

# HILL DICKINSON

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LEGAL SERVICES FOR THE TRANSITION TO FOUNDATION TRUST STATUS

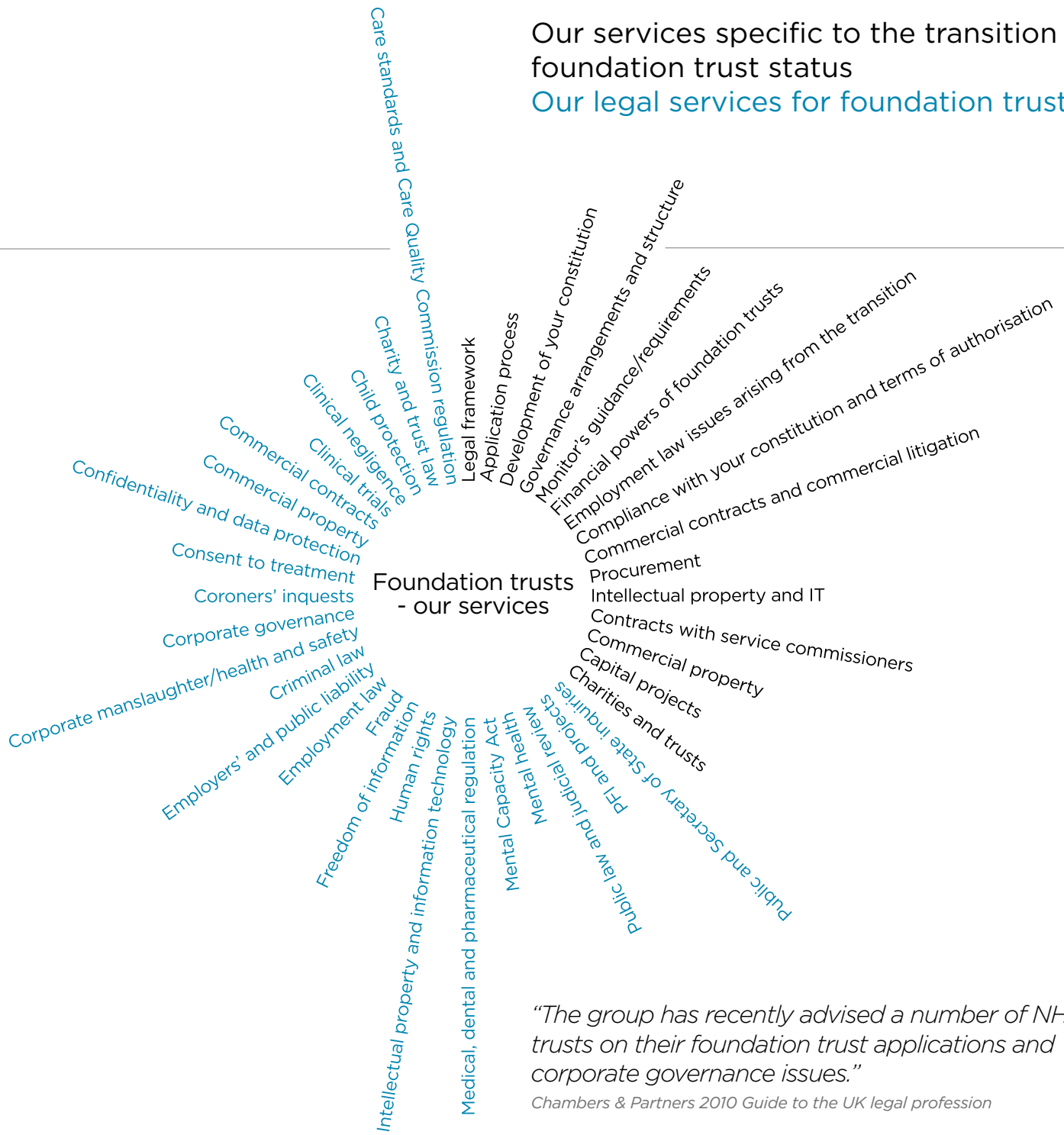
# LEGAL SERVICES FOR THE TRANSITION TO FOUNDATION TRUST STATUS

Since their inception in 2004, there are now a significant number of NHS foundation trusts in operation throughout England. As the NHS moves from an organisation with centralised governmental control to a diverse set of organisations delivering direct services to communities, it is essential for those who have not yet attained foundation trust status to understand and prepare for the application and transition process and for those who have succeeded in that process to be aware of the key issues facing foundation trusts.

Hill Dickinson's NHS governance and foundation trust team can provide you as a prospective foundation trust with invaluable support and assistance throughout all stages of the application and transition process and beyond.

