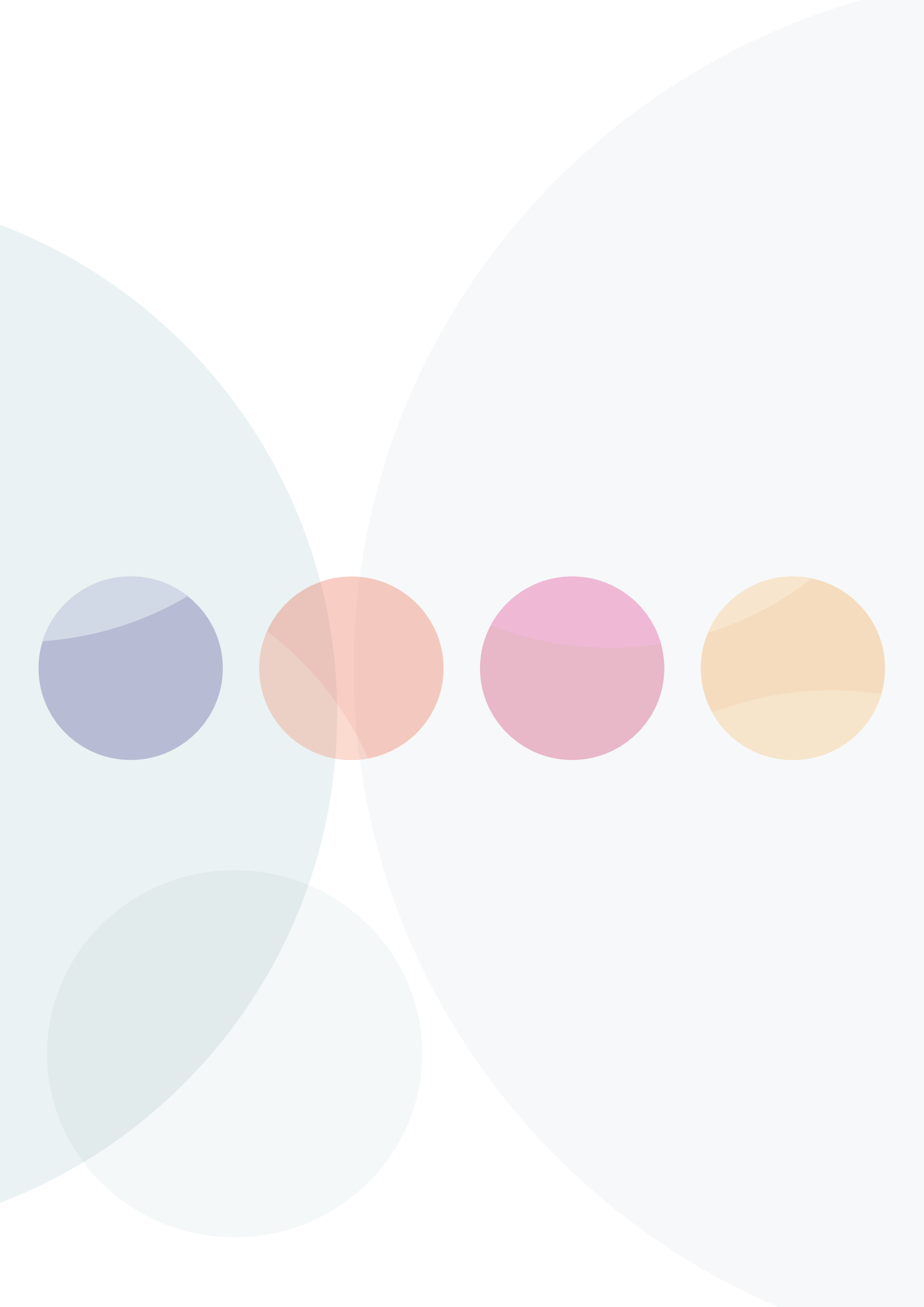


# Collaborative working in the NHS:

**Recent case studies on our experience**





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## Foreword



The public healthcare sector has a very wide range of legal firms and consultancies working with it to help drive progress and deliver complex change.

Through our NHS Providers Panel Membership programme, we have brought together some of the very best thought leaders to share their knowledge to help support you. Our experienced panel members have a proven track record in working with trusts and are committed to giving back and adding value to our members' work.

