships, joint ventures or other organisational forms. What evidence



there is goes back to 2008¹ and suggests that it is the quality of relationships that plays a crucial role in delivering good governance between organisations. Although, clearly it would be a high risk strategy to rely entirely on the persistence of good relationships alone to sustain service delivery in the medium term.

This publication therefore focusses specifically on the development of effective and robust governance between organisations – rather than on the formation of new organisations through a transaction such as a merger or an acquisition. The purpose of this publication is to address the issues boards are likely to need to contend with in establishing new vehicles for in

service delivery, to tackle some of the legal and contractual issues and to signpost an approach to dealing with the medium term challenges of direction and control. It is not a 'how to' guide or manual. But as the sector is entering uncharted territory in developing governance for new models of care, we hope that it will stimulate debate and be a good source of reference material.

¹ Integrated Governance II: Governance Between Organisations, Dr John Bullivant, Professor Michael Deighan, Professor Bryan Stoten and Andrew Corbett-Nolan

Where to start

The NHS Five Year Forward View

centres on the need to develop more preventative and integrated care models including providing more care out of hospital and closer to patients' or service users' homes. Evidence that community based provision necessarily releases efficiency savings is limited.

However there are likely to be distinct advantages for patients and service users, given that most people would prefer to receive treatment and care at or closer to home as long as it is effective and safe.





What is clear is that health and care organisations are unlikely to be able to make the necessary changes alone and will need to work with partners in order to deliver in future. However this does not necessarily need to lead all organisations down the path of a transaction and structural change. It could mean working through networks or other collaborative forms which need clarity of responsibility and accountability, but not extensive organisational restructuring.

Clarity of purpose

Can we go it alone?

Perhaps the first question organisations need to ask themselves is 'can we go it alone?' and improve productivity and outcomes for patients. If the answer is genuinely 'yes' this may be the best way forward - no partners, no contracts with them, just straightforward service redesign and delivery.



What if the answer is no?

However, if the answer is 'no' NHS provider boards will wish to review the full range of options available to them: while integration remains the current "buzzword", it need not necessarily imply organisational integration through a transaction such as a merger or acquisition. Improved outcomes may equally be achieved through improved collaboration arrangements between partners. These arrangements may take the form of joint ventures, networks, chains or partnerships. In legal terms these arrangements can be set up either contractually through partners entering into one, a series of contracts with each other or through the creation of new corporate vehicles for service delivery which are jointly owned by the partners.



Clarity of purpose is essential.

If a new delivery vehicle or a contractual collaboration is the way forward to deliver improved and more sustainable services for a particular population, clarity of purpose is essential. What will the new organisation or contractual collaboration be set up to do and just as importantly what will it not do? All of the partners need to be clear on this from the outset. There is sometimes a tendency within all of us to defer the difficult or the contentious to a later time. In partnership working such an approach is likely to mean storing up problems for the future.



Complete clarity.

The advantage of complete clarity on purpose, lines of accountability, responsibilities and the shape of the proposed delivery vehicle or contractual collaboration is that it gives all of the players the opportunity to reach agreement at the outset or to walk away without damaging service delivery or relationships. Untangling governance and accountability further down the line is much more difficult and much more likely to fail.



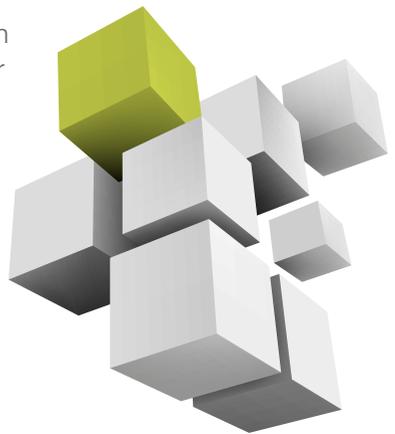
Early considerations

Good corporate governance requires strong leadership and direction to set strategy and organisational culture, and control to ensure the effective management of risks to the delivery of that strategy.

So where more than one organisation is involved in the delivery of healthcare, or where a new organisation is set up as a vehicle for service delivery, the first factor that partners or ‘owners’ will want to consider is to ensure that each organisation is capable of leading, directing and controlling the delivery of high quality services. Where a new organisation is set up they will also want to know that they, as founders and owners, can exert control over the direction of the organisation they have formed.

