Agenda Item 5

Governing Body

Meeting Date	**21 June 2018**
Report Title	**England/Wales Cross-border Healthcare**
Executive Summary	There are currently approx. 8,800 residents in Gloucestershire who are registered with a GP practice that is registered with the NHS in Wales. Whilst NHS Gloucestershire CCG remains the legally responsible commissioner for this population, Aneurin Bevan University Health Board commission and pay for health services for these residents on the CCG's behalf. Following an inquiry by the Welsh Affairs Committee, the UK Government recommended further work should be undertaken nationally to review health care arrangements for patients living on both sides of the border.
Key Issues	A Statement of Values and Principles (SVP) has now been developed, replacing the Protocol for Cross-Border Healthcare Services 2013. The SVP aims to ensure smooth and efficient interaction between health care organisations on both sides of the England/Wales border, supporting better outcomes for patients and avoiding the fragmentation of care.
Risk Issues: **Original Risk (CxL)** **Residual Risk (CxL)**	None
Management of Conflicts of Interest	None
Financial Impact	No change in financial impact
Legal Issues (including NHS Constitution)	NHS Gloucestershire is the legally responsible commissioner for Gloucestershire residents who are registered with a Welsh registered GP

	practice. These arrangements ensure that Gloucestershire residents, who are registered with a Welsh registered GP practice, are able to receive secondary care in accordance with their rights under the NHS Constitution.
Impact on Health Inequalities	These arrangements facilitate access to health care services in England for patients who live in Gloucestershire but receive care from a GP registered in Wales. As such, it may reduce potential inequalities and enable equity of access to secondary care for this cohort of patients.
Impact on Equality and Diversity	See above
Impact on Sustainable Development	None
Patient and Public Involvement	Healthwatch representatives from across the affected CCG areas are members of the Cross Border Network. Locally, these documents have been shared with Action4OurCare and Healthwatch Gloucestershire. They support the introduction of this documentation.
Recommendation	The Governing Body are asked to: • Agree NHS Gloucestershire Clinical Commissioning Group will adhere to the Statement of Values and Principles. • Approve arrangements with Aneurin Bevan University Health Board to enable Gloucestershire residents with a Welsh registered GP to access NHS services with private providers.
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Designation	Senior Manager, Engagement and Inclusion
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21 June 2018

England/Wales Cross-border Healthcare

1 Introduction

1.1 There are currently approx. 8,800 residents in Gloucestershire who are registered with a GP practice that is registered with the NHS in Wales. This cohort of patients usually live close to the England/Wales border and have been registered with their local practice for a considerable number of years. There are seven Welsh registered GP practices which have patients living in Gloucestershire. Three of these practices have a branch surgery located in Gloucestershire.

Over time, changes in health care services have resulted in significant differences to both health care policy and working practices between the NHS in England and the NHS in Wales. These differences were highlighted in 2013 and subsequently national work has been undertaken to ensure patients living in the England/Wales border areas are provided with equity of access to health care services.

2 Background

2.1 The Protocol for Cross-Border Healthcare Services April 2013, established that whilst CCGs retain legal responsibility for their resident population who are registered with a GP in Wales, the Local Health Board (LHB) and for specialised services, the Welsh Health Specialised Services Committee (WHSCC), will be responsible for securing healthcare services for those residents.

Following an inquiry by the Welsh Affairs Committee, changes to NHS referrals for patients who live in England but are registered with a GP practice registered in Wales were implemented. The change was initiated in response to the Protocol for Cross-Border Healthcare Services, 2013 being deemed as “no longer lawful, due to changes

brought about by the NHS Act 2006 (as amended by the Health and Social Care Act 2012)".

In response to the Welsh Affairs Committee report, the UK Government recommended further work should be undertaken to review health care arrangements for patients living on both sides of the border.

2.2 Gloucestershire residents

The practices detailed below have registered patients living in Gloucestershire. A small number of residents in the border areas are registered with Gloucestershire GPs; Severnbanks, Bream/Yorkley, Coleford practices. Current guidance notes that it is the responsibility of each CCG to ensure that their English residents, living in the England/Wales border areas, are able to register with an English GP.

Practice Name	Area covered	Gloucestershire patients
Wye Valley	Trellech & St Briavels	1884
Vauxhall	Chepstow & Tutshill	2504
Mount Pleasant	Chepstow & Caldicot	502
Town Gate	Chepstow & Sedbury	2843
Castle Gate	Monmouth & Raglan	307
Dixton	Monmouth	287
Wye Dean	Chepstow	484
	Total	8811

Action4OurCare is a non- political, not for profit action group, set up in March 2013 by a number of Gloucestershire residents who were concerned that their access to NHS treatment had changed because they were patients of a GP who was registered in Wales. They have continued to lobby NHS England and the Welsh Government over the last five years, to ensure that they have equity of access to NHS services with other Gloucestershire residents. We have developed a good working relationship with Action4OurCare and continue to meet with them on a regular basis. They have been helpful in promoting the Referral Assessment Service and encouraging people to contact us with their concerns.

2.3 Cross Border Network

The NHS Cross Border Network has existed for a number of years as a forum in which to discuss matters specific to healthcare arrangements for patients living along the border between England and Wales. This group considers issues both pertinent to the immediate England/Wales border and wider cross border issues impacting across England and Wales. The group has oversight both of wider policy matters, as well as specific operational issues, to the level of individual patients, as required. Marion Andrews-Evans and Caroline Smith represent the CCG on this Network: Marion currently chairs the quarterly meetings (rotational basis).

Currently, the NHS Cross Border Network can make recommendations on matters pertaining to the overall strategic direction for cross border healthcare, but does not have responsibility for final decision making on healthcare policy in England or Wales. The intention is to review the terms of reference for the Network, with a view to establishing an "operational" working group to tackle service specific issues and reach appropriate resolution.

2.4 Referral Assessment Service (RAS)

The Referral Assessment Service (RAS) was initially established as a "test" from July 2016 to enable people living in England and registered with a Welsh registered GP practice to access secondary care in England. Five of the practices with Gloucestershire residents began using the RAS during this phase. The RAS was evaluated in Spring 2017, when it was concluded that it was working well and receiving positive feedback from both patients and GPs/practice staff.

