

**REPORT TO THE TRUST BOARD MEETING
 TO BE HELD ON 9th OCTOBER 2006**

Item:	Establishing Legally Binding Contracts
To be reported by:	Paul Taylor, Director of Finance
Author:	Clare Bryce-Stephen, Head of Planning & Performance

PURPOSE OF THE REPORT:

To advise the Trust Board of the work programme that is being initiated to develop existing service level agreements into legally binding contracts.

This work is necessitated by the Trusts application for Foundation Trust status.

KEY POINTS:

- Upon attainment of Foundation Trust status, all of the Trusts service level agreement will become legally binding and enforceable through the Courts. Accordingly there is a need to review all existing SLA documentation to ensure that it is adequately robust.
- Monitor is unlikely to grant an FT licence unless the majority of Trust income is secured through legally binding contracts
- There is a need to establish more robust contract management arrangements within the Trust

IMPLICATIONS:

Legal:	Upon attaining FT status all agreements that the Trust holds for the provision or receipt of services will become legally binding (whether re-written or not).
Training:	All officers involved in the negotiation and/or management of service level agreements will need to be made aware of the change to legally binding contracts.
Financial:	The move to legally binding contracts with our PCT Commissioners is likely to be accompanied by a move to activity/performance based reimbursement. There are both potential risks and potential rewards associated with this.
Other:	In future, PCTs will have more leverage to address under-performance through the contract mechanism. Internal performance management systems need to be sufficiently robust to identify and address potential problem areas.

RECOMMENDATIONS / ACTION REQUIRED:

The Board is asked to note the contents of this report.

Establishing Legally Binding Contracts (LBCs)

1.0 Introduction

Following authorisation as a Foundation Trust, contracts with other NHS bodies will no longer be NHS contracts with disputes subject to resolution by the Secretary of State for Health. Contracts between Foundation Trusts and other NHS bodies are legally binding contracts enforceable through the Courts. Accordingly, it is necessary for BSMHT to review its existing Service Level Agreements to establish whether or not they contain adequate wording to be enforceable at law (if necessary).

The Department of Health has developed a range of Model Agreements for use by Foundation Trusts. These cover clinical contracting, non-commercial contracts (ie. with other NHS bodies) and education and training contracts. The use of these Model Agreements is not mandatory and they may be modified in light of local circumstances.

Contracting by Foundation Trusts with commercial organisations should continue to be conducted in accordance with existing rules and procedures and using existing commercial terms and conditions. DH advises that legal or other professional advice should be sought where appropriate, particularly where the EU directives on public procurement are likely to apply or where the risks associated with a proposed contract are high and insurance cover and / or indemnities cannot be obtained commensurate with the level of risk.

Prior to licensing a new Foundation Trust, Monitor will expect to see legally binding contracts in place securing 75%+ of that organisation's income.

Specific guidance is contained in the DH publication " Applying for NHS Foundation Trust Status – Guide for Mental Health NHS Trusts" (published April 2006). This guide stresses the need for establishing robust contractual arrangements both with other NHS bodies and with other statutory agencies, such as Local Authorities:

"During the assessment process, Monitor will review all existing material arrangements with a focus on the level of risk faced by the mental health trust. The risks around these arrangements are that the contracts are poorly structured leading to:

- mental health trusts being exposed to increased costs/liabilities and/or having to withdraw services if one of the partners defaults on its obligations; and
- poor governance / ineffective contract management."

2.0 BSMHT Work Programme

The establishment of legally binding contracts, particularly for the provision of clinical services, is a critical aspect of the preparation for Foundation Trust. There is a substantial amount of work to be completed by the 31st March 2007.

The work programme for BSMHT can be considered under six headings:

- Healthcare contracts
- Education contracts
- Contracts for other services received
- Contracts for other services provided
- Accommodation agreements
- Section 31 agreements

Each of these areas be managed as a separate workstream with overall co-ordination being undertaken via the FT Project Team (see Appendix 1), with progress reported monthly to the FT Project Board.

A lead officer has been identified for each workstream. This designated lead will have responsibility for co-ordinating inputs and ensuring key milestones are achieved.

a) Healthcare Contracts

This is a singularly important workstream and one that can only be achieved in partnership with our PCT Commissioners. Specific project management proposals and an outline project plan have been produced and are currently under discussion with our local PCTs as are the following proposed guiding principles:

- Single contract template to be adopted across Birmingham & Solihull with local variations introduced through activity & finance schedules and service development plans.
- Three year contract to guarantee income streams (but with a mechanism to adjust up or down for agreed service changes)
- Standard activity and performance reporting arrangements to be agreed across Birmingham & Solihull
- Use of DH model MH contract with only very minor variations (if any)
- All service changes / service improvements / service developments will in future be agreed via formal service variation orders appended to the LBC.

