Securing the Future of General Practice in London

Your guide to: forming partnerships, limited liability partnerships, companies, and other business structures
Other guides in this series:

- Your guide to: contract negotiation and relevant contract law
- Your guide to: procurement and tendering for practices and services

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INTRODUCTION

Securing the future of general practice in London is crucially important to all of us at this time. The challenges and opportunities facing practices are, without exception, in today's highly competitive environment, considerable. Practices have to have a good working knowledge of contract negotiation, procurement and tendering and consider what type of business structure they will operate in.

It's not easy. That is why we have commissioned BMA Law to produce three introductory booklets on these subjects. They do not attempt to tell you everything you need to know, as each subject area is vast. But they do, however, introduce these vitally important areas for those practices coming new to the subjects. We hope you find them helpful.

For further information on Londonwide LMCs and all that is happening to general practice in these challenging times, please don't forget to log on to www.lmc.org.uk.

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PARTNERSHIPS

Definition - “Partnership is the relationship which subsists between persons carrying on a business in common with a view of profit” (Section 1. Partnership Act 1890)

Legislation - Governed primarily by: The Partnership Act 1890. However, the Act can be superseded by a formal written partnership agreement and will only then be applicable where the partnership agreement lacks clarity, or there is an absence of any provision or no written agreement at all (Partnership at will).

Key Message:
Ensure you have a proper detailed partnership agreement covering all aspects of your business.

Legal status

In England, Wales and Northern Ireland a partnership is not a distinct and separate legal entity and cannot acquire any legal obligations or liabilities of its own. Therefore, all partners will be jointly and severally liable for any liabilities incurred as a result of the operation of the partnership.

What does this mean in practice?

One partner’s actions, whether permitted under the partnership agreement or not, may legally bind all the others. Any claimant can bring an action against:

- an individual partner
- all partners
- any of the other partners
Advantages of partnerships

- No need to file an annual report but each partner must submit a return and partnership expenses must be declared in partnership accounts.
- Simple to manage via informal partners meetings.
- More flexible structure as it is not regulated by separate legislation.
- Easy to set up by written agreement and can be tailored to suit individual business needs.

Disadvantages of partnerships

- Only one real disadvantage is the absence of limited liability and each partner is fully responsible for another partner's actions.

Key Message:
Partners are jointly and severally liable vis a vis the public, but internal liabilities vis a vis each other can be regulated by the insertion of appropriate clauses in the partnership agreement. E.g. If partner A incurs a liability of £100 due to his/her negligent behaviour or in breach of a term in the partnership agreement, then although the partnership as a whole will be liable for the £100, the other partners can ensure that partner A indemnifies the partnership for the £100 loss by inserting clauses into the agreement that cover this liability. This ensures some element of control over wayward partners.

Important points to insert into a Partnership Agreement

It is extremely important to ensure that Partners have a robust, easy to interpret partnership agreement. Avoid complicated legal terminology. It is unnecessary and only serves to complicate matters when interpretation is required.
**Note:** The important thing to remember is to attempt to avoid the Partnership Act 1890 having any effect with regard to the written agreement. The Act tends to impose conditions which are harsh and probably wholly unsatisfactory, and outside the contemplation of the Partners when they entered into business. E.g. the agreement can be dissolved on notice by any Partner without justification or there can be a forced sale of all Partnership Assets.

There are certain important issues to consider when putting an agreement together and some of the more salient points are listed below:

- Identify the business.
- Ensure that certain terms are defined especially where definition will introduce more clarity; e.g. accounting period, partnership accountants, and partnership bankers.
- Consider who the signatories are on bank accounts and the limits on withdrawals by individuals.
- Set out clearly the profit share of each Partner and avoid the use of the term salaried Partner as this indicates employment rather than partnership, especially if the Partner is on a fixed share.
- Define clearly what is to be included within partnership income.
- Define clearly which expenses are personal to the Partner and which expenses will be paid by the partnership.