NHS England has committed to continuing to fund the RAS and expand the test phase to accommodate any other Welsh registered practice. The two practices with patients in Gloucestershire which were not part of the original test phase, Mount Pleasant and Castle Gate, are planning to begin using the RAS in the near future.

Glos CCG continues to monitor patient feedback relating to the RAS service. CCG representatives meet with Aneurin Bevan University Health Board (ABHB) and staff from each of the GP practices listed above on a quarterly basis. We also visited the team at the RAS recently to review current practice and explore opportunities for the future.

3 Statement of Values and Principles

3.1 The Cross Border Network has been working with NHS England and Welsh Government to establish a replacement to the Protocol for Cross Border Healthcare Services, 2013. The Statement of Values and Principles (SVP) will be agreed at a national level between NHS England and Welsh Government. As part of this process, Welsh Health Boards and Clinical Commissioning Groups are being asked to agree that they will adhere to the SVP (see appendix 1).

3.2 The SVP formalises existing working practices rather than introducing new arrangements. It has been constructed as a working document: the main body will be formally approved by NHS England and Welsh Government, but the appendices covering the practical arrangements will be kept up-to-date via the Cross Border Network.

4 Cross Border arrangements for Private Providers

4.1 As a general rule, NHS Wales does not commission NHS services at independent providers. This has caused some significant issues during the RAS test phase and beyond, resulting in Gloucestershire residents being denied NHS treatment at providers such Winfield Hospital.

4.2 The attached agreement (appendix 2) has been developed with Aneurin Bevan Health Board and latterly NHS England. It will enable Gloucestershire residents with a Welsh GP to be given the choice of independent providers, in line with residents registered with Gloucestershire GP practices. A generic version of this agreement will be included in the appendices of the Statement of Values and Principles.

The agreement has been reviewed by Bevan Brittan LLP.

5 Recommendation(s)

5.1 The Governing Body are asked to:

- Agree NHS Gloucestershire Clinical Commissioning Group will adhere to the Statement of Values and Principles.
- Approve arrangements with Aneurin Bevan University Health Board to enable Gloucestershire residents with a Welsh registered GP to access NHS services with private providers.

6 Appendices

- Appendix 1 – Statement of Values and Principles
- Appendix 2 – Cross Border arrangements for Private Healthcare Providers

England / Wales Cross-border Healthcare Services: Statement of values and principles

1) This Statement sets out the values and principles agreed between the NHS in Wales and the NHS in England to ensure smooth and efficient interaction between both bodies for patients along the England-Wales border, in the interests of supporting better patient outcomes and avoiding the fragmentation of care.

2) This document recognises the differences in the respective countries' legislation[1] and rights of patients. Whilst this document is not legally binding in a court of law, both countries are committed to delivering high quality care in keeping with the principles set out in this document and recognise that English and Welsh residents are legally entitled to be treated in accordance with the rights of their country of residence.

3) Both countries will act in the best interest of patients at all times, and there will be no delay in accessing healthcare services whilst commissioning responsibilities are clarified.

4) Each country recognises that there are different NHS bodies with different accountability structures in place on either side of the border.

5) The operational detail of how this will work in practice and the areas affected along the England Wales border are covered in Appendix 1

6) The safety and well-being of patients is paramount. The overriding principle of this statement is that no treatment will be refused or delayed due to uncertainty or ambiguity as to which body is responsible for funding an individual's healthcare provision.

Legal Rights and Standards for Residents in Defined Border Areas

7) In relation to patients residing along the England-Wales border as defined in Appendix 1:

a) For patients resident in Wales who are registered with a GP practice under contract to NHS England, legal responsibility for commissioning or for planning and securing their healthcare will remain with their LHB. However, the CCG that includes their GP practice (or for military, specialised and offender health, NHS England) will

[1] https://www.gov.uk/government/publications/the-nhs-constitution-for-england, http://www.legislation.gov.uk/ukpga/2006/42/pdfs/ukpga_20060042_en.pdf, http://www.legislation.gov.uk/anaw/2015/2/contents/enacted, http://www.legislation.gov.uk/anaw/2014/4/contents/enacted

commission and pay for health services for those residents on the LHB's behalf.

b) For patients resident in England and registered with a GP practice under contract to a Local Health Board in Wales, legal responsibility for commissioning or for planning and securing their healthcare will remain with their CCG. However, the LHB will commission and pay for health services for those residents on the CCG's behalf.

c) Local health boards in Wales commission specialised services through a statutory joint committee known as the Welsh Health Specialised Services Committee (WHSSC). This includes specialised individual patient funding requests. All references to local health boards in this document should be construed as referring to the WHSSC where specialised services are to be commissioned. The services regarded as specialised in Wales are available at the WHHSC website.[2]

8) The Referral Assessment Service (RAS) acts as a single point of contact, used when referring English resident cross border patients (who are registered with GP practices who have opted into the service) for consultant-led secondary care (Community services, Mental Health and Urgent Suspected Cancer referrals not currently included). NHS England will be responsible for facilitating border GP practices accessing the RAS working in partnership with Welsh Government. The operational costs of the RAS is funded by NHS England and all parties agree that the RAS:

- Will be the referral process for English residents in those border Welsh GP practices that have agreed to use the RAS
- Will be maintained whilst this Statement of Values and Principles applies

9) Further operational detail on the RAS is set out in Appendix 1.

10) English resident patients whose border GP practice has not opted into the RAS have the same legal right to access NHS England services as those English resident patients whose GP practice has opted into the RAS. If an English resident patient wishes to exercise this right and their GP practice has not opted into the RAS, their local CCG must find a GP under contract to NHS England for the patient to transfer to as soon as possible in order to access NHS England services.

11) Any dispute which arises will be dealt with in accordance with the Dispute Resolution Process set out in Appendix 3.

Information sharing and operational principles

12) All organisations will share information where appropriate in a timely manner

[2] http://www.whssc.wales.nhs.uk/services

to inform good decision-making, support healthcare and minimise risk to patients. All organisations will act in accordance with legal duties relating to information sharing.

