

1 April 2013

BRIGHTON & HOVE CLINICAL COMMISSIONING GROUP

AND

BRIGHTON & HOVE CITY COUNCIL

**Agreement under Section 75 of the National Health Service Act 2006
for the
Joint Commissioning of
Health & Social Care Services**

FINAL D R A F T

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THIS AGREEMENT is made the day of2013

BETWEEN:

- (1) **BRIGHTON & HOVE CLINICAL COMMISSIONING GROUP** of Lanchester House, Trafalgar Place, Brighton BN1 4FU (the "**CCG**"); and
- (2) **BRIGHTON & HOVE CITY COUNCIL** of Kings House, Grand Avenue, Hove BN3 2LS (the "**Council**"),

together, the "**Parties**".

INTRODUCTION:

- (A) The CCG and the Council have agreed to enter into a partnership arrangement pursuant to section 75 of the National Health Service Act 2006 and Regulations 8(1)] and 9(1) of the NHS Bodies and Local Authorities Partnership Arrangements Regulations 2000 (SI 617) (in each case as amended), in respect of a range of health and social care services for vulnerable people as further described in this Agreement.
- (B) As part of the partnership arrangement referred to at Recital (A) above, the Parties have agreed that each party shall delegate certain of its functions to the other party under a lead commissioning arrangement. For these purposes, the Parties shall establish and maintain a non-pooled fund which is made up of contributions from the CCG and the Council (described in Schedule 5 (The Services) and Schedule 6 (Resources and VAT Treatment)), out of which payments may be made towards expenditure incurred in the exercise of any CCG Functions or Council Functions in connection with this Agreement.

NOW IT IS HEREBY AGREED as follows:

1. DEFINITIONS AND INTERPRETATION

1.1 In this Agreement unless the context otherwise requires the following words and expressions shall have the following meanings:

- "Act"** the National Health Service Act 2006 (as amended);
- "Agreement"** this agreement between the CCG and the Council comprising these terms and conditions, together with all Schedules attached hereto;
- "Arrangements"** has the meaning ascribed to it in Clause 4.1;
- "CCG Functions"** those of the functions of the CCG set out in Regulation 5 of the Regulations (and further described in Schedule 2 (CCG Functions) of this Agreement) in relation to these Arrangements and as are exercised in making arrangements for the provision of the Services, excluding the Excluded Functions;
- "Client Group"** the collection of Service Users either receiving or eligible to receive the Services and living within the administrative area of Brighton & Hove and registered with a Brighton & Hove CCG GP or as otherwise agreed between the Parties;
- "Commencement Date"** 1st April 2013
- "Contributions"** the respective financial contributions of the Parties (as set out

	in Schedule 5 (the Services) and Schedule 6 (Resources)), for use by the Lead Commissioner in connection with the Lead Commissioning of the Services in fulfilment of the Functions and in accordance with the terms of this Agreement;
"Contributions Manager"	the person holding the role of "Financial Lead" within the respective organisation;
"Council Functions"	the health related functions of the Council listed in Regulation 6 of the Regulations (and further described in Schedule 3 (Council Functions) of this Agreement) in relation to these Arrangements and making arrangements for the provision of the Services, but excluding the Excluded Functions;
Department	the Department of Health;
"DPA"	the Data Protection Act 1998, as amended from time to time;
"Event of Force Majeure"	an event or circumstance which is beyond the reasonable control of the Party claiming relief under Clause 22 (Force Majeure), including without limitation 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;
"Excluded Functions"	such Functions contained in Schedule 4 (Excluded Functions) of this Agreement and/or such Functions as the Parties may agree from time to time are excluded from the Arrangements, together with any exclusions set out in the Regulations;
"Financial Year"	the financial year running from 1 April of one year to 31 March in the next year;
"FOIA"	the Freedom of Information Act 2000, as amended from time to time;
"Functions"	the CCG Functions and the Council Functions in relation to the making of arrangements for the provision of the Services to meet the needs of the Client Group, but excluding the Excluded Functions as set out in Schedule 4 (Excluded Functions);
"Community Care Budget"	the budget allocated for the provision of services to individuals who receive an assessment under Section 47 of the NHS and Community Care Act 1990 and whose care is purchased in the independent or voluntary sector;
"HMRC"	Her Majesty's Revenue and Customs;
"Lead Commissioner"	the Council or CCG (as applicable having regard to Clause 5 (Services) herein) being the Party nominated by the Parties to perform the Lead Commissioning and to be responsible for the management of the associated non-pooled fund;
"Lead Commissioning"	the commissioning of the Services by the Lead Commissioner for the Council and the CCG as further detailed in Clause 5 (Services) of this Agreement;
"Joint Commissioning"	the management Board made up of representatives from both