We have experience and expertise in assisting NHS trusts to understand the changes ahead and in guiding and supporting them throughout the application process and on attainment of foundation trust status.

Our services specific to the transition to foundation trust status  
 Our legal services for foundation trusts



*“The group has recently advised a number of NHS trusts on their foundation trust applications and corporate governance issues.”*

*Chambers & Partners 2010 Guide to the UK legal profession*

## Our services



We have worked with a significant number of existing clients on their foundation trust status applications, advising on the requirements of the application and transition process and the implications of becoming a foundation trust.

Following this process and attainment of foundation trust status, we continue to advise on governance arrangements and the implications and practicalities of their new powers, whilst also continuing to provide a high quality legal service across the spectrum of healthcare and commercial law specialisms.

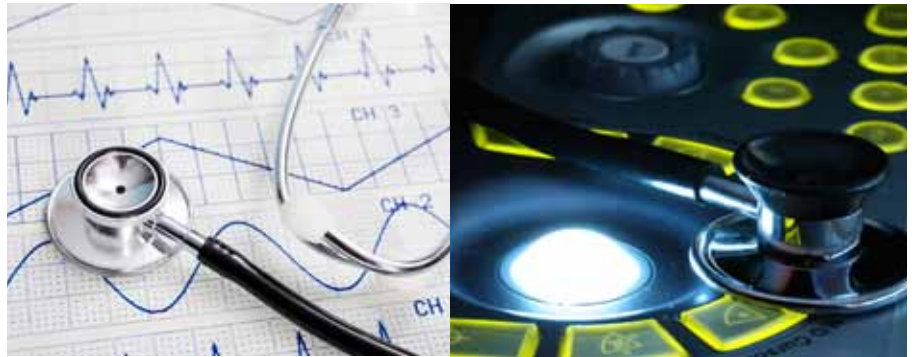
We have developed strong working relationships with the newly appointed corporate secretaries of many of those foundation trusts and have helped and supported them in their role to understand and overcome the challenges that face them.

We regularly meet with the corporate secretaries of many foundation trusts through hosting meetings of the North West Corporate Secretaries Forum. Such meetings provide a means for the corporate secretaries to discuss issues and share ideas and good practice, and seek advice from us as appropriate on any legal issues that may arise.

We provide an 'ad hoc' telephone advice service for foundation trusts and their corporate secretaries, as well as providing in-depth help and support on more complex and lengthy matters, including, for example, the development of and amendments to your constitution.

## Advice on the foundation trust legal framework

We are able to advise you on the legal framework for foundation trusts, which is incorporated within the National Health Service Act 2006. We can provide you with advice on the legal requirements imposed on foundation trusts and the requirements of and regulatory framework developed by Monitor, the independent regulator of foundation trusts.



## Advice on the application process

The application process is lengthy and demanding, consisting of a number of 'stages'. We can assist you throughout the application process to understand what is expected of you at each stage and to develop the documents and information required. We can also advise on the self-certification matters required, which will be an important consideration for the NHS trust board of directors. We are also able to provide advice on the required consultation process, which is an important step in ensuring local community understanding of and participation in the transition process and in securing effective membership of the foundation trust.

## Development of your constitution



We have worked with a significant number of NHS trusts assisting them to develop their integrated business plan and constitution. We can provide you with a draft constitution, based on the core constitution developed by Monitor but adapted to meet your trust's specific needs and preferences. We have developed a draft constitution, which meets all of Monitor's requirements, whilst addressing constitutional issues raised by Monitor during previous waves of foundation trust status applications.

We can advise you on issues such as the development of your membership and constituencies, and the constitution and roles of your board of governors and directors. We will work with you in adapting and producing a constitution, which is right for you – one size may not necessarily fit all.

We can also advise on the required annexes to the constitution to include standing orders and standing financial instructions.

Once you have attained foundation trust status, we can advise on the implementation and application of your constitution and on your terms of authorisation to help you to ensure that your trust operates in accordance with the legislative and regulatory framework.

## Advice on governance arrangements and structure

The governance arrangements for foundation trusts can prove complex with the introduction of a second 'board' – the board of governors. We can provide you with comprehensive advice on the legal requirements in relation to the governance arrangements and structure of foundation trusts, as well as advice on Monitor's Code of Governance in this regard.

We can advise on the practicalities of implementing the legislation and the code in developing your foundation trust governance arrangements and structure, including advice on the election and appointment of governors and the appointment of directors.

We can also advise on the personal accountability and liability of directors of foundation trusts arising from the use of the foundation trust's new commercial freedoms.

Once you have attained foundation trust status, we can continue to advise on governance issues, and the separate roles of both the governors and directors.