13) NHS emergency care will be available for all patients without regard to the border.

14) Local NHS bodies will work together through their local Emergency Planning / Emergency Preparedness, Resilience and Response (EPRR) teams (or the equivalent in Wales) to ensure arrangements for Civil Contingency and Emergency Response planning along the border are mutually supportive.

15) People involved in cross-border healthcare, including GPs, patients, CCGs and LHBs, advocate organisations, other clinicians and statutory patient representative groups will have easy access to information. This will include information leaflets provided at GP practices and information on the websites of all bodies involved in cross border care. This will include information for English resident patients on how to register with a GP practice under contract to NHS England in order to access NHS England services as soon as possible.

16) Health professionals' and patients' organisations will cooperate to ensure that information to patients on cross-border healthcare is clear, patient-centred and easy to understand.

17) Cross border issues will be taken into consideration in the development of any relevant future service reconfiguration, including statutory duties of consultation. This will be monitored by a representative body of Welsh Government, NHS England, LHBs, CCGs and statutory patient representative groups.

18) In developing and implementing proposals for changes to NHS services and structures, regard will be given to the impact on healthcare delivery along the border. Public engagement will involve all groups affected.

Financial principles

19) Different financial regimes in operation on either side of the border will not create inappropriate barriers to patient care; see Appendix 2 as to how adjustments will be made. There will be appropriate engagement prior to changes so that any potential impact can be identified and addressed.

20) Both countries are committed to the principle that no treatment will be refused or delayed due to uncertainty or ambiguity as to which body is responsible for funding an individual's healthcare provision, or due to differing rules as to the level of services available under each country's health system.

Changes to Statement and Review

21) The operational annexes of this statement will be reviewed on an annual basis by a representative body of Welsh Government, NHS England, LHBs, CCGs and statutory patient representative groups to assess whether they are delivering the legal rights and values set out in the statement.

22) The overarching Statement of values and principles will be reviewed 3 years from the date of implementation. The purpose of this review will be to assess whether the Statement has been effective in providing cross-border patients with their legal rights in accordance with the respective countries' legislation and to ensure that cross border patient care is operating effectively without placing undue administrative burden on LHBs or CCGs.

23) The Statement and the annexes can be reviewed at any time in line with changing operational and legal requirements. Any changes required to the operational appendix will be agreed by a representative body of Welsh Government, NHS England, LHBs, CCGs and statutory patient representative groups. Any changes to the statement will be recommended by this representative body and agreed by the Welsh Government and NHS England.

Appendix 1

Operational detail in relation to patients resident in border areas

Applicability

1) Under section 13O(1) of the National Health Service Act 2006 (as amended by section 23 of the Health and Social Care Act 2012), for patients resident in England who are registered with a Welsh GP practice, legal responsibility for commissioning or for planning and securing their secondary healthcare lies with their local clinical commissioning group (CCG), NHS England and Public Health England (PHE). However, the local health board (LHB) will for those English patients secure, pay for and provide secondary and specialised healthcare services for those residents.

2) For patients resident in Wales who are registered with an GP practice under contract to NHS England, legal responsibility for commissioning or for planning and securing their healthcare will remain with their LHB. However, the CCG that includes their GP practice (or for military, specialised and offender health, NHS England) will be responsible, on the LHB's behalf, for commissioning and paying for healthcare services for those residents

3) The following table defines the areas along the England Wales border to which the arrangements in paragraphs 1 and 2 above apply:

Areas of Wales bordering England	Clinical Commissioning Groups bordering Wales
Flintshire Wrexham Powys Monmouthshire Denbighshire	NHS West Cheshire NHS Shropshire NHS Gloucestershire NHS Herefordshire NHS South Cheshire, NHS Wirral NHS Telford and Wrekin

NB: these do not co-relate geographically

4) For the purposes of this document, border patients are those residents living along the England and Wales border (as set out above) who are also registered with a GP practice contracted to the neighbouring cross border county. For patients resident elsewhere in England or Wales who are registered with a GP on the other side of the border, responsibility for commissioning, planning, securing and paying for their healthcare will remain with the CCG or LHB area where the patient defines his or her usual place of residence[3]. The statutory and policy framework sets out the responsible

[3] https://www.england.nhs.uk/wp-content/uploads/2014/05/who-pays.pdf

commissioner for specific patients subject to the Mental Health Acts and the Children Acts.

5) LHB's in Wales have a statutory responsibility to take reasonable steps to provide healthcare that meets the needs of their local populations in accordance with the NHS (Wales) Act 2006, the Well-being of Future Generations (Wales) Act 2015 and Social Services and Wellbeing (Wales) Act 2014. They achieve this by either directly providing healthcare or by commissioning healthcare from other service providers.

6) In addition, the Welsh Health Specialised Services Committee (WHSSC), working on behalf of all Health Board's in Wales, commissions a number of more specialised services at a national level which fall outside of the remit of the RAS. Patients registered with a GP in Wales who are resident in Wales do not have a statutory right to choose which hospital they are referred to. Consequently, these patients should not be able to access healthcare services elsewhere unless all treatment options available within locally provided services or those commissioned by Health Boards have been exhausted and it is clinically appropriate to do so. A request for routine treatment outside of local services or established contractual arrangements would always be subject to a prior approval process.

Such a request may fall within one of the following categories:-

- Second opinion
- Lack of local/commissioned service provision/expertise
- Clinical continuity of care (considered on a case by case basis)
- Transfer back to the NHS following self-funding in the private sector
- Re-referral following a previous tertiary referral
- Students
- Veterans

7) For instances where funding is required for NHS healthcare for individual patients who fall outside the range of services and treatment that a Health Board has arranged to routinely provide, the Individual Patient Funding Request (IPFR) Policy route should be followed. Such a request would normally fall within one of the following categories;

    - A patient requires a treatment which is new, novel, developing or unproven and is not within the Health Board's routine schedule of services and treatment,
    - A patient requires a treatment which is outside of existing clinical policy criteria,
    - A treatment is required for a patient with a rare or specialist condition and is not eligible for treatment in accordance with the clinical policy criteria.