Board"	the CCG and the Council (as further described at Clause 8 (Governance and Monitoring Arrangements) and Schedule 7 (Joint Commissioning Board));
"NHS"	National Health Service;
"NHS Body"	has the meaning given to it at section 275(1) of the Act, and "NHS Bodies" shall be construed accordingly;
"Quarter"	each of the following periods in the Financial Year: <ul style="list-style-type: none"> (i) 1 April to 30 June; (ii) 1 July to 30 September; (iii) 1 October to 31 December; (iv) 1 January to 31 March, and "Quarterly" shall be construed accordingly;
"Regulations"	the NHS Bodies and Local Authorities Partnership Arrangements Regulations 2000 (SI 617) as amended from time to time;
"Section 75 Flexibility"	any of the powers set out in section 75 of the Act, developed to give NHS Bodies and local authorities the flexibility to be able to respond effectively to improve services, either by joining up existing services, or developing new, co-ordinated services, and to work with other organisations to fulfil this, which may include: <p>a pooled fund arrangement;</p> <p>a lead commissioning arrangement; and</p> <p>an integrated provision arrangement;</p>
"Services"	the Services described in Clause 5 (Services) and Schedule 5 (The Services) and which the Parties have agreed will come within the Arrangements and which will (unless specified otherwise in this Agreement) be procured by the Lead Commissioner from third party providers;
"Service Users"	any individual for whose benefit the Services are provided, as further described at Schedule 5 (The Services);
"Staff"	the staff of the Council and/ or the CCG who are carrying out the Arrangements under this Agreement;
"Variation"	an addition, deletion or amendment in the Clauses of or Schedules to this Agreement, agreed to be made by the Parties in accordance with Clause 15 (Review and Variation) or Clause 16 (Change of Law);
"VAT Guidance"	the guidance published by the Department entitled "VAT Arrangements for Joint NHS/Local Authority Initiatives including Disability Equipment Stores and Welfare - Section 31 Health Act 1999" (as amended or replaced from time to time); and
"Working Day"	any day other than Saturday, Sunday, a public or bank holiday

in England and Wales.

- 1.2 References to statutory provisions shall be construed as references to those provisions as respectively amended or re-enacted (whether before or after the Commencement Date) from time to time.
- 1.3 The headings of the Clauses in this Agreement are for reference purposes only and shall not be construed as part of this Agreement or deemed to indicate the meaning of the relevant Clauses to which they relate. References to Clauses are clauses in this Agreement.
- 1.4 References to Schedules are references to the schedules to this Agreement and a reference to a Paragraph is a reference to the paragraph in the Schedule containing such reference.
- 1.5 References to a person or body shall not be restricted to natural persons and shall include a company, corporation or organisation.
- 1.6 Words importing the one gender shall include the other genders and words importing the singular number only shall include the plural.
- 1.7 Where anything in this Agreement requires the mutual agreement of the Parties, then unless the context otherwise provides, such agreement must be in writing.

2. **BACKGROUND**

- 2.1 The CCG is a clinical commissioning group established under section 14C of the Act. The CCG commissions certain mental health services for the Client Group in Brighton & Hove.
- 2.2 The Council is a local authority established under the Local Government Act 1972 (as amended) and commissions social services related to the mental health services described in clause 2.1 above as well as certain physical disability services and learning disability services for the Client Group in Brighton & Hove.
- 2.3 The CCG and the Council have duties and powers to provide care to the Client Group and section 82 of the Act requires both local authorities and NHS Bodies when exercising their respective functions to co-operate to secure and advance the health and welfare of the people of England and Wales. Furthermore, under relevant guidance, local authorities and NHS Bodies are encouraged to consider partnership working, including Lead Commissioning under the Act. Section 75 of the Act and the Regulations have introduced powers for local authorities and NHS Bodies to set up joint working arrangements.
- 2.4 The Parties are entering into this Agreement (which includes Lead Commissioning) in exercise of the powers under section 75 of the Act and pursuant to the Regulations.
- 2.5 The CCG and the Council have, in accordance with Regulation 4(2) of the Regulations jointly consulted with such persons as appear to them to be affected by the Arrangements.
- 2.6 The CCG is satisfied that the Arrangements are consistent with the commissioning plan prepared by it under Section 14Z11 of the Act.
- 2.7 The Parties are satisfied that the arrangements contemplated by this Agreement are likely to lead to an improvement in the way that their functions are exercised.
- 2.8 The CCG and the Council have approved the terms of this Agreement and agree to work together in accordance with the terms of the Agreement.

3. DURATION OF THE AGREEMENT

- 3.1 This Agreement shall take effect on the Commencement Date and shall continue for a period of 3 years, subject to earlier termination in accordance with the provisions of Clause 17 (Termination) and any extension agreed in accordance with Clause 3.2 below.
- 3.2 This Agreement may, by written agreement of both parties, be extended on 31st March 2016 for a further period to be defined, as part of such agreement, at that time.