Capsticks is a leading UK law firm providing specialist legal advice to the health, housing, regulatory and social care sectors. For over 40 years Capsticks has worked with the NHS, providing specialist full-service legal advice, so they truly understand the unique challenges and opportunities that trusts face. As we move towards integrated care systems and Provider Alliances, collaborative working will continue to be key to delivering healthcare services within financial and resourcing constraints.

Please do take a moment to have a look at their set of case studies showcasing their experience in the areas of pathology and cancer services and do look out for their thought leadership, which we will continue to share through our channels

Best wishes,

A handwritten signature in black ink that reads 'Chris Hopson'. Below the signature is a solid black horizontal line.

**Chris Hopson**  
Chief Executive, NHS Providers

## Introduction

Over the course of the pandemic, collaborative working has been shown to be fundamental to tackling local populations' health issues. As we move towards integrated care systems and provider alliances, continuing that collaborative approach is key to delivering healthcare services within financial and resourcing constraints.

As specialist legal advisers to the NHS, we have been privileged enough to play a small part in some of the emerging collaborative arrangements across the country. We are conscious that we need to help NHS organisations to commission and provide health services as efficiently and effectively as possible, often through a joined-up approach. That's why we take a pragmatic and solution-based (rather than purely legal) approach: finding the best answer to the issue and helping the organisations involved to work towards it.

We set out two case studies below showing how we have done this in the areas of pathology (via procurement processes) and cancer services (via ensuring portability of employees).

## Case study - Pathology collaboration

We advised four trusts from pre- outline business case (OBC) stage on all aspects of their collaborative pathology provision and procurement of manufacturing execution system (MES) pathology equipment including:

Area of advice	Work undertaken
<p>1. Advice and recommendation on tender process</p>	<p>We advised the trusts on their procurement obligations and their impact on available options. Initially, we assisted on due diligence on the existing services, the underlying equipment, <u>laboratory information management system (LIMS) contracts</u>, the termination provisions (ability to terminate at will, expiry, and timings of notices) and identified any applicable compensation on termination. This work was crucial for establishing the ‘art of the possible’, including the timing of the required procurements and identifying potential procurement challenges before engaging the market (there was a dominant equipment provider in the market and so we advised the parties to focus scrupulously on ensuring equality of information between potential bidders to neutralise the playing field).</p>
<p>2. Contract terms and conditions recommendation</p>	<p>We advised on the full suite of contractual documentation. We used our market-leading precedent bank to establish ‘on market’ starting points – incorporating our recommendations as to drafting to be adopted by the partners where appropriate.</p> <p>To facilitate the provision of advice on a common interest basis, we set out detailed drafting notes in the body of the contract terms, explaining drafting options, the impact of those options on the partners and seeking consensus instructions from the partners – providing a clear ‘steer’ where appropriate.</p>

Area of advice	Work undertaken
<p><b>3.</b> A legal review of all tender and contract documentation to be issued to bidders as part of the tender</p>	<p>We advised on a number of procurement exercises during the commission and establishment of the pathology partnership (for various commercial reasons it was not possible for the partners to carry out a single overarching procurement). In each case we ensured legal compliance in the procurement documentation, sharing the benefit of our extensive procurement experience, identifying ambiguity in the documents, and highlighting areas of scoring that may be 'gamed' by bidders.</p>
<p><b>4.</b> Advise and formalise responses to any potential supplier challenges throughout procurement</p>	<p>We highlighted potential challenges throughout the project – a key element of our advice on procurement projects is providing assurance as to the robustness of the process and its ability to resist, and better to avoid, challenges.</p>
<p><b>5.</b> Engagement with suppliers during contract clarifications</p>	<p>We provided input on clarifications raised, ensuring that there were no 'hostages to fortune' contained in the responses and that they are clear, accurate and consistent with the procurement documents.</p>
<p><b>6.</b> Produce the draft contract</p>	<p>We populated all final form contracts for the partnership.</p>
<p><b>7.</b> Undertake a final review of contract prior to signature</p>	<p>We conducted a final review of the document to ensure it was ready for signature and produced the engrossment version.</p>
<p><b>8.</b> Assurance report at the end of the procurement to present to the executive steering group and board of directors which provides an outline of the procurement process and any risks associated with the award of contract.</p>	<p>We produced an assurance report for the partners for board sign off which included a material issues summary, key terms, legal risks, and the mitigating actions taken. Our focus on de-risking the project at the outset was important - we highlighted actions taken that directly led to reduced risk at contract signature. Mitigating risk to obtain the optimum outcome is central to our approach.</p>

## Case study - Pathology collaboration

We worked with eight trusts to create a clinical pathway for patients with cancer so that they did not have to move between hospitals within the region. Instead, the specialist clinical staff would come to them at whichever hospital they attended, improving the patient experience and the expertise available to them. This would also enable cross-cover between clinicians in very specialist areas of cancer, rather than the service simply ceasing during periods of leave. Consistency of practice and quality of service were key requirements of the organisations involved.

