

MEMORANDUM TO CABINET SOCIAL POLICY AND HEALTH COMMITTEE

USE OF LEGAL STRUCTURES AND OTHER ARRANGEMENTS BY DHBS

PROPOSAL

1. As part of the process to establish District Health Boards, this paper proposes rules and guidelines about DHBs' use of:
 - separate legal structures such as companies, trusts and incorporated societies; and
 - other arrangements such as partnerships, unincorporated joint ventures, and contracts for services.
2. An explicit policy on this issue will assist DHBs as they make arrangements for service funding and delivery in the new environment.

EXECUTIVE SUMMARY

3. The New Zealand Public Health and Disability (NZPHD) Bill requires DHBs to seek the Minister of Health's consent to have any shares or interests in a body corporate or an association of persons, unless it is allowed by regulations made under the Act. This includes a shareholding or interest in: a company; any other body corporate (eg trust or incorporated society); and any arrangement like a partnership or unincorporated joint venture.
4. I propose to use the "Shares and Interests Process" set out in Annex 1 which:
 - requires a DHB to obtain the Minister of Health's consent to hold shares or an interest in a body corporate or an association of persons, and signal its intention in its strategic and annual plans
 - links into the proposed Crown entities legislation to provide control and accountability where a DHB plans to own or be a part-owner of a company controlled by Crown entities
 - proposes similar safeguards in respect of: companies that are not controlled by Crown entities, trusts, incorporated societies, partnerships, and unincorporated joint ventures
 - allows DHBs to enter into leases and service agreements with some provisos (as set out in Annex 1).

BACKGROUND

5. DHBs will be responsible for funding or providing services which ensure the best health and independence outcomes for their populations, within available funding. To avoid duplication of effort, achieve economies of scale, and improve clinical quality, DHBs will be encouraged to co-operate in achieving their objectives. This may involve joint ventures between DHBs for:
 - health and disability support service delivery (eg regional mental health services, or funding national disability service providers)
 - provision of management support services (eg property management, information management, needs assessment)
 - provision of ancillary health services (eg laboratory services or other diagnostic services).
6. There may also be proposals for a single DHB to establish a separate entity to carry out particular service delivery or support functions. However, in accordance with Government policy, DHBs will not be permitted to establish their hospital provider arm as a separate legal entity.
7. Finally, in some cases a joint venture arrangement between a DHB and a non-Government health organisation may be the most effective option for delivering a service. For example, a developing Maori mental health provider might run a service in a DHB facility and make use of DHB administrative and other support services. A joint venture in this case could be the best way to build the capacity of the Maori provider and apply the principle of partnership.

THE NEW ZEALAND PUBLIC HEALTH AND DISABILITY BILL

8. The NZPHD Bill, as introduced, has four clauses that are directly relevant to this issue. Firstly, clause 19 allows DHBs to enter into co-operative agreements or arrangements with other DHBs or other agencies to provide services, improve health outcomes, or achieve efficiencies in the health sector.
9. Secondly, clause 23 states that no DHB may have any shares or interests in a body corporate or an association of persons unless it is in accordance with regulations made under the Act, or with the Minister of Health's consent. This includes a shareholding or interest in: a company, any other body corporate (eg trust or incorporated society), and any arrangement like a partnership or unincorporated joint venture. The third related clause is the regulation-making power referred to in clause 23.
10. Fourthly, clause 24 requires that a DHB must always control the board composition and more than 50% of the voting shares for any subsidiary, and ensure that its functions are no broader than the DHB's functions.
11. This paper develops more detailed policy in relation to these clauses.

