

Appendix B

HAMMERSMITH AND FULHAM PRIMARY CARE TRUST (1)

AND

[NON-NHS PROVIDER] (2)

**TERMS AND CONDITIONS FOR THE
PROVISION OF HEALTH SERVICES**

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PARTIES:

- (1) **HAMMERSMITH AND FULHAM PRIMARY CARE TRUST** whose principal office is at Parsons Green Centre, 5/7 Parsons Green, London SW6 4UL (the "Commissioner"); and
- (2) **[NON-NHS PROVIDER]** whose principal office is at [] (the "Provider").

WHEREAS:

- (A) The Commissioner wishes to secure the provision of health and support services to Patients and the Provider wishes to provide such services.
- (B) The Commissioner and the Provider have agreed to enter into this Agreement for the provision of Services to Patients on the terms and conditions specified below.

1. DEFINITIONS AND INTERPRETATION

1.1 In this Agreement unless the context otherwise requires, the following terms have the following meanings:

- "Act"** means the Health and Social Care (Community Health and Standards) Act 2003;
- "Annual Contract Value"** means the figure set out in Schedule C being the value of the totality of the Services (including Booked Services) in any Contract Year;
- "Authorised NHS Persons"** means the Commissioner and any body or person concerned with the treatment or care of a Patient approved by the Commissioner;
- "Booked Services"** means those of the Services from time to time listed in Schedule A, as being subject to Patient Booking (as defined in that Schedule), to the extent that they do not include any Non-Elective care;
- "Commencement Date"** 1st April 2007
- "Commissioning Representative"** means the person from time to time appointed under Clause 8.2;
- "Confidential Information"** means any information or data in whatever form Disclosed which by its nature is confidential or which the Disclosing Party states in writing to the Receiving Party is to be regarded as confidential, or which is marked 'confidential' (including, without limitation, financial information, or marketing or development or work force plans and information, and information relating to services or products) but which is not Patient Health Records or information relating to a particular Patient, or Personal Data;
- "Consultant"** means a person employed or engaged by the Provider of equivalent standing and skill as a person appointed by a NHS body in accordance with the Law governing the appointment of consultants;

"Contract Term"	means the period of time defined in Clause 2;
"Contract Year"	means the period of 12 Months beginning on 1 April in any year;
"Commissioner"	means the Commissioner or one of its Associates identified in writing to the Provider;
"Default Interest Rate"	means 2% over LIBOR;
"Disclosed"	<p>means disclosed before, on or after the Commencement Date, in writing, by spoken word or by any other means, either directly by one Party to the other Party or indirectly:</p> <ul style="list-style-type: none"> (a) by the Commissioner (as the "Disclosing Party") to the Provider or any of its Sub-contractors (as the "Receiving Party"); (b) by the Provider or any of its Sub-contractors (as the "Disclosing Party") to the Commissioner (as the "Receiving Party"); or (c) by the employees, agents, contractors, consultants or advisers of the Disclosing Party to those of the Receiving Party <p>and "Disclosing Party" means the person or organisation disclosing, and "Receiving Party" means the person or organisation receiving Confidential Information and as the case may be, on whose behalf it is Disclosed or received, as described in paragraph (a), (b) or (c) of this definition;</p>
"DPA"	means the Data Protection Act 1998;
"Elective Care"	means mental healthcare or treatment which is not Non-elective Care;
"Emergency Care"	means mental healthcare or treatment for which a Patient has an urgent clinical need (assessed in accordance with Good Clinical Practice and Good Healthcare Practice) and which is in the Patient's best interests;
"Equipment"	means any thing save for the Providers Premises, the Services Environment and the Staff that the Provider may use in the delivery of the Services;
"FOIA"	means the Freedom of Information Act 2000;
"Good Clinical Practice"	means that degree of skill and care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled, efficient and experienced clinical services provider and a person providing services the same or similar to the Services at the time the Services are provided;
"Good Healthcare Practice"	means using standards, practices, methods and procedures conforming to the Law and exercising that degree of skill and care, diligence, prudence and foresight which would be expected from a skilled, efficient and experienced provider and a

person engaged in the provision of services the same or similar to the Services at the time the Services are provided;

"GP"	means a general medical practitioner or general dental practitioner registered on a Performers List of a Primary Care Trust in England;
"Healthcare Commission"	means the Commission for Healthcare Audit and Inspection established under the Health and Social Care (Community Health and Standards) Act 2003;
"Indirect Losses"	means loss of profits (other than profits directly and solely attributable to provision of the Services), loss of use, loss of production, increased operating costs, loss of business, loss of business opportunity, loss of reputation or goodwill or any other consequential or indirect loss of any nature, whether arising in tort or on any other basis;
"Law"	means: <ul style="list-style-type: none">(a) any applicable statute or proclamation or any delegated or subordinate legislation or regulation;(b) any enforceable community right within the meaning of S2(1) European Communities Act 1972;(c) any applicable guidance, direction or determination with which the Commissioner and/or the Provider is bound to comply to the extent that the same are published and publicly available or the existence or contents of them have been notified to the Provider by the Commissioner and/or the Department of Health;(d) any applicable judgment of a relevant court of law which is a binding precedent in England and Wales in each case in force in England and Wales or in England;
"Losses"	means all damage, loss, liabilities, claims, actions, costs, expenses (including the cost of legal or professional services), proceedings, demands and charges whether arising under statute, contract or at common law but, to avoid doubt, excluding Indirect Losses;
"Mental Health Act Commission"	means the Special Health Authority responsible for issuing guidance and ensuring quality control in certain aspects of mental health service delivery;
"Major Incident"	means any occurrence designated as a major incident to which the Provider is designated as a recipient or supporter hospital, where in both cases the designation is by an ambulance service or trust within the National Health Service;
"Month"	means a calendar month commencing on its first day;
"NHS Body"	means a health service body as defined in [section 9 of the National Health Service Act 2006];
"Non-elective Care"	means:

	<ul style="list-style-type: none"> (a) intensive care, whether or not provided with Emergency Care; (b) Emergency Care; and (c) Unscheduled Care, whether or not it is also Emergency Care;
"Operational Day"	means a day other than a Saturday, Sunday or bank holiday in England;
"Party"	means the Commissioner or the Provider as the context requires;
"Patient"	means a patient of the Commissioner who is referred or presents to the Provider as part of the provision of the Services;
"Patient Health Record"	means any record which consists of information relating to the particular physical or mental health or condition of a Patient;
"Patient Safety Incident"	means any unintended or unexpected incident which could have or did lead to harm to one or more Patients receiving NHS funded healthcare;
"Patients' Forum"	means the Patients' Forum established under the NHS Reforms and Healthcare Professions Act 2002 to monitor the services provided by the Commissioner or, as the case may be, any one of its Associates to its Patients;
"Personal Data"	has the meaning set out in the DPA;
"Provider's Premises"	means any premises controlled or used by the Provider for any purposes connected with the provision of the Services;
"Provider Representative"	means the person from time to time appointed by the Provider under Clause 8.1;
"Quality Standards and Recommendations"	means the standards and recommendations referred to in Clause 12 and Schedules A and B;
"Serious Untoward Incident"	means an incident or accident or near miss where a patient (whether or not an NHS Patient), member of staff, or member of the public suffers serious injury, major permanent harm or unexpected death on the Provider's Premises and where the actions of the Provider, the Provider's Staff or the Commissioner are likely to be of significant public concern;
"Services"	means the services set out in the Service Specification to be provided by the Provider pursuant to and in accordance with this Agreement;
"Services Development Plan"	means a plan agreed pursuant to Clause 6.1;
"Services Environment"	means the rooms, theatres, wards, treatment bays, clinics or other physical location, space, area, accommodation or such other place as may be used or controlled by the Provider from time to time in which the Services are provided excluding Patients private residences, Local Authority premises, schools

and premises controlled by the Commissioner;

"Services Prices"	means the prices for Services to be paid by the Commissioner to the Provider which are calculated in accordance with Clause 7.2 and set out in Schedule C;
"Service Specification"	means the service specification set out in Schedule A;
"Staff"	means all persons (whether clinical or non clinical) employed or engaged (including volunteers, agency, locums casual or seconded personnel) by the Provider in the provision of the Services or any activity related to, or connected with the provision of the Services, including Consultants;
"Standards for Better Health"	means both the core standards and any developmental standards that may be agreed for the Provider during the Term of this Agreement as set out in the "National Standards, Local Action – Health and Social Care Standards and Planning Framework 2005/06-2007/08 (DoH, 2005)";
"Sub-contractor"	means any NHS Body or other body corporate or person or consortium of persons engaged by the Provider as its permitted sub-contractor for or to assist in the provision of the Services and agreed in writing by the Commissioner;
"Unscheduled Care"	means mental healthcare or treatment provided to a Patient without prior schedule or referral;
"Utilisation Management Scheme"	means a scheme established to ensure the correct use of resources in relation to the treatment of an individual or group of patients in accordance with Schedule B; and
"Variation"	means an addition, deletion or amendment in the Clauses or Schedules agreed in accordance with Clauses 3, 6, 26 or 29, or to be made automatically where required by this Agreement, or agreed or decided in accordance with Clause 21.