8) Individual Patient Funding Requests and other forms of prior approval will not be required for emergency or immediately necessary treatment.

9) Clinical commissioning groups (CCGs), established under the Health and Social Care Act 2012, are statutory bodies which have the function of commissioning services for the purposes of the health service in England and are treated as NHS bodies for the purposes of the National Health Service Act 2006. The duties of clinical commissioning groups to commission certain health services are set out in section 3 of the 2006 Act, and amended by section 13 and 14 of the 2012 Act.

10) As in Wales, some services that provide care for rare or highly complex conditions are commissioned centrally by NHS England. Factors which determine whether NHS England directly commission a service include:

- The number of individuals who require the service;
- The cost of providing the service or facility;
- The number of people able to provide the service or facility and
- The financial implications for CCGs if they were required to arrange for provision of the service or facility themselves

11) In England, an Individual Funding Request (IFR) can be made for a treatment or service which is not routinely available from the NHS. This may include treatments which are very new, or where there is limited evidence that the treatment is clinically or cost effective. Each CCG will publish their Exceptional Clinical Circumstances policies, which indicate where an IFR or Prior Approval is required. Prior Approval requests relate to procedures that are funded, but which are subject to the patient meeting pre-defined thresholds for treatment.

12) NHS England has a duty when making commissioning decisions, to have regard to the likely impact of these decisions on the provision of health services to persons who reside in an area of Wales that is close to the border with England. The NHS in Wales will be expected to operate on the same basis in relation to actions affecting persons who reside in an area of England that is close to the border with Wales.

13) The following tables summarise what border patients should be able to expect in terms of standards for access to non-specialised and specialised healthcare depending on residency, referral pathway, GP location and provider. Standards should be taken to include clinical thresholds for treatment and other referral criteria specified by the CCG or LHB:

Patient's Residency	GP Registration	Legally Responsible Body	Patient referred by	English Provider	Welsh Provider
Wales	Wales	LHB	GP	NHS Wales Standards	NHS Wales Standards
England	Wales	CCG	GP via RAS	NHS England Constitution	NHS Wales Standards
England	Wales	CCG	GP referral other than via RAS	NHS England Constitution	NHS Wales Standards
England	England	CCG	GP	NHS England Constitution	NHS Wales Standards
Wales	England	LHB	GP	NHS England Constitution	NHS Wales Standards

Nationally commissioned specialised services

14) Although these services do not go through the RAS, English resident patients have a right to access NHS England specialised services in accordance with the NHS England constitution. The following table sets out the arrangements in place regarding access to specialised services

Patient's Residency	GP Registration	Patient referred by	Legally Responsible Body	Body which will pay for patient's care	English Provider	Welsh Provider
Wales	Wales	GP	LHB	WHSSC (on behalf of LHB)	NHS Wales Standards	NHS Wales Standards
England	Wales	GP via RAS	NHSE	LHB via WHSSC	NHS England Constitution	NHS Wales Standards
England	Wales	GP referral other than via RAS	NHSE	NHSE	NHS England Constitution	NHS Wales Standards
England	England	GP	NHSE	NHSE	NHS England Constitution	NHS Wales Standards
Wales	England	GP	LHB	NHSE	NHS England Constitution	NHS Wales Standards

Referral Assessment Service

15) The RAS is a referral system, managed by Shropshire CCG, to enable English residents (registered with a Welsh GP practice) choice of secondary care provider in England or to be referred back to NHS Wales. The RAS acts as a single point of contact for Welsh border GP practices when referring English cross-border patients into England for consultant-led secondary care (Community services, Mental Health and Urgent Suspected Cancer referrals not currently included). The RAS offers English residents the choice of secondary care in England in line with NHS Constitutional rights or to be referred back to NHS Wales to be treated under Welsh standards.

16) NHS England will be responsible for facilitating GP practices accessing the RAS, working in partnership with the Welsh Government.

17) If referred via the RAS into services provided in England, these patients will be included in the English provider data sets provided to the Welsh LHBs.

Managing Cross-border Services

18) A representative body of Welsh Government, NHS England, LHBs and CCGs will work together to create and manage mechanisms for identifying and managing cross border issues.

19) Local NHS bodies will work together to ensure arrangements are in place so that bodies engage populations across the border in discussions on quality and changes to services provided.

20) Cross-border NHS-funded care in residential care homes in Wales and England is based on the care homes' location. CCGs should refer to the responsible commissioner guidance, *'Who Pays? Determining Responsibility for Payment to Providers*, and NHS bodies within Wales to the definition set out in the *Responsible Body Guidance. https://www.england.nhs.uk/wp-content/uploads/2014/05/who-pays.pdf. Amendments to this document were made in 2016. https://www.adass.org.uk/media/5173/updated-s117-who-pays-guidance-applicable-from-1st-april-2016.pdf.*

21) Where a CCG or LHB arranges a package of NHS Continuing Healthcare (CHC), (other than a package that is only NHS funded nursing care), the placing body will remain responsible for that person's CHC until that episode of care has ended.

Appendix 2

Transfer of funds

1) The aim of this Statement is that there will be no financial shortfall on the part of any LHB or CCG in providing healthcare services to the other country's residents in accordance with their legal rights.[4]

2) In acting in accordance with this Statement the responsible LHBs and CCGs will be appropriately funded to commission healthcare services for the other country's residents. A timely and appropriate transfer of funds will occur between the Welsh Government/LHBs and Department of Health/NHS England/CCGs, based on the existing methodology of reimbursement on the current per capita basis for the net difference in primary care registrations between England and Wales.

3) There are around 21k English residents registered with Welsh GPs, and 15k Welsh residents registered with English GPs. Each country initially pays for all secondary care costs from primary care referrals, whether English or Welsh residents.

4) At the end of each financial year England makes a transfer of funds to Wales which notionally relates to the cost of all secondary care for the 6k net "extra" English residents who are registered with Welsh GPs.