4. SUMMARY OF THE ARRANGEMENTS

- 4.1 The Parties have agreed that, with effect from the Commencement Date, the partnership arrangements are to comprise:
- 4.1.1 the Lead Commissioning arrangements set out in this Agreement (and more particularly described in Schedule 5 (The Services));
 - 4.1.2 the management of a non-pooled fund (as further described in Schedule 5 (The Services) and Schedule 6 (Resources and VAT Treatment)) for the revenue expenditure on the Services;
 - 4.1.3 provision of the Contributions by each Party, insofar as is required for the exercise of the Functions (including as set out in Schedule 9 (Shared Management Support cost)
 - 4.1.4 performance of the Functions specified in Schedule 2 (CCG Functions) and Schedule 3 (Council Functions) in accordance with this Agreement; and
- full engagement in the Joint Commissioning Board established for the monitoring of the Functions and the Services (as set out and described in Schedule 7 (Joint Commissioning Board));the "**Arrangements**".
- 4.2 Without prejudice to the other provisions of this Agreement, the primary objective of the Parties in entering into this Agreement is to improve the commissioning of the Services in accordance with the aims and outcomes outlined in Schedule 1 (Aims and Outcomes).
- 4.3 The Parties hereby represent that they have obtained all necessary consents sufficient to ensure the delegation of Functions provided for by this Agreement.
- 4.4 It is the Parties' intention that the Arrangements shall be the mechanism through which the Functions shall be fulfilled.
- 4.5 The Parties wish to use this Agreement to enable either the Council or CCG to act as the Lead Commissioner for designated service areas, as identified in Clause 5 below.
- 4.6 The Lead Commissioner shall (without limitation):
- 4.6.1 act as the Lead Commissioner and exercise both the Council and CCG functions concurrently;
 - 4.6.2 administer the Parties' Contributions in accordance with the provisions of this Agreement; and
 - 4.6.3 be responsible for the operational management of Staff that are carrying out the relevant Functions in respect of the applicable designated service area (but without thereby incurring any legal responsibility for them, unless actually employed by such Lead Commissioner).

5. SERVICES

5.1 The services areas covered under this Agreement are as follows:

Lead Commissioner = Council	Lead Commissioner = CCG
Integrated Communication Equipment Store	Mental Health
Carers	Dementia
Personalisation & Support	Short Term Services

5.2 The Lead Commissioner shall commission the services set out in Schedule 5 (The Services), in order to satisfy the Functions and its other obligations set out in this Agreement and in accordance with the procedure set out in Schedule 8 (Standards of Conduct).

6. SERVICE STANDARDS AND PERFORMANCE MANAGEMENT

6.1 The Lead Commissioner shall use all reasonable endeavours to ensure that the Services under this Agreement are carried out in accordance with all applicable national and local standards, including:

6.1.1 the agreed set of standards that apply to the Services and specific aspects of the Services, as set out in Schedule 8 (Standards of Conduct); and

6.1.2 each Party's respective standing orders and standing financial instructions, and will be monitored by applicable bodies / regulators, including the Care Quality Commission and Monitor.

6.2 Without prejudice to Clause 6.1 above, the Lead Commissioner shall exercise its duties, obligations and functions arising out of or in relation to this Agreement effectively, efficiently, fairly and in good faith.

6.3 The Lead Commissioner shall report to the Joint Commissioning Board as required on the operation of the Arrangements (which, to avoid doubt, shall include but not be limited to, the operation of the Services and performance levels against agreed performance measures, targets and priorities) and the exercise of the Functions by the Lead Commissioner. The Lead Commissioner agrees that all such reporting shall take place not less often than Quarterly as well as annually throughout the duration of this Agreement.

6.4 The Parties shall agree the format of, and the content to be included in, the reports to the Joint Commissioning Board referred to at Clause 6.3 above. Any disagreement as to the format of the content to be included in the reports may be referred to the Joint Commissioning Board for its determination and/or instruction.

6.5 The Joint Commissioning Board shall ensure that Service Users and their families fully participate at all levels of the Lead Commissioner's work under these Arrangements and that an annual evaluation of the Lead Commissioner takes place and includes outcomes which are qualitative as well as quantitative.

7. LEAD COMMISSIONING STRUCTURE

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- 7.1 The CCG's Chief Operating Officer shall have overall responsibility for the carrying out of the Functions when the CCG is performing the Lead Commissioning for the Client Group.
 - 7.2 The Council's Director of Adult Social Care shall have overall responsibility for the carrying out of the Functions when the Council is performing the Lead Commissioning for the Client Group.
 - 7.3 The management structure for Lead Commissioning is out in Schedule 10.
 - 7.4 The parties may agree changes in the management structure for Lead Commissioning in writing in accordance with clause 15. Such changes shall only be made in accordance with all applicable law and guidance and after such consultation as shall be required by law and guidance.

8. GOVERNANCE AND MONITORING ARRANGEMENTS

- 8.1 The Parties shall jointly monitor the effectiveness of the Arrangements.
- 8.2 The Parties agree that they shall establish and maintain the Joint Commissioning Board, whose role and function shall be as described at Schedule 7 (the Joint Commissioning Board). The Joint Commissioning Board's terms of reference shall be reviewed by the Parties on an annual basis and, if necessary, amended to ensure that the Joint Commissioning Board continues to assist the Parties to meet the aims and objectives of the Arrangements.
- 8.3 The role of the Joint Commissioning Board is to manage and monitor the Council's/ CCG's role as Lead Commissioner, the exercise of the Functions and the application of the Contributions, the management and administration of the Contributions, together with supporting the implementation of any strategic plan or variation to the Services as provided for in Schedule 5 (Services).

Clinical and Corporate Governance

- 8.4 The CCG is subject to a duty of clinical governance, which (for the purposes of this Agreement) shall be defined as "a framework through which it is accountable for continuously improving the quality of its services and safeguarding high standards of care by creating an environment in which excellence in clinical care will flourish".
- 8.5 The Council acknowledges that clinical governance (as described at Clause 8.4 above) applies to the treatment of NHS patients. Such patients are entitled to expect to receive services which are part of a clinical governance system irrespective of where they are treated.
- 8.6 The Arrangements will therefore themselves be subject to clinical governance obligations to the extent they are relevant to the process of commissioning the Services and the Lead Commissioner will require that all Services are subject to clinical governance obligations relevant to the Services (as set out in Schedule 10 (Standards of Conduct)) and the Council shall use reasonable endeavours to co-operate with all reasonable requests from the CCG, which the CCG considers necessary in order to fulfil its obligations.
- 8.7 The Lead Commissioner shall comply with the principles and standards of corporate governance relevant to NHS Bodies and local authorities.