- 1.2 A reference to the singular shall include the plural and vice versa and a reference to a gender shall include any gender.
- 1.3 The headings in this Agreement shall not affect its interpretation.
- 1.4 References to any statute or statutory provision include a reference to that statute or statutory provision as from time to time amended, extended or re-enacted.
- 1.5 References to a statutory provision shall include any subordinate legislation made from time to time under that provision.
- 1.6 In the event and to the extent only of any conflict between the Clauses, the Recitals and the Schedules, the Clauses shall prevail over the Schedules, which shall prevail over the Recitals.
- 1.7 References to Clauses and Schedules are to Clauses, Sub-Clauses and Schedules of this Agreement as from time to time amended by any Variation and references to Paragraphs and Sub-Paragraphs are references to Paragraphs and Sub-paragraphs of the Schedules to this Agreement as from time to time amended by any Variation unless otherwise stated.

2. **COMMENCEMENT AND DURATION**

2.1 Subject to Clause 26, this Agreement shall take effect from the Commencement Date and shall be for a period of 1 year.

3. **REVIEW**

3.1 During the Contract Term, the Commissioner and the Provider shall meet quarterly on such dates as they shall agree to review:

3.1.1 the Services Prices;

3.1.2 the Schedules;

3.1.3 the performance of the Parties with regard to their respective duties and obligations under this Agreement;

3.1.4 subject to Clause 21.3, any suggested improvements, extensions or reductions or other Variations to the Services; and

3.1.5 such other matters as the Commissioner and the Provider consider necessary.

4. **SERVICES**

4.1 Subject to Clause 4.2, the Provider shall provide the Services needed by each Patient of the Commissioner who is referred or presents to the Provider for mental healthcare or treatment in accordance with:

4.1.1 this Agreement with particular regard to but without limitation

the Service Specification in Schedule A and any targets additionally specified in it in relation to any of the Services;

4.1.2 all Law applicable to this Agreement and the provision of the Services.

4.2 Nothing in this Agreement shall require the Provider to provide, or to continue to provide, the Services to Patients:

4.2.1 who are unsuitable for treatment under the Services, according to Good Clinical Practice;

4.2.2 who are temporarily unsuitable for treatment under the Services, according to Good Clinical Practice for as long as such unsuitability remains;

4.2.3 who have not validly consented or, where appropriate, had consent given on their behalf, to the treatment provided under the Services;

4.2.4 who display behaviour unacceptable to the Provider, its Staff or the Consultant clinically responsible for the management of the care of such Patient (having regard to the Provider's zero-tolerance policy from time to time in issue), notwithstanding that the judgements in those cases must take into account the mental health of such Patients.

4.3 Where the Provider proposes to refuse to provide or to continue to provide the Services to any Patient under Clause 4.2:

- 4.3.1 the Provider shall explain to the Patient:
 - 4.3.1.1 the action that it is taking and the reasons for such action, following up any oral explanations in writing within one Operational Day of such explanation being given; and
 - 4.3.1.2 that the Patient has the right to challenge the Provider's decision through any relevant complaints procedure.
- 4.4 Subject to Clause 4.2.4, nothing in this Clause 4 shall be deemed to enable or permit the Provider to:
 - 4.4.1 refuse or withhold any treatment in any of the circumstances mentioned in Clauses 4.2.1, 4.2.2 or 4.2.3 which is urgently required by, and is in the best interests of, any Patient and the Provider shall ensure that its Staff take appropriate clinical advice in determining whether such treatment is urgently required and is in the best interests of the Patient; or
 - 4.4.2 refuse or withhold any treatment on the grounds of the behaviour of any person other than the Patient.

5. **SERVICES ENVIRONMENT AND EQUIPMENT**

- 5.1 The Provider shall at all times comply with all Law, regulation or requirement applicable to it and the Quality Standards and Recommendations and any other requirement specified in Schedule 3, in relation to the Services Environment and the Equipment and ensure the Services Environment and the Equipment:
 - 5.1.1 is suitable for the performance of the Services;
 - 5.1.2 complies with any applicable Law and Good Healthcare Practice relating to health and safety and is a safe Services Environment in which to provide the Services; and
 - 5.1.3 is sufficient to enable the Services to be provided at all times and in all respects in accordance with this Agreement.
- 5.2 The Provider shall store and use all Equipment strictly in accordance with the manufacturer's instructions, and any written clarification provided by the manufacturer.

6. **SERVICE IMPROVEMENT/DEVELOPMENT**

- 6.1 All Parties wish to encourage the improvement of Services, quality, clinical outcomes, patient satisfaction, information provision and the Services Environment, and the Commissioner and the Provider may agree a Services Development Plan to deliver such improvement setting out the respective obligations of each Party having regard, in particular, to any joint obligations.

7. **PRICES AND PAYMENT**

- 7.1 The Commissioner shall pay the Provider only for all activity duly delivered under the Services as detailed in Schedule C.
- 7.2 The Services Prices shall be fixed by agreement between the Commissioner and the Provider and are set out in Schedule C.

- 7.3 For the totality of the Services, the Commissioner agrees to pay an amount equal to the Annual Contract Value shown in Schedule C and this amount shall be payable in 12 equal Monthly payments, becoming due on the 15th day of each Month.
- 7.4 No payment shall be due in respect of services needed to rectify performance or omission from performance of the Services provided by the Provider, and if any such treatment is provided by the Commissioner or procured by it from another provider, the Commissioner shall be entitled to recover the cost of it from the Provider.
- 7.5 Payment of any invoice raised under this Clause 7 shall be made within 30 days from the date of receipt of such invoice, unless the amount invoiced is disputed and in which event it will be dealt with according to Clause 7.8.
- 7.6 All payments shall be made by BACS (Bank Automated Clearing System) or as otherwise agreed by the Parties in writing.
- 7.7 Payment is exclusive of any applicable VAT for which the Commissioner shall be additionally liable to pay the Provider upon receipt of a valid tax invoice at the prevailing rate in force from time to time.
- 7.8 If either Commissioner or Provider, acting in good faith, disputes all or any part of payments calculated in accordance with this Clause 7, the undisputed amount of the payment shall be paid and the provisions of this Clause 7.8 shall apply. The Parties to the dispute shall attempt to resolve it in accordance with Clause 21. Following resolution of the dispute, any amount agreed or determined to have been payable shall be paid forthwith by the Commissioner to the Provider, or, as the case may be, by the Provider to the Commissioner together with interest on such amount, calculated in accordance with Clause 7.9.
- 7.9 The Commissioner and the Provider shall be entitled, without prejudice to any other right or remedy, to receive interest on any payment not made to it on the due date, pursuant to the terms of this Agreement, , calculated from day to day at a rate per annum equal to the Default Interest Rate from the day after the date on which payment was due (according to the agreement or decision in dispute resolution, where Clauses 7.8 and 21 apply) up to and including the date of payment.
- 7.10 Whenever any sum of money shall be agreed, or decided, as due and payable to the Commissioner as a consequence of reconciliation or dispute resolution, such sums, at the discretion of the Provider, may be deducted from or applied to reduce any amount due, or which at any time afterwards may become due under this Agreement, from the Commissioner to the Provider, provided that not less than 5 Operational Days notice of the intention to apply or deduct such a sum is given by it to the Commissioning Representative.
- 7.11 Whenever any sum of money shall be agreed from the Commissioner, or, as the case requires, decided, as due and payable to the Provider, as a consequence of reconciliation or dispute resolution, such sums, at the discretion of the Commissioner, may be deducted from or applied to reduce any amount due, or which at any time afterwards may become due, under this Agreement to the Commissioner, provided that not less than 5 Operational Days notice of the intention to apply or deduct such a sum is given to the Provider Representative.
- 7.12 The Commissioner shall not reimburse the Provider for any costs, disbursements or expenses of a personal nature incurred by Patients whilst in receipt of the Services

including without limitation telephone calls and any purchases made from any retail outlets situated within the Provider's Premises. Such costs, disbursements and expenses are incurred personally by Patients and the Provider shall make at its own cost its own arrangements for the collection of such costs, disbursements and expenses if not provided free of charge by the Provider to Patients.