## Monitor's guidance and requirements

We can advise on the role of Monitor and on Monitor's guidance and requirements throughout the application process and following the attainment of foundation trust status, to help you comply with and meet the requirements imposed on you.

As the independent regulator of foundation trusts, Monitor has significant regulatory powers. We can advise on the nature and implementation of those powers and their potential effect on you as a foundation trust.

## The financial powers of foundation trusts

Foundation trust status permits a trust to borrow money from the financial markets and enter into funding agreements with banks. This is often a necessity in order to prove liquidity to Monitor in the application process. We are experienced in advising trusts on the initial phases of acquiring funding and negotiating the required documentation. Our considerable experience in acting for both trusts and banks enables us to provide sound practical advice to trusts going through what is often uncharted territory.

## Employment law

There are specific employment issues that may arise on attaining foundation trust status, including staff transfer issues and director appointments. Foundation trusts also have to operate in a more commercial environment where traditional NHS approaches may not be sufficient. Our NHS employment team has a wealth of experience in acting for and advising NHS bodies, including foundation trusts, on all aspects of employment law and we can therefore advise you on any employment law queries arising from the transition to foundation trust status.

## Commercial contracts and commercial litigation

Foundation trusts are not NHS bodies for the purposes of entering into contracts. Therefore, all contracts entered into by foundation trusts are commercial contracts, insofar as the obligations set out in them are capable of being enforced through litigation.

We have considerable experience of drafting, amending and negotiating all types of commercial agreements on behalf of foundation trusts. For example:

- Agreements for the procurement of goods, equipment and services, including advice on the application of relevant procurement legislation
- Agreements for the sharing of data with external organisations
- Agreements for the procurement of managed services (for example, in relation to IT services or medical equipment services)
- Agreements for the provision of services by organisations outside the NHS and other outsourcing arrangements

We can provide advice in relation to the agreements to which you are a party prior to attaining foundation trust status and advise on whether those agreements can and should be amended.

Hill Dickinson also has a specialist commercial litigation team who can assist you in relation to all commercial litigation matters arising from the foundation trust's commercial agreements. The team regularly provides advice on both initiating commercial litigation and defending such claims, and can represent you in respect of all such proceedings.

## Procurement

On attaining foundation trust status you may wish to procure additional or different goods, equipment or services in connection with your development and vision as a foundation trust. We can advise you on the application of the UK and EU procurement regimes, including advice on ensuring compliance with the Public Contracts

Regulations 2006. We can assist you in designing procurement strategies, the choice of procurement procedure and with the implementation and conduct of a procurement process. We have considerable experience of drafting a wide range of documents used in various types of procurement,

including notices for issue in the Official Journal of the European Union, pre-qualification questionnaires, invitations to tender, and contract award notices.

We can also advise you on dealing with challenges received from third parties following contract award.

## Intellectual property and IT

As a foundation trust you may wish to review or enhance your intellectual property. We can help you to conduct an intellectual property audit to find out what you own, what you use, what is being created and what agreements you have with third parties for the use of intellectual property. It really is the case that intellectual property could be the most valuable thing the foundation trust owns.

We can also advise you on how to deal with the ownership of intellectual property rights in the contracts of employment issued to staff. The contracts should, and it is important that they do, deal with ownership of such rights, particularly contracts with consultants and researchers who could introduce an invention as big and profitable as the laryngeal mask (which was invented by a consultant anaesthetist and is now used worldwide).

We can assist you to ensure that any work undertaken for the foundation trust by third party contractors is the subject of an agreement that deals with the ownership of intellectual property rights. We can draft such agreements for you or advise you in relation to agreements you are being asked to sign.

We can assist on all aspects of software use and licensing and advise on applying to register the name of the trust as a trademark. Trademarks have always been important for businesses seeking to protect their reputation in the marketplace and foundation trusts are quickly realising that the brands under which they operate are important for business purposes. We can advise on how to protect what could be a trust's most important asset.

We also have extensive expertise and knowledge of the law of copyright and can assist you in protecting, exploiting and enforcing your rights in this area.

Turning to IT requirements, employee IT usage policies are essential. We can draft such policies for you to cover the downloading of software, the use of the internet, the distribution of copyrighted material via email and other uses of the trust's IT system.

## Contracts with service commissioners

We have substantial experience in advising foundation trusts on the content of agreements with primary care commissioning organisations.

Foundation trusts will usually contract with primary care commissioners on the basis of the terms and conditions for the provision of health services as issued by the Department of

Health. We have advised a number of foundation trusts in relation to these agreements and can assist you to ensure that you fully understand the rights and obligations you have under these agreements and with the drafting of the agreements.



