

**BMA**

**Scotland**



# **GP partnerships under the NHS in Scotland**

## **Guidance for GPs**



**British Medical Association**  
bma.org.uk

## Notes

This membership guidance gives general guidance only and should not be treated as a complete or authoritative statement of the statutory provisions governing partnerships. It is strongly recommended that anyone considering any action based on this guidance should contact the BMA on 0300 123 123 3 for further advice before taking any final decisions

Every effort was made to check its accuracy at the time of production but there may have been later changes.

This guidance is available to members free of charge from the BMA. Scottish partnership law differs in many respects from the provisions that apply in the rest of the UK. This guidance reflects those differences.

Generally, there are only slight differences between General Medical Services (Section 17J) and Primary Medical Services (Section 17C) in relation to drafting partnership agreements, but any differences relevant to this guidance are noted in the appropriate places.

It is not part of the BMA service to provide commercial/management advice to practices or GPs. This guidance is for general use only. Practices/GPs are urged to seek the specialist advice of accountants and independent lawyers in relation to the more detailed aspects of their partnership agreements, including drafting and the application of tax and accounting. This is especially important where advice is required on whether the arrangement is appropriate to an individual GP or practice's needs.

Members may obtain additional advice or clarification from the BMA. Please quote your current membership number.

**BMA Scotland is keen to receive feedback on this guidance document so that it can be improved with time. Please share any comments on the guidance with us via [info.gpscotland@bma.org.uk](mailto:info.gpscotland@bma.org.uk)**

**This membership guidance provides general guidance on medical partnerships under the NHS in Scotland. Members are strongly advised to enter into a written partnership agreement and to seek legal and accountancy advice in doing so, both on setting up a partnership and on the admission or retirement of a partner.**

## Help available to GPs from BMA Scotland

BMA Member Services provides GP BMA members with a wide range of advice, assistance, and representation.

### Partnership matters

Help is available to answer general queries about partnership law and specific questions about medical partnerships under the NHS in Scotland, particularly about the relationship between partnership law and the requirements of NHS regulations. **BMA Scotland Member Services can provide advice on partnership agreements, whether executed or draft, but may also refer members on to our partner service, BMA Law for more in-depth advice or full drafting of agreements. Please note there is a charge for full drafting services.**

BMA can provide free and impartial mediation in partnership disputes where there are BMA members on both sides. This is a purely voluntary arrangement and can only proceed by the consent of the parties involved. Where successful, mediation avoids the need to incur legal costs involved in arbitration or court action. In no circumstances will the BMA litigate for one party against another in any partnership dispute.

### GPs as Employers

BMA Scotland Member Services can offer advice on employment and discrimination law, good employment practice and specific staff problems, particularly disciplinary and grievance and performance matters. We will also comment on contracts for employed practice staff, including medical staff.

Through our member engagement team, we can also offer tailored training for groups of GPs and practice managers on a broad range of employment-related topics including recruitment and selection, issuing and managing contracts, leave and absence management and disciplinary and grievance handling.

Cases involving GP BMA members facing employment tribunal claims from current or former staff can be referred to solicitors contracted by the BMA, if the merits of the GPs' case pass a standard merits assessment threshold of at least a 50 per cent chance of success.

### GPs as Employees

GP BMA members working as employees, in or outside the NHS, can be represented by the BMA in the same way as employed hospital and public health doctors. Salaried GPs working for GP practices, or for Health Boards, can be advised and represented in the same way. Where potential conflicts of interest arise between GP employers and their medically qualified staff, both parties, if BMA members, can access help from BMA Scotland Member Services. However, to avoid any potential conflict of interests, each party will have a separate representative (unless it is agreed to have a BMA mediator assist both sides in reaching an agreement without using formal disciplinary or grievance processes. Legal support is available to employed GP BMA members, subject to the merits assessment process.

### GPs as Contractors

Advice, assistance, and representation are given to GP BMA members on matters arising from their NHS contracts.

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## 1. Introduction

A partnership is defined by the Partnership Act 1890 as “the relationship which subsists between persons carrying on a business in common with a view of profit”. A partnership established in Scotland is a separate legal entity unlike the rest of the UK. In a general practice partnership, the business arrangement normally entails the provision of essential primary medical services under General Medical Services (GMS) Section 17J or Primary Medical Services (PMS) Section 17C Agreements together with associated activities.

- 1.1 All the arrangements and undertakings between partners or prospective partners should be on a strict business footing. Verbal assurances offer no real security and should be avoided. **To regulate medical partnerships properly, and to avoid dispute, partnerships should have a signed, up-to-date, regularly reviewed, written partnership agreement where all applicable terms are accurate and precisely defined.** A written partnership agreement defines the rights, liabilities, and responsibilities of all partners in the business. Every partnership agreement should be the result of detailed consideration by all the partners and intended partners. It is essential that the agreement is kept up-to-date, particularly when there are changes to the membership of the partnership such as the addition of a new partner.

### 1.2 Partnerships at will

- 1.2.1 Most of the partnership problems on which BMA help is sought arise either from the fact that there is no written agreement or from inadequately drawn up agreements. The absence of a written agreement will mean that the business will be a ‘partnership at will’ i.e. one which is implied by law and subsists at the will of the partners from day to day.
- 1.2.2 **Although oral partnership agreements are legally valid, they offer no real security and should be avoided.** In a partnership at will, relations between partners are governed by the Partnership Act 1890, unless some agreement to the contrary can be proved. The Partnership Act was designed to cover all partnerships and does not meet the specific needs of individual professions.
- 1.2.3 Partnerships at will are an unstable basis for a business relationship because:
- unless there is an express agreement to the contrary, a partnership at will can be dissolved on notice by any partner without justification. Dissolution will take immediate effect, unless it can be proved that a notice period has been agreed.
  - Dissolution of a partnership-at-will may result in the forced sale of all partnership assets (including the practice premises) and the redundancy of all staff, incurring potentially large financial liabilities and the potential loss of NHS contracts for all the parties involved even if a new partnership is established.
  - During the lifetime of a partnership at will, all partners are deemed to have equal profit shares unless there is clear evidence to the contrary having been agreed and most decisions are made by simple majority. A written agreement will significantly reduce the potential for serious disagreements and instability.

**The BMA strongly recommends that GPs enter into a written partnership agreement and seek legal and accountancy advice in doing so. Advice should also be sought by both the partnership and the incoming or outgoing partner on the addition of a new partner or on the retirement of a partner. The agreement should make provision for the death or disability of a partner.**



## 1.3 A note on partnership agreements

- 1.3.1 It would be virtually impossible to draft an agreement which regulates every aspect of the partnership. Although a partnership agreement may legitimately vary the rights and obligations of partners as implied by the Partnership Act 1890 (or by the general law), these rights and obligations will apply in the absence of any contrary provision. So, while an agreement may appear to be specific and exhaustive in relation to some aspects of the firm's affairs, it must be ensured that the partners do not, by their conduct, confine or altogether exclude the application of those duties and obligations which are implied in every partnership agreement (by the Partnership Act, general law, or medical contract).
- 1.3.2 Where partners have not made an agreement their rights and duties are laid down in the Partnership Act 1890. For those who have, the Act is also important because it governs their relationships with outside persons. In the eyes of the law the existence of a partnership does not depend on the presence of a written agreement, but on the conduct of the parties. If the way doctors work together makes them appear to be partners, the law will say that they are partners to the outside world and liable as such.
- 1.3.3 The relationship between partners requires the highest degree of trust. This is because partners are jointly and severally liable for their own and each other's actions; for example, if one partner commits the partnership to incur a debt of £10,000, the partners may be sued jointly for the recovery of that debt, or any one partner may be sued individually for the whole debt (even though he or she was not the partner who entered into the contract). Since in Scotland a partnership is a separate legal entity, any claim or liability may be directed to the partnership as a legal entity as well as the partners.
- 1.3.4 If partners depart from the terms of their agreement, even if they only vary the agreement by their conduct, the variation could well be binding on them by law. It is not necessary for the partners to persist for long in a course of conduct inconsistent with the terms of agreement; it is only necessary that they shall all have clearly intended to supersede them. Many disputes would be avoided if all partners kept in mind the main provisions of their agreement, and record in writing every variation by getting their solicitors to draft a proper amendment to the agreement or by evidencing such variations in a minute signed by all the partners.