9. INSPECTION

- 9.1 The Parties shall co-operate with any investigation undertaken by the Care Quality Commission and/or the Audit Commission and/ or any regulatory authority/ body.

10. FINANCIAL ARRANGEMENTS

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- 10.1 The Parties acknowledge that they are not entering into a Pooled Fund arrangement pursuant to section 75(2)(a) of the Act and Regulation 7 of the Regulations.
- 10.2 The Parties agree to adhere to the financial arrangements more fully set out in Schedule 5 (The Services) and Schedule 6 (Resources and VAT Treatment) Part 1 (Financial Resources) of this Agreement.
- 10.3 Each Lead Commissioner will be responsible for the proper management and auditing of the accounts relevant to such Lead Commissioning activities as are its responsibility (as identified in Section 5 above) and the performance of its obligations under this Agreement and shall appoint an officer ("**the Contributions Manager**") to be responsible for managing and administering the Parties' Contributions to the extent required in Schedule 6 (Resources) Part 1 (Financial resources).
- 10.4 Any overspends or underspends that may occur throughout the term of this Agreement shall be dealt with according to the provisions of Part 2 (Overspends and Underspends) of Schedule 6 (Resources).
11. **TREATMENT OF VAT**
- 11.1 The Parties shall agree that their respective Contributions shall be treated, for VAT purposes, in accordance with the provisions set out in Schedule 6 (Resources) Part 3 (VAT Regime).
12. **STAFFING ROLES**
- 12.1 The Parties have agreed that the Arrangements shall be facilitated by the Staff resourcing set out in Schedule 9
- 12.2 The CCG and the Council shall make available the level of staff resources required to carry out the Functions (as applicable) in relation to their respective Lead Commissioner responsibilities.
13. **CONFLICTS OF INTEREST**
- 13.1 The Lead Commissioner shall use all reasonable endeavours to ensure that no member of staff or representative of the Lead Commissioner shall put themselves in a position whereby duty and private interest conflict. The Parties' policies for identifying and managing conflicts of interest should be adhered to.
14. **INDEMNITIES, LIABILITY AND INSURANCE**
- 14.1 Nothing in this Agreement shall affect:
- 14.1.1 the liability of the CCG to the Service Users in respect of the CCG Functions; or
- 14.1.2 the liability of the Council to the Service Users in respect of the Council Functions.
- 14.2 Each Party (the "First Party") shall indemnify and keep indemnified the other Party (the "Second Party") and its officers, employees and agents against any damages, costs, liabilities, losses, claims or proceedings whatsoever, arising in respect of:
- 14.2.1 any damage to property (real or personal) including, but not limited to, any infringement of third party intellectual property, including patents, copyrights and registered designs;
- 14.2.2 any death or personal injury;
- 14.2.3 any fraudulent or dishonest act of employees;

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- 14.2.4 any Service User complaint or investigation by the Parliamentary and Health Service Ombudsman or the Local Government Ombudsman or any similar entity, arising out of or in connection with the Agreement, to the extent that such damages, costs, liabilities, losses, claims or proceedings shall be due directly or indirectly to any negligent act or omission, any breach of this Agreement or any breach of statutory duty by the First Party, its officers employees or agents. Where the Parties are unable to agree any such apportionment of liability and consequential indemnity under this Clause 14 the disputes procedure in Clause 23 (Dispute Resolution) shall apply.
- 14.3 For the avoidance of doubt, the Second Party shall be under a duty to mitigate its losses in accordance with general principles of common law and the indemnity on the part of the First Party shall not extend to damage, cost, liability, loss, claim or proceedings incurred by reason of or in consequence of any negligent act or omission, misconduct or breach of this Agreement by the Second Party.
- 14.4 Each Party shall ensure that it maintains appropriate insurance arrangements in respect of employer's liability, liability to third parties and all other potential liability under this Agreement.
- 15. REVIEW AND VARIATION**
- 15.1 If at any time during the term of this Agreement the Council or the CCG requests in writing any change to the Services described or the manner in which the Services are commissioned, then the provisions outlined in this Clause 15 shall apply.
- 15.2 The Party proposing the Variation ("the Proposer") shall provide a report in writing to the other Party (the "Report") setting out:
- 15.2.1 the Variation proposed;
 - 15.2.2 the date upon which the Proposer requires it to take effect;
 - 15.2.3 a statement of whether the Variation will result in an increase or decrease in Contributions by reference to the relevant component elements of the Service or Services the subject of change;
 - 15.2.4 a statement on the individual responsibilities of the CCG and the Council for any implementation of the Variation;
 - 15.2.5 a timetable for implementation of the Variation;
 - 15.2.6 a statement of any impact on, and any changes required to the Services;
 - 15.2.7 details of any proposed staff and employment implications; and
 - 15.2.8 the date for expiry of the Report.
- 15.3 Following receipt by the receiving Party ("the Recipient") of the Report and allowing the Recipient 10 Working Days from receipt in which to consider the Report, the Parties shall meet to discuss the proposed Variation and acting reasonably and in good faith shall use reasonable endeavours to agree the Variation.
- 15.4 Where the Parties are unable to agree on the terms of the Variation then the Agreement may terminate in accordance with Clause 17.3.3
- 15.5 If agreement in principle is reached then the Parties shall confirm in writing their decision to proceed with the proposed Variation and shall agree a formal Variation to this Agreement.