This may seem simple enough, but experience in the health sector and beyond has demonstrated that it is much more difficult than it may seem at first. Often owners are satisfied once the appointment of one or more of their own current directors is made to the board of the new organisation or to the partnership board set up under a contractual collaboration arrangement.

Clearly this is necessary, but it is likely to be insufficient as time progresses and the strategies and objectives of owners and the owned diverge. We will return to the issues of direction and control in the body of this publication.





The second factor NHS boards will wish to consider from the outset is accountability. How will the new vehicle for delivery or the partnership board relate to local stakeholders and the regulators? Where a new vehicle for delivery is set up, in some cases it will contract directly with commissioners while in others it will in effect be sub-contracting on behalf of its owners. Where a contractual collaboration is used one or more partners may contract directly with commissioners and then sub-contract to other partners. We consider this in further detail below.

Regulation will be simpler in a contractual collaboration than where a new vehicle for service delivery is set up. In a contractual collaboration the partners will continue to be subject to relevant regulatory regimes, particularly of the

Care Quality Commission (CQC) and Monitor, in their own right, though partners will need to check whether amendments to existing registrations are required. Foundation trusts will need to consider the effect of service redesign and the involvement of other partners in delivering services on Monitor's risk ratings.

Where a new delivery vehicle is set up, the CQC might require separate registration of the vehicle and may inspect it as an entity in its own right. The vehicle may also need a provider licence from Monitor but it is possible or even likely that Monitor will wish to hold the 'owner' provider organisations to account for service delivery.

Once again it is important to seek clarity from the regulators and from commissioners as early as

possible in the process. Lastly, but not least, foundation trusts will need to consider how their council of governors will relate to new organisations providing services on their behalf and on behalf of partners.

Whatever the form of change under consideration, provider boards will wish to ensure they have access to appropriate advice and expertise to inform their decision making. Avoiding transactions, or setting up new vehicles for delivery or working in partnership through contractual arrangements, brings with it the possible advantage that the providers in question may be less likely to fall under the merger control regime of competition law. However, boards will wish to understand at an early stage all the potential legal implications of collaboration before progressing.

Corporate governance and the board of directors

Good governance between organisations is unlikely to be delivered if the governance infrastructure of the partner organisations is not fit for purpose or if there are significant issues of leadership and direction in one or more of the partner organisations.

It is advisable therefore that all potential partners review their internal governance infrastructure and practice before embarking on establishing a new care model. This does not need to be a full blown governance review involving management consultancies and additional cost. It does need to be a frank and honest self appraisal identifying what works and what needs to be changed.

Boards of NHS trusts and foundation trusts already carry out annual appraisals of board and committee effectiveness so it is unlikely that a large amount of extra work will be required. The governance arrangements of other potential partners are unlikely to be centred on corporate governance in the same way as they are for NHS trusts and foundation trusts. Nor will they always have a deep understanding of corporate governance and its role in organisational success. This is not necessarily a problem as long as it does not lead to blurred governance arrangements in the new care model, in particular in any new vehicle set up for delivery.

Reviews should be proportionate to the size and scope of the organisation, and based on sound governance principles.



The organisation responsible for service delivery

Provider boards need to work with their partners and other stakeholders, in particular commissioners, to identify which organisation or organisations will be responsible for service delivery in a new care model.

In some cases there may be good reasons for partners to keep existing contracting arrangements in place (at least initially) and seek to integrate and improve services through putting in place some form of management contract between the partners. This could be the case for short term alliances or, on a longer term basis, for setting up hospital chains.

But in other cases, particularly in response to commissioning requirements, partners might put in place new contracting arrangements for service delivery. Options for this would be:

1

A prime contractor model in which a single organisation or consortium of providers (also known as the service integrator) takes responsibility for coordinating and managing an integrated service which is delivered by a range of sub-contractor organisations.

2

A prime provider model in which the service integrator coordinates and manages the integrated service but also provides some services itself, with others delivered by sub-contractors.

3

An alliance contracting model in which multiple organisations, both commissioners and providers, agree to work collaboratively to deliver integrated services, typically involving collective accountability, aligned objectives and incentives and sharing of risk and reward.



These models can be set up through a network of contracting arrangements. Any of them could involve a new vehicle set up by partners for service delivery, either as a prime contractor or provider or as a sub-contractor.