**How to form a Partnership**

- A robust partnership agreement is required preferably linked to any GMS or PMS arrangements.
- Each Partner of the partnership will be required to register as self employed.
- The partnership must decide on the capital contribution of each Partner which will in turn dictate his/her share of the capital.
- If it is anticipated, or known, that the vatatable turnover of the partnership will exceed £64,000, then the partnership must register for VAT with HMRC.
Since partnerships are commonly utilised by GPs when they are delivering services under GMS or PMS contracts, it is extremely important to ensure that the terms of the partnership agreement are linked to the obligations under GMS or PMS contracts. A normal commercial partnership agreement will never be satisfactory for GPs in this instance. Unless the agreement corresponds to the GPs medical contracts, then there is always the risk of conflict of terms which could result in placing any medical contract at risk.

This is especially important where the partnership may be in dispute. The GMS and PMS Regulations together with the respective contracts contain a number of clauses relating to what occurs during dispute or termination. As far as possible, the partnership agreement should ensure its terms do not inadvertently create a situation where partners’ actions may bring about the termination of any medical contract.

A Partnership is a recognised vehicle for delivering primary medical care under a GMS contract as well as a limited company. The PMS Regulations do not provide for equivalent vehicles by virtue of the fact that a PMS agreement is an agreement between the PCT and each individual doctor. As a result, this means that PMS GPs have a greater flexibility in determining what vehicle they may choose to operate as a group and are not restricted to partnerships or companies.

**Partnerships in the Commercial World**

Large/medium commercial businesses are rarely run via partnerships. The main advantage lacking in commercial partnerships is limited liability. While partnerships may remain a satisfactory vehicle for small groups of professionals, a larger and more varied commercial enterprise, which may carry higher risk, will attain more protection for members through a limited liability.
LIMITED LIABILITY PARTNERSHIPS (LLPs)

Definition

A Limited Liability Partnership (LLP) is a misnomer as it is not technically a partnership at all. It is a corporate entity consisting of members not shareholders.

Governing Legislation

LLPs are governed by the Limited Liability Partnerships Act 2000 and LLP Regulations 2001 together with certain sections from the Companies Act and the Financial Services and Markets Act 2000. An LLP will also require a partnership agreement which sets out any additional rights and responsibilities of the members.

Legal Status

An LLP is a separate and distinct legal entity capable of acquiring and holding property and assets in its own right. The liability of members is limited and the LLP continues to exist unaffected by any changes in membership.

What does this mean in practice?

Members are protected by limited liability status and, unlike traditional partnerships, one member’s actions do not bind another member. Any legal entity can become a member of an LLP including a company. Membership is unlimited but cannot fall below two. Two or more members must also be chosen as “designated members” who will have a statutory duty to undertake certain responsibilities and actions on behalf of other members. These statutory duties are very similar to the duties that a company secretary may perform on behalf of a company and similarly there are penalties for failing to perform those statutory duties e.g. signing accounts and notifying the registrar of membership changes.
Key Message:
Ensure that you choose some identifiable designated members - if not then all members will be deemed “designated”.

Advantages of LLPs

1. Less formal in terms of structure and management than a company.
2. No objects clauses - an LLP can do effectively what it wants.
3. Partnership law does not apply.
4. No limit on number of members.
5. Incorporation is simpler.
6. Reduced personal responsibility for business debts.

Disadvantages of LLPs

1. Members are subject to Schedule D income tax and National Insurance which means they are taxed as individuals (PAYE).
2. Section 4(4) provides that members of LLPs could be deemed to be employees (probably the case where the member is on a fixed income).
3. Need to have designated members who take on the role similar to a company secretary (this is only onerous for the people so designated).
4. Not available for non-profit making activities.

How is incorporation achieved?