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- 15.6 All Variations made to this Agreement pursuant to this Clause 15 or otherwise shall be agreed between the Parties and made in writing.

16. **CHANGE OF LAW**

- 16.1 If at any time during the term of this Agreement a change to the manner in which a Service or the Services are commissioned is required by operation of NHS or Local Government law through statutes, orders, regulations, instruments and directions made by the Secretaries of State for Health and Local Government respectively or others duly authorised pursuant to statute or other changes in the law which relate to the powers, duties and responsibilities of the Parties and which have to be complied with, implemented or otherwise observed by the Parties in connection with the Functions for the time being, then the provisions outlined in this Clause 16 shall apply.
- 16.2 The Parties shall jointly investigate the likely impact of the required change on the Services and any other aspect of the Agreement and shall prepare a Report in writing, setting out:
- 16.2.1 the Variation proposed;
 - 16.2.2 the date upon which it should take effect;
 - 16.2.3 a statement of whether the Variation will result in an increase or decrease in Contributions by reference to the relevant component elements of the Service or Services the subject of change;
 - 16.2.4 a statement on the individual responsibilities of the CCG and the Council for any implementation of the Variation;
 - 16.2.5 a timetable for implementation of the Variation;
 - 16.2.6 a statement of any impact on, and any changes required to the Services;
 - 16.2.7 details of any proposed staff and employment implications; and
 - 16.2.8 the date for expiry of the Report.
- 16.3 Where the Parties are unable to agree on the terms of the Variation then the Agreement may be terminated in accordance with Clause 17.3.3.
- 16.4 The Parties shall confirm in writing their decision to proceed with the proposed Variation and shall agree a formal Variation, in writing, to this Agreement.

17. **TERMINATION**

- 17.1 Either Party ("**the First Party**") may, at any time by notice in writing to the other Party, terminate this Agreement if the other Party is in default of its obligations under this Agreement (the "**Defaulting Party**") and:
- 17.1.1 if such default is capable of remedy, fails to comply with a written notice from the First Party to remedy such default within a reasonable period (which shall be specified in such written notice), such termination notice to take effect two (2) weeks from its date of receipt; or
 - 17.1.2 if such default is not capable of remedy, such termination notice shall take effect upon receipt.
- 17.2 Either Party may terminate this Agreement:
- 17.2.1 for convenience, by giving no less than twelve (12) months' notice in writing to the other Party; or

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- 17.2.2 immediately on written notice, if the other Party suffers an Event of Force Majeure and such event persists for more than twenty (20) Working Days following the service of the notice referred to at Clause 22.4.2;
- 17.3 Either Party ("**the First Party**") may terminate this Agreement by giving the other Party not less than 6 months' notice in writing if:
- 17.3.1 the First Party's fulfilment of its obligations hereunder would be in contravention of any guidance from any Secretary of State issued after the date hereof;
- 17.3.2 the fulfilment of the Arrangements would be ultra vires; or
- 17.3.3 the Parties are unable to agree a Variation to this Agreement in accordance with Clause 15 (Review and Variation) and/or Clause 16 (Change of Law) so as to enable either/ both Parties to fulfil its/ their obligations in accordance with law and guidance.

18. **EFFECTS OF TERMINATION**

- 18.1 Upon termination of this Agreement for any reason whatsoever, the following shall apply:
- 18.1.1 termination of this Agreement shall have no effect on the liability of either Party to make payment of any sums due under this Agreement, nor any rights or remedies of either Party already accrued, prior to the date upon which such termination takes effect;
- 18.1.2 upon termination of this Agreement, the Parties agree that they will work together and co-operate to ensure that the winding down and disaggregation of the integrated and joint activities is carried out smoothly and with as little disruption as possible to individual Service Users, the Client Group as a whole, Staff, the Parties and third parties, in accordance with Schedule 12 (Winding Down Protocol); and
- 18.1.3 the Parties shall ensure that payment of the Contributions, including the handling of any potential remaining overspend or underspend, is carried out in accordance with the procedures set out in Schedule 12 (Winding Down Protocol).
- 18.1.4 Upon termination, but subject to the provisions of Schedule 12 (Winding Down Protocol), the Contributions shall continue to be used by the Lead Commissioner only to pay for any of the Services delivered by third parties under contracts approved by the Joint Commissioning Board until the earliest date at which such contracts can also be validly terminated.

19. **CONFIDENTIALITY**

- 19.1 Except as required by law and specifically pursuant to Clause 21 (Freedom of Information), each Party agrees at all times during the continuance of this Agreement and after its termination or expiry to keep confidential any and all information, data and material of any nature which either Party may receive or obtain in connection with the operation of this Agreement or otherwise relating in any way to the business, operations and activities of the other Party, its employees, agents and/or any other person with whom it has dealings including any Service User of either Party. For the avoidance of doubt this Clause shall not affect the rights of any workers under section 43 A-L of the Employment Rights Act 1996.
- 19.2 The Parties agree to provide or make available to each other sufficient information concerning their own operations and actions and concerning Service User information

(including material affected by the DPA in force at the relevant time) to enable efficient operation of the Arrangements (which to avoid doubt shall include the Services).