5) The settlement figures are based on average numbers of cross border GP registrations, and average costs of secondary care per capita in both countries. The respective values have been reviewed a number of times since 2007-08, the growth in health spending in both countries means the current settlement figure of £5.8m remains appropriate.

[4] https://www.gov.uk/government/publications/the-nhs-constitution-for-england

Appendix 3 - Dispute Resolution Process for NHS commissioners for disputes relating to treatment of patients

This section applies to disputes between NHS commissioners either side of the border between England and Wales.

The following dispute resolution process sets out the steps which must be followed if agreement between the LHB or WHSSC in Wales and the CCG in England cannot be reached. The following principles will apply whilst a dispute is underway:

- Any financial dispute will not interfere with the commencement of the patient's treatment.
- The commissioning body of the patient remains legally responsible for the patient's care whilst the dispute is underway
- The referral date will continue to be the point at which the patient was referred by the Primary Care provider and not the date of the dispute.
- Should the patient wish to complain about the treatment/services they have been given they will do this through the relevant NHS complaints procedure[5]
- No providers of NHS services in England or Wales will be financially disadvantaged once the dispute has been resolved

Stage in Process	Maximum timescale
Stage 1. Local resolution The LHB or Welsh Health Specialised Services Committee and the CCG must try to reach an agreement locally on which is the responsible body using the joint guidance from WG and NHS England. All reasonable efforts must be made by officers (escalating to chief officers and finally to Chairs if necessary) of the LHB or WHSCC and CCG to reach agreement locally. This can include choosing to either: • agree to fund the patients treatment on a 50/50 basis; or • the host provider will pay the cost of treatment If this occurs, a financial adjustment will be made once the dispute has been resolved to ensure the provider identified to pay the treatment has not been financially disadvantaged.	Week 3
Stage 2. Resolution at HSSG Director / NHS England Regional Directors of Operations and Assurance level = In exceptional circumstances, the LHB/WHSSC and the CCG Chief Officers may conclude that they cannot reach local agreement and	Week 8

[5] https://www.nhs.uk/nhsengland/complaints-and-feedback/pages/nhs-complaints.aspx

so decide to refer on to the relevant Director of the Health and Social Services Group in the Welsh Government (HSSG) and the Regional Directors of Operations and Assurance of NHS England. The joint submission should provide the following information: • a background summary of the patient's case • confirmation that the patient's care is not at risk • who is currently taking responsibility for the patient • the reason why the commissioner/healthcare planners are in disagreement as to who is responsible for funding the patient's healthcare; and • what has been done to try and resolve matters. Discussion will take place between the HSSG Director and the NHS England Regional Directors of Operations and Assurance to resolve the issue based on the facts and guidance. The decision will be final and binding on both commissioner/health care planner. A joint letter advising of the decision will be issued to both.	
Stage 3. National Level In the extraordinary event of an agreement not being reached between the HSSG Director and the NHS England Regional Directors of Operations and Assurance by week 10, guidance should be sought from the Chief Executive of the NHS in Wales and the National Director of Operations of NHS England in England. Through their teams, both the Chief Executive and National Director will liaise with one another to agree the policy interpretation for the case and provide joint advice to both the HSSG Director and NHS England Regional Directors of Operations and Assurance to ensure a resolution is achieved.	Week 14

APPENDIX 2: CHANGES TO REFERRAL PROCESS FOR ENGLISH PATIENTS REGISTERED WITH WELSH GPs – USE OF PRIVATE HEALTHCARE PROVIDERS BY CCGs

This Agreement is made on the day of 2018

Between:

(1) Aneurin Bevan University Health Board of Lodge Road, Caerleon, Newport NP18 3XQ

(2) NHS Gloucestershire Clinical Commissioning Group of Sanger House, 5220 Valiant Court, Gloucester Business Park, Brockworth, Gloucester GL3 4FE

Background:

A. The border between Wales and England is approximately 170 miles long, with 50% of the population of Wales living within 25 miles of the border. As a result cross border movements are a fact of life, including for patients accessing healthcare services. Since devolution, there has been increasing divergence between the healthcare systems of England and Wales.

B. For a number of years the Department of Health (DH) and Welsh Government had in place a protocol for cross border healthcare services.

C. The first protocol was introduced as a temporary measure in February 2005 with the purpose of creating time to adjust financial allocations to reflect the residence-based legal responsibilities that had come into force for Primary Care Trusts (PCTs) in July 2003. It was subsequently renewed a number of times.

D. In accordance with the NHS Act 2006 (as amended by the Health and Social Care Act 2012) (the Act) NHS England assumed responsibility for the protocol.

E. In April 2013 the Welsh Government and NHS England agreed a revised protocol for cross border healthcare services. The aim of the revised protocol was to improve the interaction between the NHS on either side of the England-Wales border. The protocol set out the same operational arrangements for commissioning secondary care for English and Welsh cross-border patients as previous protocols. For English residents with a

Welsh GP, the protocol requires the Local Health Board to make arrangements to commission but the statutory responsibility sits with the clinical commissioning groups (CCG).

F. Section 3(1A) of the Act provides that a CCG has responsibility for persons who are provided with primary medical services by a member of the group and persons who usually reside in the group's area and are not provided with primary medical services by a member of any CCG i.e. English residents registered with a Welsh GP fall into this category.

G. A proposal was made to the Cross Border Network in Sept 2015, describing how a Referral Assessment Service (RAS) hosted by Shropshire CCG could address the limitations of the protocol, and appropriately manage English-resident patient referrals into English-commissioned services or back into the Welsh NHS if that was their patient choice.

H. The functions of the RAS therefore were to:

- **accept electronic patient referrals from Welsh GP practices;**
- **use a case management approach to accept and assess agreed referrals for secondary care from Welsh GP practices;**
- **liaise directly with patients and Welsh GP practices about patient care needs and choice, as necessary; and**
- **refer patients to the appropriate provider.**

I. An issue has arisen during the pilot phase of the RAS process between Aneurin Bevan University Health Board and NHS Gloucestershire Clinical Commissioning Group, where an English resident patient with a Welsh GP has chosen to be referred to a Private Provider. NHS Gloucestershire Clinical Commissioning Group regularly refers to Private Providers. Whilst Aneurin Bevan University Health Board does have private contracts, there has been no detailed clinical due diligence undertaken by Aneurin Bevan University Heath Board in respect of every Private Provider in the Gloucestershire area and consequently Aneurin Bevan University Health Board cannot support their use.