- 7.13 The Provider shall not at any appointment or during the admission of Patients under the Services provide, or offer to Patients to provide, any clinical or medical services (including diagnostics) to Patients for which charges would be payable by the Patient.

8. REPRESENTATIVES

- 8.1 For the Contract Term the Provider shall appoint the Provider Representative and a deputy representative ("Deputy") and shall promptly notify any change in the identity of the Provider Representative or his Deputy to the Commissioning Representative in writing. The Provider Representative, or her Deputy if the Provider Representative is not available shall be the key point of contact at the Provider for the Commissioner to whom it may refer all queries and day to day communications regarding the operation of this Agreement in the first instance.

- 8.2 For the Contract Term the Commissioner shall appoint the Commissioning Representative and a deputy representative ("Deputy") and shall promptly notify any change in the identity of the Commissioning Representative or his Deputy to the Provider Representative in writing. The Commissioning Representative or Deputy if the Commissioning Representative is not available shall be the key point of contact at the Commissioner for the Provider to whom the Provider may refer all queries and communications regarding the operation of this Agreement.

9. COMPLAINTS

- 9.1 The Commissioner and the Provider shall each maintain a complaints procedure compliant with all Law (including any NHS Complaints Regulations in force) applicable to it and shall provide the other Party with such details relating to that complaints procedure as may reasonably be required.

- 9.2 The Provider shall inform Patients and appropriate family members and carers known to the Provider that they are entitled to use both the Provider's complaints procedure and the Commissioner's complaints procedure and shall make details of the procedures available to them.

10. STAFF

- 10.1 The Provider shall employ or engage sufficient clinical and non-clinical staff in accordance with Good Clinical Practice and Good Healthcare Practice to ensure that the Services are provided in all respects in accordance with this Agreement. In particular, the Provider shall ensure that a sufficient reserve of Staff is available to provide the Services in accordance with this Agreement including, without limitation, during any period of absence due to holiday entitlements, sickness, contractual or statutory leave entitlement or otherwise and anticipated and actual peaks in demand for each of the Services.

- 10.2 To avoid doubt, nothing in this Clause shall require the Provider to either procure additional Staff or increase the availability of existing staff in order to meet significant excess demand for the Services over and above the agreed indicative levels set out in Schedule A.

- 10.3 To avoid doubt, the Provider shall be responsible for Staff engaged by it, as well as Staff employed by it, as if the acts and omissions of all Staff were those of the Provider itself.
- 10.4 The Provider shall provide as part of the provision of the Services only such persons who:
- 10.4.1 are registered with the appropriate professional body;
 - 10.4.2 possess the appropriate qualifications, experience and skills to perform the duties required of them and, where this is not the case, ensure that such persons are appropriately supervised; and
 - 10.4.3 are covered by adequate indemnity insurance for the provision of the Services and are members of a medical defence organisation or equivalent where appropriate.
- 10.5 The Provider shall ensure that every Staff member involved with the provision of the Services:
- 10.5.1 receives proper and sufficient training and instruction in accordance with Good Clinical and Good Healthcare Practice and the standards of their relevant professional body, if any, in the execution of their duties; and
 - 10.5.2 receives full and detailed appraisal in terms of performance and on-going education and training in accordance with Good Clinical and Good Healthcare Practice and the standards of their relevant professional body if any.
- 10.6 The Parties acknowledge that the provisions of The Transfer of Undertakings (Protection of Employment) Regulations 2006 (the "Transfer Regulations") may apply upon the Provider ceasing to provide the Services or part of the Services. In circumstances where the Transfer Regulations do apply, the Parties shall comply with their obligations under those Regulations.
- 10.7 In the event of expiry or termination of the Agreement, the Provider and the Commissioner shall co-operate fully to ensure an orderly handover in relation to all aspects of Patient care to alternative providers and shall at all times act in such a manner as not adversely to affect the health and/or safety of any Patient.
- 10.8 In the event that any employees of the Provider transfer to the Commissioner or any third party pursuant to the Transfer Regulations (the "Transferring Employees"):
- 10.8.1 the Provider shall indemnify and keep indemnified in full the Commissioner against all Losses arising whether before or during the term of this Agreement out of or in connection with or in respect of the Transferring Employees which, for the avoidance of doubt, shall include any claim made by any third party arising out of or in connection with or in respect of the employment or engagement of any of the aforesaid persons, where and only to the extent that such Losses were due to the acts or defaults of the Provider, their servants or agents before such transfer and while such persons were in the employment of the Provider;
 - 10.8.2 the Commissioner shall indemnify the Provider and keep the Provider indemnified from and against any and all Losses in respect of any act or omission of the Commissioner occurring in respect of the employment of any Transferring Employee or any claim made by any third party arising out

of or in respect of any act or omission of any Transferring Employee after the date on which the employment of the Transferring Employees transfers to the Commissioner or any third party pursuant to the Transfer Regulations (the "Transfer Date"), save to the extent that such liability was due to any act or omission of the Provider after the Transfer Date;

10.8.3 the Provider and the Commissioner warrant that they shall comply in full with all their obligations under the Transfer Regulations including without limitation those under Regulations 11 and 13 and shall indemnify and keep indemnified the other Party against all Losses arising from any breach of the warranty in this Clause 10.8.3; and

10.8.4 the indemnities in this Clause 10.8 shall continue to apply after the expiry or termination of this Agreement without any limitation in time and, in particular but without limitation, shall continue to apply in respect of any employee of the Provider whose contract of employment transfers to the Commissioner on the expiry or termination of this Agreement and if on the expiry or termination of this Agreement the contract of employment of any employee engaged or employed by the Provider in the provision of the Services to the Commissioner shall pass to a new service provider the Provider shall, on written request by the Commissioner, provide to the new service provider a written and binding indemnity in respect of each and every employee in the same terms as those set out in Clause 10.8.1 above with the substitution of a reference to the new service provider for each reference to the Commissioner.

11. SERIOUS UNTOWARD INCIDENT AND PATIENT SAFETY INCIDENT REPORTING

11.1 The Provider shall promptly provide to the Commissioning Representative a full copy of any notification made by the Provider to the Healthcare Commission, or Commission for the Social Care Inspection or any successor body where such notification directly or indirectly concerns any Patient.

11.2 Subject to the provisions of DPA and the Act, the Provider shall agree with the Commissioner arrangements for notification and investigation of any Serious Untoward Incident directly or indirectly involving any Patient including the form in which such notifications are made and shall provide any further information which the Commissioner may reasonably require in relation to the Serious Untoward Incident. In default of agreement under this Clause 11.2 the arrangements for notification and investigation of Serious Untoward Incidents which shall apply shall be those operated by the Strategic Health Authority responsible for the area in which the Provider's headquarters is located.

11.3 Subject to the provisions of DPA and the Act, the Commissioner may in its complete discretion use all or any part or parts of the information provided by the Provider under this Clause 11 in any report which the Commissioner makes to any NHS Body or any department, office or agency of the Crown, or any other body in connection with such Serious Untoward Incident or in relation to the prevention of such Serious Untoward Incidents.

