

Arrangements for delegation and joint exercise of statutory functions: guidance for integrated care boards, NHS trusts and foundation trusts

On 28 September 2022, NHS England (NHSE) published [statutory guidance](#) outlining options for how NHS organisations – NHSE, integrated care boards (ICBs), and NHS providers – can exercise some of their statutory functions via delegation or via joint working arrangements under the Health and Care Act 2022. This briefing summarises the guidance and sets out some initial high-level commentary on the implications for trusts. If you have any reflections, feedback or questions about the guidance, please contact [Leo Ewbank](#), policy advisor (systems).

Key points

- The Health and Care Act 2022 introduces some flexibilities which enable health and care organisations – NHSE, ICBs and trusts – to work together more closely, including by delegating or jointly exercising some statutory functions. This guidance provides an overview of the delegation and joint working arrangements made possible by the Act.
- The guidance points to four main options for where NHS bodies may wish to delegate or jointly exercise some functions: i) NHSE and ICBs working together; ii) multiple ICBs working together; iii) arrangements between NHS providers, and with commissioners (NHSE or ICBs), whereby functions are delegated or jointly exercised; iv) NHS bodies jointly exercising functions with local/combined authorities.
- Because local/combined authorities cannot delegate their functions to NHS bodies using the Act's provisions, section 75 agreements will continue to be a key mechanism supporting joint working between local government and NHS organisations.
- The Act does not create an expectation that functions should be delegated or jointly exercised: these decisions rest with local health and care organisations based on local circumstances and priorities.
- NHSE recommends that systems do not implement any new formal delegations in 2022/23. This does not preclude informal collaborative approaches in 2022/23 which may act as a precursor to delegation or joint exercise mechanisms going live in 2023/24.
- There are risks associated with moves to delegate or jointly exercise statutory functions: for example, around how best to embed high-quality governance. It is for local trusts and partners to

fully assess the opportunities and risks these collaborative mechanisms present in their contexts. Trust boards will need to be fully engaged in those discussions and ensure robust oversight of any delegated or jointly exercised functions on an ongoing basis.

- NHS Providers has worked with members to support NHSE as it developed this guidance. We welcome the resulting document's emphasis on providing options to local systems, which reflects the variation in arrangements across integrated care systems (ICs), and maintains a flexible ethos.
- NHSE plans to undertake further engagement work in the second half of 2022/23 focused on implementation of delegation or joint exercise approaches between ICBs and trust(s). This is a key area of interest for trust leaders and NHS Providers will continue to work with members and NHSE to inform this national policy development work.

Purpose of the guidance and background

This statutory guidance provides an overview of the new collaborative working arrangements that are possible between NHS organisations and local government following the passage of the Health and Care Act 2022 ('the Act'). It is intended to support organisations to ensure that any proposed delegations or joint exercise of functions are lawful and accord with principles of good governance.

NHSE, ICBs, NHS trusts and foundation trusts (FTs) **must** have regard to this guidance, and it should be read alongside The National Health Service (Joint Working and Delegation Arrangements) (England) Regulations 2022 ([here](#)).

The context for the guidance is the development of statutory ICs and the wider policy focus on integrated care and joint working between organisations. Although this has been a policy priority for some time, the legal framework has constrained the ways in which organisations can work together. The Act seeks to address some of these barriers and facilitate collaborative working.

Overview of relevant legislative changes

A small number of sections in the Act that are relevant to delegation or the joint exercise of functions.

Section 65Z5 provides new powers for statutory NHS bodies – NHSE, ICBs, NHS trusts and NHS foundation trusts (FTs) – to delegate their functions to each other, and to local authorities and combined authorities. It also enables them to jointly exercise their functions with each other and/or local/combined authorities; and to form joint committees and pool funds to do so. NHS bodies are not allowed to delegate statutory functions to any organisations other than those defined in s65Z5.

The guidance makes clear that some statutory functions cannot be delegated as they are central to the governance of NHS bodies (explored in Annex E).