J. The Parties have agreed to enter into this Agreement whereby the required due diligence to enable Aneurin Bevan University Heath Board to allow English residents with a Welsh GP to be referred to a Private Provider is

undertaken by NHS Gloucestershire Clinical Commissioning Group. Where patients are accessing healthcare through the Extended Choice Network, due diligence will be undertaking by the local CCG.

K. Primary liability for claims arising out of treatment received by a Private Provider following a RAS referral primarily lies with the Private Provider. However, if that negligence resulted from NHS Gloucestershire Clinical Commissioning Group's failure to perform adequate due diligence in accordance with this Agreement, NHS Gloucestershire Clinical Commissioning Group may be held responsible. It is with that in mind that the Parties enter in to this Agreement.

Agreed Terms

Definitions and Interpretation

1. **In this Agreement, words and expressions shall have the meaning as set out in Schedule 1.**

2. In this Agreement, unless otherwise specified, reference to:
   - **a. includes and including shall mean including without limitation;**
   - **b. a document in the agreed terms is a reference to that document in the form approved and for the purposes of identification signed by or on behalf of each Party;**
   - **c. a Party includes any substitute or subsequent party which may become a signatory to this Agreement in accordance with the terms hereof and/or the successors in title to that part of a Party's undertaking which includes this Agreement;**
   - **d. a person includes any person, individual, partnership, company, firm, corporation, government, state or agency of a state or any undertaking or organisation (whether or not having separate legal personality and irrespective of the jurisdiction in or under the law of which it was incorporated or exists);**
   - **e. any statute or statutory provision in force at the date hereof shall be deemed to include references to any statute or statutory provision which amends, extends, consolidates or replaces the same (other than any such statute or statutory provision with retrospective effect to the extent that it is retrospective) and to any order, regulation,**

instrument or other subordinate legislation made thereunder in force at the date hereof;

f. **writing or written includes email but does not include fax or any other form of electronic communication;**

g. **recitals, clauses, paragraphs or Schedules are the recitals, clauses, paragraphs of or Schedules to this Agreement. The Schedules form part of the operative provisions of this Agreement and references to this Agreement shall, unless the context otherwise requires, include references to the recitals and the Schedules;**

h. **words denoting the singular shall include the plural and vice versa and words denoting any gender shall include all genders; and**

i. **the headings in this Agreement are for information only and are to be ignored in construing the same.**

Commencement and Duration of the Agreement

3. **This Agreement shall come into force on 1 August 2018 ("the Commencement Date").**

4. **Unless terminated in accordance with Clauses 25 to 26 or other prior lawful termination, the Agreement will be subject to review in line with the Statement of Values and Principles.**

Parties Obligations

5. **In consideration of the funding agreements set out in Clause 6, NHS Gloucestershire Clinical Commissioning Group will carry out due-diligence in relation to Private Providers which it commissions, in accordance with the NHS Standard Contract. Where patients are accessing healthcare through the Extended Choice Network, due diligence will be undertaking by the local CCG.**
6. **Subject to Clause 7, where a Clinical Commissioning Group has carried out its obligations in accordance with Clause 5, NHS Gloucestershire Clinical Commissioning Group shall recharge the Aneurin Bevan University Health Board for the cost of treatment of a Private Provider in respect of the relevant Patient. The recharge will be limited to PbR rates as set nationally or where the treatment is outside the scope of PbR then the recharge will be at the contract rates negotiated by the NHS Clinical Commissioning Group.**

7. **Aneurin Bevan University Health Board considers that a conflict of interest exists and under this Agreement, will not make reimbursement for any treatment undertaken at St Joseph's Hospital, Harding Avenue, Newport.**

Indemnity

8. **NHS Gloucestershire Clinical Commissioning Group agrees to indemnify Aneurin Bevan University Health Board against any claim (in accordance with Clause 9 below), made by a Patient against Aneurin Bevan University Health Board, arising from treatment received by them at under this agreement.**

9. **NHS Gloucestershire Clinical Commissioning Group is liable for and agrees to indemnify and to keep indemnified Aneurin Bevan University Health Board against:**
    a. **All directly occurring damages, losses, liabilities, claims, actions, costs, expenses, (including the cost of legal and/or professional services that have reasonably and properly incurred), proceedings, demands and charges whether arising under statute, contract or common law but excluding Indirect Losses, in respect of:**
        i) **Any loss of or damage to property (whether real or personal); and**
        ii) **Any injury to any person, including injury resulting in death; and**

    b. **any losses of Aneurin Bevan University Health Board**

    that result or arise from NHS Gloucestershire Clinical Commissioning Group's negligence or breach of contract in connection with performance of this Agreement except insofar as that loss, damage or injury has been caused by any act or omission by or on the part of, or in accordance with the instructions of, Aneurin Bevan University Health Board, any sub-contractors, their staff or agents.

10. **This indemnity shall not cover Aneurin Bevan University Health Board to the extent that a claim under it results from Aneurin Bevan University Health Board's negligence or wilful misconduct.**

11. **NHS Gloucestershire Clinical Commissioning Group is required to put in place appropriate indemnity cover, whether under CNST or other risk**

pooling arrangements or under commercial insurance, in respect of its potential liabilities as employer, and to the public, and for clinical and professional negligence liability to Patients. If the proceeds of any indemnity cover us insufficient to cover the settlement of any claim relating to this Agreement, NHS Gloucestershire Clinical Commissioning Group must make good any deficiency. The indemnity arrangements must remain in force until any potential liability may reasonably be considered to have ceased.

