



Department
of Health

The UK Government's Response to the House of Commons Welsh Affairs Committee Report: Cross-border Health arrangements between England and Wales

Cm 9125



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to the House of Commons
Welsh Affairs Committee
Report: Cross-border Health
arrangements between England
and Wales

Presented to Parliament
by the Secretary of State for Health
by Command of Her Majesty

September 2015

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The UK Government's Response to the House of Commons Welsh Affairs Committee Report: Cross-border Health arrangements between England and Wales

INTRODUCTION

1. The House of Commons Welsh Affairs Committee of the 2010-15 Parliament published its report *Cross-border health arrangements between England and Wales* on 12 March 2015.¹ This Command Paper sets out the UK Government's response to those of the report's recommendations that were addressed to the UK Government and the English NHS. Some of those recommendations were also addressed to the Welsh Government and the Welsh NHS. The UK Government has discussed its response to those recommendations with the Welsh Government.

2. The UK Government welcomes the Committee's interest in arrangements for cross-border healthcare. In particular:

- taking account of the Committee's inquiry, NHS England is working with the Welsh NHS to refresh the informal forum that in previous years brought together NHS bodies from both sides of the border. (The first meeting of the refreshed forum is due to take place in early September 2015). It is also considering ways of strengthening this cross-border forum by ensuring the involvement where appropriate of patients and the public, and of national bodies and of providers of specialised services (who are not necessarily based in border areas);

- the UK Government is pleased to have this opportunity to restate its policy that people resident in England should receive English-commissioned secondary care. Achieving this for English residents who are registered with GP practices in contract with the Welsh NHS depends on the co-operation of the Welsh Government and the Welsh NHS. NHS England is working with them to put in place the necessary arrangements. The UK Government wants this to happen as soon as possible.

CONTEXT

3. Originally, there was a single NHS for both England and Wales. The NHS Act 1946 provided for "the establishment of a comprehensive health service for England and Wales". The UK Government was responsible for services in both countries (although from 1969 the NHS in Wales became the responsibility of the Secretary of State for Wales).

4. With the advent of devolution, responsibility for the NHS in Wales was transferred from the UK Government. The current position is that:

¹ <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmwelaf/404/40402.htm>

- the Welsh Ministers are accountable to the National Assembly for Wales for the NHS in Wales, which exists to benefit the people of Wales;²
- the Secretary of State for Health is accountable to the UK Parliament for the NHS in England, which exists to benefit the people of England.³

5. In practice:

- residents of one country access elective secondary care (including specialised services) when those services are commissioned by their home NHS, from a provider either in their own or in the other country. These are services to which patients cannot self-refer: it is the referral by their home NHS that determines the service they receive and the standards to which they do so.
- residents of one country access primary care and emergency care services:
 - either in their own country and commissioned by their home NHS;⁴

2 Section 1 of the NHS (Wales) Act 2006 provides that "The Welsh Ministers must continue the promotion in Wales of a comprehensive health service designed to secure improvement:
(a) in the physical and mental health of the people of Wales, and
(b) in the prevention, diagnosis and treatment of illness."

3 Section 1 of the NHS Act 2006 provides that "the Secretary of State must continue the promotion in England of a comprehensive health service designed to secure improvement:
(a) in the physical and mental health of the people of England, and
(b) in the prevention, diagnosis and treatment of physical and mental illness".

4 There is an exception. Footnote 11 explains that there are a few practices in contract with the NHS of one country (four in contract with the Welsh NHS, one in contract with the English NHS) with surgeries geographically in the other country. Patients registered with those practices receive the primary care services commissioned by the NHS with which the practice is in contract.

- or across the border and commissioned by the NHS of the other country.

These are services to which people self-refer, without going through an intermediary or gatekeeper. Where the resident of one country accesses a service provided by the other country's NHS for which there is no gatekeeper, there is no mechanism for the resident's home NHS to require the service provider in the other country to provide the same service and standards as would be provided by the resident's home NHS.

6. To a large extent England and Wales, with their populations of around 54 million and 3 million respectively, are self-sufficient in terms of their healthcare provision. Patients crossing the Wales/England border to access care account for a small proportion of the total number of patients cared for by either NHS. For example:

- around 55,000 inpatient episodes in England each year relate to Welsh residents, and around 10,500 inpatient episodes in Wales relate to English patients;⁵
- there are just under 21,000 English residents registered with GP practices in contract with the Welsh NHS, and just

5 The Hospital Episode Statistics produced by the Health and Social Care Information Centre show that in English hospitals in 2013/14:

- nearly 57,000 (0.37%) of the 15.5 million inpatient finished admission episodes;
- around 277,000 (0.34%) of the 82.1 million outpatient attendances; and
- just under 49,000 (0.26%) of the 18.5 million A&E attendances

were for people resident in Wales.