Alongside, new provisions in the Act establish a 'conferral of discretion' power relating to arrangements made by NHSE and ICBs with NHS providers. The power confirms that trusts may lawfully take on wider population health activities, clarifying the space providers have to lead service design based on population needs. A contract conferring discretion onto provider(s) could be an alternative to, or a stepping-stone towards, formal delegation.

Any decisions by NHS organisations about delegation and joint exercise of functions should also take into account the local strategies and system plans, and other relevant national policy documents.

Future mechanisms for collaborative arrangements

The guidance outlines three options that NHS bodies will have in carrying out their functions under the new legislation:

- 1 Carry out the function themselves**
- 2 Delegate responsibility to one or more organisations** to carry out functions on their behalf
- 3 Carry out their functions jointly (jointly exercise) with one or more other organisations**, potentially by forming joint committees and pooling funds

The guidance emphasises that the legislation and guidance create flexibilities for NHS organisations to engage in delegations and joint working arrangements. They should decide if delegation or joint exercise arrangements would support service change in line with the local integrated care strategy and other system/place plans.

Implementing any delegation or joint exercise arrangements will have material consequence for organisations' governance arrangements. It will be for local partners to carefully consider the opportunities and risks of entering into delegation or joint exercise arrangements. One part of any preparatory work will be ensuring that robust governance arrangements are established to oversee and support delegated or jointly exercised functions.

Summary of mechanisms

The guidance specifies which legislative mechanism enables different forms of collaborative working.

Mechanism	Organisations which may be involved	Description
Section 65Z5 delegation	NHSE, ICBs, trusts/FTs	A voluntary arrangement whereby NHS organisations delegate responsibility for carrying out specified functions to other NHS organisations or to Local/combined authorities.
Sections 65Z5 and 65Z6 joint exercise arrangements	NHSE, ICBs, trusts/FTs	Two or more organisations come together to take decisions together in a binding way. May include pooling funds to support those functions.
Section 75 partnership arrangements	NHSE, ICBs with local authorities and/or combined authorities Trusts/FTs with local authorities and/or combined authorities	Previously existing mechanism which enables collaborative working between an NHS organisation and a local/combined authority to jointly exercise or delegate NHS functions and local government health-related functions.
Conferral of discretion	NHSE, ICBs, trusts/FTs	Confirms that providers are able to determine the services they deliver under a contract, and how they are delivered. It may be an alternative, or preliminary step, to implementing a formal delegation.

Managing conflicts of interest

The guidance acknowledges that moves to embed delegation and joint exercise of functions will raise questions about conflicts of interest which will require careful management. The guiding principles of NHS organisations when managing conflicts – that decisions must be made in the public interest without undue influence from other interests – will apply to new arrangements stemming from the Act’s flexibilities, including joint committees. The guidance makes clear that individuals from outside NHS organisations with relevant expertise, eg relevant social enterprises, can be members of joint committees, but that their interest should be recognised and taken into account.

NHSE has previously published interim guidance setting out some principles for the effective management of conflicts of interest within ICBs, recognising that providers are part of ICBs by design (available [here](#)).

Options for collaborative arrangements

The guidance sets out four main scenarios in which the legal changes could facilitate closer joint working between organisations through delegation or joint exercise of functions. Below we briefly summarise these scenarios (some more detail is provided in Annexes).

- **Arrangements between NHSE and ICBs.** NHSE has previously delegated the commissioning of primary medical services to clinical commissioning groups (CCGs). In the coming months and years, NHSE plans to delegate further commissioning functions to ICBs, including for wider primary care services, such as dental and primary ophthalmic services, and some specialised services from April 2023.
- **Arrangements between ICBs.** ICBs will be able to delegate functions to, or exercise functions jointly with, other ICBs to plan services. This could, for example, include scenarios where a lead ICB takes on delegated responsibility on behalf of a group of ICBs to commission ambulance services.
- **Arrangements between NHS providers, and with NHSE and ICBs.** Provider collaboratives may wish to establish a joint committee arrangement to oversee a shared agenda. Additionally, providers will be able to take on delegated functions, such as planning functions, from commissioners. There will need to be a clear rationale for how a trust, or group of trusts, taking on commissioning functions will help to improve care for local populations.
- **Arrangements involving local and combined authority functions.** The new Act enables NHS bodies to delegate or share their functions with local/combined authorities. But local/combined authorities cannot delegate their functions to NHS bodies. Local/combined authorities will need to use section 75 agreements with NHS bodies if they wish jointly exercise some of their functions with NHS bodies – for example commissioning and/or delivery of sexual health services.