Early consideration of a memorandum of understanding to document agreed principles is likely to be helpful. In some cases an overarching framework agreement may also need to be entered into by the partners to supplement the service contracts awarded between them. The contracting model will need to ensure compliance with the different contracting regimes which apply to different types of services.

Legal forms and legal issues



When developing effective and robust governance between organisations for new care models a number of legal issues need to be considered at an early stage:

Legal form

There are a number of different ways of organising collaboration arrangements between multiple partners. The Dalton Review² sets out a very helpful list of suggested organisational forms but it is useful to understand that the way the organisational forms are described in the Dalton Review are not legally defined terms. The main differentiating factor between the options is the extent of organisational integration involved. At one end of the spectrum are loose collaborations – for example ‘buddying’ arrangements – while at the other end are consolidations involving changes in ownership requiring transactions – for example mergers and acquisitions.

As discussed above, there are two options for the legal form of a collaboration arrangement – contractual or corporate (setting up a new jointly owned corporate vehicle). In the latter case the options for a new vehicle range from traditional profit-distributing entities such as companies limited by shares and limited liability partnerships to entities set up for public benefit such as companies limited by guarantee, community interest companies, industrial and provident societies and charities.

To decide on the right organisational and legal form provider boards need to consider the extent of organisational integration that they want, their legal powers (noting in particular the restrictions on NHS trusts setting up corporate vehicles), how quickly they want to set up the arrangements (informal arrangements or contractual collaborations are likely to be quicker than setting up new delivery vehicles) and whether they have the resources and skills to implement the new arrangements.

Complying with competition law

Generally, the more permanent and formal a change, the more competition law needs to be taken seriously. Collaboration between organisations is unlikely to result in issues where providers are not competing with each other, i.e. where they provide health services at different 'levels' of care pathways.

Where organisations which do offer the same or similar services come together, then that can give rise to either a merger assessment or the risk of anti-competitive (collusive) behaviour – both areas need to be understood when considering organisational change or service re-design.

The good news is that putting in place new models of care does not automatically give rise to competition concerns and this is particularly the case where improved patient outcomes are demonstrably at the heart of change.



Sharing information & integrating technology

Plans to redesign local health systems can only succeed if the partner organisations involved are able to access patient records and other service information efficiently. This might mean creating integrated patient records or, where that is not yet possible, ensuring information governance processes are in place that allow lawful sharing of data. For electronic records, that may mean finding a way of integrating information management and technology systems.



Making changes to the way services are delivered

NHS trusts and foundation trusts as well as commissioners have statutory duties to involve service users and other stakeholders in the development and consideration of proposals for changes to services, where those changes will impact on the manner in which the services will be delivered or the range of services available. Delivery of more personalised, integrated care for service users under a new care model may well impact on the way in which services are delivered. Engagement will be essential to make the case for change. Early consideration should be given to statutory duties to involve and consult.



Accountability structures

As noted above, complete clarity about lines of accountability is essential to robust governance between organisations. Provider boards need to understand the registrations and licences needed in their collaboration arrangements and have processes to ensure compliance with them.

First, organisations working together in new care models need to consider their CQC registration requirements. In particular:

Any new delivery vehicle set up to provide services is likely to have to make an application for CQC registration.

A subsidiary or franchise holder will also usually require separate CQC registration where it is responsible for the services (not the franchisor or owner).

Registration requirements will also need to be considered if organisations change the services they provide by increasing or decreasing their regulated activities.

In delivering services provider boards also need to consider how they can comply with the fit and proper persons test and fundamental standards of care for regulated activities, as required by the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014.

Secondly, organisations working together in new care models will need to consider their Monitor licence requirements. As well as foundation trusts, any new delivery vehicle will need a licence unless any exemptions apply, e.g. where only a small volume of services is being provided, but it is possible or even likely that Monitor will wish to hold the 'owner' provider organisations to account for service delivery.



For foundation trusts and other existing licensees, Monitor may need assurance on the impact that service re-design and the (increased) involvement of other organisations in delivering services will have on governance and continuity of services ratings under the licence.

Finally, registrations with the Information Commissioner's Office (ICO) will need to be considered in the context of sharing of personal data by organisations. The Data Protection Act 1998 requires every data controller who is processing personal information to register with the ICO, unless they are exempt.