11.4 This Clause 11 shall survive the termination or expiry of this Agreement.

12. QUALITY AND CLINICAL GOVERNANCE

- 12.1 The Provider shall carry out the Services in accordance with Law (and in particular, but without limitation, Sections 45 and 46 of the Act as if it were an NHS Body), Good Clinical Practice and Good Healthcare Practice, and shall comply with the standards and recommendations from time to time:
- 12.1.1 contained in or relating to the Standards for Better Health;
 - 12.1.2 arising from any audit or Serious Untoward Incident and/or Patient Safety Incident reporting;
 - 12.1.3 issued by the National Institute for Health and Clinical Excellence (or any successor) or required by the Mental Health Act Commission;
 - 12.1.4 issued by the UK National Screening Committee and the National Specialist Commissioning Advisory Group (or any successor of them) and agreed in writing between the Commissioner and the Provider; and
 - 12.1.5 issued by any relevant professional body and agreed in writing between the Commissioner and the Provider

and such other quality standards and recommendations from time to time agreed in writing between the Commissioner and the Provider.

- 12.2 The Provider shall ensure that:
- 12.2.1 all Staff are informed and aware of the standard of performance they are required to provide and are able to meet that standard; and
 - 12.2.2 the adherence of the Staff to such standards of performance shall be routinely monitored and that remedial action shall be promptly taken where such standards are not attained.
- 12.3 The Provider shall make arrangements to carry out patient satisfaction surveys at reasonable intervals in relation to the Services and will co-operate with any such surveys as may be carried out by the Commissioner. Details of arrangements for such surveys shall be made available to the Commissioning Representative on request. In discharging its obligations under this Clause the Provider shall have regard to any Department of Health guidance from time to time relating to patient satisfaction surveys.
- 12.4 The Commissioner and the Provider shall undertake to improve and assure the quality of clinical services for Patients through a framework of clinical governance having regard to any Department of Health guidance on clinical governance including HSC1999/065, Clinical Governance: Quality in the new NHS and Clinical Governance Reporting Processes (November 2002) or any amendment, guidance or re-issue of them from time to time in issue.

13. PROCEDURES AND PROTOCOLS

- 13.1 The Provider shall within a reasonable time after request, make available to the Commissioning Representative copies of any patient guide or other written policy, procedure or protocol which the Provider implements.
- 13.2 The Provider shall promptly notify the Commissioning Representative of any material changes to such guides, policies, procedures and protocols as have been made available to the Commissioning Representative under this Clause 13.

- 13.3 The Commissioner and the Provider shall develop and implement appropriate protocols setting out their individual obligations relating to co-operation with governmental agencies as and when they arise under Law, including requirements imposed on them by the Secretary of State for Health under its statutory powers.
- 13.4 In particular, but without limitation of Clause 13.3, the Commissioner and the Provider shall develop and agree as soon as practicable a protocol in relation to safeguarding and protecting the welfare of children.
- 13.5 All protocols agreed pursuant to Clauses 13.3 or 13.4 shall also set out responsibilities of the Commissioner and the Provider to give full support and do all things necessary to support the other, in the other's performance of its obligations to co-operate with governmental agencies.

14. **SERVICE TARGETS**

- 14.1 The Provider shall meet the service targets (if any) for Services specified in the Service Specification.

15. **INFORMATION AUDIT**

- 15.1 The Provider shall maintain accurate accounts and records of all payments, receipts and financial and other information relevant to the provision of the Services (in this Clause 15 collectively referred to as "Records").
- 15.2 The Commissioner and the Provider shall have the right to appoint ("the Appointing Party") at the Appointing Party's expense, an independent third party auditor (in this Clause 15 called "Auditor") if for its part the Commissioner has reasonable cause for concern, in relation to calculation of any of the Services Prices, or the charging of them; or for its part the Provider has reasonable cause for concern, in relation to payment of the Annual Contract Value, or any part thereof, and/or any non-payment made by the Commissioner under the terms of Schedule C. The Auditor shall have the right to inspect the Records for such period as reasonably required. The Party the subject of the audit shall allow the Auditor and his authorised agents the right of reasonable access to (and, the right to take copies of) the Records, books of account and other sources of relevant information.
- 15.3 In order that the Appointing Party may be satisfied that the prices paid or any invoice raised in accordance with Clause 7.2 are fair and reasonable, the Party subject to the audit shall furnish such particulars of cost (including the costs of Sub-contractors and supplies) in connection with the Services Prices or any matter the subject of the audit as may be reasonably required by the Appointing Party on an annual basis and permit the same to be verified by the relevant Representative by inspection of the other Party's books, accounts and other documents and records.
- 15.4 If the Appointing Party has been overcharged for the Services, the Party subject to the audit shall, within 7 days of receiving written notice of such overcharge, reimburse the Appointing Party concerned the amount of the overcharge and if any audit shall have revealed an overcharge exceeding 5% of the amount that should have been charged the Party the subject of the audit shall in addition, within the 7 day period, reimburse the Appointing Party with the reasonable costs incurred by them in performing the audit.
- 15.5 If the Appointing Party has undercharged for the Services, the Party subject to the audit shall (within 7 days of receiving notice of undercharge) reimburse the

Appointing Party the amount of the undercharge, less the reasonable costs of performing the audit.

16. PATIENT HEALTH RECORDS AND CONFIDENTIAL INFORMATION OF PATIENTS AND STAFF

- 16.1 The Provider shall create records, which shall form part of Patient Health Records, for all Patients receiving treatment as part of the Services. Patient Health Records shall be kept in an appropriate secure location. Authorised NHS Persons shall be granted access to such Patient Health Records and shall be entitled to inspect them and require copies to be provided by the Provider (at the Provider's cost).
- 16.2 The Parties shall comply with any duty arising from the Patient's entitlement to confidentiality of his/her Patient Health Record and any other information (including Personal Data) relating to him/her as a Patient in accordance with the Human Rights Act 1998, the DPA, Access to Health Records Act 1990, consent requirements and the common law duty of confidentiality.
- 16.3 The Provider shall use Patient Health Records and any information relating to Patients in the possession, custody or control of the Provider or in the possession, custody or control of any person under the Provider's control solely for the execution of the Provider's obligations under this Agreement and as otherwise required by the Commissioner.
- 16.4 The Provider shall provide to each Patient full and accurate information regarding the relevant treatment or procedure to be performed on such Patient as part of the provision of the Services and shall evidence such information in writing in the relevant Patient Health Record. The Provider shall ensure that Patient Health Records contain written evidence that informed consent to the treatment or procedure to be performed has been given by the relevant Patient or where appropriate his/her representative.
- 16.5 The Provider shall promptly return any Patient Health Records and any other Personal Data relating to an individual Patient's treatment to the Patient's GP upon request at any time, except where the Provider is otherwise required to retain such information to comply with legislative requirement in either of which cases the Provider shall supply copies to the Patient's GP on request.
- 16.6 The Provider shall in providing the Services comply with the following as from time to time amended or replaced:
- 16.6.1 the Confidentiality Code of Practice for NHS Staff;
 - 16.6.2 the NHS Code of Practice on Confidentiality;
 - 16.6.3 Protecting and Using Patient Information (A Manual for Caldicott Guardians);
 - 16.6.4 the NHS Information Governance Toolkit; and
 - 16.6.5 the security management standard BS 7799-2.
- 16.7 The Provider shall appoint a senior clinician to perform the role of Caldicott Guardian in accordance with the guidance listed in Clause 16.6.3 above and make available on request the name and contact details of the Caldicott Guardian to the Commissioning Representative.

17. CONFIDENTIAL INFORMATION OF THE PARTIES

17.1 Each Party undertakes to keep secret and strictly confidential and shall not disclose Confidential Information of the other Party to any third party, without the other Party's prior written consent provided that the provision of this clause 19 shall not apply to any Confidential Information which is:

17.1.1 in or enters the public domain other than by breach of the Agreement;

17.1.2 obtained from a third party who is lawfully authorised to disclose such information;

17.1.3 required to be disclosed by judicial, administrative, governmental or regulatory process in connection with any action, suit, proceedings or claim or otherwise by applicable law;

17.1.4 required to be disclosed to ensure compliance with the FOIA or other requirement of Law.

17.2 The Commissioner shall ensure that satisfactory systems exist to ensure that any unauthorised persons do not obtain Confidential Information of the Provider and that the Commissioner's Staff comply with all national and local National Health Service requirements in relation to confidentiality. This includes in relation to any information of a confidential nature, which comes into the hands of the Commissioner or its Staff including patient healthcare and staff records and commercially sensitive data.