Welsh Government figures show that in 2013/14 10,500 English residents were admitted to Welsh hospitals (see table 8.7c at <http://wales.gov.uk/statistics-and-research/health-statistics-wales/?lang=en>).

under 15,000 Welsh residents registered with GP practices in contract with the English NHS.⁶

The UK Government believes that choice benefits patients and would therefore like all patients to have choice over where, when and from whom they receive services. This is already reflected in the NHS Constitution in England. The UK Government welcomes the Welsh health Minister's statement to the Select Committee in January that "[the Welsh Government's] aim is to make sure that people get the treatment they need in the best place for them. Sometimes, that will mean that we are able to move treatments closer to people's homes and to bring services back across the border. But sometimes, services across the border will still be the best for Welsh patients."⁷

7. It is clearly as important to provide good care to those who cross the border to access services as it is to those who do not. NHS bodies in England and Wales are under a duty to co-operate with each other, but they do not have legal powers to compel each other to take particular actions. The UK Government and the English NHS are committed to working constructively with the Welsh Government and the Welsh NHS in the interests of patients. We understand from the Welsh Government that it and the Welsh NHS are similarly committed to working with the UK Government and the English NHS.

RESPONSE TO RECOMMENDATIONS

8. The Committee's recommendations appear in italics in its report and in the headings below. The paragraph numbers given at the end of each heading are those

⁶ The exact figures, at 4 August 2015, were 20,814 English residents, and 14,758 Welsh residents.

⁷ Oral evidence, Q357.

of the paragraph of the report where the recommendation first appears and then of the paragraph in the section on "Conclusions and recommendations" at the end of the Committee's report. The paragraphs below respond in order to all the recommendations, other than those in paragraphs 61 and 63 of the report (paragraphs 8 and 12 of the section on "Conclusions and recommendations"), which deal with matters that are solely the responsibility of the Welsh NHS and the Welsh Government.

FUNDING AND COMMISSIONING

The Department of Health should investigate the problem of why some patients living in England, currently being treated in the Welsh healthcare system and wishing to be treated in the English healthcare system, have been turned away by GP practices in England. This should be considered in light of the legal rights of these residents under the Health and Social Care Act 2012. (Paragraphs 31, 2)

9. The Committee referred to "the legal rights of residents under the Health and Social Care Act 2012". We understand this to mean the rights that people resident in England have under the NHS Constitution.⁸ The most recent version of the NHS Constitution was published on 27 July 2015.⁹ The rights for patients that it sets out relate to services arranged by the English NHS.

⁸ Part 1 of the Health and Social Care Act 2012 amended provisions on the health service in England in the NHS Act 2006 and in related legislation, including the Health Act 2009 which deals with the NHS Constitution.

⁹ <https://www.gov.uk/government/publications/the-nhs-constitution-for-england>

10. The right that is most relevant in this context is described in the Constitution as follows:

You have the right to choose your GP practice, and to be accepted by that practice unless there are reasonable grounds to refuse, in which case you will be informed of those reasons.

The Handbook to the Constitution explains:

What this right means for patients

You can choose with which GP practice you would like to register. That GP practice should accept you onto its list of NHS patients unless there are good grounds for not doing so, for instance because you live outside the boundaries that it has agreed with NHS England or because they have approval to close their list to new patients. In rare circumstances, the GP practice may not accept you if there has been a breakdown in the doctor-patient relationship or because you have behaved violently at the practice. Whatever the reason, they must tell you why.

If you cannot register with your preferred GP practice, NHS England will help you find another.

Source of the right

The right is derived from the duties imposed on the provider of GP services by virtue of regulations made under the NHS Act 2006, in particular paragraphs 15 to 17 of Schedule 6 to the National Health Service (General Medical Services Contracts) Regulations 2004 and paragraphs 14 to 16 of Schedule 5 to the National Health Service (Personal Medical Services Agreements) Regulations 2004.

11. NHS England¹⁰ is accountable¹¹ for commissioning primary medical care in England. It has a legal responsibility to ensure that everybody in England has access to primary medical care. NHS England has assured the Department of Health that, where English residents have difficulty registering with an English GP practice, NHS England helps them to find an English practice that is able to accept them. NHS England continues to work with its local commissioning teams to keep current arrangements under review and to consider strategies for improving access to primary care.