Direction and control

Shared focus on patients & good relationships will take new partnerships a long way...

Experience within the sector to date suggests that a shared focus on patients and good relationships will take new partnerships a long way irrespective of the governance arrangements and the mechanisms by which owners can exert influence. At the outset relationships may well be at their strongest. Typically the partners have come together because of shared objectives and because by pooling resources they can achieve things that could not be achieved alone. Initiatives may be driven by particular individuals who work well together and have shared aims. Enthusiasm is at its highest and a 'can do' attitude tends to pervade all aspects of the shared endeavour. The downside of this can be a tendency to defer potentially contentious issues, to assume that the aims of the partners will continue to coincide and to assume that future disagreements won't turn into disputes.

Clearly, the less formal the arrangements are for delivering services in partnership with others, the greater the liability that accrues to each of the partners and the greater the risk that the arrangement will not endure. Informal collaborations can be quick to put together, can be fleet of foot and adaptable but can also fall apart quite quickly with the risk of failure accruing to each partner.

Conversely, formal arrangements – such as new vehicles for delivery and comprehensive contractual collaborations – are likely to be durable and more stable, but may be less flexible and adaptable.

Complexity of control when setting up new delivery vehicles



When setting up a new delivery vehicle partners need to understand that they are setting up an entity in its own right that over time will develop its own culture, its own strategies and ambitions which may or may not converge with those of its owners. Where a new vehicle for delivery involves a small number of partners and has a limited purpose it is, as one might expect, relatively easy for the 'owner organisations' to set up and control in the short and longer term. Such vehicles will usually have a small number of directors, typically one nominated by each partner. Directors nominated by the owners will often be part time in the role and continue to be employees of the nominating organisation and will therefore be acutely conscious of the direction that their employer wants them to take.

But the more partners involved in a new vehicle for delivery, the more members or owners it is likely to have and therefore the more directors. Such an organisation is much more likely to be large and complex. In large scale corporate joint ventures where a new vehicle is set up, more often than not the owners will nominate non-executive directors (NEDs) and the vehicle will employ its own executives. So when setting up a new delivery vehicle with multiple partners for major service delivery, the 'owner' partners need to decide whether they cede some control and direction by allowing the NEDs to appoint the executive directors, rather than reserving the final say to themselves as owners.

Complexity of control when setting up new delivery vehicles (continued)

A company director must act in the way that she or he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. So it is up to the company's directors, not its owners, to determine what is in the collective best interests of the owners. Where a company has multiple owners (members) it will be up to the board of directors of that company to interpret where the best interests of the owners lie. In the private sector this can be simpler than in the public sector because the benefits to members can often be defined in terms of profit and increased value. In the public sector defining benefit to members can be more challenging and open to much broader interpretation. Clearly where something is a matter of interpretation there is scope for disagreement and dispute.

At the outset the partners who become the owners of the new delivery vehicle, whether brought together by necessity or ambition, will have negotiated an agreement on what the new vehicle they are forming will deliver, how it will operate, how they will nominate its directors and what they want it to do. They will have set up a process through which they can liaise with each other and with the board of the new vehicle and they are likely to be in broad agreement on the key issues facing the organisation they have created. They can also use the agreement to limit the authority of the board by reserving an agreed list of significant decisions to the owners (so-called 'reserved matters').

So, the questions for NHS provider organisations are: how do we avoid the worst case scenario or something approaching it and how do we create the conditions for continuing success? Clearly maintaining good relationships at all levels of the partnership is central to achieving a good outcome. Active management of stakeholder relationships is rightly becoming more commonplace in the public sector. This is necessary for new delivery vehicles, but will not, we suspect, be sufficient.

We strongly advocate that partners who set up a new delivery vehicle, and the vehicle itself, agree to a longer term strategy to maintain a shared vision, values and as far as possible a shared culture as a means of actively delivering continuing positive relationships and shared objectives even as the people in senior positions change. This should mean not only an agreement on paper, but a programme of work to measure, promote and maintain alignment of values and culture over the medium to longer term. The outcome is likely to be that areas of possible disagreement and divergence are identified early and dealt with in the context of shared values rather than becoming a point of dispute.