Incorporation can be achieved by filing a Form LLP2 with the Companies Registrar. The form sets out the name of the LLP, where the registered office is situated and the name, address and date of birth of each member and which members are to be designated members. Form LLP2 also contains a signed statement by a solicitor. All members of the LLP must sign and date the form confirming their consent to act.
On submission and on payment of the appropriate fee (£20 and £50 for same day service), one receives a certificate of incorporation.

You will also require a LLP agreement which is a private agreement signed between members. There is no statutory requirement for this but there is every good reason to have one (see page 10).

**Key Message:**
Check with Companies House first as to whether your chosen LLP name is available. The name of the LLP will always be written with the letters "LLP" or "Limited Liability Partnership" at the end.

**Key Message:**
You may roll over a normal partnership in to an LLP and the LLP will acquire all the debts and assets of the partnership. There is no tax payable on the transfer of assets.

Stamp Duty exemption contained in section 12 of the Act in relation to premises transfer which has a time limit of 12 months i.e. no stamp duty payable on premises transfer to an LLP within 12 months of incorporation so it is best not to have an LLP lie dormant before trading or you may lose the tax advantage.

**Agreement**

As stated, the agreement between members should be clear and robust. Listed below are some of the more salient points to consider. However, this list is not exhaustive:

- The parties to the agreement will be the initial members and the limited liability partnership.
- Define designated members in a separate schedule.
- Set out the definition section including definitions, e.g. LLP property, auditors, accounting reference date, registered office and members.
• Set out any banking arrangements and/or authorisations with regard to payments and cheques.
• Define how capital shall be provided and whether members are required to contribute.
• Profits and losses – define how these are to be distributed.
• Set out how members are to be admitted.
• Members’ duties and restrictions – it is important to control the manner in which members are to operate within the LLP, including what they are not permitted to do.
• Indemnity and expenses – always useful to include an indemnity where a member incurs personal liability.
• Retirement and death – set out the conditions and obligations with regard to a member retiring or ceasing to be a member and notice period required.
• Expulsion – detail on instances where expulsion may occur.
• Entitlements and obligations of outgoing members.
• Confidentiality.
• It is advisable that the bye laws and administrations for the LLP are set out in a separate schedule.

If he/she does not have an agreement then the default provisions set out in regulation 7 of the Act will apply and these may not be amenable to members. The default provisions however, can be useful in forming a good basis or guideline when drafting an agreement.

The agreement will have effect between the members only. If there are any inconsistencies between the agreement and the incorporation document, then the incorporation document will prevail.

Members vis a vis the public

Every member of the LLP is an agent of the LLP in the same way as an ordinary partnership. However, if a member ceases to be a member, he/she is still regarded as binding the LLP and being treated as a member unless the person dealing with him/her has been given notice that he/she is no longer a member or notice that he/she has ceased to be a member is given to the Registrar.
In any other circumstances, where a member is liable to any person outside of the LLP, through, for example, a wrongful act or omission in the course of business, then the LLP is liable to the same extent as the member.

**Key Message:**
It is crucial that when a member ceases to be a member notice is given immediately to the Registrar - although there will be a time lag between the notice being received by the Registrar and that notice becoming part of the public record.

**Key Message:**
There is some debate about the fact that if LLP members act like partners and call themselves partners then they lose the limited liability status and protection of the LLP. Members of the public need to know who they are dealing with and it is worth bearing this in mind in daily activity and management.

**Key Message:**
Although an LLP has unlimited capacity, in conducting business, it is easier to identify where a member has acted outside the remit of the LLP when the business is clearly identified. This can be done by inserting a descriptive statement within the LLP agreement. This will be helpful where a claim may be brought against a member for acting contrary to the business of the LLP.

**LIMITED COMPANIES**

Definition – A company formed under the Companies Act 2006 or the Companies Act 1985 regarded in law as a "person" capable of owing property or assets and being liable to be sued or to be able to bring a claim in its own right. In fact, the company is able to enter into transactions or even employ individuals in the same way as an individual.
What does this mean in practice?