PROVIDER SELECTION AND PRIVATE INVOLVEMENT PROTOCOLS

12. A separate paper to SPH discusses protocols to guide DHBs in their choice of provider for publicly-funded services, and in the use of public facilities for privately-funded services. These protocols will need to be followed when DHBs are considering options like entering into joint ventures or setting up separate entities for service provision. Among other things, the protocols require that:
 - where a DHB has a significant proposal to out-source services, or to start providing services previously provided by a non-government provider, this should be included in the strategic and annual plans for approval by Ministers
 - proposals from DHBs to be involved in the provision of privately-funded services will need to be included in the DHB's strategic and annual plans for approval by Ministers.
13. The protocols also include specific measures in relation to the use of Maori and Pacific providers which state that the choice of provider should:
 - in respect of services for Maori, be consistent with the principles of partnership, participation and protection of the Treaty of Waitangi, and continue to build Maori capacity for providing for Maori needs; and
 - in respect of services for Pacific people, continue to build Pacific capacity for participating in the health and disability sector and providing for Pacific peoples' needs.

DHBs will need to take account of these protocols when considering whether to provide a service for Maori or Pacific people itself; enter a joint venture with a Maori or Pacific provider; or contract with a Maori or Pacific provider to deliver the services on its own.

OPTIONS FOR COLLABORATIVE AND OTHER SERVICE ARRANGEMENTS

14. DHBs can arrange for services in a number of ways, ranging from a simple contract through to the establishment of a separate legal structure, such as a company. I propose that DHBs should be given flexibility to establish the legal structures and other arrangements that will best achieve the objectives set down by Government, subject to certain safeguards to ensure adequate control and accountability.
15. A number of factors will guide a DHB's decision on whether to use a separate legal structure, including: whether non-Government organisations are involved; the relative ease of financing; the need to limit liability; or simply the convenience of segregating an activity from a DHB's main functions. Separate legal entities that could be used by DHBs for service arrangements include: commercial or charitable trusts; incorporated societies; and companies.

16. In practice, trusts are unlikely to enable the degree of control required and the State Services Commissioner has advised that trusts should only be used for small scale, special purpose activities. However, depending on the particular function, there may be circumstances where a trust is the preferred form and I do not want to rule them out at this stage.
17. Incorporated societies are not generally used for the types of activities that DHBs will want performed, although they do offer some advantages in terms of flexibility and ease of exit and entry by DHBs. Again, I would not want to rule out their use for collaborative service arrangements.
18. In practice however, when DHBs wish to use a separate legal entity for a joint venture or to perform support or delivery functions, a company will often be the most appropriate form. Companies:
 - are suitable for non-profit (as well as for-profit) activities
 - can be constrained and held accountable via their constitution
 - are relatively easy to enter and exit
 - have a robust and well understood governance structure and legal context
 - provide for limited liability (which can be important to protect a DHB entering into a joint venture with a non-Government provider)
 - allow DHBs to quarantine certain projects which can make financing easier.

There are currently about 40 Hospital and Health Service (HHS) subsidiary companies in existence.

19. In addition to these advantages, the proposed Crown entity reforms will include a range of control and accountability measures in relation to companies controlled by Crown entities which are discussed below.
20. There are also a number of options that do not require a separate legal entity, including partnerships and various contractual arrangements such as unincorporated joint ventures and leases. Provided measures can be put in place to ensure adequate control and accountability, each of these may have its place and I do not propose to rule any of these options out at this stage.

ENSURING CONTROL AND ACCOUNTABILITY

21. As noted above, DHBs will have to seek the Minister of Health's consent before taking any shares or interest in a body corporate or association of persons, unless regulations under the NZPHD Act allow them to do so. To ensure transparency, in addition to seeking the Minister's consent, I propose that DHBs should signal their intention to enter such arrangements in their strategic and annual plans.

22. Although there is the opportunity to permit certain types of arrangement under regulations, I do not propose to make any regulations for this purpose at this stage.
23. The sections below address the various types of arrangement that DHBs may want to use to perform support or delivery functions and set out what DHBs will be required to do to gain the Minister of Health's consent. The proposals are summarised in Annex 1.