We acted on a 'common interest' basis, saving significant legal costs that would otherwise have been involved in each organisation taking its own advice. We advised on how to achieve the smooth transfer of employees between different employers in order to ensure that the project was a success. In particular, this involved advising on:

1. The legal framework for moving employees between organisations: secondments, honorary contracts, transfer of undertakings (TUPE) or joint management arrangement.
2. The requirements of each organisation, and the legal requirements, relating to statutory and mandatory training.
3. The legal position in relation to right to work checks where the employee goes to work at another employer as part of their role.
4. Information governance: the arrangements for sharing employee and clinical data between organisations.
5. The application of policies and procedures to employees working at multiple sites.
6. The appropriate indemnity and financial arrangements to underpin the arrangements.
7. The use of existing mobility clauses in contracts of employment.

This was a pioneering project, involving applying legal principles in a novel and innovative way in order to improve patient care.



### **What did your work involve and how did you advise the client?**

At the start of the project, we identified a team to advise the trusts. As this was an unusual and high-profile piece of work, a partner and a senior associate took the lead in providing advice.

We established a lead client through which instructions would flow in order to ensure consistency of approach.

We established an email circulation list via which all advice was provided.

We formulated a plan to ensure that the project was successful. Engagement of the employees involved was key. We therefore agreed with the clients that the changes would be clinically led, so that the doctors, nurses and associated clinical staff involved in delivering the services were engaged in its design. Once that clinical steering group had designed, and had bought in to, the clinical pathways, a workforce steering group involving HR leads for all the trusts involved met to discuss how to implement the model. We participated in those meetings and were embedded in the decision-making process, enabling us to highlight potential issues at an early stage. This ensured that only realistic, practical and legally robust options were pursued.

Once initial work had completed, a pilot scheme was introduced across two trusts to establish how the arrangements would work in practice and to resolve 'snagging' issues, so the project could be rolled out more widely.

The indemnities between trusts required particular attention and involved liaising with NHS Resolution in order to ensure that NHS Indemnity would cover any claims arising out of employees performing clinical services at a different organisation. Our close relationship with NHS Resolution meant this could be achieved quickly and effectively.

Statutory and mandatory training also required a new approach, with trust leads meeting face-to-face to discuss minimum requirements in order to agree a set of principles quickly.

**Outcome:** We achieved a successful outcome with clear practical arrangements to ensure an effective service. These included:

1. An overarching legal agreement dealing with financial obligations, indemnities, and service delivery. It covered practical arrangements for how individuals would work across organisations, including access to IT, uniform, and security clearance.
2. A precedent 'honorary contract' was agreed to ensure consistency of approach, issued automatically by the employing trust on behalf of all the other trusts.
3. A 'passport' allowing employees to move between organisations. This gave access to authorised sites, which could be adjusted remotely, and provided information on what the individual was authorised to do.

The work revolutionised cancer services in the region with significant improvements in patient services and excellent employee engagement (due to the clinically led design which meant the model represented how clinicians wanted to treat patients). There are plans to expand the model to other services.

**Contact**

Andrew Rowland  
Partner, Head of Healthcare  
0773 802 7472  
andrew.rowland@capsticks.com

Mary Mundy  
Partner  
0742 300 0016  
mary.mundy@capsticks.com



**NHS Providers** is the membership organisation for the NHS hospital, mental health, community and ambulance services that treat patients and service users in the NHS. We help those NHS trusts and foundation trusts to deliver high-quality, patient-focused care by enabling them to learn from each other, acting as their public voice and helping shape the system in which they operate.

NHS Providers has all trusts in voluntary membership, collectively accounting for £92bn of annual expenditure and employing more than one million staff.



One Birdcage Walk, London SW1H 9JJ  
020 7304 6977  
[enquiries@nhsproviders.org](mailto:enquiries@nhsproviders.org)  
[www.nhsproviders.org](http://www.nhsproviders.org)  
[@NHSProviders](https://twitter.com/NHSProviders)

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Registered Office  
One Birdcage Walk, London SW1H 9JJ