## 1.4 A note on discrimination

It is unlawful for any partnership or its individual members to discriminate on the grounds of a protected characteristic under the Equality Act 2010, which identifies age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or philosophical belief, sex, and sexual orientation as protected characteristics:

- when advertising for a new partner
- when appointing a new partner
- in the terms on which a new partner is offered a partnership
- by refusing, or deliberately neglecting, to offer a partnership.

In addition, if someone is already a partner it is unlawful to discriminate:

- in the way he or she is afforded access to any benefits, facilities, or services
- by refusing, or deliberately neglecting to afford access to those benefits, facilities, and services.

It is also unlawful to discriminate during dissolution of the partnership or when determining expulsion of a partner.

## 1.5 Limited liability partnerships (LLPs)

Some GPs may come across the term limited liability partnership or LLP. LLPs are an alternative to a general partnership of the nature described above. They are governed by the Limited Liability Partnerships Act 2000 and not by the Partnership Act 1890. They are normally adopted to reduce the liability risk resulting under normal partnership rules. The terms “member” and “partner” are used interchangeably in relation to LLPs.

### 1.6 The key features of an LLP are as follows:

- 1.6.1 It has a legal personality separate from its members, meaning it can own property and enter into contracts in its own name.
- 1.6.2 Changes in an LLP’s membership do not affect its continued existence.
- 1.6.3 Generally speaking, the members of the LLP are not required to meet the liabilities of the LLP; their financial risk being limited to the amount they have invested or agreed to invest in the LLP as working capital.
- 1.6.4 LLPs do not pay corporation tax – the individual members are taxed on their share of the LLP profits, like any other partnership.
- 1.6.5 The members are free to agree how they wish to share profits, who is responsible for management and how decisions are made, when and how new members are appointed, and what should happen if a member dies or resigns from the LLP. The members may also agree a process for expulsion of a partner, for example if there is misconduct.
- 1.6.6 Like companies, LLPs are required to file annual accounts and other information at Companies House. The accounts are publicly available, although the LLP agreement is private and does not need to be filed.

### 1.7 LLPs may be more expensive and complicated than setting up a partnership and have additional requirements and costs:

- Financial information about the business must be made publicly available by sending a copy of annual accounts to Companies House.
- The accounts of the LLP must be audited (it is possible to be exempt from the audit requirement depending on annual turnover, balance sheet, and number of employees).
- The LLP should have suitable professional indemnity insurance cover from a medical defence body.

### 1.8 There are likely to be complexities for partnerships considering the possibility of incorporating an LLP should consult a solicitor and should also consult with the Health Board (HB) and any landlords or lenders.

## 2. Preliminary considerations

- 2.1** GP partners have the right to arrange their partnerships as they wish, subject to the legal requirement to have sufficient involvement with patient care. There are no longer any formal 'job-share' arrangements - partners can work half a week each, or a certain number of sessions each and divide the profits as they decide, based on this. Decisions such as annual leave entitlement are decided upon by the partners and are written in the partnership agreement. It is recommended that the specific arrangements regarding the allocation of leave are agreed and included in the partnership agreement.
- 2.2** GMS contracts issued by Health Boards (HB) are held between practices and the HBs. The implications of this, and its effects on partnerships, must be understood by all partners in a practice, as well as intended partners. Partnerships in Scotland are separate legal entities, unlike in the rest of the UK.
- 2.3** A partnership agreement entered for the purpose of providing services under a contract should consider the obligations under that contract. The terms and conditions of any partnership agreement should therefore be consistent with those individual partners obligations where applicable, whether the contracting party is the partnership or the individuals.
- 2.4** It is always vital to seek professional advice from solicitors and accountants in the preparation of a written agreement. BMA Law can provide drafting services to BMA members at a discounted rate. In the long run this may well save subsequent costs in unscrambling ensuing problems. The partners would be well advised to first discuss matters between themselves and as far as possible arrive at a basis of agreement. The outcome should then be made known to the professional advisers. This may save unnecessary professional charges in preparing the agreement.

### 2.5 The new partner

- 2.5.1** **New partners should sign up to a partnership agreement prior to their commencement date as a partner to avoid any confusion.**
- 2.5.2** It is important to note that an existing agreement may bind a new partner even if they have not signed it. If the existing agreement makes no provision for the addition or departure of a partner then on the addition of a partner (or departure of a partner), a completely new business entity may be created. Without any agreement between the new partner and the existing partnership, it is likely that the business will be deemed a partnership at will.
- 2.5.3** A properly drawn partnership agreement should deal with the possibility of new partners joining to avoid the addition of a new partner requiring the drawing up of a completely new partnership agreement. For example, if the existing partnership agreement does not provide for the continuation of the partnership on the addition of a new partner (or death/departure of a partner), then the partnership will continue, if it is not dissolved, as a partnership at will, but may be subject to the terms of the previous agreement. It is important to consider the use or otherwise of continuation clauses to avoid a "last person standing" situation developing where the failure to recruit new partners on the retirement or expulsion of existing partners could leave a single partner carrying all the liabilities of the partnership on their own.

- 2.6** A well drafted partnership agreement should deal with profit sharing where there is a change in partners; shares in profits should be in a simple formula in the body of the agreement or if too specific to survive a change in the partners



or their respective share should go into a schedule to the agreement which can be substituted on the addition of a new partner. Where there is a well drafted agreement, an addendum will therefore often be sufficient to cover the addition of a new partner who could be then bound by the terms which previously subsisted between the existing partners.

## 2.7 Admission of new partners

- 2.7.1 Unless the partnership agreement states otherwise, the admission of a new partner requires unanimous consent of the other partners. Generally, it is preferable that a new/refreshed partnership agreement is established when a new partner joins. Existing partners should ensure that the new partner signs the partnership agreement from the outset.
- 2.7.2 It is also possible for a new partner to sign up to an existing partnership agreement by 'deed of adherence' by which the new partner agrees to be bound by the terms of the existing partnership. This may result in the partnership agreement appearing out of date, e.g. because it does not include the name of the new partner, and it might include the name of a retired partner, but it is an effective and straightforward method of ensuring a new partner is signed up to the agreement, without requiring all partners to sign a new agreement.
- 2.7.3 **Both the partnership and the new partner will want to seek advice from the BMA and seek legal and accountancy advice prior to the commencement date of the new partner.**

## 2.8 Retirement of a partner

- 2.8.1 Under the Partnership Act 1890, a partner has no right to retire, but may dissolve the continuing partnership by serving notice on the other partners and so achieve their own retirement in that way. If the partners wish to depart from this (which the vast majority will), then suitable wording needs to be included in the partnership agreement. The partnership agreement should include wording to the effect of, '*No Partner shall be capable of dissolving the Partnership unilaterally by means of a notice*' and include a clause setting a more suitable mechanism for retirement and repayment of capital. A reasonable period of notice for retirement should be required, perhaps tied to the Partnership's accounting year end date for ease of determining the outgoing partner's share. It would be a good idea to set a timescale for return of capital to the outgoing partner. It is not uncommon to see capital repaid in six-monthly instalments over a period of years, so as not to put unnecessary pressure on cash-flow.