20. DATA PROTECTION

- 20.1 The Parties acknowledge their respective duties under the DPA and shall give all reasonable assistance to each other where appropriate or necessary to comply with such duties.
- 20.2 To the extent that the Lead Commissioner is acting as a Data Processor (as such term is defined in the DPA) on behalf of the other Party, the Lead Commissioner shall, in particular, but without limitation:
- 20.2.1 only process such Personal Data as is necessary to perform its obligations under this Agreement, and only in accordance with any instruction given by the other Party under this Agreement;
 - 20.2.2 put in place appropriate technical and organisational measures against any unauthorised or unlawful processing of such Personal Data, and against the accidental loss or destruction of or damage to such Personal Data having regard to the specific requirements in Clause 20.2.3 below, the state of technical development and the level of damages that may be suffered by a Data Subject (as such term is defined in the DPA) whose Personal Data is affected by such unauthorised or unlawful processing or by its loss, damage or destruction;
 - 20.2.3 take reasonable steps to ensure the reliability of employees who will have access to such Personal Data, and ensure that such employees are aware of and trained in the policies and procedures identified in Clauses 20.3.3 - 20.3.5 below; and
 - 20.2.4 not cause or allow such Personal Data to be transferred outside the European Economic Area without the prior consent of the other Party.
- 20.3 The Lead Commissioner shall ensure that Personal Data is safeguarded at all times in accordance with the DPA and other relevant data protection legislation, which shall include without limitation the obligation to:
- 20.3.1 Will comply with statutory requirements regarding information governance self-assessments;
 - 20.3.2 have an information guardian able to communicate with the Joint Commissioning Board, who will take the lead for information governance and from whom the Joint Commissioning Board shall receive regular reports on information governance matters including details of all data loss and confidentiality breaches;
 - 20.3.3 (where transferred electronically) only transfer essential data that is (i) necessary for direct Service User care; and (ii) encrypted to the higher of the international data encryption standards for healthcare and the National Standards (this includes, but is not limited to, data transferred over wireless or wired networks, held on laptops, CDs, memory sticks and tapes);
 - 20.3.4 have policies which are rigorously applied that describe individual personal responsibilities for handling Personal Data;
 - 20.3.5 have agreed protocols for sharing Personal Data with other NHS organisations and non-NHS organisations; and

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- 20.3.6 have a system in place and a policy for the recording of any telephone calls, where appropriate, in relation to the Services, including the retention and disposal of such recordings.

21. **FREEDOM OF INFORMATION**

- 21.1 Each Party acknowledges that the other Party is subject to the requirements of the FOIA and each Party shall assist and co-operate with the other (at their own expense) to enable the other Party to comply with its information disclosure obligations.
- 21.2 Where a Party receives a "request for information" (as defined in the FOIA) in relation to information which it is holding on behalf of the other Party, it shall (and shall procure that its sub-contractors shall):
 - 21.2.1 transfer the request for information to the other Party as soon as practicable after receipt and in any event within two (2) Working Days of receiving the request for information;
 - 21.2.2 provide the other Party with a copy of all information in its possession or power in the form that the other Party requires within five (5) Working Days (or such other period as may be agreed) of the other Party requesting that information; and
 - 21.2.3 provide all necessary assistance as reasonably requested to enable the other Party to respond to the request for information within the time for compliance set out in section 10 of the FOIA.
- 21.3 Where a Party receives a request for information which relates to the Agreement, it shall inform the other Party of the request for information as soon as practicable after receipt and in any event within two (2) Working Days of receiving the request for information.
- 21.4 If either Party determines that information must be disclosed pursuant to Clause 21.3, it shall notify the other Party of that decision at least two (2) Working Days before disclosure.
- 21.5 Each Party shall be responsible for determining at its absolute discretion whether the relevant information is exempt from disclosure or is to be disclosed in response to a request for information.
- 21.6 Each Party acknowledges that the other Party may be obliged under the FOIA to disclose information:
 - 21.6.1 without consulting with the other Party; or
 - 21.6.2 following consultation with the other Party and having taken its views into account.

22. **FORCE MAJEURE**

- 22.1 Where a Party is (or claims to be) affected by an Event of Force Majeure, it shall take all reasonable steps to mitigate the consequences of it, resume performance of its obligations as soon as practicable and use all reasonable efforts to remedy its failure to perform.
- 22.2 Subject to Clause 22.1, the Party claiming relief shall be relieved from liability under this Agreement to the extent that because of the Event of Force Majeure it is not able to perform its obligations under this Agreement.

22.3 The Party claiming relief shall serve initial written notice on the other Party immediately it becomes aware of the Event of Force Majeure. This initial notice shall give sufficient details to identify the particular event.

22.4 The Party claiming relief shall then either:

22.4.1 serve a detailed written notice within a further five (5) Working Days. This detailed notice shall contain all relevant available information relating to the failure to perform as is available, including the effect of the Event of Force Majeure, the mitigating action being taken and an estimate of the period of time required to overcome it; or

22.4.2 in the event it reasonably believes that the effects of the Event of Force Majeure will make it impossible for the Arrangements to continue, serve notice of this to the other Party and the Agreement will terminate in accordance with Clause 17.2.2 of this Agreement.