Any income generated by the company will belong to the company and not to its members or shareholders, although a company can only act through individuals known as directors. There are four main types of company:

1. Company limited by way of shares.
2. Company limited by way of guarantee.
3. Private unlimited company.
4. Public limited company.

For the purposes of this booklet three and four will not be discussed, however some information on Community Interest and Social Enterprise Companies is included.

Advantages of a limited company

- Limited liability of members is the main advantage.
- **Tax advantages** – corporation tax on company profits is currently set at 28% and 21% for small companies.
- **Perpetual Succession** - the company exists until wound up or struck off the Register.
- Flexible investment by outsiders to the company.
- Advantages in borrowing structures e.g. floating charges.

Disadvantages of a limited company

- Cost of setting up and administration.
- Taxation may be more disadvantageous than, for example, a sole trader, depending on the circumstances. Professional advice should be taken as the structure adopted will be dependent upon the type of business envisaged.
- Disclosure - the company’s affairs may be subject to public disclosure including its accounts.
• Limited liability of members will be dependent on the actions of those members, especially where directors have been fraudulent or in some circumstances acted wholly outside the remit of that company.

**Key Message:**
Note that the concept of limited liability may be removed if the courts have reason to do so i.e. if the company is a sham, fraud or where a personal relationship exists.

**Key Message:**
Think carefully about the type of business you are running and ensure that you take proper advice regarding the tax consequences of running the company as well as tax payable on transfer of assets including stamp duty and VAT. Limited liability must be considered along with these other elements.

**Setting up a limited liability company**

• Choose a company name and ensure that it is available by contacting Companies House.
• The word limited is not necessarily always used where a company limited by way of guarantee is concerned.
• Choose where the registered office of the company will be.
• Ensure that the objects clauses in the Memorandum of Association cover the actions and business that you wish the company to undertake now and in the future - this saves from having to go back and change the objects clauses in the future.
• Ensure that the Articles of Association set out clearly the number of directors on the Board including any official titles. Also, how many directors are required to constitute a quorum.
• Forms 10 and 12 (which can be downloaded from the Companies House website) must be filled in correctly and submitted together with the Articles of Association and Memorandum of Association and appropriate fee (£20 or £50 for same day service).

Administration

Records and accounts of private companies must be filed with Companies House. Changes in Accounting Reference Date can be effected by the submission of Form 225. This is something that most companies will have to do when newly set up, as the Accounting Reference Date for a new company will usually be set from the last date of the month of incorporation which could fall within any month of any given year.

Key Message:

As of October 2009 when parts of the Companies Act 2006 come into effect, the requirement to have an objects clause is to change - the company’s objects are to be unrestricted unless restricted by the Articles of Association.

Company Limited by way of Shares

Company's authorised share capital - in the case of a company limited by way of shares this indicates the share capital of the company i.e. the number of shares, their value and type (ordinary, preferred etc) and how many shares the company has available for issue to members - this is known as the authorised share capital.

Shares and Share Holding

We know that members of a company own that company and therefore the manner in which ownership is determined by how many shares each person holds in that company.
Shares are an asset and also a right in the company to be able to do a variety of things e.g. participate in the release of a dividend or being able to vote or being able to receive a proportion of assets on winding up of the company.

Normally all shares contain the same rights, but there are some exceptions to this rule. However, the rule of thumb is that shareholders have the same rights and liabilities vis a vis the company. Where shares may differ is when different voting rights are to be created and instead of creating them for the individual member, they are created through the issue of different types of share.

**Company Limited by way of Guarantee**

This is a company which is set up administratively in a very similar way to a company limited by way of shares, but this type of company does not operate through a share structure. Company “members” (rather than shareholders) guarantee a sum of money to the company in the event that the company is wound up. In many cases, this usually amounts to £1 sterling. Normally reserved for not for profit organisations but can be utilised to trade as well. It is a common vehicle used for membership organisations.