Companies Controlled by Crown Entities

24. Cabinet has agreed to a set of policies to govern Crown entities, including a policy on companies controlled by Crown entities, or "subsidiary companies" (CAB(00) M19/11(1) of 12 June 2000 refers). The policy and proposed legislation on subsidiary companies will provide significant safeguards for any company controlled by Crown entities. This will of course include a company controlled by a DHB or group of DHBs, as well as any company controlled by DHBs and non-health Crown entities.
25. The key aspects of the policy as it affects DHBs are that:
 - the powers and functions of subsidiary companies of all Crown entities will be subject to the same statutory limitations as their parents
 - letters of expectation sent by Responsible Ministers to Crown entity boards should reinforce that:
 - ⇒ all Crown entities should advise the Responsible Minister before they establish a new subsidiary company
 - ⇒ Crown entities will be accountable to their Responsible Ministers for the activities and performance of subsidiaries, and will be monitored in this respect by the responsible department on behalf of that Minister
 - ⇒ accountability documents (statements of intent, output agreements and annual reports) of all Crown entities must include information on the activities and performance of their subsidiary companies.
 - Crown entity subsidiary companies will be subject to the Crown entity financial regime (including borrowing and investment powers), and application of the Official Information Act 1982, Public Audit Act (when passed) and Ombudsmen Act 1975
 - decisions on the duties of Crown entity board members, and annual report disclosure requirements (eg the staff receiving remuneration over \$100,000 per annum with termination and other payments each disclosed separately), will also apply to any subsidiary companies
 - there will be a report back on whether the subsidiaries of non-company Crown entities should be included in the Crown entity fees framework, and if so, how.

26. In addition to seeking my consent, I propose that DHBs wishing to have shares in a company controlled by Crown entities be required to comply with the measures proposed for inclusion in Crown entities legislation. Once the legislation is passed, DHBs will of course be obliged to comply.
27. Clause 24 of the NZPHD Bill requires a “subsidiary” to be controlled by one DHB alone whereas the Public Finance Act and the Crown entities reforms include companies controlled by a number of Crown entities as a “subsidiary”. For consistency, it may make sense to amend or delete clause 24. This could be done as a consequential amendment when the Crown entities legislation is drafted. I will report further on this if needed.

Companies that are not controlled by Crown entities, trusts, incorporated societies, partnerships, and unincorporated joint ventures

28. I propose that where a DHB wants to hold shares or an interest in any of these types of arrangement, such proposals should include the information set out in the consent process guidelines in Annex 2. The guidelines reflect the measures proposed for Crown entities legislation and aim to ensure that non-controlled companies cannot be used by DHBs to step outside Government policy or avoid accountability and other requirements.

Contracts for services, and leases

29. In general, DHBs will not be required to seek the Minister’s consent to individual contracts for services or leases. The exceptions will be:
 - under the Provider Selection Protocols, if the DHB proposes to out-source a significant service this will need to be included in the strategic and annual plans for approval by Ministers
 - if the contract involves the DHB in the provision of privately-funded services the Private Involvement Protocols will need to be followed and the involvement included in the DHB’s annual plan for Ministers’ approval
 - if a DHB wants to grant a lease for more than 5 years the Minister’s written approval is required
 - some restrictions on DHBs entering operating or financial leases may be proposed following reports to the Ministers of Health and Finance on tax and financing issues (see para 30).

If the Government wishes to impose any further constraints on the service contracts and leases that DHBs enter into, it can do so through the annual Crown funding agreement with each DHB.

TAX AND FINANCING ISSUES

30. There are potential tax avoidance concerns with operating and financial leases and joint ventures because DHBs will be tax-exempt. Officials are due to report

back to the Ministers of Health and Finance by 28 September 2000 with rules to address these avoidance concerns. There are also concerns that DHBs could enter into some types of financial or operating leases which avoid the usual scrutiny applying to investment and financing proposals. A report back on these issues was due with the Ministers of Health and Finance on 14 September. Any restrictions imposed as a result of these reports will apply on top of the measures described in this paper.

APPLICATION TO HHSs

31. I propose that the Ministry of Health review all current HHS subsidiary companies (and any other Crown entity controlled companies they are involved in) for compliance with the measures that will be included in the Crown Entities Bill. It will also review other arrangements that HHSs have shares or an interest in, to assess the degree of control and accountability. The Ministry will report to me by 30 October suggesting any changes that may be required to bring existing companies and other arrangements into line, how those changes can be made, and identifying any associated costs.
32. I also propose that the "Shares and Interests Process" summarised in Annex 1 should apply to HHSs for the period until they are disestablished.