18. LIABILITY FOR LOSS, DAMAGE AND INJURY INSURANCE

18.1 The Commissioner and the Provider shall each maintain in force at its own cost such insurance policies as are appropriate and adequate having regard to its obligations and liabilities under this Agreement. The Provider shall on the reasonable written request of the Commissioner from time to time:

18.1.1 provide the Commissioner with evidence that such insurance policies are fully paid up and in force;

18.1.2 allow the Commissioner to inspect its insurance policies and ensure that the Commissioner is satisfied that the Provider's insurance cover is adequate; and

18.1.3 provide the Commissioner with copies of the full policy document for its insurance policies.

18.2 Without prejudice to its liability for breach of any of its obligations under this Agreement:

18.2.1 the Commissioner shall be liable to the Provider for, and shall indemnify the Provider against; and

18.2.2 the Provider shall be liable to the Commissioner for, and shall indemnify the Provider against;

any loss, damages, costs, expenses, claims or proceedings whatsoever in respect of the matters mentioned in Clause 18.3.

18.3 The matters referred to in Clause 18.2 are:

- 18.3.1 any loss of or damage to property (whether real or personal);
- 18.3.2 any injury to any person, including injury resulting in death; and
- 18.3.3 any Losses (excluding Indirect Losses) of the indemnified Party

in consequence of or in any way arising out of the indemnifying Party's negligence or breach of contract in connection with the performance of this Agreement or of the provision of the Services (including in the case of the Provider (without limitation) its use of Equipment or other materials or products, or of its Staff or Sub-contractors in the provision of the Services) except insofar as such loss, damage or injury shall have been caused by any act or omission undertaken in strict accordance with the instructions of the indemnified Party or by any act or omission or negligence on the part of the indemnified Party, its employees or agents.

- 18.4 The Provider shall specifically take out and maintain insurance against its liability under Clauses 18.2 and 18.3 with a minimum limit of indemnity of £5 million per incident in respect of loss or damage to property and £10 million per person per incident in respect of injury to any person, or such other sum as may be agreed between the Provider and the Commissioner (or as the Commissioner on reasonable notice may from time to time reasonably request.)
- 18.5 The Provider shall from time to time, whenever requested by the Commissioner, produce documentary evidence to it that the Provider's insurance policies taken out pursuant to Clause 18.4 are fully maintained and that the premiums on them are fully paid and that the interest of the Commissioner as a loss payee is endorsed on each of them.
- 18.6 In connection with the Services, unless the Commissioner and the Provider otherwise agree in writing, the Provider shall not ask or require and shall ensure that no other person shall ask or require any Patient to sign any document whatsoever containing any waiver of liability (other than a waiver in reasonable terms relating to personal property) of the Provider to such Patient and shall not present and shall ensure that no other person shall present any such document to an Patient for acceptance except for where such document is required under medical research approved by the Local Research Ethics Committee and the Patient has given informed consent.
- 18.7 This Clause 18 shall survive in all respects the termination for any reason of this Agreement or its expiry, in relation to any claim made within 15 years after such termination or expiry.

19. **DATA PROTECTION & FREEDOM OF INFORMATION**

- 19.1 The Commissioner and the Provider acknowledge their respective duties under the DPA and FOIA and hereby confirm they will comply with their obligations and duties under the said Acts and shall give all reasonable assistance to each other where appropriate or necessary to comply with any obligations arising under the said Acts.

20. **DISCRIMINATION**

- 20.1 The Commissioner and the Provider shall not discriminate unlawfully within the meaning and scope of any Law, enactment, order, regulation, or similar instrument relating to discrimination (whether relating to race, gender, disability, religion or otherwise) in employment or performance of the Services and each of them shall

take all reasonable steps to ensure observance of this Clause 20 by its employees and Staff and agents (and, in the case of the Provider its Sub-contractors).

21. DISPUTE RESOLUTION PROCEDURE

21.1 Except and to the extent that any injunction is sought relating to a matter arising out of Clause 17, if any Dispute arises out of or in connection with this Agreement, the Parties in dispute, shall first attempt to settle it by either of them making a written negotiation offer to the other.

21.2 If the Parties in dispute are unable to settle the Dispute by negotiation, they shall, within a reasonable period submit the Dispute to the mediation service provider agreed by the Parties, or, in default of such agreement, shall submit the Dispute to mediation by CEDR under the Model Mediation Procedure.

21.3 Subject to Clause 24, if the Parties in dispute are unable to settle the Dispute within 20 Operational Days after the date it is submitted to mediation, then the provisions of Clause 41 shall apply.

21.4 In this Clause 21:

21.4.1 "Dispute" shall mean a dispute between the Parties in Dispute arising out of or in connection with this Agreement ;

21.4.2 "Parties in dispute" shall mean the Commissioner as one Party, and the Provider, as the other; and

21.4.3 "CEDR" shall mean Centre for Effective Dispute Resolution.

22. INFORMATION REQUIREMENTS

22.1 The parties acknowledge that in order for the parties to achieve accurate forecasting, and ensure service quality there needs to be timely regular exchange of detailed and accurate information and accordingly the Provider shall:

22.1.1 comply with current NHS data standards in relation to the information collected and provided on the services provided;

22.1.2 adopt new and revised standards as approved by the Information Standards Board;

22.1.3 establish and maintain systems and procedures for recording information in accordance with the NHS Data Dictionary and Manual and the NHS CDS Manual; and

22.1.4 submit to the Commissioner all that information required by the Commissioner and set out in Schedule A.

23. MONITORING

23.1 The Provider shall be responsible for monitoring its performance of this Agreement during the term of this Agreement. The Provider shall provide the Commissioning Representative with relevant particulars of any aspects of its performance which fail to meet the requirements of this Agreement (unless otherwise notified in writing by the Commissioner) including, in particular but without limitation, failure to meet any

target mentioned in Clause 14.1 and specified in Schedule A or B or to meet any of the Quality standards and Recommendations under Clause 12 or Schedule A or B.

- 23.2 The Commissioner and the Provider shall meet quarterly to formally review progress and performance against this Agreement, and at other such intervals as they may agree, to discuss the monitoring under this Agreement and any information supplied pursuant to Clause 22.

24. **PERFORMANCE**

- 24.1 Where the Commissioner has reasonable evidence that performance of the Services specified in Schedules A or B fails to meet with requirements under this Agreement, the Commissioner may write to the Provider in respect of those Services setting out the matter or matters of concern with a reminder of the implications.

- 24.2 The Provider, where it has reasonable evidence that performance of the Commissioner fails to meet with requirements under this Agreement in relation to one or more of the areas set out below, may write to the Commissioner setting out the matter or matters of concern with a reminder of the implications:

24.2.1 where the Commissioner is late in any payments to be made under this Agreement; or

24.2.2 where there is an overpayment or underpayment by the Commissioner of any sums due under this Agreement.

- 24.3 Without prejudice to the rights of the Commissioner or the Provider under this Agreement, if at any time the Provider or the Commissioner has committed any material breach of its obligations under this Agreement and where it is capable of remedy has not remedied such breach within 7 Operational Days of receipt of written notice to remedy then the Provider may write to the Commissioner, or (as the case may be) the Commissioner may write to the Provider, setting out the matter or matters of concern and containing a reminder of the implications.

- 24.4 Within 5 Operational Days of either Party writing to the other in accordance with Clause 24.3, the Parties shall meet to discuss the matter of concern and agree a plan of action to remedy the matter, including a timetable and method for review of the planned remedial action.

25. **SUSPENSION**

- 25.1 The provisions of this Clause 25 shall apply if:

25.1.1 the Commissioner, acting reasonably, considers that a breach by the Provider of any obligation under this Agreement:

25.1.1.1 may create an immediate and serious threat to the health or safety of any Patient of the Commissioner; or

25.1.1.2 may result in a material interruption in the provision of one or more of the Services in Schedule A; or

25.1.2 the Provider is not in breach of its obligations as described in Clause 25.1.1 but the Commissioner justifiably considers the circumstances constitute an emergency, including an Event of Force Majeure affecting provision of the Services by the Provider.