It is not uncommon to see compulsory retirement provisions in a partnership agreement, e.g. to say that a partner is deemed to serve a notice of retirement upon reaching a certain age. However there is no such provision by default. Where the compulsory retirement provision relates to the age of the partner, the provisions of the Equality Act 2010 should be taken into account, as age is a protected characteristic under equality legislation. It may be simpler to avoid setting any compulsory retiral age in the agreement, as any provision in a partnership agreement that requires a partner to retire at a certain age is potentially discriminatory unless it can be objectively justified. If a compulsory retiral age is to be included, to avoid claims partnerships will have to identify the aim that they intend to achieve by fixing a retirement age, e.g. to aid succession planning and bring on the next generation and show that aim is sufficiently legitimate to justify compulsory retirement at that age.

## 2.9 Expulsion of a partner

- 2.9.1 There is no power to expel any partner unless it is included in the partnership agreement. Common grounds for expulsion of a partner include:
- Breaches of the partnership agreement
  - Ceasing to hold relevant professional qualifications
  - Conduct having an adverse effect on the partnership business
  - Personal insolvency or bankruptcy
  - Neglecting to perform their duties
  - Prolonged ill-health (see also below 'Incapacity leave').
- 2.9.2 If a process for expulsion is required, it should be set out in the partnership agreement. This should include details around the decision-making process and consequences, including timing for return of capital to the outgoing partner.
- 2.9.3 It may be preferable to suspend a partner first, while the partnership decide whether to exercise the power to expel. Therefore it is increasingly common to include a power of suspension (as well as expulsion) in partnership agreements. The suspended partner is normally entitled to their usual profit share during the period of suspension. The purpose of suspension is to remove the partner from the business quickly and legitimately in order to investigate their alleged conduct. The purpose is not to punish the partner financially.
- 2.9.4 The period of suspension should be finite and linked to the period of time the other partners expect they will need to carry out investigations and/or take advice. It is therefore advisable for the Partnership Agreement to leave the length of suspension open to the discretion of the other Partners, subject to a maximum period, for example six months. If fault or wrongdoing is found, the partners would then be entitled to consider expulsion.
- 2.9.5 Suspension of a partner by the Health Board or Tribunal is a separate matter and discussed in further detail later in this guidance – see paragraph 3.29.

## 2.10 Probationary periods

- 2.10.1 In the past, partnerships have sometimes employed a salaried GP 'with a view to partnership' (once termed 'an assistantship with a view to partnership') e.g., for six to 12 months. Partners need to be aware however that, with the passage of time, salaried GPs, like all employees have and will accrue employment rights, in particular, the right not to be unfairly dismissed or the right to receive a redundancy payment after two years' service. In general, the BMA does not encourage the use of 'with a view to partnership' arrangements, as they have in the past often proved to be exploitative. The difficulty for the aspiring partner is usually the lack of clarity (including legal clarity) over the circumstances in which a partnership will be entered into. This can be achieved by a properly regulated period of mutual assessment included in the partnership agreement.
- 2.10.2 Partnership agreements can provide for a new partner to be admitted as a partner but subject to a probationary (mutual assessment) period, normally of around six months. This gives both sides the opportunity for mutual assessment, during which time either the existing partners or the new partner are able to give notice – often a period of one month. The agreement should be drawn in such a way that such notice would not, however, end the partnership between the existing partners. Financial arrangements for the new partner during the mutual assessment period should be defined in the agreement. Often the new partner will receive a

guaranteed fixed share rather than a full share of the profits. It is important to remember that having a mutual assessment period on the introduction of a new partner does not change the fact that there is a new legal partnership from the first day. Probationary periods may vary in length but six months should normally be sufficient (the exact length may depend on practicalities such as coinciding with the end of the financial year/period).

- 2.10.3 Partners should ensure that the current, existing agreement and/or a prepared draft of any revised or supplemental agreement is available to give to prospective partners in order for them to be able to seek advice.

## 2.11 'Salaried partners'

- 2.11.1 The term 'salaried partner' is a misnomer which leads to misunderstanding and is best avoided. Although it is used fairly widely, particularly in professions other than medicine, the person so described is seldom a partner in law. The expression 'salary' should never be used when a fixed share is meant as the use of the term indicates employee status and could have serious tax consequences for the partner concerned and national insurance contribution consequences for the partnership as 'employer'.
- 2.11.2 Whether a partnership exists depends on the true relationship between the parties and not on a label attached to it. A relationship does not become a partnership simply by calling it one. Use of the term salaried partner is not necessarily conclusive and the consequences for liability etc would depend on the facts of each case. If a salaried partner does all those things a normal partner would do and yet still calls themselves salaried, the courts could deem that they have all the rights and liabilities of a normal partner. On the other hand, if that person has no rights to see the accounts of the partnership, does not get involved in management, has no access to the cheque book and no power to sign cheques there would normally be evidence to prove they are an employee, rather than a partner.

## 2.12 Holding out

The fact that partners take no active interest in the practice finances will not prevent them from appearing to be a full partner to the outside world. Where a partner holds themselves out as a partner to a third party the firm as a whole will be bound by that arrangement. Partners should therefore insist on a clause in the agreement whereby the other partner(s) agree to pay and discharge all the expenses and liabilities of the partners except those attributable to their acts or omissions and to indemnify them accordingly.

## 2.13 Non-medical partners

- 2.13.1 The new GMS contract makes it possible for practice partnerships holding GMS contracts to include non-medical members, such as practice managers, providing all members meet the conditions of the contract, including the minimum number of working hours in each week. At least one of the partners must be a medical practitioner whose name is included in the GP register, all other partners must be individuals and satisfy conditions of the General Medical Services Scotland Regulations.

- 2.13.2 Appointing non-medical members to the partnership may offer benefits to the partnership by inducing such persons to promote the business. However, a non-medically qualified person cannot provide medical services, which is the normal business of a medical partnership. Any such arrangement should therefore be very carefully thought out and evidenced in a written agreement. When drawing up partnership agreements with non-GP partners, partners will need to consider, among other issues, the following:
- whether there are any aspects of decision-making which should be specifically reserved for the health professional partner(s) or categories of health professional partner(s)
  - what mechanism would be appropriate for determining profit share given that:
    1. the nature of the work of the GP partner(s) will be different from that of other partners
    2. the relative ability of the various categories of partners to influence the income and business prospects of the partnership.
  - the means of removing non-medical partners (in the case of those who were formerly employed by the partnership) will be covered by the terms of the agreement construed under partnership law.

## 3. The partnership agreement

### 3.1 Equity for all partners

A written and defined partnership agreement should help to avoid the breakdown of the partnership. It must seek to be fair for all parties. In an ideal situation, the partnership agreement should provide the security which partners reasonably can expect.

### 3.2 The agreement

- 3.2.1 It is important that each agreement should be drawn up in accordance with the wishes of the partners who alone will know the individual circumstances of the practice and will be able to foresee contingencies likely to arise. Nevertheless, partnership agreements do tend to follow a prescribed pattern and include a number of clauses which are common to all.
- 3.2.2 Strictly speaking, many of these 'standard' clauses are not necessary either because the rights or obligations they assign are prescribed by the Partnership Act 1890 or, in the case of others such as an obligation to be just and faithful in all dealings with one's partners, they are always implied. Partnership agreements are not intended to define all the rights and obligations of the partners but should govern the most important elements.

### 3.3 Essential clauses

Certain items should be included in every agreement. These are as follows:

- date of the document
- name and title of firm
- practice address
- names and addresses of the partners
- definitions
- the nature of the business
- date of commencement and the duration
- the capital
- practice premises
- expenses and their allocation
- income
- division of profits
- attention to the affairs of the firm
- tax liability
- engaging and dismissing staff
- power to make decisions
- holidays, sabbatical leave, study leave, adoptive leave
- leaving the partnership/continuation clause on departure of a partner
  - voluntarily
  - involuntarily
- lengthy incapacity
- retirement and death
- defence society
- arbitration
- banking
- accounts
- pensions
- suspension

This list is not exhaustive but includes those items which relate particularly to medical partnerships. Further information about these items is given in the following paragraphs, together with some examples of typical clauses.