This does not negate the need to consider how failures to agree and disputes are dealt with. While it is tempting to defer discussion of dispute resolution until a contentious issue arises, most of us would agree that it is a mistake to do so. Dispute resolution mechanisms are best drafted and agreed at the outset when disputes are less likely.

Similarly, the means by which a partner or part owner can exit the arrangement is probably not at the top of agendas for discussion, however exit strategies and mechanisms need be on the agenda for discussion from the outset, so that each partner knows how they can protect their long term interests and so that if the worst comes to pass there can be no doubt as to the routes available. Part of that protection must be a mechanism also to deal with failures by a partner which could put the venture in jeopardy, escalating through stages to the ultimate sanction of forced exit of a partner.



Complexity of control when setting up new contractual collaborations

Contractual collaborations may be less susceptible to issues of divergence of interest.

Contractual collaborations may be less susceptible to issues of divergence of interest as described above during the life of the contract. However the meaning of contractual terms can be the subject of disagreement between partners and there will always be service delivery issues that arise during the life of a contract that existing contract terms do not cover. Contract variation may not always be straightforward, so once again it is important that issues of dispute resolution are considered and dealt with at the outset. Arrangements should be considered to deal with failures by partners and to introduce new partners where necessary.

Contracts normally run for a fixed period of time and renewal may not be a straightforward process or even something all of the contracting organisations deem to be desirable. It is worth considering from the outset therefore what arrangements need to be put in place for contract renewal and exit strategies for the termination of contracts with a particular view to ensuring continuity of service.



In short, in the same way as when setting up new delivery vehicles, partners to contractual collaboration arrangements need to work together to address these issues and to develop and maintain a shared vision, values and as far as possible a shared culture as a means of actively delivering continuing positive relationships and shared objectives over the medium to longer term. Setting up a partnership board with representatives of partners may help with this.



**Positive relationships
& shared objectives
over the medium to
long term.**

Issues and possible solutions

The key to longer term success lies in anticipating potential issues and dealing with them at the outset, then adhering to an agreed strategy to maintain control and direction:



It is worth reiterating that clarity of purpose is essential. Each partner needs to know what is expected and what can be delivered and be wholeheartedly signed up to what the new arrangement will deliver.



Informal arrangements may sometimes be easier to get started, but they come with added risks, depend on good relationships which may not always endure in hard times and can fall apart quite quickly. Potential partners will need to balance the benefits against risk and put in place measures to deal with dissolving the arrangement and exit from the outset.



Simplicity trumps complexity. The simpler the arrangement the easier the arrangement will be to control. The fewer players involved the more simple the arrangements will be, so it is worth considering excluding non-essential players or bringing them in under contract rather than as joint owner of a new delivery vehicle.



Contractual collaborations clearly provide more stability than informal arrangements, but they will be vulnerable to termination of service contracts as it is not automatic that contracts will be renewed or that it will be easy to agree new terms as the contractual period nears its end. Once again contingencies and exit agreements are advisable.



Complex corporate joint ventures with multiple partners as owners of new delivery vehicles often depend heavily on strong relationships to help them navigate disagreements. The larger and more complex the arrangement the more likely it is to have its own identity. Negotiating and implementing a joint strategy to maintain shared mission, values and culture will minimise the scope for divergence as people and relationships change.



Deferring discussion of potentially difficult issues is not to be recommended. A commitment to defer nothing and to fudge nothing is likely to serve all partners well in the longer term.



The outset is the best time to consider and agree exit mechanisms and for each partner organisation to consider its own exit strategy.

Conclusions

Delivering good governance between organisations will be a small, but nevertheless significant and important consideration for NHS providers and their partners as they transform care models to deliver the health and care services of the future which patients and service users rightly expect.

There is considerable enthusiasm across the sector for delivering new models of care and for working across traditional boundaries to bring services closer to those who rely upon them. However, it is important that this enthusiasm drives successful change and does not lead to an overly optimistic view of the potential complexities of delivering good governance across multi-organisation services.

None of the potential problems we identify in this publication are insurmountable, but it is essential NHS providers and their partners plan to deal with them from the outset. It is equally important, when dealing with contracts or forming new vehicles for delivery, to consider how a common set of values and culture can be maintained over time, because these will be the determinants of longer term cohesion between organisations and continuing success of the arrangements they put in place.



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