25.2 Where the provisions of this Clause 25 apply and the Commissioner considers it to be necessary or expedient to do so, the steps which it may take shall include the partial or total suspension of the obligation of the Provider to provide the Services (being those affected as mentioned in Clause 25.1.1 or all or any of them where Clause 25.1.2 applies) and its right to receive payment for them until such time as the Provider shall have demonstrated to the reasonable satisfaction of the Commissioner that it will perform (and is capable of performing) its obligations in respect of the relevant Services to the required standard and (except where suspension or partial suspension is by reason only of an Event of Force Majeure pursuant to Clause 25.1.2) the Commissioner may recover its costs resulting from suspension, under Clause 26.6 provided that the Commissioner, as and when it becomes reasonably satisfied as to such future performance by the Provider of all or some of the Services, may require the Provider to restore such suspended services under the terms of this Agreement and Schedules A and B, and such restoration shall be without prejudice to the Commissioner's right to recover its costs resulting from suspension, or to the continuation of suspension of some of that Commissioner's Services.

25.3 Any suspension or restoration of any Services shall be exercised by written notice to the Provider.

26. **TERMINATION**

26.1 Either Party may terminate this Agreement by giving to the other not less than 3 months' written notice.

26.2 The Commissioner or the Provider shall be entitled to terminate this Agreement in its entirety by written notice to the other having immediate effect, if an Event of Force Majeure persists for more than 30 days without all the Parties agreeing alternatives terms pursuant to Clause 32.

26.3 The Commissioner shall be entitled to terminate this Agreement in its entirety, by written notice to the Provider having immediate effect if:

26.3.1 the Provider suspends, or threatens to suspend, payment of its debts or is deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986; or

26.3.2 the Provider commences negotiations with all or any class of its creditors with a view to rescheduling any of its debts, or enters into any composition or arrangement with its creditors generally; or

26.3.3 an order is made or resolution is passed, or a notice is issued convening a meeting for the purpose of passing a resolution, or any analogous proceedings are taken for the winding-up, administration or dissolution (other than a members' voluntary liquidation solely for the purpose of solvent amalgamation, reconstruction, reorganisation, dissolution, merger or consolidation) of the Provider; or

26.3.4 any liquidator, receiver, administrative receiver, administrator or similar officer is appointed over, or in respect of, the Provider or any part of its business or assets; or

26.3.5 a creditor or encumbrancer of the Provider attaches or takes possession of, or a distress, execution, sequestration or other such process is levied or

enforced on or sued against, the whole or any part of its assets and such attachment or process is not discharged within 14 days; or

- 26.3.6 any event occurs, or proceeding is taken, with respect of the Provider in any jurisdiction to which it is subject that has an effect equivalent or similar to any of the events mentioned in Clause 26.3.1 to Clause 26.3.5 (inclusive).
- 26.4 The Commissioner shall be entitled to terminate this Agreement by written notice to the Provider having immediate effect if:
- 26.4.1 the Provider ceases, or threatens to suspend or cease, to carry on its business or substantially the whole of its business; or
 - 26.4.2 the Provider is in persistent or repetitive breach or other material breach of any obligations under the Agreement, including the Schedules and such breach has not been remedied after seven Operational Days following a request by the Commissioner that the breach is remedied.
- 26.5 If, as a result of termination of or partial termination of this Agreement by the Commissioner under Clauses 26.3 or 26.4 or suspension of it under Clause 25, the Commissioner:
- 26.5.1 procures the Services or part of them from an alternative supplier; or
 - 26.5.2 executes the Services or part of them itself
- and if the reasonable cost to the Commissioner of procuring such Services from an alternative supplier or executing such Services itself exceeds the amount that would have been payable to the Provider for providing the same Services, then (except where suspension is by reason only of an Event of Force Majeure) the Commissioner shall be entitled to recover from the Provider such excess it may incur for a period of 6 months or the period of suspension or the period from the date of termination or suspension to the end of the Contract Year in which it occurred whichever is shorter, together with all reasonable administration costs in addition to any other sums payable by the Provider to the Commissioner in respect of any termination.
- 26.6 Termination of this Agreement for any reason or its expiry shall not affect any rights or liabilities that have accrued prior to the date of termination.
- 26.7 On the termination of this Agreement for any reason, for a reasonable period both before and after any such termination, the Provider shall:
- 26.7.1 co-operate fully with the Commissioner and any successor providing the Services or any part of the Services in order to achieve a smooth transfer and to avoid any inconvenience or any risk to the health and safety of patients and/or of employees of the Commissioner and/or members of the public;
 - 26.7.2 at the reasonable cost of the Commissioner, promptly render all reasonable assistance, provide all information (save for any management manuals which expression shall for the purposes of this Clause mean a guide which incorporates confidential information as to the management framework and practices of the Provider or other information treated as confidential by and relating to the business of the Provider which is not in

the public domain) including, without limitation, information relating to the terms and conditions of employment of its employees engaged in the provision of the Services and any potential claims relating to or associated with the provision of the Services and all detailed specifications with schedules and all other particulars relating to the provision of the Services and which is reasonably requested by the Commissioner and shall use reasonable endeavours to undertake all actions reasonably requested by the Commissioner to the extent reasonably necessary to effect an orderly assumption of the Services by another provider of the Services;

26.7.3 at the reasonable cost of the Commissioner, deliver to the Commissioner all materials, papers, documents and operating manuals owned by the Commissioner and utilised by the Provider in the provision of the Services as are necessarily required for the continued provision of the Services;

26.7.4 insofar as it is in the power of the Provider to do so and at the reasonable cost of the Commissioner, use all reasonable endeavours to obtain the consent of third parties to the assignment, novation or termination of existing contracts between the Provider or any third party nominated for that purpose by the Commissioner which relate to or are associated with the Services as the context requires; and

26.7.5 comply with its obligations pursuant to the Transfer of Undertakings (Protection of Employees) Regulations 2006 as amended, in relation to employees employed in the provision of the Services at the date of expiry of this Agreement.

26.8 The provisions of Clauses 26.5 and 26.7 shall survive the termination, for any reason, or the expiry of this Agreement.

27. CONSEQUENCES OF EXPIRY OR TERMINATION OR SUSPENSION

27.1 Upon the termination of this Agreement for any reason, or its expiry, or during any period of suspension (but, in the case of partial termination or suspension, only as regards the Services affected):

27.1.1 the Commissioner shall use all reasonable endeavours to ensure that no further Patients are referred by it to the Provider other than for Non-elective Care under Clause 33 ;

27.1.2 the Provider shall cease to accept any referrals other than for Non-elective Care under Clause 33 ; and

27.1.3 the Provider shall immediately cease its treatment of Patients or arrange for their discharge as soon as is practicable unless:

27.1.3.1 the Parties concerned agree that it would be impractical to cease any or all of such treatments; or

27.1.3.2 the Parties concerned agree that the treatment of any Patient should not so cease; or

27.1.3.3 in accordance with Clause 27.3 and Clause 27.4, it would be clinically inappropriate (that is to say, not in accordance with Good Clinical and Good Healthcare Practice and in the Patient's

best interests) to cease any or all of such treatments in the reasonable opinion of either of the Parties concerned.

- 27.2 Where in the reasonable opinion of the Provider it would not be clinically appropriate to immediately cease the treatment of a Patient the Provider shall promptly and in any event within 48 hours notify the Commissioner of its decision giving reasons and the Provider shall continue to treat such Patient in accordance with the terms and conditions of this Agreement unless the Commissioner notifies the Provider that the treatment of such Patient must cease.
- 27.3 Where in the reasonable opinion of the Commissioner it would not be clinically appropriate to immediately cease the treatment of a Patient, or pending any such cessation, the Provider shall continue to treat Patients in accordance with the terms of this Agreement until either the treatment finishes or the Commissioner determines it is clinically appropriate to stop such treatment.
- 27.4 For the avoidance of doubt, the Commissioner shall pay to the Provider such sums as shall become due in accordance with Clause 7 for any activity carried out by the Provider under Clauses 27.1, 27.2 and 27.3 pro rata to complete provision of the relevant Service at the rates in force prior to the termination or expiry of this Agreement or suspension of any of the Services.
- 27.5 The Parties shall use all reasonable endeavours to minimise any inconvenience caused to or likely to be caused to Patients or prospective Patients as a result of the expiry or termination of this Agreement.
- 27.6 The provisions of this Clause 27 shall survive the expiry or termination for any reason of this Agreement.