23. **DISPUTE RESOLUTION**

23.1 The Parties shall use their best efforts to negotiate in good faith and settle any dispute that may arise out of or relate to this Agreement. If any dispute cannot be settled amicably through ordinary negotiations, then it shall be referred to the Chief Executive of the Council and the Chief Executive of the CCG for discussion and resolution.

23.2 Each Party shall use all reasonable endeavours to reach a negotiated resolution to the dispute through the above dispute resolution procedure. If the dispute is not resolved, the Parties will use reasonable endeavours to settle it by mediation in accordance with the Centre for Effective Dispute Resolution ("**CEDR**") Model Mediation Procedure ("**the Model Procedure**").

23.3 To initiate the mediation, a Party must give notice in writing ("**ADR notice**") to the other Party requesting a mediation in accordance with Clause 23.2.

23.4 The procedure in the Model Procedure will be amended to take account of:

23.4.1 any relevant provisions in this Agreement;

23.4.2 any other agreement which the Parties may enter into in relation to the conduct of the mediation ("**Mediation Agreement**").

23.5 The costs of the mediation shall be met in equal shares by the Parties and will not be paid from the Contributions.

24. **NOTICES**

24.1 Any notice or communication in relation to this Agreement shall be in writing.

24.2 Any notice or communication to the Council shall be deemed effectively served if sent by registered post or delivered by hand to the Council at the address set out above and marked for the Chief Executive or to such other addressee and address notified from time to time to the Joint Commissioning Board for service on the Council.

24.3 Any notice or communication to the CCG shall be deemed effectively served if sent by registered post or delivered by hand to the address set out above and marked for the attention of the Chief Executive or to such other addressee and address notified from time to time to the Joint Commissioning Board for service on the CCG.

24.4 Any notice served by hand delivery shall be deemed to have been served on the date it is delivered to the addressee. Where notice is posted, it shall be sufficient to prove that the notice was properly addressed and posted and the addressee shall be

deemed to have been served with the notice forty-eight (48) hours after the time it was posted.

25. EXCLUSION OF PARTNERSHIP AND AGENCY

25.1 Nothing in this Agreement shall create or be deemed to create a legal partnership under the Partnership Act 1890 or the relationship of employer and employee between the Parties or render either Party directly liable to any third party for the debts, liabilities or obligations of the other Party.

25.2 Save as specifically authorised under the terms of this Agreement, neither Party shall hold itself out as the agent of the other Party.

26. ASSIGNMENT AND SUB-CONTRACTING

26.1 This Agreement, and any right and conditions contained in it, may not be assigned or transferred by either Party without the prior written consent of the other Party, except to any statutory successor to the relevant function.

27. THIRD PARTY RIGHTS

27.1 The Contracts (Rights of Third Parties) Act 1999 shall not apply to this Agreement and accordingly the Parties to this Agreement do not intend that any third party should have any rights in respect of this Agreement by virtue of that act.

28. COMPLAINTS

28.1 Any complaints relating to Council Functions shall be dealt with in accordance with the statutory complaints procedure of the Council.

28.2 Any complaints relating to the CCG Functions shall be dealt with in accordance with the statutory complaints procedure of the CCG.

28.3 Insofar as any complaint may relate to the content of this Agreement or to the operation of the Arrangements, such complaints shall be referred to the Joint Commissioning Board or such Joint Commissioning Board member or sub-committee made up of Joint Commissioning Board members as it nominates for the procedure adopted by it for the handling of complaints to be carried through.

28.4 All complaints shall be reported by the Parties to the Joint Commissioning Board.

29. ENTIRE AGREEMENT

29.1 This Agreement constitutes the entire agreement and understanding of the Parties and supersedes any previous agreement between the Parties relating to the subject matter of this Agreement.

30. SEVERABILITY

30.1 If any term, condition or provision contained in this Agreement shall be held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision shall not affect the validity, legality or enforceability of the remaining parts of this Agreement.

31. WAIVER

31.1 The failure of any Party to enforce at any time or for any period of time any of the provisions of this Agreement shall not be construed to be a waiver of any such provision and shall in no matter affect the right of that Party thereafter to enforce such provision.

31.2 No waiver in any one or more instances of a breach of any provision hereof shall be deemed to be a further or continuing waiver of such provision in other instances.

32. **COSTS AND EXPENSES**

32.1 Each Party shall be responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution of this Agreement.

33. **GOVERNING LAW AND JURISDICTION**

33.1 Subject to the provisions of Clause 23 (Dispute Resolution) this Agreement shall be governed by and construed in accordance with English Law, and the Parties irrevocably agree that the courts of England shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this Agreement.

34. **FAIR DEALINGS**

34.1 The parties recognise that it is impracticable to make provision for every contingency which may arise during the life of this Agreement and they declare it to be their intention that this Agreement shall operate between them with fairness and without detriment to the interests of either of them and that if in the course of the performance of this Agreement, unfairness to either of them does or may result then the other shall use its reasonable endeavours to agree upon such action as may be necessary to remove the cause or causes of such unfairness.