### 3.4 Date/name/title/address

- 3.4.1 The agreement must be dated and give the name and title of the firm. The practice address, i.e. the address from which the practice is to be conducted, must also be included.
- 3.4.2 In the past, medical partnerships were usually conducted under the true names of the individual partners. Now many practices operate under a different name eg The Parkside Surgery. Practices operating under business names must comply with Part 41 of the Companies Act 2006, which restricts the use of certain words or phrases in business names, and applies to any person, partnership or company carrying on a business under a name which is not their own name. For further information and guidance see: <https://www.gov.uk/government/publications/incorporation-and-names>
- 3.4.3 The agreement must start with a list of the names and addresses of the parties, including any non-health professional parties. The address which appears for each partner in the partnership agreement must be the address to which any legal documents could effectively be served. The Act requires the partnership to disclose the name of each partner on the business letterhead paper. These names should also be displayed prominently at the place of business. If the partnership carries on under a different name from those of the partners, this should appear in the agreement and on the business letter head.
- 3.4.4 The names of all the partners and the business address must appear on all business letters, written orders for goods or services to be supplied to the business, invoices and receipts issued in the course of business and written demands for payment of debts arising in the course of the business. It is also important to remember that non-partner names on letter heads must make their status clear to avoid the risk that they are construed as partners in any action against the partnership.

### 3.5 Definitions

It is always helpful to have a list of definitions of certain terms of the agreement. For example, bankers, accountants or practice name or area.

### 3.6 The nature of the business

It is vital to specify the nature of the business in which the partners have a joint interest because this limits the extent to which each partner can, in his or her capacity as their agent, bind the other partners. This is important since otherwise liabilities arising from any other business activity of any partner might be inadvertently shared by all the other partners.

### 3.7 Date of commencement and duration of the partnership

- 3.7.1 The date of the agreement and the date the partnership commenced are rarely the same. Ideally the agreement should be prepared (and dated) before the partnership starts, but it is in order and not uncommon for the agreement to provide that the partnership commenced on a given date prior to the date of the agreement – provided it did.
- 3.7.2 There is no advantage in limiting the duration of the partnership as this may well decrease the security of individual partners. It is preferable that the duration of the partnership should be for an indefinite period such as the joint lives of the partners or any two or more of them, unless determined under conditions specified in the agreement. The Partnership Act 1890



provides 'subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner'. A statement to the contrary should therefore always be included in partnerships of more than two.

- 3.7.3 The agreement should cover the arrangements for the dissolution of the partnership and the circumstances in which this may arise. Dissolution occurs when the entire partnership ceases to exist. The agreement should specify that a unanimous vote would be needed to dissolve the partnership. Time spans should be considered carefully in any dissolution, to give the partnership time to divide assets and cater for any liabilities. It would be prudent for the agreement to state that dissolution should not take effect until such time as the terms of dissolution have been agreed between the partners. The partnership should also have regard for the practice staff and take employment law into consideration when making arrangements for dissolution of the partnership (see 3.16 below) and also the obligations under their respective medical contracts.
- 3.7.4 Dissolution is distinct from the determination of a partnership in relation to one of the partners, where the partnership as a whole continues (eg in the event of the retirement, death or expulsion of one of the partners).

### 3.8 The capital

- 3.8.1 Partnership capital assets may include premises, equipment, stock of drugs, surgery fittings and furniture etc, in which there is to be joint ownership, and may also include cash subscribed by the partners as 'working capital'. Professional advice should be sought from the practice accountants as to which assets belong to the partnership.
- 3.8.2 An incoming partner should expect to contribute a share of the capital or some elements of it, depending on the circumstances of the practice. Continuing partners should expect to return to an outgoing partner their share of the capital. Incoming partners should consult their accountants. More information on joining a partnership can be found above (section 2.5).
- 3.8.3 Capital must be defined and is probably best recorded in a schedule to the main agreement. This is important because the initial divisions may be subject to change in the future and, with a schedule, a change may be affected without altering the main body of the agreement.
- 3.8.4 It is recommended that partners should participate in the net value of the firm's assets in the same proportions as they enjoy the profits. This has meant that normally, incoming partners have purchased initially a less than equal share in the capital and made further purchases. As their capital share increases, so does their share of the profits in proportion. This is a business decision and will vary from one partnership to another.
- 3.8.5 However, buying in stages is not advisable so far as premises are concerned. Incoming partners should consider either purchasing an equal share immediately or delaying the purchase until reaching parity – thus avoiding the extra expense of buying premises in stages. This is also a business decision to be made by the partnership and depends entirely on whether it is intended that ownership of the partnership premises should be shared, this may not be the case.
- 3.8.6 If notional or cost rent is payable, whether in part or whole in respect of the practice premises, the partnership agreement should clarify to whom the payment should be made (ie the landlord), and how the payment is to be dealt with in the partnership accounts.

- 3.8.7 Where the situation arises that a partner is leaving, the partnership agreement should deal with how that partner's share will be realised and how it is to be valued. If there is no mechanism in place it can be immensely difficult to agree at the time it is required. It can be even more difficult if a partner dies and there is a requirement for negotiation with his or her executor, often a surviving spouse or child. The agreement may include a clause obliging the ongoing partners to purchase the 'outgoing partner's' share in the business and/or the premises, or the partners may wish to include an option to purchase any share in the property especially on the death of a partner where it is preferable for the remaining partners to be given the option to purchase. In any case this is a matter for the partnership to decide and conveyancing advice should be sought from the partnership solicitor. However, the situation with a regard to property is somewhat simplified if the partnership as a separate entity owns the premises.
- 3.8.8 The partnership agreement should always include proper procedures for valuation and whatever basis is used it should be stated that goodwill must be excluded from the valuation of essential services. The agreement should state who pays for valuations.

### 3.9 Goodwill

General practitioners cannot buy or sell the goodwill or any part of the goodwill of the practice. The Primary Medical Services (Sale of Goodwill and Restrictions on Sub-contracting) (Scotland) Regulations 2004, which have been in force since 1 April 2004, relax this ban in relation to enhanced, out-of-hours and additional services, but not in relation to essential services. If premises previously used for the purposes of essential medical practice are sold for a sum substantially in excess of the consideration which might reasonably have been expected if the premises had not previously been used as a medical practice, it may be deemed that there has been a sale of goodwill. Sale of goodwill is a very complex matter and specialist accountancy advice is recommended.

### 3.10 Practice premises

- 3.10.1 When premises are owned by one or more of the partners it is essential that a proper written agreement defining the rights of the partnership to occupy the premises is drawn up between the owners and the partnership as a separate entity and independent legal advice should be sought.
- 3.10.2 Where the practice premises are owned by one of the partners usually the owner should be entitled to payment for, or in lieu of rent and, where applicable any other services supplied by the landlord. Such payment should be made out of the partnership funds, ie by the partnership as a whole and not only by the non-owners. Any reimbursement received from the HB should be paid into the partnership account and become partnership property and distributed accordingly with regard to discharging rental liabilities. Any agreement should define liabilities for maintenance, both internal and structural. There should be clear arrangements in place for the responsibility of bearing costs associated with premises. Lease arrangements should be referred to solicitors.
- 3.10.3 Appropriate clauses should be inserted within the partnership agreement to ensure that if the owner decides to leave the partnership and terminate the lease, any remaining partnership has sufficient time in which to find new premises or make alternative arrangements. The same will apply in respect of any tenancy agreement and they should be advised to seek advice from a specialist property lawyer.

- 3.10.4 It is important to note that in the event of one partner leaving a practice, there may be a knock-on effect with respect to premises funding where property is leased by the partnership from a third party and the rent is funded by the HB. In these circumstances, the HB may send a surveyor to review the premises and re-evaluate the actual space being used to deliver essential services under the contract. This may well result in a cut in funding owing to the fact that following a partner's departure, not all of the premises are being used to deliver services under the contract. This inevitably results in practitioners/partners having to fund the difference out of their own pockets.
- 3.10.5 It is far simpler and advisable where possible for any premises to be leased or owned by the partnership. This eliminates to a certain extent any property issues or conveyancing issues that would normally arise when a partner leaves or joins a partnership.
- 3.10.6 There will be specific requirements to address where the partnership owns its premises and has a GP premises sustainability loan.<sup>a</sup> The BMA may provide general guidance on sustainability loans – but partnerships with or considering a sustainability loan will want to take expert professional advice on the implications for their partnership agreement.