28. **REMEDIES**

- 28.1 Save as may be expressly set out in this Agreement, no remedy conferred by any provision of this Agreement is intended to be exclusive of any other remedy and each and every remedy shall be cumulative and shall be in addition to every other remedy given hereunder or existing at law or in equity, by statute or otherwise.
- 28.2 Neither the expiration nor the termination of this Agreement shall prejudice or affect any right of action or remedy which shall have accrued or shall thereafter accrue to the Commissioner or to the Provider.

29. **VARIATIONS**

- 29.1 This Agreement and its Schedules shall not be varied by any additions, deletions or other amendments except by:
- 29.1.1 agreement in writing, signed by the Commissioning Representative on behalf of the Commissioner and the Provider Representative on behalf of the Provider;
- 29.1.2 agreement or decision pursuant to dispute resolution under Clause 21; or
- 29.1.3 a Variation agreed pursuant to Clause 32.8.
- 29.2 All Variations shall be recorded.

30. **REPRESENTATIONS AND WARRANTIES**

- 30.1 The Commissioner, on the one hand, and the Provider, on the other hand hereby represents and warrants to the other that:
- 30.1.1 it has full power and authority to enter into this Agreement and has taken all necessary corporate or other action to authorise the execution, delivery and performance thereof and no restriction on the powers of its officers will be contravened by any such execution, delivery or performance;
 - 30.1.2 all governmental or official approvals and consents have been obtained and are in full force and effect, and all other actions have been taken, conditions satisfied and things done in order to enable it lawfully to enter into, comply with its obligations and enforce its rights under this Agreement, and to ensure that this Agreement is admissible in evidence in England;
 - 30.1.3 the execution of the Agreement, the performance of obligations and exercise of rights under them by it does not and will not contravene or conflict with its constitution, or any Law, regulation, contract, charge or undertaking affecting it, any of its assets, or any agreement or document to which it is a party or which is binding on it or any of its assets;
 - 30.1.4 the copies of all documents supplied to the other Party or any of its advisers by or on its behalf from time to time are complete and the contents of them are true;
 - 30.1.5 it has the right to permit and licence disclosure and use and further disclosure and use (in accordance with Clause 17) of Confidential Information which it Discloses to the other Party or its associates or Sub-contractors;
 - 30.1.6 no claim against it or any of its assets is presently being assessed and no litigation, arbitration or administrative proceedings are presently in progress or, to the best of its knowledge, pending or threatened against it or any of its assets which will have, or are likely to have, a material adverse effect on its ability to perform its obligations under this Agreement to which it is a Party;
 - 30.1.7 no proceedings or other steps have been taken and not discharged (nor, to the best of its knowledge threatened) for its winding-up or dissolution or for the appointment of a receiver, administrative receiver, administrator, liquidator or similar officer in relation to any of its assets or revenues; and
 - 30.1.8 all information supplied by either Party to other during the award procedure leading to the execution of this Agreement is, to the reasonable knowledge and belief of either Party, true and accurate in all material aspects and each party is not aware of any material facts or circumstances which have not been disclosed to the other which would, if disclosed, be likely to have an adverse effect on a reasonable public sector entity's decision whether or not to contract with either party substantially on the terms of this Agreement.
- 30.2 The warranties set out in Clauses 30.1.4 and 30.1.8 are continuous throughout the Contract Term and shall survive termination of this Agreement.

31. **NOTICES**

- 31.1.1 Any notices required to be given under this Agreement must be in writing and may be served by personal delivery, post (special or recorded delivery or first class post), electronic mail or facsimile.
- 31.2 Notices given by post shall be effective upon the earlier of actual receipt, or 5 Operational Days after mailing. Notices delivered by hand shall be effective upon delivery. Notices given by facsimile shall be deemed to have been received where there is confirmation of uninterrupted transmission by a transmission report and there has been no telephonic communication by the recipient to the senders (to be confirmed in writing) that the facsimile has not been received in legible form:
- 31.2.1 within 2 hours after sending, if sent on a Operational Day between the hours of 9am and 4pm; or
- 31.2.2 by 11am on the next following Operational Day, if sent after 4pm on an Operational Day but before 9am on the next following Operational Day.
- 31.3 Notices sent by electronic mail shall be deemed to be served if a telephone call is made to the recipient warning the recipient that an electronic mail message has been sent to him (as evidenced by a contemporaneous note of the Party sending the notice) and (unless otherwise agreed by the Parties) a hard copy of such notice is also sent by first class recorded delivery post on the same day as that on which the electronic mail is sent.

32. **FORCE MAJEURE**

- 32.1 For the purposes of this Agreement, an Event of Force Majeure means an event or circumstance including (but without limitation) any of the following events or circumstances:
- 32.1.1 war, civil war, armed conflict or terrorism; or
- 32.1.2 nuclear, chemical or biological contamination of the Provider's Premises from any of the events referred to in Clause 33.1.1 above; or
- 32.1.3 pressure waves caused by devices travelling at supersonic speeds;
- 32.1.4 strikes or lock outs beyond the reasonable control of the affected party; or
- 32.1.5 riot, flood or earthquake

which is beyond the reasonable control of and directly causes the Commissioner the Provider ("the Party claiming relief") to be unable to comply with all or a material part of its obligations under this Agreement but shall not include Major Incidents which shall be dealt with according to Clause 33.

- 32.2 Subject to Clause 32.3 the Party claiming relief shall be relieved from liability under this Agreement to the extent that by reason of the Event of Force Majeure it is not able to perform its obligations under this Agreement.
- 32.3 Where the Party claiming relief is (or claims to be) affected by an Event of Force Majeure:
- 32.3.1 it shall take all reasonable steps to mitigate the consequences of such an event upon the performance of its obligations under this Agreement, resume performance of its obligations affected by the Event of Force Majeure as soon as practicable and use all reasonable endeavours to remedy its failure to perform;
- 32.3.2 it shall not be relieved from liability under this Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to its failure (if any) to comply with its obligations under Clause 32.3.1; and
- 32.3.3 the Commissioner shall not be entitled to retain payment by virtue of Schedule B or require the Provider to implement a review in accordance with a Utilisation Management Scheme further to Schedule B, or require the Provider to pay costs to the extent that the circumstances giving rise to such rights arise as a result of Force Majeure.
- 32.4 The Party claiming relief, if it is the Provider, shall serve written notice on the Commissioning Representative, or, if it is the Commissioner, shall serve written notice on the Provider Representative within 5 Operational Days of it becoming aware of the relevant Event of Force Majeure. Such initial notice shall give sufficient details to identify the particular event claimed to be an Event of Force Majeure.
- 32.5 Subsequent written notice shall be similarly served by the Party claiming relief within a further 5 Operational Days which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the Event of Force Majeure on the ability of any such person claiming relief to perform, the action being taken in accordance with Clause 32.3 (Mitigation), the date of the occurrence of the Event of Force Majeure and an estimate of the period of time required to overcome it (and/or its effects).
- 32.6 Subsequent written notice shall be similarly served by the Party claiming relief as soon as the consequences of the Event of Force Majeure have ceased and of when performance of its affected obligations can be resumed.
- 32.7 If, following the issue of any notice referred to in Clause 32.5, the Party claiming relief receives or becomes aware of any further information relating to the event of Force Majeure and/or any failure to perform, it shall similarly submit such further information as soon as reasonably possible.
- 32.8 The Commissioner and the Provider shall endeavour to agree any Variations of this Agreement which may be equitable having regard to the nature of an Event of Force Majeure. Clause 21 shall not apply to a failure to reach agreement pursuant to this Clause 32.8.