12. **Liability under this indemnity is conditional on Aneurin Bevan University Health Board discharging the following obligations. If any patient makes a claim, or notifies an intention to make a claim, against Aneurin Bevan University Health Board which may reasonably be considered likely to give rise to a liability under this indemnity (**Claim**), Aneurin Bevan University Health Board shall:**

    a. **as soon as reasonably practicable, give written notice of the Claim to NHS Gloucestershire Clinical Commissioning Group, specifying the nature of the Claim in reasonable detail;**

    b. **not waive any entitlement nor make any admission of liability, agreement or compromise in relation to the Claim without the prior written consent of NHS Gloucestershire Clinical Commissioning Group (such consent not to be unreasonably conditioned, withheld or delayed), provided that Aneurin Bevan University Health Board may settle the Claim (after giving prior written notice of the terms of settlement to the extent legally possible) to NHS Gloucestershire Clinical Commissioning Group and only in exceptional circumstances without obtaining NHS Gloucestershire Clinical Commissioning Group's consent) if Aneurin Bevan University Health Board reasonably believes that failure to settle the Claim would be prejudicial to it in any material respect.**
    Gloucestershire Clinical Commissioning Group is a member of NHS Resolution's CNST Scheme and therefore for the avoidance of doubt, any such claims will be handled by NHS Resolution except in exceptional circumstances.

    c. **give NHS Gloucestershire Clinical Commissioning Group and its professional advisers access at reasonable times (on reasonable**

prior notice) to its premises and its officers, directors, employees, agents, representatives or advisers, and to any relevant assets, accounts, documents and records within the power or control of Aneurin Bevan University Health Board, so as to enable NHS Gloucestershire Clinical Commissioning Group and its professional advisers to examine them and to take copies (at NHS Gloucestershire Clinical Commissioning Group's expense) for the purpose of assessing the Claim; and

d. **be deemed to have given to NHS Gloucestershire Clinical Commissioning Group sole authority to avoid, dispute, compromise or defend the Claim.**

13. **Aneurin Bevan University Health Board shall at all times take all reasonable steps to minimise and mitigate any loss it may suffer or incur as a result of an event that may give rise to a Claim under this indemnity.**

14. **If NHS Gloucestershire Clinical Commissioning Group Court brings court proceedings against a Private Provider for treatment as set out in this Agreement, Aneurin Bevan University Health Board provide their unequivocal consent for those proceedings to be brought under their name.**

15. **If a claim is brought by NHS Gloucestershire Clinical Commissioning Group in the circumstances set out in Clause 14 in relation to treatment provided by a Private Provider under this Agreement, Aneurin Bevan University Health Board shall co-operate with NHS Gloucestershire Clinical Commissioning Group in relation to the investigation and pursuit of the Claim.**

Anti-Bribery and Corruption

16. **Each Party covenants and undertakes with the other Party that it will not, directly or indirectly:**

a. **give, promise, offer or authorise; or**
b. **accept, request or agree to receive,**

any payment, gift, reward, rebate, contribution, commission, incentive, inducement or advantage to or from any person in contravention of the Bribery Act 2010.

Funding of Costs

17. Each Party shall bear its own costs incurred in connection with the preparation of this Agreement.

Relationship of the Parties

18. Nothing in this Agreement is intended to, or shall be deemed to, establish any partnership between any of the Parties, constitute any Party the agent of another Party, or authorise any Party to make or enter into any commitment for or on behalf of the any other Party.

Data Protection and Confidentiality

19. The Parties acknowledge their respective obligations under the Data Protection Legislation and shall give all reasonable assistance to each other where appropriate or necessary to comply with such obligations.

20. Each Party hereby acknowledges that any Information received by it from any other Party (whether before or after the date of this Agreement) is of a strictly confidential nature and undertakes not to disclose it except in accordance with this Agreement.

21. Clause 20 shall not apply to Information which:

a. **at the time of disclosure is already lawfully in the possession of the other Parties;**
b. **at the time of its disclosure is lawfully in the public domain not as a result of a breach by any person of obligations of confidentiality to which it or they are subject;**
c. **subsequent to its disclosure is lawfully acquired by the Party to which it has been disclosed; or**
d. **falls into the public domain otherwise than through any breach of the terms of this Agreement on the part of the other Parties.**

22. **The recipient Party shall restrict the disclosure of the Information and any reproduction thereof only to those of its employees and advisers who need to have access to it and only to the extent required and necessary for them to carry out their obligations set out in this Agreement. Information disclosed pursuant to this clause shall be stored securely when not in use.**

23. **Any Information supplied or disclosed by a Party shall remain the sole and exclusive property of that Party and this Agreement shall not operate to transfer ownership of the Information to the other Party.**

24. **No Party shall make any announcements or press releases in respect of this Agreement except as may be mutually agreed in writing by the Parties.**

Termination

25. **This Agreement will terminate on the Expiry Date or may be terminated in whole on the earlier of:**

    a. **the Parties mutually agreeing in writing to terminate this Agreement on the provision of not less than 3 months' Notice; or**

    b. **any Party being in material breach of any of its obligations under this Agreement and failing to remedy that breach within the period specified in a written notice from the other Party identifying the breach; or**

    c. **the Welsh Assembly and NHS England agreeing a material revision of the Statement of Values and Principles for cross border health care. The Agreement will automatically terminate on the effective date the change to the Statement of Values and Principles comes into force (or as otherwise agreed between the Parties); or**

    d. **either party terminating this Agreement on written notice and with immediate effect, if they suffer an Event of Force Majeure which persists for more than 20 Business Days without the Parties agreeing alternative arrangements.**

26. Any termination of this Agreement for whatever cause shall not affect or be deemed to affect any right or obligation of any Party which arose prior to such termination.

Correspondence and Notices

27. Notices required under this Agreement shall be signed by a duly authorised representative of the Party initiating such notice and shall be either delivered to an officer or authorised representative of the Party to whom it is directed, or sent by mail, postage prepaid to the following addresses (which may be changed by written notice from the Party in question to the other Parties):

NHS Gloucestershire Clinical Commissioning Group
Address: Sanger House, 5220 Valiant Court, Gloucester Business Park, Brockworth, Gloucester GL3 4FE
For the attention of: The Accountable Officer

Aneurin Bevan University Health Board
Address: Lodge Road, Caerleon, Newport NP18 3XQ
For the attention of: The Chief Executive

28. Any such notice shall be deemed to have been served:
    a. **if delivered by hand, when delivered; and**
    b. **if sent by first class post, 48 hours after posting,**

provided that if such notice is not received on a Business Day or is received after business hours in the place of receipt such notice will be deemed to be given on the next Business Day.

