



NHS contract reform – a legal perspective



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provides an overview of the legal situation facing dental professionals in light of NHS contract reform.

The NHS England dental contract underwent a number of reforms at the end of 2022, as well as during 2023. Potentially, these changes have significant implications for dental professionals, particularly in terms of direct access and contractual obligations. With this in mind, what follows is an overview of some of the main issues under scrutiny within the walls of Buxton Coates Solicitors, to help dental team members better understand and steer through these reforms effectively.

1. Understanding the reforms

The recent reforms were driven by six primary goals:

1. To be designed with the support of the profession
2. To improve oral health outcomes
3. To increase incentives to undertake preventive dentistry, prioritise evidence-based care for patients with the most needs, and reduce incentives to deliver care that is of low clinical value
4. To improve patient access to NHS care, with a specific focus on addressing inequalities, particularly deprivation and ethnicity
5. To demonstrate that patients are not having to pay privately for dental care that was

6. To be affordable within NHS resources made available by the Government, including taking account of dental charge income.

It is worth noting at this point that it is not clear how these goals will be monitored. Based on recent experiences with PDS+ contract holders, we envisage that where the NHS/ICBs (integrated care boards) are not clear with how they intend to implement change, it often results in disputes between the NHS/ICB and the GDS contract holder.

As for the reason why these six aims were created in the first place, this is the result of significant challenges with staff recruitment and retention, most especially because NHS dentistry was not attracting dental care professionals (DCPs). Most DCPs were seeking to move solely to private dentistry, where they could earn more money whilst facing fewer administrative challenges.

We have seen other challenges in respect of DCPs, as some dental hygienists and dental therapists, quite understandably, do not feel direct access is within their scope of practice, unless they are very experienced.

In fact, dental hygienists and dental therapists have expressed concerns with how practice owners are trying to administer the

Box 1 Common problems and queries

NHS Contract holder disputes

At present, the most common dispute is where contract holders are handing back their NHS contracts because they are consistently underperforming. This is a result of being unable to recruit associates to perform the UDAs or dental nurses to provide chairside services, leading to cancelling several patients' appointments.

This leaves the GDS contract holder with substantial clawback. GDS contract holders are afforded the opportunity to pay the clawback over several months, so that it is manageable for the practice owner, and they are not forced into administration.

However, the NHS is refusing to offer this benefit to those who have handed their contract back, even though paying a lump sum of clawback is not feasible for the GDS contract holder and they simply do not have the financial means to pay it, after years of financial struggle trying to maintain their GDS contract.

Unclear contract terms

PDS+ contracts have KPIs as well as a UDA target. We have recently found that some of the KPIs are beyond the control of the contract holder themselves. For example, one of the KPIs is that the NHS sends patients a text following their appointment asking them to complete a satisfaction survey. Where the NHS has not sent out this survey, they are deeming that the contract holders have underperformed. The NHS is then issuing clawback, which is being deducted from the contract payments on a monthly basis without the contract holder's consent. This has resulted in substantial disputes that are ongoing with the NHS.

Associate disputes

We often find that it is not clear with associates and practice owners as to what will happen where the associate does not meet their UDA target. This may result in the associate not understanding that their Associate Agreement allows the practice owner to deduct clawback where they have not met their UDA target. This is irrespective of whether they have been paid the monies in the first instance.

Alternatively, disputes arise where the Associate Agreement does not allow the practice owner specifically to make those deductions, but they do anyway.

changes and feel pressured into accepting direct access. Therefore, dental hygienists and dental therapists may be left negotiating new contractual terms.

2. Working agreements

Where new contractual terms are agreed, it is in the best interests of the practice owner and the dental hygienist or dental therapist to ensure this is accurately reflected in the Hygienist/Therapist Agreements.

Dental hygiene and therapy services have been directly accessible in private dentistry for some time. However, some dental hygienists and dental therapists have been reluctant to take on direct access patients even in the private sector.

From a regulatory perspective, dental hygienists and dental therapists need to be confident it is within their scope of practice and that they have the correct indemnity insurance in place. As a DCP, even where they are employed, they cannot delegate these responsibilities to the practice owner.

The main difficulty we foresee is dental

hygienists and dental therapists not having contracts that accurately reflect their working arrangements. It is likely the GDS contract holders will just issue them with Associate Agreements or Private Hygienist/Therapist Agreements but this will not accurately reflect the terms of engagement.

The legal standing of a dental hygienist or dental therapist is entirely dependent upon their contractual arrangements/agreements with the GDS contract holder. They may need to negotiate new contracts, to ensure the terms accurately reflect the services they are providing.

In our experience, where there is ambiguity in the self-employed contracts, it is likely to result in a dispute between the GDS contractor and dental hygienist or dental therapist. Furthermore, where terms are ambiguous, they are difficult to rely upon and enforce.

3. Varying a contract

If you want to vary your contract, you can approach your ICB directly. Depending upon the variation you are seeking to achieve,

Box 2 A case in point

To offer one example of when things went awry, an NHS contract was handed back and the NHS issued a letter to the practice's patients informing them the practice had permanently closed.

In our capacity representing the practice owner, we wrote to the NHS on behalf of our client, explaining the detriment their actions had on the business and setting out their potential claim for defamation.

The NHS denied defamation but accepted the error in communication. The NHS corrected its error by agreeing the wording of a letter with the practice owner to go out to the patients, informing them that the practice remained open offering private dentistry.

there will be specific provisions within the GDS/PDS contract on how to instigate the variation.

An example is approaching the NHS/ICB to incorporate your GDS contract. The NHS reserves the right to restructure the contract and even reduce the UDA value.

It is our advice that you instruct a solicitor to review the contract and ask them to assist you with approaching the NHS/ICB to achieve the variation.

4. Clarity is key

If you are a provider or performer, you should ensure you have a bespoke Associate, Hygienist or Therapist Agreement in place.

The disputes we see arise as a result of contracts that have unclear terms. For example, where there is a complaint, defective treatment, or underperformed UDAs, the parties are unable to agree a resolution as it is not clear what the parties' intentions were at the outset.

To protect yourself and your self-employed staff, you should ensure there are clear, bespoke agreements in place from the outset, which the team at Buxton Coates Solicitors can prepare for you.

Buxton Coates Solicitors is a full-service, independent law firm providing bespoke legal services for dental professionals. If you would like help with any legal issues, simply email info@buxtoncoates.com or call 0330 088 2275 in the first instance.

<https://doi.org/10.1038/s41407-024-2055-y>