33. MAJOR INCIDENTS

- 33.1 If the impact of a Major Incident is such that the demand for Non-elective Care to be provided by the Provider increases with the result that the ability of the Provider to provide any one or more of the Services, comprising Elective Care is reduced then those services comprising Elective Care shall be suspended for so long as the Provider can show to the reasonable satisfaction of the Commissioner that the Provider's ability is reduced, by its written confirmation given at intervals of not more than 2 Operational Days and the Commissioner shall not be entitled to retain payment by virtue of Schedule B or require the Provider to implement a review in accordance with a Utilisation Management Scheme further to Schedule B, or require the Provider to pay costs to the extent that the circumstances giving rise to such rights arise as a result of a Major Incident.
- 33.2 During any such suspension, the Provider shall nevertheless use its reasonable endeavours to minimise the extent of it and, in particular, continue the provision of the Services comprising Elective Care as well as Non-elective Care, where the Patient is already receiving treatment at, or is admitted after the date of the first confirmation pursuant to Clause 33.1, and the Provider shall not in any event:
- 33.2.1 discharge any Patient, until it is clinically appropriate (that is, in accordance with Good Clinical Practice and Good Healthcare Practice and in the Patient's best interests) to do so; or
- 33.2.2 transfer any Patient to another provider, except where clinically appropriate.
- 33.3 During any such suspension, the Provider may if necessary cancel or postpone out-Patient appointments and admission dates and make other changes to its waiting lists, so far as Services comprising Elective Care are concerned, but shall nevertheless use its reasonable endeavours to minimise such cancellations, postponements and changes.
- 33.4 During any such suspension and where requested by the Provider, the Commissioner shall use its reasonable endeavours to avoid any new referrals for Services comprising Elective Care itself or by any GP or other of its agents.
- 33.5 Without prejudice to the provisions of, and the Provider's responsibilities under, Clauses 33.2 and 33.3, each confirmation given under Clause 33.1 shall additionally state:
- 33.5.1 the identity of each Patient who has, and the Provider to which he/she has, been transferred;
- 33.5.2 the identity of each Patient who has not been but is likely to be transferred, the probable date of transfer and the identity of the intended alternate provider;
- 33.5.3 cancellations and postponements of admission dates;
- 33.5.4 cancellations and postponements of out-Patient appointments;
- 33.5.5 other changes in the Provider's list
- and such information shall be stated cumulatively and, for additions since the previous confirmation, separately.
- 33.6 To avoid doubt, during, or as a result of any such suspension:

- 33.6.1 Clause 25 shall not apply to any suspension of Services comprising Elective Care under this Clause 33;
- 33.6.2 the Provider shall be entitled to payment in accordance with Clause 7 for any Services comprising Elective Care it continues to provide;
- 33.6.3 subject to Clause 33.7, the Provider shall continue to provide, and shall be entitled to payment in accordance with Clause 7 for provision of, Services comprising Non-elective Care begun (and any interrelated Elective Care) before the date of the Provider's first confirmation of suspension under Clause 33.1; and
- 33.6.4 subject to Clause 33.7, the Provider shall provide, and shall be entitled to payment in accordance with Clause 7 for provision of, Services comprising Non-elective Care (and any interrelated Elective Care) to Patients referred or presenting to the Provider after the date of the Provider's first confirmation of suspension under Clause 43.1, whether as the result of the Major Incident or otherwise.
- 33.7 The provision of Services comprising Non-elective Care pursuant to Clause 33.6.3 and 33.6.4 shall in all events be subject to the Provider's discretion to make a transfer or diversion of a Patient if the Provider considers that to be in the best interests of all the patients to whom the Provider is providing Non-elective Care whether or not as a result of the Major Incident, but using that discretion on its own responsibility and in accordance with Good Clinical Practice and Good Healthcare Practice.
- 33.8 Immediately after the Provider gives written notice to the Commissioner that the effects of the Major Incident on the Provider's ability have ceased, that availability of Services comprising Elective Care shall be fully restored, Clauses 33.1 to 33.7 inclusive shall cease to apply in relation to that Major Incident and all the terms, conditions and Schedules of this Agreement shall again have full force and effect.
34. **THIRD PERSON RIGHTS**
- 34.1 Except insofar as this Agreement applies in the favour of the Healthcare Commission, the National Audit Office, counter Fraud and Security Management Services and the Patients' Forums this Agreement is intended and agreed to be solely for the benefit of the Provider, and the Commissioner and no other person or organisation (including the Provider's Sub-contractors permitted under Clause 38.2) shall acquire any benefit, claim or rights of any kind whatsoever pursuant to, under, by or through this Agreement.
- 34.2 No Variation shall create any such rights unless expressly so stated in such Variation. This does not affect any right or remedy of a person or organisation which exists or is available apart from the Contracts (Rights of Third Parties) Act 1999.
35. **WAIVER**
- 35.1 The rights and remedies of the Parties in respect of this Agreement shall not be diminished, waived or extinguished by the granting of any indulgence, forbearance or extension of time by any Party to the other nor by failure of, or delay by any said Party in ascertaining or exercising of any such rights or remedies or in insisting upon strict performance of any provision of this Agreement. The waiver by any Party of any breach of this Agreement shall not prevent the subsequent

enforcement of any subsequent breach of that provision and shall not be deemed to be a waiver of any subsequent breach of that or any other provision affecting any Party or Parties.

35.2 No waiver of any provision of this Agreement shall be effective unless it is agreed pursuant to Clause 29.

36. ENTIRE AGREEMENT

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

36.2 Each of the Parties acknowledges and agrees that in entering into this Agreement it does not rely on and shall have no remedy in respect of any statement, representation, warranty or understanding (whether negligently or innocently made) of any person (whether party to this Agreement or not) other than as expressly set out in this Agreement as a warranty or in any document agreed by the Parties in writing to be contractually binding.

36.3 Nothing in this Clause shall exclude any liability for fraud or any fraudulent misrepresentation.

37. SEVERABILITY

37.1 If at any time any part of this Agreement (including any one or more of the Clauses of this Agreement or any sub-Clause or paragraph or any part of one or more of these Clauses) is held to be or becomes void or otherwise unenforceable for any reason under applicable law, the same shall be deemed omitted from this Agreement and the validity and/or enforceability of the remaining provisions of this Agreement shall not in any way be affected or impaired as a result of that omission.

38. ASSIGNMENT AND SUB CONTRACTING

38.1 Save as may be expressly permitted by the terms of this Agreement (including the Provider's right to provide the Services using Consultants and clinical and non-clinical Staff engaged by the Provider (including agency nurses) but subject to Clause 10.3) neither Party shall assign, delegate, sub-contract, transfer, charge or otherwise dispose of all or any of its rights or obligations under this Agreement without the prior written consent of the other Party.

38.2 The Provider is permitted to provide the Services using, or using the assistance of Sub-contractors being the bodies or individuals from time to time agreed in writing by the Commissioner.

38.3 The Provider shall be responsible for the acts and omissions of its Sub-contractors as if such act or omission had been omitted or committed by the Provider, but nothing in this Clause 38 or other Clause of or Schedule to this Agreement nor the recognition and permission of the Commissioner shall constitute any Sub-contractor of the Provider a party to this Agreement for any purpose.

38.4 This Agreement shall be binding on and shall be to the benefit of the Provider and the Commissioner and their respective successors and permitted transferees and assigns.

39. COUNTERPARTS

39.1 This Agreement may be executed in one part or with or without one or more counterparts. Any single part or counterparts executed by or on behalf of the Parties shall constitute a full original of this Agreement for all purposes.

40. **MITIGATION**

40.1 Each of the Provider and the Commissioner shall at all times take all reasonable steps to minimise and mitigate any loss for which a Party is entitled to bring a claim against another Party, pursuant to this Agreement.

41. **GOVERNING LAW AND JURISDICTION**

41.1 This Agreement shall be considered as a contract made in England and Wales and shall be subject to the laws of England and Wales.

41.2 Subject to the provisions of Clause 21 of this Agreement, all Parties agree that the courts of England and Wales shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Agreement.

42. **SCHEDULES**

42.1 The provisions of the Schedules (as amended from time to time by Variations) shall form part of this Agreement.

43. **CONFLICTS OF INTEREST**

43.1 If either party becomes aware of any conflict of interest which has or is likely to have an adverse effect on the other party's decision (acting reasonably) to determine whether or not to contract with or continue to contract with the other party substantially on the terms of this Agreement, the party aware of the conflict shall immediately declare such an interest to the other and the other party shall take such action under this Agreement as it deems necessary without prejudice to any other right it may have under Law.

IN WITNESS WHEREOF the Parties have signed this Agreement on the date shown below.

1 **SIGNED by** } on (Date)
for and on behalf } **SARAH ARKLE, DIRECTOR OF STRATEGY & COMMISSIONING, HAMMERSMITH & FULHAM PRIMARY CARE TRUST**
of COMMISSIONER }

2 **SIGNED by** } on (Date)
for and on behalf of } **[INSERT NAME OF NON-NHS PROVIDER]**
PROVIDER }