## Commercial property issues arising from foundation trust status

With one of the largest and most respected real estate practices in the north west, we have a dedicated team of NHS property lawyers with over twenty years' experience in this field. We have considerable experience in providing commercial and legal advice on all issues relating to the transfer and leasing of land and buildings to and from NHS trusts, foundation trusts, primary care organisations,

commercial organisations and NHS local improvement finance trusts (LIFT) as well as a variety of schemes with third party suppliers/providers. We can advise you on all property matters arising from your transition to a foundation trust, including undertaking a full review of your property portfolio and dealing with land registration issues.

## Capital projects

In the context of an application for foundation trust status, and on securing foundation trust status, you will have a variety of competing capital projects requirements, from, for example, a need to replace ageing clinical facilities to a need to achieve savings against utilities costs and improve efficiency in the operation of energy, plant and equipment.

We are one of the country's leading practices in the area of combined heat and power projects and in 2009 were awarded the 'Innovation award' by the Combined Heat and Power Association. We have successfully

completed a number of such projects for clients in the healthcare sector, delivering long-term guaranteed savings against utilities costs. In a number of these projects we have been able to combine the energy services elements of the project with the outsourcing of facilities management services in order to secure favourable VAT treatment for the project.

In addition to our combined heat and power projects work, our projects team regularly advises clients in the healthcare sector in the following areas:

- Project and development agreements
- Public Private Partnerships (including PFI projects)
- Managed services arrangements (for example, in relation to IT services or medical equipment services)
- National Health Service LIFT and similar projects
- Asset-backed finance
- Staff residential accommodation projects
- Nursery facilities projects

## Charities and trusts

As a foundation trust you may be a corporate trustee of a charity and you will certainly hold charitable funds. We have lawyers who advise charities on all manner of transactions, regulatory matters and conflict issues. The process of transition to foundation trust status should involve a review of how you hold and operate your charitable funds - for example,

an independent charity board or incorporated company may be able to fundraise more effectively than the board of the trust whilst avoiding any conflict of interest between the foundation trust's annual financial targets and long term growth of independent fundraising.

We can provide advice on all such matters arising from a trust's trustee status.

## Sharing our expertise with you



### Training

Hill Dickinson provides a range of seminars, workshops and breakfast meetings throughout the year, some including topics specific to foundation trusts. Topics covered at previous seminars include:

- The principles and rules for cooperation and competition
- Foundation trust governance arrangements
- Income generation
- Foundation trust insurance and risk management

Delegates from these seminars provided the following comments:

“These events are excellent, you should consider holding them more frequently.”

“Very worthwhile as a whole.”

“Another excellent event from Hill Dickinson.”

We can also provide bespoke training sessions on request tailored to your organisation’s specific requirements, either at our offices or at your premises.

### Keep informed

We provide regular email updates on legal developments in the health sector affecting our clients’ organisations. Contact us if you are not already on our mailing list and would like to receive our email updates and details of our training programme.

## Health practice group

### The complete legal solution to the health sector



*“Extremely detailed health service knowledge and commitment to strengthening client relationships.”*

*Chambers & Partners 2009 Guide to the UK legal profession*

Through our many years of experience and expertise, Hill Dickinson provides over 75 healthcare clients with a specialist legal service encompassing the full spectrum of healthcare law, employment law, property law and other commercial law specialisms.

We work in partnership with our clients to offer immediate, high quality, pragmatic legal advice strengthened by our understanding of the diverse and ever-changing issues faced by the NHS.

By adopting a multi-disciplinary approach, Hill Dickinson can

draw upon lawyers from across a number of practice areas including commercial and IT, property, projects, employment, health and safety and intellectual property to ensure that your legal headaches are dealt with cost-effectively and by the appropriate specialist.

As well as assisting you through the transition to foundation trust status, from the attainment of foundation trust status our team of specialist lawyers can continue to assist you by delivering a quality service to meet all your legal needs.

## Contacts

For advice on how Hill Dickinson can support and assist you through the transition to foundation trust status and beyond, please contact:

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## About Hill Dickinson

The Hill Dickinson Group offers a comprehensive range of legal services from offices in Liverpool, Manchester, London, Chester, Piraeus and Singapore. Collectively the firms have more than 160 partners and 1,100 people.

As a recognised leader in energy and procurement, commercial property and employment law, Hill Dickinson won the Innovation Award at the Combined Heat and Power Association Awards 2009, the Insider North West's Property Law Firm of the Year 2009, as well as The Liverpool Law Society's Employment Team of the Year 2009.

Hill Dickinson is a major force in healthcare and public sector law, and is well respected in the company and commercial arena. The firm has a highly reputable commercial litigation practice and its marine expertise is internationally renowned. Hill Dickinson is also widely regarded as a leader in the fields of insurance, intellectual property and wealth management.

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