Dispute Resolution Procedure

29. Where any dispute arises in connection with this Agreement, the Parties must use their best endeavours to resolve that dispute on an informal basis within twenty (20) Business Days.

30. If any dispute is not resolved under Clause 29, the Parties' respective chief executives or nominees shall meet and co-operate in good faith to resolve the dispute within ten (10) Business Days.

31. Where any dispute is not resolved under Clauses 29 or 30, then the Parties may attempt to settle such dispute by mediation in accordance with the CEDR Model Mediation Procedure or any other model mediation procedure as agreed by the Parties. To initiate a mediation, any Party may give notice in writing (**Mediation Notice**) to the others requesting mediation of the dispute and shall send a copy thereof to CEDR or an equivalent mediation organisation as agreed by the Parties asking them to nominate a mediator. The mediation shall commence within twenty (20) Business Days of the Mediation Notice being served. No Party will terminate such mediation until each of them has made its opening presentation and the mediator has met each of them separately for at least one (1) hour. Thereafter, paragraph 14 of the Model Mediation Procedure will apply (or the equivalent paragraph of any other model mediation procedure agreed by the Parties). The Parties will co-operate with any person appointed as mediator, providing him with such information and other assistance as he shall require and will pay his costs as he shall determine or in the absence of such determination such costs will be shared equally.

32. In the absence of a solution being reached pursuant to Clauses 29 to 31 above the matters in dispute shall be referred to NHS England and NHS Wales for determination.

Variation and Waiver

33. The Agreement may only be varied by written instrument signed by the Parties.

34. Subject to Clauses 25 and 26, in the event which materially affects a Party's ability to perform their respective obligations under this Agreement, the Parties shall co-operate in good faith to make the necessary changes to this Agreement within 20 Business Days of a Parties notice that such an event has occurred or as otherwise agreed between the Parties. If the Parties are not able to agree any necessary changes the Parties within such period the Parties shall maintain the status quo and the matter shall be referred to the Dispute Resolution Procedure under Clauses 29 to 32.

35. No consent or waver, express or implied by a Party of any breach or default of any other Party in performing its obligations under this Agreement shall be deemed or construed to be a consent or waiver of any other breach of default by such Party of the same or any other obligation hereunder. Failure on the part of any Party to complain of any act or failure to act of any other Party or to declare the Party in default shall not constitute a waiver by such Party of its rights hereunder.

36. The rights and remedies provided by this Agreement are cumulative and (subject as otherwise provided in this Agreement) are not exclusive of any rights or remedies provided by law.

Entire Agreement

37. This Agreement constitutes the entire agreement between the Parties in relation to its subject matter and shall supersede all prior or contemporaneous written and oral understandings, agreements and representations relating to its subject matter, provided that no liability which any Party may otherwise have to the Parties in respect of statements made fraudulently prior to execution of this Agreement shall be excluded.

Exclusion of Third Party Rights

38. The Contracts (Rights of Third Parties) Act 1999 shall not apply to this Agreement and no rights or benefits expressly or impliedly inferred by it shall be enforceable under that Act against the Parties by any other person.

Counterparts

39. This Agreement may be executed in any number of counterparts which together shall constitute one agreement. Each Party may enter into this Agreement by executing a counterpart and this Agreement shall not take effect until it has been executed by both Parties.

Law

40. This Agreement and any non-contractual rights or obligations arising out of or in connection with it, shall be governed by and construed in accordance with English law and the Parties submit to the exclusive jurisdiction of the courts in England and Wales.

Signed on behalf of Aneurin Bevan University Health Board

.....
Print Name:

Signed on behalf of NHS Gloucestershire Clinical Commissioning Group

.....
Print Name:

Schedule 1

Definitions

the Act means the National Health Service Act 2006 (as amended by the Health and Social Care Act 2012)

Agreement means this Agreement

Business Day means a day (excluding Saturdays, Sundays and public holidays) on which banks generally are open in the City of London for the transaction of normal banking business (other than solely for trading and settlement in Euros)

Data Protection Legislation Data Protection Legislation means for the periods in which they are in force in the United Kingdom, the Data Protection Act 1998, the GDPR ((a) the General Data Protection Regulations (Regulation (EU) 2016/679) which comes into force on 25 May 2018; and (b) any equivalent legislation amending or replacing the General Data Protection Regulations (Regulation (EU) 2016/679)), the Data Protection Directive (95/46/EC), the Regulation of Investigatory Powers Act 2000, the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000 (SI 2000/2699), the Electronic Communications Data Protection Directive (2002/58/EC), the Privacy and Electronic Communications (EC Directive) Regulations 2003 (SI 2426/2003) and all applicable laws and regulations relating to the processing of personal data and privacy, including where applicable the guidance and codes of practice issued by the Information Commissioner, in each case as amended or substituted from time to time.

Event of Force Majeure means an event or circumstance which is beyond the reasonable control of the Party affected, including war, civil war, armed conflict or terrorism, strikes or lock outs, riot, fire, flood or earthquake, and which directly causes that Party to be unable to comply with all or a material part of its obligations under this Agreement.

Indirect Losses means loss of savings, loss of business opportunity, loss of goodwill or any claim for consequential loss, pure economic loss or for indirect loss of any nature.

Information means any information, data, software and correspondence, proposals and other materials containing or based (in whole or in part) on any such information or reflecting the

views, opinions or interests of the Party(ies) disclosed or exchanged, including information transferred orally, visually, electronically to the Party(ies) in connection with this Agreement.

Mediation Notice has the meaning set out in Clause 31

Patient means an individual resident in Gloucestershire registered with a Welsh GP that wishes to be referred to a Private Provider.

Private Provider means a privately owned organisation which holds a NHS Standard Contract for provision of healthcare services with a CCG.

Referral Assessment Service has the meaning set out in Recital G