We recommend that the Welsh and UK Governments continue to work together to clarify what an English patient registered with a Welsh GP and a Welsh-registered GP, and a Welsh patient registered with an English GP and an English-registered GP, can expect. (Paragraphs 32, 3)

12. The UK Government wants English residents registered with GP practices in contract with the Welsh NHS to have access to secondary care commissioned by the English NHS to English standards, as set out in English NHS legislation and the NHS Constitution. The UK Government wants this to happen as soon as possible. Achieving it depends on the co-operation of the Welsh Government and the Welsh NHS. The UK Government has asked NHS England to

10 "NHS England" is the operating name of the NHS Commissioning Board, an executive non-departmental public body established by section 1H of the NHS Act 2006.

11 NHS England has recently given clinical commissioning groups (CCGs) greater powers directly to commission primary medical services. However, where those powers are used, NHS England still retains the residual liability for the performance of primary medical care commissioning.

work with the Welsh Government and the Welsh NHS to put in place the necessary arrangements and will update the Committee at a later date on the progress of that work.

CROSS-BORDER PROBLEMS

We recommend that the Department of Health and the Welsh Government work together to carry out a review of cross-border Service Level Agreements. (Paragraphs 62, 10)

13. The Department of Health has discussed this recommendation with the Welsh Government and the position of both bodies is that:

- it is helpful and in the best interests of patients to keep under review arrangements for bodies on one side of the border to provide services for NHS commissioners on the other side of the border;
- this is best done in the first instance by the individual bodies that are parties to those arrangements (rather than by the Department of Health and the Welsh Government, who are not parties to them);
- where reviews by individual bodies identify problems that cannot be resolved between the bodies concerned, the cross-border forum (mentioned in paragraph 2 above) would be a sensible place to consider the issues further in the first instance.

The paragraphs below set out the considerations that have led us to this conclusion.

14. This recommendation occurs at the end of a section of the report headed "Tertiary services". However, arguably the issues

it raises also apply to the commissioning of secondary care (including specialised services) more generally.

15. It is worth explaining, first of all, that the Department of Health does not commission NHS services from the Welsh Government. Nor does the Welsh Government commission NHS services from the Department of Health.

16. Instead, responsibility for commissioning secondary care rests, in England, primarily with clinical commissioning groups (CCGs), and in Wales, with local health boards (LHBs). In England, NHS England has responsibility for commissioning specialised services, and in Wales, the Welsh Health Specialised Services Committee assists LHBs in their commissioning of those services.

17. In the majority of cases, services are provided under an arrangement, not between two commissioners, but between a commissioner and a provider.¹² In Wales, LHBs have both commissioning and providing functions, but in England it is NHS Trusts and Foundation Trusts (and in some cases, private and third sector providers), not CCGs or NHS England, that are providers. A CCG might therefore arrange for an LHB to provide it with services; but an LHB would not arrange for a CCG to provide it with services.

18. In practice, the arrangement between the commissioner and the provider may take a number of forms. Sometimes it may be a service-level agreement; sometimes it may be a contract.

19. No commissioner automatically has powers to compel a provider on the other side of the England/Wales border to provide it with services. Nor does any provider

¹² At the request of the Welsh NHS, NHS England commissions some specialised services on behalf of the Welsh NHS. In those cases, the Welsh agreement is with NHS England rather than directly with the provider.

automatically have powers to require that a commissioner on the other side of the border commission services from it. Any arrangement between a commissioner and a provider is one that each party chooses to enter into. In deciding to make such an arrangement, and in settling its details, individual commissioners and providers take account of their own needs and circumstances.

20. Commissioners and providers may also be required, under the NHS legislation that applies to them, to meet certain requirements. The requirements that are in place differ between the two health services. In particular:

- in England, English commissioners are required¹³ to include in their commissioning contracts provisions on patient safety incidents and other matters specified by NHS England. English commissioners are expected to use the standard contract developed by NHS England for all material patient flows. The standard contract is an important means of guaranteeing the standard of service provided to English residents: for example, it provides a mechanism for ensuring that waiting time standards are observed. It is kept under review by NHS England, and from time to time consultation takes place on its proposed contents: Welsh providers, as well as others, have the opportunity to comment. It should be noted that the regulations and the standard contract are binding on English NHS *commissioners*; English NHS *providers* are free to agree other arrangements (although in practice

commissioners who are able to agree such other arrangements will not be English NHS bodies): this enables English providers to agree, for example, to meet standards set by the Welsh NHS, which in practice are sometimes different from those set by the English NHS.