IMPLICATIONS FOR CLOSING THE GAPS

33. The main mechanism for assessment of DHB proposals for closing gaps will be the review of their strategic and annual plans and approval by Ministers.
34. Another important influence will be the Provider Selection Protocols discussed in paras 12-13 above and set out in another paper. DHBs will need to take account of these protocols when deciding how services for Maori and Pacific people should be provided.
35. In terms of the measures proposed in this paper, if a DHB wants to enter into a collaborative arrangement with either a Maori or Pacific provider, it will need to comply with the proposed consent process. These requirements could appear overly intrusive and onerous to a non-Government provider. However, by making an arrangement to undertake the joint activity only, the accountability and control measures discussed here would not impinge on any of the other activities of the Maori or Pacific provider.
36. Note also that the Crown Entity Steering Group has been directed to report back to EXG in September 2000 on how best to address Treaty of Waitangi issues in Crown entity reforms. Any policy changes flowing from that report back will of course apply to DHBs.

FINANCIAL IMPLICATIONS

37. There could be financial implications if the Government decides to wind up any of the existing HHS arrangements following the review by the Ministry of

Health. I will report back if I want to propose any changes with financial implications.

LEGISLATIVE IMPLICATIONS

38. There are no legislative implications at this stage. I may propose a small amendment to the NZPHD Bill in due course to include a company controlled by a number of Crown entities as a “subsidiary”. This would achieve consistency with the Public Finance Act and the Crown entity reforms.

HUMAN RIGHTS

39. There are no human rights implications.

REGULATORY IMPACT STATEMENT

40. This paper does not require a Regulatory Impact Statement as it does not propose any Bill or statutory regulation.

PUBLICITY

41. HHSs will be advised of the contents of this paper and it will be placed on my website.

CONSULTATION

42. The following departments have been consulted in the preparation of this report: Department of Prime Minister and Cabinet, Treasury, Te Puni Kokiri, Pacific Island Affairs, State Services Commission, Health Funding Authority.

AT THE MEETING ON 2 OCTOBER 2000, FOLLOWING REFERENCE FROM THE CABINET SOCIAL POLICY AND HEALTH COMMITTEE, CABINET:

CAB (00) M 32/2A(1)

DISTRICT HEALTH BOARDS: USE OF LEGAL STRUCTURES AND OTHER ARRANGEMENTS

This minute amends and replaces SPH (00) M 25/6

- a **noted** that the New Zealand Public Health and Disability Bill (the Bill) states that no District Health Board (DHB) may have any shares or interests in a body corporate or an association of persons unless it is in accordance with regulations made under the Act, or with the consent of the Minister of Health;

- b **noted** that when DHBs are considering options for service delivery, they will also need to comply with protocols which guide:
 - i. their choice of providers for publicly-funded services (Provider Selection Protocols);
 - ii. any involvement in the provision of privately-funded care (Private Involvement Protocols) [CAB (00) M 32/2A(2) refers];
- c **noted** that, among other things, the Provider Selection Protocols require that:
 - i. where a DHB has a significant proposal to outsource services, or to start providing services previously provided by a non-government provider, this should be included in the strategic and annual plans for approval by Ministers;
 - ii. in respect of services for Maori and Pacific people, the choice of provider should continue to build Maori and Pacific capacity for participating in the health and disability sector and providing for Maori and Pacific peoples' needs;
- d **noted** that, in accordance with Government policy, a DHB will not be able to establish its hospital provider arm as a separate legal entity;
- e **agreed** that DHBs should be given flexibility to establish the legal structures and other arrangements that will best achieve the objectives set down by Government, subject to certain safeguards to ensure adequate control and accountability;
- f **noted** that the proposed Crown entities legislation will include control and accountability measures for any companies controlled by Crown entities [CAB (00) M 19/11(1) refers];
- g **noted** that the Crown Entity Steering Group has been directed to report back to EXG in September 2000 on how best to address Treaty of Waitangi issues in Crown entity reforms and that resulting measures will apply to DHBs;
- h **noted** the option (consistent with Crown entities reform policy) of establishing regulations under the New Zealand Public Health and Disability Act to allow DHBs to have shares in companies controlled by Crown entities, subject to any further restrictions that may be required;
- i **agreed** to the "Shares and Interests Process", summarised in Annex 1 attached to this minute, which sets out the requirements for a DHB wanting to have shares or an interest in any company, trust, incorporated society, partnership, or unincorporated joint venture;
- j **noted** that officials were due to report back to the Ministers of Health and Finance:

- i. by 14 September 2000 on whether any restrictions are needed on DHBs entering into operating and financial leases;
- ii. by 28 September 2000 with rules to address tax avoidance concerns;

and that further constraints may be required following these report backs;

- k **agreed** that the requirements for DHBs set out in the attached annexes should apply to the Health and Hospital Services (HHSs) until the Bill comes into force;
- l **noted** that the Minister of Health will report further if she considers that the Bill should be amended to treat a company controlled by a number of Crown entities as a “subsidiary” (consistent with the Public Finance Act and the proposed Crown entities legislation);
- m **noted** that the Ministry of Health will review all current HHS subsidiary companies and other arrangements to assess the degree of control and accountability and report to the Minister of Health by 30 October 2000 suggesting any changes that may be required, how those changes can be made, and identifying any associated costs.

ANNEX 1 SHARES AND INTERESTS PROCESS

The following table summarises the requirements for any DHB wishing to have shares or interests in a body corporate or association of persons.

Type of arrangement	Timing	
	Until Crown entity legislation passed	After Crown entity legislation passed
<ul style="list-style-type: none"> Companies controlled by one or more DHBs Companies controlled by DHBs and other Crown entities 	<ul style="list-style-type: none"> seek Minister of Health's consent & signal intention in strategic & annual plans comply with measures proposed for inclusion in Crown entities legislation (see para 25) comply with Provider Selection & Private Involvement Protocols 	<ul style="list-style-type: none"> seek Minister of Health's consent & signal intention in strategic & annual plans comply with measures in Crown entities legislation comply with Provider Selection & Private Involvement Protocols
<ul style="list-style-type: none"> Companies that are not controlled by Crown entities Other legal entities (trusts, incorporated societies) Partnerships Unincorporated joint ventures 	<ul style="list-style-type: none"> seek Minister of Health's consent & signal intention through strategic and annual plans use consent process guidelines set out in Annex 2 comply with Provider Selection & Private Involvement Protocols 	
<ul style="list-style-type: none"> Contracts for services and leases 	<ul style="list-style-type: none"> comply with Provider Selection & Private Involvement Protocols comply with any restrictions included in the annual Crown Funding Agreement if the DHB wants to grant a lease for more than 5 years, the Minister of Health's written approval is required. 	

Note: Further restrictions could be imposed on DHBs entering into joint ventures, and financial or operating leases, following consideration by Ministers of tax avoidance and financing concerns.

ANNEX 2 CONSENT PROCESS GUIDELINES

Where a DHB proposes to have shares or an interest in any:

- companies that are not controlled by Crown entities
- trusts, incorporated societies and any other non-company separate legal entities
- partnerships, unincorporated joint ventures and any other association of persons

the DHB should seek the Minister of Health's consent, providing information as to:

- a) the entity's functions and scope, and the mechanism for ensuring that these are and will remain, consistent with Government policies
- b) the proposed directors, trustees, partners, members, or other parties to the arrangement
- c) how the DHB will report on, be held accountable for, and be monitored on its involvement in the entity
- d) the proposed financial arrangements (including assets, liabilities, and the investment required) and mechanisms for reducing exposure to financial and any other significant risks, and how the entity will be audited
- e) the accessibility of information about the entity's activities (compared to access under the Official Information Act)
- f) the duties of board members, trustees or members, and whether remuneration levels for highly paid individuals will be disclosed
- g) what details of the entity's activities will be listed in the DHB's annual report.