Annexes

Annex A: Delegation and joint exercise of statutory functions

There are three ways in which statutory bodies can delegate authority for decision-making over their functions:

- **Internal organisational delegation:** an organisation's board delegates decision-making to a sub-committee or an employee within the organisation.

- **Delegation to other organisations:** an organisation delegates functions to another organisation via a delegation agreement. For example, a lead commissioner arrangement.
- **Jointly exercising functions:** two or more organisations establish arrangements to make shared decisions. This is often overseen by a joint committee, which operates on the basis of an agreement of the participating organisations' boards.

Delegation of NHS England functions to ICBs or NHS providers

NHSE has the option to delegate any of its direct commissioning functions to ICBs or NHS providers. This includes the option for NHSE to delegate some commissioning responsibilities to trusts. If NHSE does this, the same set of considerations would apply as when ICBs delegate functions to providers.

Delegation of ICB functions to NHS providers

ICBs may delegate functions to NHS providers, or to a provider group/collaborative. This may include delegating commissioning functions to providers which will deliver aspects of the services in scope. In these circumstances ICBs will need to ensure they select the providers in line with existing procurement law (and in line with the new provider selection regime when that comes into force). NHSE plans to work with ICBs and trusts to provide further supporting operational details regarding how ICB to provider delegations will operate in practice.

Delegation of NHS provider functions to other NHS providers

This is likely to take different forms depending on the nature of the collaboration between trusts and the services in scope. Trusts may create a joint committee to oversee a collection of networked clinical services, or could delegate responsibility for procuring some goods and services to a single trust to.

Annex B: Joint working arrangements

One mechanism for NHS organisations to jointly exercise statutory functions will be a joint committee arrangement. Local/combined authorities may be part of these arrangements. However, local/combined authorities cannot use the Act's new provisions to delegate or jointly exercise their functions with statutory NHS bodies – although this could be enabled via the use of a section 75 arrangement and a joint committee formed between NHS and local/combined authority partners.

Joint committees

Organisations participating in joint committees agree to abide by the decisions of the joint committee on subjects in its remit. Joint committees can be used to enable risk-sharing arrangements and pooled funding. Joint committees can involve individuals who are not employees of the participating organisations if they bring relevant expertise.

Committees-in-common (CIC) arrangements

CIC arrangements are already used in the NHS to support collaboration, with participating organisations delegating decision-making to an internal committee of their organisations. The organisations ensure as far as possible common decisions are reached by those committees. CICs are not a mechanism for taking decisions which are binding for their member organisations, and cannot provide a basis for delegation from one organisation to another.

Pooled funds

The Act introduces a new mechanism for pooling funds, in addition to existing section 75 agreements. A pooled fund can be managed by a joint committee or led by one of the participating organisations. When creating a pooled fund, organisations should agree: i) the scope of functions the fund covers; ii) the organisations' contributions and responsibilities for over/underspends; iii) hosting arrangements; iv) authorisation arrangements; v) reporting arrangements; vi) how the pooled fund could be discontinued.

Annex C: Section 75 partnership arrangements

Section 75 agreements existed prior to the 2022 Act and provide a mechanism for local authorities and NHS bodies to collaborate through jointly planning and pooling funds. Section 75 arrangements can be overseen by a joint committee of participating organisations.

Some NHS services are excluded from section 75 arrangements, including surgery, radiotherapy, abortion services, primary dental services, and emergency ambulance services. The new provisions in the 2022 Act cannot be used as a way to circumvent the rules excluding some NHS services from section 75 arrangements.