### 3.11 Expenses

- 3.11.1 In addition to the rent, rates, heat, light and maintenance of the practice premises, the firm as a whole should pay for any practice staff employed, accountancy, stationery, bank charges, practice telephones etc, and such expenses should be paid or allowed for before profits are distributed. Where not all the partners own the premises, the agreement should be specific as to what expenses for the property are to be borne by the partnership. Routine maintenance, for example, would normally be borne by the partnership but improvements and additions would not. Other items such as telephones at the partners' homes and car expenses are occasionally paid by the partnership but more usually by the partners individually. Incoming partners should check to see whether there are certain occasions where individual partners are required to provide equipment at their own expense (e.g. a mobile phone or car). Whichever method is adopted should be made clear in the agreement.
- 3.11.2 With the present arrangements for HMRC tax assessment, it is particularly important that partners decide how personal expenses are to be dealt with, i.e. claimed through the partnership accounts or on personal expenses claimed by individual partners. If personal expenses differ to a large extent (e.g. one partner has an expensive car) the latter method may be more appropriate. It is very rare for personal expenses to be paid through the partnership accounts. These expenses should be paid personally and either kept completely outside the accounts or brought into the accounts by transfer from the credit of individual partners' current accounts. In the profit split they should be charged against the shares of the partners concerned. Specialist advice should be sought from an accountant.
- 3.11.3 The fact that partnership expenses are paid before the distribution of profits means that the partners usually contribute towards such expenses in the same proportions as they share the profits, and this is right and proper. However, there may occasionally be charges against individual

<sup>a</sup> [BMA Scotland GP sustainability loans – frequently asked questions](#)

partners' shares (e.g. locum charges) and this should be provided for in the agreement. There should be a clause in the partnership agreement specifying that expenditure incurred by a partner on behalf of the partnership and capital allowances due on assets owned by a partner should be taken into account when the net profit of the practice is divided between the partners.

### 3.12 Partnership income

- 3.12.1 Partnership agreements should clearly define what should be treated as partnership income as distinct from personal income to avoid any possibility of future dispute and acrimony.
- 3.12.2 The definition of partnership income and the way it is distributed is a matter for the partners to agree, for example, whether each partner may be allowed to keep private patient income or whether seniority payments should go to the relevant partner. Partnership agreements should also consider how any earnings from other sources are dealt with by the partners. Under current primary medical services contracts, there are many different streams of payment available to practices and each one must be catered for in terms of division of profit.
- 3.12.3 Partners should decide whether fees or honoraria and financial loss allowance payments received through committee or other work should be paid to the practice or kept by the individual, and whether the individual should meet the cost of providing cover during absences. Gifts and legacies should be dealt with in a separate section of the agreement.

### 3.13 Division of profits

- 3.13.1 The agreement should state that the division of profit should be reassessed if the duties of the partners change. The agreement should be drawn carefully so that the section on division of profits does not need to be changed owing to the addition or departure of a partner. Where this is not possible, the division of profits should appear in a schedule/annex to the agreement which can be substituted at this time.
- 3.13.2 The share to which each partner is entitled should be stated, together with any arrangements for adjustments in the future. The method of accounting and of payment to the partners should also be included.
- 3.13.3 Arrangements for division of receipts are not determined by law.

### 3.14 Attention to the affairs of the partnership

It should be considered whether there should be restrictions on the right of each partner to take up other employment, self-employment, voluntary or public office work or membership of committees or councils which may detract from the business of the partnership. This is a matter for the partners to decide and agree.

### 3.15 Engaging and dismissing staff

The partnership agreement should state who is responsible for staff. A dismissed employee may claim unfair dismissal which would normally be made against the partnership as a separate legal entity. However individual partners could be named in any Employment Tribunal claim, particularly if the claim relates to discrimination or whistleblowing. It is therefore advisable in principle that staff employed at the expense of the partnership should be engaged and dismissed only with the

consent of all partners. Practices should have an agreed policy on dealing with staff members and **doctors are strongly advised to take employment law advice to ensure that the correct procedures have been followed, and employment practice complied with, before disciplining or dismissing an employee or taking action which could be construed as constructive dismissal.** The agreement should also provide that any communications concerning the dismissal of a member of staff are dealt with by, and with the consent of, all partners. Partners should be aware of the requirements of employment law, including discrimination under the Equality Act 2010, whistleblowing and Trade Union detriment. Further employment law advice is available from the BMA.

### 3.16 Power to make decisions

- 3.16.1 This is an important section of any agreement. It should cover the calling of partnership meetings, both urgent and routine and state whether a partner outside the UK should have a right to receive notification of any meeting. Rules for decision-making in the absence of a partner and proxy voting should also be defined in the partnership agreement.
- 3.16.2 Unless the agreement states otherwise, the majority of differences of opinion in the partnership, will be settled by majority decision under the Partnership Act 1890. The partners should therefore decide whether or not 'majority voting' should apply and their decision might well be affected by the size of the firm. In a partnership of three for instance, partners may opt for unanimity of all decisions. A partnership of five may feel that unanimity will be difficult to achieve and opt for a qualified majority of four-to-one to alter the status quo. Whatever the decision, the agreement should make the position clear.
- 3.16.3 Even if the agreement gives the majority the power to make decisions, all are entitled to be heard on the subject and unless all have an opportunity of voicing their opinion, those objecting to the decision will not be bound by it. It may be worthwhile considering provisions for decision making during periods when partners are absent so that the general running of the practice is not inhibited.
- 3.16.4 Because the liability of partners is 'joint and several' it is recommended that all partners should be entitled to an equal vote. However, as noted above, when drawing up partnership agreements with non-GP partners, partners will need to consider:
- whether there are any aspects of decision-making which should be specifically reserved for the health professional partner(s) or categories of health professional partner(s)
- 3.16.5 Whatever the decision-making arrangements, decisions on such issues as changing the nature of the partnership business or contract type or admitting a new partner should be unanimous.
- 3.16.6 The agreement should clearly set out what partners are prohibited from doing on their own in terms of binding the partnership to any liability or agreement. It is wise to insert a clause indemnifying the other partners for all liability arising from conduct performed outside of what is permitted by the partnership agreement, or in breach of its terms, to protect the other partners. In effect, any liability incurred by the partnership by an individual partner acting without authority under the partnership will be indemnified by that partner. Following from this, each partner should be properly insured against this eventuality.

### 3.17 Holidays and study leave

- 3.17.1 It is up to the partnership to decide how much leave a partner can take. However, serious inequalities within a partnership in terms of leave or workload could give rise to a discrimination claim, as they could in an ordinary employment situation.

Provision must be carefully agreed to cover additional costs of any leave and to ensure equality and prevent any breach of the discrimination legislation. It may also be necessary to consider whether profit share and any cost of the employment of locums paid for by the partnership will be affected during any prolonged leave. If it is necessary for a locum to be employed because of the absence of a partner on leave it is usually considered fair that this should be an expense of the partnership.

- 3.17.2 It is wise to include in the agreement a restriction on the number who can be away on leave at the same time. Partnerships should be aware that issues of priority can arise over leave, especially over the summer months. Some practices give priority to those with children over school holiday periods while others may refer to seniority. This is a matter for the partnership to decide but, again, partners should be aware that some policies may result in claims of discrimination.