- in Wales, we understand that the Welsh Government requires all NHS providers to provide services to the same (Welsh) standards. The Welsh Government has told us “This is to ensure Welsh patients receive the same high-quality care no matter where in Wales they are seen and treated.”

21. Given what is said above, and in particular that the Department of Health and the Welsh Government are not parties to the agreements and contracts that are in place, the Department and the Welsh Government are not convinced that the best way forward is for them to conduct a review of cross-border service level agreements drawn up by other bodies. It is preferable for individual bodies to continue to work together to ensure that the arrangements they put in place meet both their needs. Where there are obstacles to this that they think could be tackled by NHS England or the Department of Health, and/or the Welsh NHS or the Welsh Government, a sensible place for raising such issues and for discussing how others have tackled them, would be the cross-border forum described in paragraph 2 above.

We recommend that the UK Government and the Welsh Government work together to examine how improvements can be made in the electronic transfer of information between Wales and England. (Paragraphs 70, 14)

13 By regulations 16 and 17 of the NHS Commissioning Board and CCGs (Responsibilities and Standing Rules) Regulations 2012, SI 2012/2996, as amended, made under section 6E of the NHS Act 2006.

22. The Department of Health and the Welsh Government agree with the recommendation that they – or in the first instance, the two health services – should work together to examine how improvements can be made in the electronic transfer of information between Wales and England. Discussions are currently taking place between NHS England and the Welsh Government regarding information sharing between the two NHSs. It is hoped that a formal agreement can be reached in the coming months.

23. The evidence that the Committee received suggests that there are a number of information issues, associated sometimes with governance, at other times with standard procedures or compatibility of different technologies. We therefore think the issues would best be considered by the providers and commissioners concerned, in the first instance bilaterally, and then in the cross-border forum if appropriate.

24. Meanwhile, the Welsh Government has asked us to inform the Committee that work is continuing in Wales to support and increase electronic cross-border exchange information. Welsh GP practices have the technical capacity to receive electronic discharge information, and demographic information is already exchanged using the Personal Demographic Service which enables patients to be identified by NHS number. Data about Welsh patients treated in England and English patients treated in Wales, can be shared. NHS Wales Informatics Service (NWIS) is also seeking to implement the GP2GP system which enables patients' electronic health records to be transferred directly between GP practices. More work needs to be done on standards for this to be introduced in Wales. Other information can also be shared electronically by making use of the Secure File Sharing Portal established by NWIS. The recent

introduction in England of secure encrypted mail by nhs.net allows data to be sent safely to and from an unencrypted email domain. This new technology could provide a solution for the secure transfer of electronic data between the two health services.

We recommend that the Department of Health works with its counterparts in the devolved administrations to establish a single Performers List for GPs across the UK. (Paragraphs 76 and 16)

25. The Committee's recommendation aims to address difficulties in recruiting GPs to work in Wales.

26. The Welsh Government has informed us that it is already planning action on this point. It intends to consult over the coming months on changes to the NHS (Performers List) (Wales) Regulations 2004 and the relevant application forms. The proposed changes would allow a GP already on an English, Scottish or Northern Ireland performers list to apply to be placed on a local health board's performers list by completing a streamlined application form.

27. The Department of Health has discussed the Committee's recommendation with the Welsh Government and with the devolved administrations responsible for health services in Scotland and in Northern Ireland. It believes that the right course of action at this stage is for the Welsh Government to continue with the consultation it is planning.

28. If difficulties persist after the action planned by the Welsh Government, the case for a UK-wide performers list could be considered further. However, it needs to be recognised that this would not be a quick fix. There is currently no power to make UK-wide regulations on performers lists, so new primary legislation would be needed to create one.

29. There would also be a number of policy and practical issues raised by creating a single UK-wide list:

- Performers lists are not ends in themselves. The requirement to be on a performers list was introduced in each part of the UK in 2004, in the wake of the Harold Shipman case, as a way of helping to ensure patient safety.
- Accordingly, admission to a list is not a once-for-all process. Once on a list, the GP's performance is regularly reviewed by the NHS body responsible for commissioning primary medical services in the area where the GP is providing them.¹⁴

14 Consequently, the regulations for England (The NHS (Performers Lists) (England) Regulations 2013, SI 2013/335, as amended by the NHS (Performers Lists) (England) (Amendment) Regulations 2015, SI 2015/362) require NHS England to maintain a single list for the whole of England.