**Articles of Association**

These form the framework for the day to day management of a company and set out how the company is to be run and how the powers of that company are to be exercised. This is an important document as it dictates the relationships between members, directors and shareholders (where you have a company limited by way of shares). Only where substantial detail is required vis a vis a share company and shareholders do you need a separate shareholders agreement. This is a private document which regulates the affairs of shareholders vis a vis the company.
Where you have a company limited by way of shares, the articles help regulate the shareholders relationship with one another as well as with the company.

Articles of Association are required for both types of company, along with a Memorandum of Association which sets out the objects of the company. Please note that the format of either of these documents although essentially the same, will change slightly depending on what type of company one opts for.

**COMMUNITY INTEREST COMPANIES**

A community interest company (CIC) is not a separate type of legal entity. Confusion arises at times when these companies are dealt with separately giving the impression they are somehow fundamentally different to other types of companies. In fact, the main difference is that CICs reinvest their profit back into the community. Shareholders can still receive dividends but dividend payments are subject to a cap set by the Secretary of State. CICs are established by setting up a company in the usual way by electing one of the models mentioned in this guide (Share or Guarantee company).

CICs are governed by the Community Interest Regulations 2005. A company satisfies the community interest test if a reasonable person might consider that its activities (or proposed activities) are carried on for the benefit of the community.

The only real advantage of a CIC is limited liability, but only because it can attain this by virtue of operating under one of the limited liability structures set out earlier. It is less regulated than a charity, but probably only because it has none of the tax advantages that a charity automatically acquires.
Most GP commercial operations would not operate under this model and not for profit organisations would usually operate under a company limited by way of guarantee or a charity. There may well be a few instances where this type of company will be preferable, but it is to be remembered that the distinguishing feature of this model is the manner in which profits and assets are distributed. It is advisable that proper legal/financial advice is taken before deciding on this or any other model.

Registration of a Community Interest Company

In addition to the usual company documents that need to be filed at Companies House, a Community Interest Statement will be required to be filed, together with an Excluded Company Declaration. These will be in a set, approved format with an additional fee of £15 to be paid to the regulator on formation.

Note: Companies House cannot register a CIC until the regulator has agreed the company is eligible for CIC status.

**Key Message:**
Individuals must ensure that they continue to satisfy and maintain the Community Interest Test for as long as the CIC is in existence. Careful consideration therefore must be given to any additional functions that the CIC may perform or wish to perform in the future, that fail to satisfy the test. Failure to adhere to the proper community test functions will result in enforcement action by the regulator.

SOCIAL ENTERPRISE COMPANIES

There is no separate model for a social enterprise company which can be set up under any of the structures set out in this booklet. The objectives of this type of company are purely social and similar to CICs in that its profits are reinvested into the community. Basically these types of entities meet a social and environmental need e.g. the Big Issue magazine falls within the definition of a Social Enterprise company.
Useful websites

www.lmc.org.uk
www.cicregulator.gov.uk
www.companieshouse.gov.uk
www.britishchambers.org.uk
www.hmrc.gov.uk/index.htm
www.socialenterprise.org.uk
<table>
<thead>
<tr>
<th>Entities</th>
<th>Status</th>
<th>Uses</th>
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</thead>
<tbody>
<tr>
<td>Limited by way of Guarantee</td>
<td>Separate legal Entity Limited Liability of members they agree to guarantee (usually £1 Sterling)</td>
<td>Can utilise for trading purposes or for non profit making enterprises – Usually used by membership organisations</td>
</tr>
<tr>
<td>Limited by way of Shares</td>
<td>Separate legal Entity Limited Liability of Members</td>
<td>Commercial Business – High Risk</td>
</tr>
<tr>
<td>LLP</td>
<td>Separate legal entity Limited Liability of Members</td>
<td>Commercial Business – High Risk</td>
</tr>
<tr>
<td>Partnerships</td>
<td>Not a separate legal entity Joint and Several Liability of the Partners</td>
<td>Usually used for small groups of professionals / small business with low risk (GMS/PMS)</td>
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