### 3.18 Sabbaticals

In considering sabbaticals, the following points, which are not exhaustive, should be taken into account:

- a) many practices are making formal provision within their agreements for sabbaticals to be taken
- b) the purpose – whether purely educational, for broadening professional experience in another environment, or relaxation
- c) the frequency with which sabbaticals may be taken by each partner, eg once in every seven or ten years
- d) the length of absence
- e) any need to inform and agree with the HB the sabbatical arrangements proposed. [Under the National Health Service Primary Medical Services Performers List Regulations (Scotland) 2004, the HB may choose to remove from the performers list any performer who cannot demonstrate that they have performed services, which those included in the relevant performers list perform, within the area of the HB during the preceding twelve months]
- f) if educational, whether a requirement should be made that the intending absentee should apply for payments under arrangements for prolonged study leave (contained in the GMS Statement of Financial Entitlements (SFE))
- g) the apportionment of locum costs and any locum allowance
- h) the continuing eligibility of the absent partner to receive their share of the profits
- i) ownership of any earnings of the absent partner while away
- j) the right where practicable to be included in decision-making in the practice during absence, with the proviso that no decision requiring the agreement of all the partners shall be taken in their absence
- k) the right of return to partnership at the due time without disadvantage



### 3.19 Incapacity and long-term sickness leave

- 3.19.1 It should be considered whether a locum should be employed during sickness and incapacity, especially where the period of sickness is lengthy. There can be various arrangements for this. A simple method is for the whole expense to be borne by the absent partner, but in the case of illness/accident, most practices prefer a system whereby the expense of a locum is borne by the partnership for the first few weeks of the absence because this will reduce the premium payable on a personal sickness and accident policy. Time limits should be considered both for the period during which locums need not be employed and also for the period during which they will be employed. Allowances may be received from the HB for the employment of a locum and their distribution should be defined in the agreement. If the remaining partners are to cover absences, there may need to be provision for this in the partnership agreement.
- 3.19.2 It could be considered whether a long period of sickness would give the other partners the right to terminate the sick partner's membership or the right to seek a medical report on an absent partner. The majority of agreements oblige a partner to retire from the partnership after being incapacitated from performing a fair share of the work for a period which commonly may be anything from six to 12 months. Most partners want to be reasonably generous in this direction (after all, the provisions affect not only their partners but themselves) but the extended absence of a partner places a considerable burden on those who remain. In any event, the performers list regulations 2004 allow HBs to remove performers from the list where they cannot demonstrate that they have performed services within the area of the HB within the preceding 12 months. Advice should be sought in relation to the disability discrimination provisions in the Equality Act 2010.
- 3.19.3 The rights of partners in partnership agreements to paid sickness leave is a matter to be addressed in the partnership agreement. Practices should be careful not to discriminate on the grounds of disability and it is advisable that benefits attributable to long term sick leave are comparable to those attributable to maternity leave. Rights such as holiday leave should continue, by agreement, to accrue during a period of incapacity, just as they do during maternity leave.
- 3.19.4 Consideration should be given to it being a requirement of the agreement that every partner effects some form of permanent health insurance, either to reimburse the practice for the costs of hiring a locum etc or to make up any loss of income by the incapacitated partner. In any case, each member of the firm would be wise to consider arranging personal insurance against the possibility of their working life being cut short.

### 3.20 Maternity, paternity, adoption, and shared parental leave

The rights of partners to maternity, paternity, adoption, and shared parental leave are matters for the partnership agreement. The partners may agree on any arrangement they wish to be included in the partnership agreement; however it should be borne in mind that where maternity leave and locum payments are concerned, it would still be open to any partner to raise a discrimination claim at a later date. The outcome of such a claim would be decided on an individual basis based on the facts.

- 3.20.1 Careful consideration should be given to the provisions which will apply in the event of a partner becoming pregnant or going on paternity, adoptive or shared parental leave. Some of the provisions which it will be necessary to consider are set out below. These points are not exhaustive.

a) *In the case of maternity leave, what time off should be given for ante-natal care?*

A suggestion is that this should be defined as reasonable time off. This will give both parties some flexibility since it is very difficult to legislate in advance for how many ante-natal appointments will be necessary and at what times during the working day they will take place.

b) *What should be the length of maternity, paternity, adoptive or shared parental leave? Does the partnership have the right to employ a locum to provide cover for this leave and at whose expense?*

It is suggested that the minimum amount of leave be tailored to the maximum length of time for which allowances are payable under the SFE. This is currently 26 weeks for ordinary maternity leave and for ordinary adoption leave and shared parental leave for the parent who is the main care provider; and two weeks for paternity leave and for adoption leave for the parent who is not the main care provider. It is perfectly acceptable for the partnership agreement to provide for a longer period of absence but in this case, it is especially important to consider the question of responsibility for paying the costs of a locum for the additional period of leave granted.

**Partnerships will wish to check the provisions in the most recent version of the SFE as this is an area that tends to evolve with time.**

Legislation also provides for shared parental leave and shared parental pay.

It is recommended that the partnership agreement ensures that the right to locum payments is dependent upon the doctor complying with the provisions under the SFE. For example, currently this means that the partner must produce:

- for maternity, paternity or shared parental leave, a certificate of expected confinement for maternity or paternity leave
- for an adoptive parent who is not the main carer provider, a letter written by the partner concerned and countersigned by the appropriate adoption agency confirming the date of the adoption match and the name of the main care provider
- for an adoptive parent who is the main care provider, a letter written by him or her and countersigned by the appropriate adoption agency confirming the name of the main care provider and the date of the adoption match.

c) *What should be the impact of maternity, paternity, adoptive and shared parental leave on holiday leave, sick leave, and other leave entitlements?*

It is recommended that it be made clear in the partnership agreement that maternity leave is in addition to the holiday leave, sick leave, and other leave entitlement so as to comply with the law on discrimination. [Arrangements regarding pregnancy and childbirth cannot be cited as being discriminatory against men and should therefore not be regarded as 'extras' on top of other forms of leave.] The partnership agreement should make clear that maternity, paternity, adoptive and shared parental leave is in addition to any other leave granted under the terms of the partnership agreement.

d) *What payments is the partner eligible to receive while on maternity, adoptive or shared parental leave?*

Arrangements for maternity, adoptive and shared parental pay for partners can vary widely between practices because partners are not subject to all the provisions of employment law. It is however advisable that these do not vary from sickness and incapacity pay because of the possibility of a discrimination claim arising. Prospective partners should carefully check the arrangements in place before signing.

e) *What are the notice requirements for paternity, maternity adoptive and shared parental leave?*

The legislative provisions for each type of leave can provide for minimum periods of notice to be eligible. It is advisable to have notice requirements so that the partnership can plan for the partner's absence. This should cover both the commencement and termination of leave, including return to the practice. Where there are known difficulties in obtaining locum cover, for example, a longer period might be reasonable.

f) *What are the provisions for failure to return after maternity adoptive or shared parental leave?*

Expulsion from the partnership on failure to return after the agreed period of leave should be considered so that the partnership is not left in limbo should the partner simply fail to return. It should be made clear that the partner's right to sick leave is in addition to the right to maternity leave so that if maternity leave is followed by a period of sickness, then the expulsion provision will not apply until the maximum period of absence through incapacity is exhausted.

3.20.2 *What are the provisions for consideration of issues regarding return to work?*

Some thought should also be given to a partner's return to work after childbirth or adoption. Partners in these circumstances may prefer to work more flexibly or on a part-time basis. Requests to return to work part-time should be considered, partly to avoid potential discrimination claims.

### 3.21 Leaving the partnership

3.21.1 It is important to note that any determination of a partnership may have an effect on the contract between the partnership and the HB. Details of this are set out below in 3.22, but partnerships should consider including a clause in the partnership agreement whereby each departing partner gives rights to the others to acquire their share of the partnership, whatever the reason for them leaving.

#### **Voluntarily**

3.21.2 The conditions under which partners may retire from the firm, including a period of notice and the arrangements for the acquisition of their share by the remaining partner or partners, should be stated. The period of notice to the HB should normally be 28 days if a partnership changes to a single-handed medical practice, otherwise there is no period of notice mentioned in GMS, but the HB should always be given reasonable notice.