Similarly, the regulations for Northern Ireland (The Health and Personal Social Services (Primary Medical Services Performers Lists) Regulations (Northern Ireland) 2004, SI 2004/149, as amended by the Health and Personal Social Services (Primary Medical Services Performers Lists) Regulations (Northern Ireland) 2008, SI 2008/434, and 2010, SI 2010/376) require the Northern Ireland Health and Social Care Board to maintain a single list for the whole of Northern Ireland.

The regulations for Wales (The NHS (Performers Lists) (Wales) Regulations 2004, SI 2004/1020, as amended by the NHS (Performers Lists) (Wales) (Amendment) Regulations 2005, SI 2005/258, and 2006, SI 2006/945, and the NHS (Primary Medical Services) and (Performers Lists) (Miscellaneous Amendments) (Wales) Regulations 2008, SI 2008/1425), require each of the 7 local health boards in Wales to maintain a performers list for its own area. The NHS Shared Services Partnership administers the listing process centrally on behalf of LHBs in Wales, and once accepted onto the list for one Welsh health board a GP is able to work anywhere in Wales.

Scottish regulations (The NHS (Primary Medical Services Performers Lists) (Scotland) Regulations

- The system is designed to ensure practitioners are fit for the specific role they undertake. Local intelligence about the nature of the job and services is required to assess a GP's suitability. (This is why GPs who are already on NHS England's performers list for England need to notify NHS England if they propose to practise in a different area within England).
- On the face of it, a UK-wide list would reduce the ability of each NHS to decide what it thinks best for its part of the UK.
- Nor is it clear who would be responsible for assessing a GP's suitability for work in a local area if the approach of a UK-wide list were to be adopted.

These considerations lead the Department of Health to have significant reservations about the suggestion of a UK-wide list.

We recommend that the Department of Health and the Welsh Government work together with medical practitioners, particularly at a GP level, to ensure that patients are better informed of the differences in healthcare policy between England and Wales. Patients must also be made aware of the impact of choosing a Welsh or English GP and the implications that this might have for later care. (Paragraphs 94 and 19)

2004, SI 2004/114, as amended by SI 2004/216, SI 2005/333, SI 2006/136, SI 2007/207, SI 2007/413, SI 2010/93 and SI 2011/392) require each of the 14 health boards in Scotland to maintain a performers list for its area, but allow GPs, when applying to join one health board list, to specify other health boards on whose list they would like to be included. If accepted onto the list, the other health board can also include the GP without further enquiry.

30. We take this recommendation to relate, not to the populations of England and Wales as a whole, but specifically to those resident in one country who are registered, or are considering registering, with a GP practice in contract with the other country's NHS. The work already under way on the protocol, described in paragraph 12 above, is therefore relevant to this recommendation and the Department of Health will update the Committee when it provides an update on this group more generally.

We recommend that NHS Wales and NHS England work together to improve patient engagement for cross-border services. (Paragraphs 102 and 21)

31. The Department of Health and the Welsh Government agree that it is important that the Welsh NHS and the English NHS should work together to improve patient engagement for cross-border services.

32. English and Welsh NHS bodies are already under a duty to co-operate with each other.¹⁵ We think what is needed is improved joint working at local level. The cross-border forum is a suitable place to consider examples of good practice, to discuss issues with patients, and to consider what further action might be taken.

We recommend that formal protocols are put in place to ensure consultation between LHBs and CCGs when changes to services impact on populations across the border. (Paragraphs 108 and 24)

33. We understand that the aim of this recommendation is that NHS bodies should share information with NHS bodies on the other side of the border that could be affected by their decisions. The Department of Health and the Welsh Government agree that this is important.

34. The Department of Health is not convinced that "formal protocols" are the best way of achieving this outcome. Considerable effort could go into agreeing formal protocols which, in the event, might prove irrelevant to the actual issues that arise, or might lead to confusion over their status in relation to the requirements in legislation about who must be consulted in what circumstances.

35. We therefore envisage that the revived cross-border forum will be able to discuss as and when the need arises what consultation, in addition to that required by legislation, might be valuable in particular cases.

¹⁵ Section 72 of the NHS Act 2006 says "It is the duty of NHS bodies to co-operate with each other in exercising their functions." "NHS body" for this purpose means:

- an NHS Trust or Special Health Authority
- a Local Health Board (which exists only under Welsh NHS legislation)
- NHS England, a CCG, or an NHS Foundation Trust (which exist only under English NHS legislation), or
- NICE, or the Health and Social Care Information Centre (which are arm's length bodies of the Department of Health).

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