Effective and legal delegations

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Delegation 101

- **Responsibility** – the obligation to carry out some or all aspects of a statutory function.

- **Accountability** – the obligation to explain how functions are being carried out, either by the organisation on which the function was initially conferred by legislation or by another organisation under a delegation or joint working arrangement, along with the obligation to ensure that any deficiencies are being addressed.

- **Liability** – the obligation to bear the legal consequences that result from a failure to carry out tasks within an organisation’s area of responsibility, or a failure to carry them out properly.
Section 65Z5(6) NHS Act 2006:

“Any rights acquired, or liabilities (including liabilities in tort) incurred, in respect of the exercise by a body of any function by virtue of this section are enforceable by or against that body (and no other person).”
Internal delegation to a committee or officer
Delegation to another organisation
Joint decision-making
  Committees-in-Common
  Joint committees
s.75 partnership arrangements with local authorities
Lead Provider contracting
Conferral of discretions
Delegation & Joint decision-making

Sections 65Z5 & 65Z6 NHS Act 2006

- “Relevant bodies” may delegate functions to another relevant body or local authority
- “Relevant bodies” are NHSE; ICBs; NHS FTs; NHS Trusts
- Where relevant body exercises function jointly with relevant body or local authority they may:
  - Form a Joint Committee
  - Establish a Pooled Fund
Lead provider contracting

Lead provider

NHSE or other commissioners

Contract and payment flows

Provider collaborative board (optional, committees in common)

Provider 2
Provider 3
Provider 4
Provider 5

Legal entity
Decision making committee
Section 12ZA NHS Act 2006

“Conferral of discretions’ is not a mechanism to achieve delegation – but it allows arrangements with providers to include identifying and deciding the services necessary to meet the needs of the population, rather than just the logistics of service delivery.”
A glimpse into the future
Effective and legal delegations

11 July 2023
Michael Rourke
Partner
Most advanced delegations are:

- NHSE’s delegations of **most** functions relating to primary medical services commissioning to CCGs
- ICBs established - additional primary care commissioning (dental, ophthalmic, etc.)
• Former Delegations under s13 NHS Act 2006:
  • 13Z(1) - “The Board may arrange for any such function to be exercised by or jointly with...”

  • 13Z(6) Arrangements made under this section do not affect the liability of the Board for the exercise of any of its functions.

• Delegations now under 65Z5:
  • 65Z5(1) A relevant body may arrange for any functions exercisable by it to be exercised by or jointly with any one or more of the following—

  • 65Z5(6) Any rights acquired, or liabilities (including liabilities in tort) incurred, in respect of the exercise by a body of any function by virtue of this section are enforceable by or against that body (and no other person).
Governance:

- NHSE delegation agreement is 94 pages long
- Clear legal basis
- Clear as to what has been delegated what has not
- Clear as to reporting

Foundation Trusts:

- Constitutional reviews- are you up to date
- Scheme of Delegations
- Restrictions
Restrictions

• The National Health Service (Joint Working and Delegation Arrangements) (England) Regulations

• Guidance issued under section 65Z7 - must have regard - Annex E
  • Functions central to the corporate governance of individual organisations cannot be delegated
  • Table F to be checked
New Power - but is *delegation* what you are doing

- Very Permissive
- Ease of creating new committees between relevant bodies and local authorities

**But!**

- Are you delegating, or jointly working/deciding?
- If you are joint working: who is making decisions, where, when, how? - Majority vs unanimous?
- Incremental approach vs Big Bang
Any questions?