#### **Involuntarily**

3.21.3 Under the Partnership Act 1890 a partner cannot be expelled by a majority unless the agreement so provides. It is therefore wise to include a clause providing for the expulsion of a partner in certain circumstances, including lengthy incapacity, bankruptcy, removal from the medical register or performers list, gross breaches of the agreement etc. Some agreements specify that any notice served should take effect forthwith (obviously bearing in mind that a period of time would be necessary to deal with a division of assets). Others make provision for expulsion to take place a period of time after the notice is served.

3.21.4 Expulsion clauses must apply equally to be enforceable, and an expulsion notice must be signed by all other partners to be valid.

- 3.21.5 Although an expulsion clause confers a right to expel a partner in certain circumstances, the clause, like any other, may be waived by mutual consent. It can only be used to expel a partner on one of the stated grounds if the necessary steps are taken within a reasonable time; delay may be considered as condoning the misconduct or other circumstances giving rise to the expulsion.
- 3.21.6 Partners should be aware that it can be difficult and expensive to prove to the satisfaction of the court that any such ground has been adequately met. For this reason, agreements have sometimes included an expulsion or compulsory retirement clause which allows for the service of notice simply on the basis that all the other partners agree they no longer wish to be in partnership with the individual concerned. This clause may well be challenged in court and is not entirely failsafe; it also undermines the stability of the partnership and obviates all the other provisions within the agreement which have been included specifically to provide security for all partners. Partners should also be aware of possible unlawful discrimination claims resulting from such discretionary decisions.

### 3.22 Partnership splits

#### ***General Medical Services contracts***

- 3.22.1 As indicated, the GMS contract is held between the HB with the partnership as a legal entity. If a partner or partners leave, there is no reason why the partnership must end. There are also no obligations under the Scottish Regulations to inform the HB (although as a matter of good practice this is usually done). However the HB may decide to terminate the medical contract under paragraph 107 of the Scottish Regulations if the HB considers that the change in partners will have a serious adverse impact on the contractor's ability to perform under the contract.
- 3.22.2 Where the partners cannot resolve their differences and a dissolution of the partnership is inevitable, partners will be required to deal with outstanding liabilities and contracts, including termination of employment contracts (and associated redundancy costs) and the GMS contract. Where this happens the partners may be in a position of having to reapply separately for individual GMS contracts with no guarantee of obtaining them. Parties will be required to submit separate business cases to the HB setting out robust reasons supported by sufficient evidence as to why they are able to continue to deliver essential services (and indeed any other services). Amongst other things, this will entail proving that they have sufficient infrastructure experience, staff, and premises.
- 3.22.3 In instances where there has been a split between two partners there have been occasions when neither partner has been granted a GMS contract. This is wholly dependent on individual HBs, their attitudes, local requirements, and budgets. In these instances the individual doctors might be offered a position within a health centre run and owned by the HB. In the interim they may be granted temporary accommodation in order to continue providing services to patients until a position becomes available. In any event, there are no guarantees. The position will be even more complicated where one of the partners owns the premises and the HB wishes/needs to continue using them to provide patient services after the dissolution. Partners should be aware that the standard GMS contract contains provisions which oblige contractors to cooperate with HBs after the termination of the contract in the continuation of patient services. Failure to observe such provisions may not only cause difficulties with the HB but could also be regarded as unethical conduct reportable to the General Medical Council (GMC) if services to patients are unnecessarily put at risk.

3.22.4 Where there is substantial variation in the partnership, the contractor must give notice to the HB. Although the notice period is not always specified in the contract, the longer the notice period the more beneficial it will be to the partnership as a whole. This must be reflected within the partnership agreement by providing that departing partners give as much notice to the partnership as possible. Once the HB receives notice that there is substantial variation in the partnership, it will assess whether the change in membership is likely to have a serious adverse impact on the ability of the contractor to fulfil its obligations under the contract. If it judges this to be the case, the HB can terminate the contract forthwith or may allow the contractor to continue for a period up to 6 months in order to assist the contractor in providing clinical services by employing or supplying another GP(s). Therefore it is important for a contractor to ensure that adequate notice of any major change is given to the HB.

#### ***PMS (Section 17) Agreements***

3.22.5 PMS agreements provide that a PMS Section 17 Agreement can be held between the HB and the partnership as a separate legal entity. If an individual partner leaves or joins the partnership, there will be an obligation under the contract for the other partners to inform the HB of the change. As in GMS, the HB has the power to terminate the agreement if they consider that the change would have a serious adverse impact on the ability of the provider to perform.

### **3.23 Retirement**

3.23.1 The partnership agreement needs to provide for what happens to a partner and to a partnership on retirement with regards to both assets (including premises) and the relevant NHS contracts. There is now no retirement age under GMS or PMS. Legislation on age discrimination may have implications for agreed compulsory retirement ages and decisions on return to work after retirement. For this reason, it is recommended that compulsory retirement ages are no longer included in partnership agreements.

3.23.2 Under GMS a retiring single-handed GP must give three months' notice of termination of the contract to the HB. **Retiring doctors are not responsible for securing the succession of the practice but some single-handed GPs wish to take a partner prior to retirement to guarantee succession.** This will entail creating a new partnership with the incoming doctor. The HB should be given 28 days' notice of the new partnership and another 28 days' notice if the contractor wishes to change from a partnership back to a single-handed practitioner. The new partner should be able to retain the contract if nominated by the retiring partner. A written partnership agreement should be created even when a partnership is constituted with a view to the original single-handed practitioner retiring. This helps to demonstrate that the partnership is genuine and helps to ensure the rights of the new partner on the other's retirement. The arrangements for PMS are different owing to the ambiguity surrounding notice periods for termination and the fact that contracts are held between the HB and the individual practitioner rather than between the HB and partnership.

### 3.24 Death

Where a partner dies, the remaining partner or partners should notify the HB of the death. A GMS contract would normally continue with the remaining partner or partners (except for example where the surviving partner is not a medical practitioner, although interim arrangements with the HB are possible). Consideration should be given to what happens to a deceased partner's share of partnership assets. If there is no obligation to sell the assets to the partnership they may be retained by the surviving spouse or civil partner (see under premises).

### 3.25 Restrictive covenants

'Restrictive covenants' often used to be included in partnership agreements to prevent departing partners from taking their patient lists with them. Restrictive covenants are not so relevant under the new contract as lists are no longer personal to GPs. Restrictive covenants are in any case difficult to enforce and are legally open to challenge.

### 3.26 Medical defence organisation

An obligation should be placed on each partner to be a member of an approved medical defence organisation while in partnership and on reasonable request of the others to produce evidence of such membership. The agreement could require evidence of payment of defence organisation fees to ensure that the payment does not elapse. For this reason, it may be preferable to provide for payment to be made via the practice and there may be advantages where all partners are members of the same MDO. Approval by the partnership as a whole of particular defence organisations is important, as some organisations provide more limited cover than others. Partners should check the extent of their indemnity cover with defence bodies.

### 3.27 Dispute resolution

No partnership agreement can cover all contingencies and from time-to-time disputes or differences of opinion will arise. The two main means of dealing with such disputes are voluntary mediation and arbitration.

**3.27.1 Mediation** – Mediation is a voluntary process in which an independent person agreed between the parties helps to create the conditions for resolution of the dispute by assisting the parties to communicate and negotiate effectively with each other. The mediator meets the parties individually and together for this purpose. The mediator has no power to make any solution to the dispute obligatory or binding upon the parties but will help to ensure that what is agreed is clearly understood by the parties and has been recorded in writing. BMA Scotland offer a free mediation service to partners on non-commercial elements of the partnership agreement.