Annex D: Flowcharts for delegation arrangements

Annex D provides flowcharts to support decision-making when local organisations are considering delegating or jointly exercising functions (pages 30-32 of the guidance [here](#)).

Annex E: Restrictions and conditions on delegating and joint working

The Act is generally permissive in establishing a range of options for delegating or jointly exercising statutory functions. However, there are some limitations on these options. A list (known as the '2022 regulations') has been published identifying functions which are excluded from delegation or joint exercise arrangements on the basis they have been assessed as not suitable – available [here](#).

NHSE does not recommend that ICBs undertake new delegations during 2022/23. This does not apply to any pre-existing agreements such as the delegation of primary care commissioning functions. NHSE will be undertaking further engagement with ICBs and trusts throughout 2022/23 to understand the opportunities for delegations in 2023/24 and plans to issue further guidance.

NHSE has separately published a functions table for NHSE, ICBs and NHS providers to support decision-making around delegation and joint exercise of functions – available [here](#) – which all bodies must consider when exploring delegation or joint exercise arrangements.

NHS Providers view

This guidance provides welcome further clarity on how some of the flexibilities created by the 2022 Act can be used to support improving care. With members' input, NHS Providers has supported NHSE to develop this guidance and we welcome NHSE's commitment to ensuring trusts' insights and operational understanding have informed the guidance.

The guidance reflects and informs the varied ways trusts work with partner organisations across different geographies like place, system and multi-system footprints. It is positive that the guidance emphasises that local partners are best placed to decide if and how to implement delegations or joint committees. It is also positive that the guidance details delegation and joint working options between providers and commissioners. Trust leaders believe there are real opportunities to improve care and value for money by bringing resources and capabilities together in new ways and some are keen to explore implementing these models.

Over time, it is possible that delegated and joint arrangements may become quite complex, particularly given some trusts are collaborating with partners in multiple vehicles, eg place-based partnerships, and provider collaborative(s) which may operate across one or more systems. It may therefore take some time to clarify how far these various collaborative arrangements will go, and how they will interact and support each other.

The guidance rightly makes clear that there will need to be a clear rationale and audit trail for implementing delegation or joint committee models based on how they will support improvements in care (and good practice would see this set out in a business case).

As the guidance acknowledges, there are some limitations to the new legal framework. For instance, the role of non-statutory providers, like primary care, in delegated decision-making remains to be fully clarified in practice. Joint working with a full range of local health and care services is integral to system working and, therefore, there may need to be some development work to understand how delegation and joint exercise approaches can be implemented to support involvement across a range of sectors, including NHS, local authority, primary care, and VCSE.

While delegating functions and budgets may present opportunities for trusts and their partners, it will also raise some questions about how effective governance arrangements can be maintained within ICSs, and where accountabilities really lie. Trust boards – including strong and constructive non-executive scrutiny – are central to effective management of risk within systems, and will need to test and scrutinise proposals to delegate or jointly exercise statutory functions. The legal regime surrounding delegations, and the different liabilities placed on an organisation accepting a delegation compared to a more traditional contractual relationship, means trust boards will want to carefully assess the balance of opportunities and risks. How trust boards effectively manage risk in a system context, including where trusts may be part of several partnership arrangements, is a topic NHS Providers will continue to explore and support trust boards with over the coming months.

There are outstanding questions about how conflicts of interest will be robustly managed within systems and partnership delivery vehicles. As the guidance acknowledges, the implementation of delegations may create new scope for conflicts of interest to occur. National bodies have previously set out some principles for how these can be managed. While principles may be useful, the scope for conflicts of interest is broad and conflicts are sometimes not straightforward to identify. There is therefore a strong case for further national work to provide more clarity for leaders and boards.

Trusts and partners will want to reflect on the options the guidance has laid out and develop plans regarding how these could support service change and improvement in their local systems. NHS Providers will be supporting trusts to navigate this development process, and will continue to gather, aggregate and share intelligence on how well the policy regime is enabling trusts to improve care for communities.