Securing LBCs with our 4 local PCTs and with WMSSA will satisfy Monitor's requirement that 75% of income is covered.

Lead Officer: Clare Bryce-Stephen, Head of Planning & Performance

Much of the work involved in establishing legally binding contracts is work that the Trust would have needed to undertake regardless of its FT application (see Appendix 2). The impact of our FT application is to impose a more challenging timetable.

b) Education Contracts

Given the parties involved (the StHA and our local Universities), the level of risk inherent in these contracts is not perceived as great. Work is going on nationally to develop a single learning & development contract for use by Foundation Trusts but in the interim the DH recommends the use of a 'wrapper' document that effectively supplements existing SLAs, making the amendments necessary to reflect the fact that the agreements are now legally binding, and ensuring that some necessary areas such as record keeping, which might not have been included in the previous less formal documents, are fully covered.

It is assumed that a similar process will need to apply to centrally funded R&D programmes but further advice will be sought.

Lead Officer: Co-ordinating role to be undertaken by the HR Management & Development Committee with named leads taking responsibility for specific contracts.

c) Contracts for Services Received

This workstream will cover services received from other NHS bodies, statutory agencies (if not covered via Section 31 or lease agreement) and from third sector partners. It is assumed that all services received from independent sector partners are already covered by appropriate, commercially binding agreements (though this will be tested) . It is proposed that the review of these agreements is approached in a similar way as for Services Provided (see below). For some services, however, such as Clinical Tests, it may be appropriate for a single individual to lead a review on behalf of a number of Directorates to ensure a degree of consistency. The Trust's register of services received will be updated and risk assessed and decisions then taken as to which reviews are to be conducted locally and which on a Trust-wide basis.

d) Contracts for Services Provided

BSMHT provides a variety of services to other NHS bodies, to other statutory agencies such a Probation, and to private and third sector organisations. Generally these arrangements are locally negotiated and managed at individual Directorate level. Some are covered by reasonably robust agreements but others are not. All of these require review to ensure that they adequately protect the interests of the Trust and are sufficiently robust should they be subject to legal challenge. It is proposed that responsibility remains with individual Directorates for negotiating and management such agreements but that a central Lead is identified who would:

- Maintain a register of such agreements
- Develop a pro-forma contract
- Provide advice and support to Directorates
- Advise on appropriateness of final contract documentation
- Liaise with the Trust Legal Department
- Liaise with Risk Management (as per CNST requirements)

(Much of this is in place already for inter-NHS agreements but needs extending to cover arrangements with other types of organisations).

It would not be practical to require all such agreements to be reviewed and updated by 31st March. Instead a priority programme should be developed based upon an assessment of the risks and financial sums involved.

Corporate Lead: Clare Bryce-Stephen, Head of Planning & Performance

e) Accommodation agreements

Any agreements through which BSMHT uses accommodation owned by another NHS organisation or a statutory partner (ie. a Local Authority) should be formalised within a commercial lease or licence agreement. Similarly any agreements which allow partner organisations to use Trust accommodation also need to be formalised. Priority will be given to those agreements where there is a need to guarantee continued use of accommodation into the medium term (eg. Solihull DGH) or where there has been a history of disputed charges.

Lead Officer: Neil Hathaway

f) Section 31 agreements

The application guide for prospective Mental Health FTs states that:

“To mitigate against these risks mental health trusts should seek to ensure that partnership and joint venture contracts are robust, with clearly defined services, quality, and activity requirements”.

The guide includes a checklist against which mental health trusts are encouraged to assess their current arrangements. In summary, the following terms need to be specified within each Section 31 agreement:

- payment terms;
- risk sharing arrangements;
- governance;
- dispute resolution arrangements; and
- penalties to minimise inherent levels of risk.

Given that the Section 31 agreements to which BSMHT is party do not involve the transfer of large amounts of funding, they may be perceived as less risky however Monitor is still likely to want to review the arrangements and ensure that the Trust is adequately protected, including against reputational risks.

It is not envisaged that any major re-drafting of our existing Section 31 agreements will be required but some clauses may need to be strengthened.

Lead Officer: Peter Davidson, Head of Social Care

Clare Bryce-Stephen
Head of Planning & Performance

29th September 2006