**3.27.2 Arbitration** – It is nevertheless advisable for partnership agreements to include provision for arbitration of disputes which may arise. The agreement should specify that the arbitrator should be independently nominated (e.g. via the Chartered Institute of Arbitrators) and should be able to act impartially in the dispute. Partners should be aware that arbitration will incur expense in that the arbitrator's fees and expenses will be payable, either by one or both of the parties to the dispute, and that arbitration decisions are binding on the parties and may only be appealed to the court on a point of law or perversity.



### 3.28 Banking

The partnership's bankers should be named in the agreement and identified by bank, branch, and account number. The agreement should also state the arrangements for drawing cheques on the partnership account. It is advisable to limit the financial powers of individual partners so that expenditure over a certain amount requires two signatures on the cheque for security reasons. There should also be some provision for signatories if the partners are on holiday or leave. There should be arrangements for any partnership credit card use.

### 3.29 Tax and accounts

- 3.29.1 It is essential that all partners or their agents be allowed free access to and copies of all the partnership accounts and records. A denial of access to these records for any doctor is a strong argument that the doctor is really an employee, and not a partner.
- 3.29.2 As a matter of good practice, prospective partners should be given reasonable access to the books and accounts of the practice, including provision for them to make the accounts available in confidence to their own accountants for the purposes of taking advice.
- 3.29.3 The partnership's accountants should be named in the agreement together with the arrangements for drawing up the accounts and the dates of the partnership's financial year.
- 3.29.4 The partnership will be responsible for maintaining proper books and there will be a requirement for all the partners to sign the annual accounts once approved. It is usual to include exceptions to the binding nature of the accounts if a manifest or material error is discovered in them within a certain time after signature (often either three or six months). Partners must, when required, render true accounts and full information of all things affecting the partnership to any other partner or that partner's legal representative. The law requires each member of the partnership to observe the most scrupulous good faith towards the others.
- 3.29.5 Each partner should warrant that their expense claims are reasonable, accurate and complete and they may warrant that they have supplied the partnership accountant with all relevant information. Partners who incur late filing penalties and interest may agree to indemnify (reimburse) the other partners in respect of such penalties. One partner should be nominated to file a Partnership Tax Return with the Inland Revenue and their responsibilities should be clearly defined in the partnership agreement.
- 3.29.6 A partner who derives any benefit from any transaction concerning the partnership or from any use of its name or connection without the consent of the others, must account to the others for that benefit. A partner who, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, must account for and pay over to the firm all profits made in that business.
- 3.29.7 Tax liability is a complex area which should be referred to an accountant.

### 3.30 Suspension

- 3.30.1 General Practitioners in Scotland can be suspended from practicing medicine in Scotland by the General Medical Council, NHS Tribunal, and NHS boards. Suspension of a GP who is part of a partnership for the purposes of delivering General Medical Services will have considerable ramifications for the partnership and practice finances. Therefore, it is strongly recommended that the partnership agreement contains provisions specifically covering the possible suspension of a partner.
- 3.30.2 Partners must comply with their GMC responsibilities to inform the relevant bodies of concerns about colleague's professional conduct.

#### ***Suspension by the GMC or NHS Tribunal***

- 3.30.3 Where a GP in a GMS partnership is suspended from the medical performers list following suspension from the medical register by the GMC or suspension by the NHS Tribunal pending a hearing – the practice is entitled to payments under section 11 of the Statement of Financial Entitlements which are intended to cover the costs associated with locum cover for the suspended doctor. One of the key conditions of payments under the SFE is that the suspended GP continues to receive at least 90% of their normal monthly drawings from the partnership account.
- 3.30.4 The partnership agreement should clarify that where one partner is suspended following action by the GMC or NHS Tribunal:
- That the partner should not be inhibited from continuing to carry out normal administrative and non-NHS responsibilities, subject to any conditions imposed by suspension, but that the remaining partners should have the power to prevent the suspended partner from such activities as they reasonably believe would be detrimental to the partnership.
  - That the suspended partner will continue to receive at least 90% of their normal monthly drawing from the partnership account in order not to preclude a practice from accessing payments under the SFE.
  - The process should the practice fail to receive payments under the SFE or where the payments received under the SFE are insufficient to cover the costs to the practice associated with the suspension, and how the shortfall will be met. This will require a decision by the partnership – possible arrangements could include requiring the suspended partner to indemnify the other partners against any shortfall, the partnership covering any shortfall, or contributions from both the suspended partner and the remaining partners covering any shortfall.

#### ***Suspension by the NHS board***

- 3.30.5 NHS boards have the power to suspend GPs from the performers list in the absence of action from the GMC or NHS Tribunal. Where a GP is suspended by an NHS board:
- Consistent with suspension from the performers list following action by the GMC or NHS Tribunal the practice may be eligible for payments under the SFE, or
  - The suspended GP may be entitled to payments directly from the NHS board under the Performers List Regulations as outlined in a [Determination by Scottish Ministers](#).
- 3.30.6 Payments from under the Determination and SFE cannot be received at the same time. Therefore, the suspended GP and partnership will need to agree which payments to pursue. It is likely that payments under the Determination would be advantageous as, unlike the payments under the SFE, there is no cap on the payments and the suspended GP, if eligible,

would receive payments from the NHS board equivalent to their normal monthly drawings from the practice. Payments under the Determination are only made where certain conditions are met including a key condition that the suspended partners must not be entitled to their normal monthly drawings from the partnership.

3.30.7 For suspension by an NHS board the partnership agreement should include:

- That the partner should not be inhibited from continuing to carry out normal administrative and non-NHS responsibilities, subject to any conditions imposed by suspension, but that the remaining partners should have the power to prevent the suspended partner from such activities as they reasonably believe would be detrimental to the partnership.
- Where payments are to be sought under the Determination – the partnership agreement must be clear that during a period of suspension by the NHS board a suspended partner is not entitled to drawings from the partnership account. This is necessary (and indeed the only mechanism) to ensure a partner is “not entitled” to payments from the partnership.
- Where payments are to be sought under the SFE – the partnership agreement would need to be clear that the suspended partners will continue to receive at least 90% of their normal monthly drawings from the partnership account in order not to preclude a practice from accessing payments under the SFE.
- The partnership agreement will also need to be clear where either:
  - The costs to the practice are greater than the monies retained by the practice where the suspended partner receives payments directly from the NHS board under the Determination and is not making monthly drawings from the practice account, or
  - The practice fails to receive payments under the SFE or the payments received under the SFE are insufficient to cover the costs to the practice associated with the suspension and how the shortfall is met.

### 3.31 Pensions

3.31.1 Partnerships should consider the implications of a pension provision in the partnership agreement. Usually all partners, unless already in receipt of an NHS pension, are eligible for automatic entry to the NHS pension scheme and need to opt out if they do not wish to contribute. The practice is responsible for all employer and employee contributions which should be treated as partner drawings. If a partner opts out of the NHS Pension scheme the partnership agreement should describe what happens to their employer and employee contributions, usually the opted-out partner is entitled to take their contributions as drawings.

3.31.2 In the case of partners’ pensions, pensionable pay is defined as NHS Profits, and these are determined following the production of practice accounts. It is therefore necessary to include provision for paying contributions after the closure of the financial year for any late earnings that relate to that year. Any partner who leaves a practice will have outstanding contributions to pay on any outstanding payments which will need to be drawn up in the final accounts.

3.31.3 Further information on pensions is available from the Scottish Public Pensions Agency and the BMA pensions department.

## Appendix 1

### Duties implied for partners by general law

The Partnership Act 1890 sets out the following rules as to the interests and duties of partners:

The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement expressed or implied between partners, by the following rules:

1. All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm.
2. The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him:
  - a. in the ordinary and proper conduct of the business of the firm; or
  - b. in or about anything necessarily done for the preservation of the business or property of the firm.
3. A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of 5 per cent per annum from the date of payment of advance
4. A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by them.
5. Every partner may take part in the management of the partnership business.
6. No partner shall be entitled to remuneration for acting in the partnership business.
7. No person may be introduced as a partner without the consent of all existing partners.
8. Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners.
9. The partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them.

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