SCHEDULE 1
AIMS AND OUTCOMES

1. The Parties wish to use this Agreement to enable the Lead Commissioning arrangements for the Services, which have been categorised into 6 designated service areas, as listed in Clause 5 (Services) of the Agreement and more specifically detailed in Schedule 5 (The Services).
2. Without prejudice to the other provisions of this Agreement, the primary objective of the Parties in entering into this Agreement is to improve the commissioning of the Services by:-
 - 1.1 analysing local needs, gaps in current service provision and capacity and demand issues, so as to ensure investment is targeted and cost effective;
 - 1.2 commissioning integrated services and seamless care pathways, which will improve outcomes and service user/carer experience of the Services; and which shall be achieved by (without limitation)
 - 1.3 synergising business planning, reporting procedures and other bureaucratic requirements between the Parties;
 - 1.4 aligning budgets to improve the efficiency and cost-effectiveness of Services provision/ commissioning;
 - 1.5 improved team working and priority setting;
 - 1.6 a higher level of accountability via the Joint Commissioning Board.

SCHEDULE 2
CCG FUNCTIONS

1. For the purposes of this Schedule 2 (CCG Functions), Schedule 3 (Council Functions) and Schedule 4 (Excluded Functions), reference to legislation and provisions within such legislation mirrors the references contained in the Regulations as at the Commencement Date, and shall be deemed to include any and all replacement and amending legislation and provisions as may come into force from time to time whether prior to or following the Commencement Date.
2. The NHS functions are:
 - 2.1 the functions of arranging for the provision of services under sections 3, 3A and 3B of, and paragraphs 9 to 11 of Schedule 1, to the 2006 Act, including rehabilitation services and services intended to avoid admission to hospital;
 - 2.2 the functions of providing the services referred to in paragraph 2.1, pursuant to arrangements made by a clinical commissioning group or the NHS Commissioning Board;
 - 2.3 the functions of arranging for the provision of services under section 117 of the Mental Health Act 1983; and
 - 2.4 the functions of providing services referred to in paragraph 2.3 pursuant to arrangements made by a clinical commissioning group or the NHS Commissioning Board;
 - 2.5 The functions of making direct payments under:
 - 2.5.1 section 12A(1) of the National Health Service Act 2006 (direct payments for health care); and
 - 2.5.2 the National Health Service (Direct Payments) Regulations 2010; and
 - 2.5.3 the functions under Schedule A1 of the Mental Capacity Act 2005.

SCHEDULE 3
COUNCIL FUNCTIONS

The health-related functions are:-

1. The functions specified in Schedule 1 to the Local Authority Social Services Act 1970 except for those Functions listed at Schedule 4 (Excluded Functions);
2. The functions under sections 7 or 8 of the Disabled Persons (Services, Consultation and Representation) Act 1986;
3. The functions of providing, or securing the provision of recreational facilities under section 19 of the Local Government (Miscellaneous Provisions) Act 1976;
4. The functions of local authorities under the Education Acts as defined in section 578 of the Education Act 1996;
5. The functions of local housing authorities under Part I of the Housing Grants, Construction and Regeneration Act 1996 and under Parts VI and VII of the Housing Act 1996;
6. The functions of local authorities under section 126 of the Housing Grants, Construction and Regeneration Act 1996;
7. The functions of waste collection or waste disposal under the Environmental Protection Act 1990;
8. The functions of providing environmental health services under sections 180 and 181 of the Local Government Act 1972;
9. The functions of local highway authorities under the Highways Act 1980 and section 39 of the Road Traffic Act 1988;
10. The functions under section 63 (passenger transport) and section 93 (travel concession schemes) of the Transport Act 1985;
11. Where the Parties enter into arrangements under regulation 7(1) or 8(1) in respect of the provision of accommodation under sections 21 or 26 of the National Assistance Act 1948, the function of charging for that accommodation under section 22, 23(2) or 26 of that Act;
12. Where the Parties enter into arrangements under regulation 7(1) or 8(1) in respect of the provision of a service under any enactment mentioned in section 17(2)(a) to (c) of the Health and Social Services and Social Security Adjudications Act 1983, the function of charging for that service under that section; and
13. The functions of local authorities under or by virtue of sections 2B or 6C (1) of, or Schedule 1 to, the 2006 Act.

SCHEDULE 4
EXCLUDED FUNCTIONS

1. CCG Functions shall not include the following:
 - 1.1 surgery;
 - 1.2 radiotherapy;
 - 1.3 termination of pregnancies;
 - 1.4 endoscopy;
 - 1.5 the use of Class 4 laser treatments and other invasive treatments; and
 - 1.6 emergency ambulance services; and
2. The Council Functions shall not include any functions pursuant to the following:
 - 2.1 subject to Regulation 6(k) of the Regulations, sections 22, 23(3), 26(2) to (4), 43, 45 and 49 of the National Assistance Act 1948;
 - 2.2 sections 6 and 7B of the Local Authority Social Services Act 1970;
 - 2.3 section 3 of the Adoption and Children Act 2002;
 - 2.4 sections 114 and 115 of the Mental Health Act 1983;
 - 2.5 section 17 of the Health and Social Services and Social Security Adjudications Act 1983; and
 - 2.6 Parts VII to X and section 86 of the Children Act 1989,

Or any other functions that are specified in the Regulations as amended from time to time as being excluded from section 75 arrangements.
3. To avoid doubt:
 - 3.1 All functions that are not specified as either Council Functions in Schedule 3 or CCG Functions in Schedule 4 of this Agreement shall be Excluded Functions; and
 - 3.2 Any Functions of either Party that do not relate to or benefit any individual falling within the Client Group shall be Excluded Functions.

