

# Involving the Public in NHS Commissioning: A Culture Clash in Cornwall

by Dr Peter Levin, on behalf of West Cornwall HealthWatch, January 2016

## **Summary**

This paper takes a close look at how Kernow Clinical Commissioning Group (KCCG) carries out its duty to involve the public in its activities. It focuses on a document entitled *Procurement framework for managing Commissioning changes* which, although not intended for public consumption, was tabled at a meeting of the Governing Body of KCCG in November 2015. Having been revealed to the public, the document was then announced as being the subject of a 'piece of engagement', with comments required within five days, which included a weekend. Following complaints, the deadline was subsequently put back by a month.

West Cornwall HealthWatch (WCHW), an independent voluntary watchdog body, and six other local groups submitted comments on the document. In a detailed and reasoned criticism, WCHW pointed out that it contained no clear statement of the purpose of the document or its intended audience, and that in many places it was difficult to discern what the language used actually meant. Of particular concern was a very confused description of the process of managing changes in commissioning, a description that completely omitted any reference to involving the public in the process, although it is a process that has major implications for patients and potential patients.

Of even greater concern is the reaction of KCCG to the comments submitted and what that reaction reveals about the organization and its culture. The comments were not circulated to all the members of KCCG's Governing Body, and at a subsequent meeting the document was approved with the wording unchanged. We have learned since that WCHW's comments were regarded as hostile and aggressive.

KCCG's reaction is indicative of wide differences between the culture of the organization and that of the public world within which it is situated. Differences in attitudes, expectations and language are so great – and there is so little understanding of them – as to constitute major obstacles to public involvement in KCCG's commissioning activities. It seems likely that this will be the case in localities across the country, and indeed at national level too.

This paper consists of seven parts:

Part 1. Introduction

Part 2. Detailed comments on the 'Procurement framework' document

Part 3. Discussion and conclusions on the 'Procurement framework' document (including questions about the way in which KCCG is run)

Part 4. The sequel: how KCCG reacted to criticism

Part 5. KCCG's constitution and legal duties

Part 6. Is KCCG abiding by its constitution and legal duties?

Part 7. The 'culture clash' between KCCG and the public: is there a way forward?

## **1. Introduction**

On November 10th, 2015, a document entitled *Procurement framework for managing Commissioning changes*<sup>1</sup> was tabled at a meeting of the Governing Body of the Kernow Clinical Commissioning

Group<sup>2</sup> (KCCG). Two weeks later, the co-ordinator of West Cornwall HealthWatch (WCHW) received an email drawing her attention to a 'piece of engagement ... around ... a draft procurement framework document' that had been placed on the KCCG website and informing her that the engagement would close five days later (the five days included a weekend). Following complaints, the deadline was subsequently deferred to December 31st. It is the document on the website, 'Draft 6', that is dealt with here. The full version is appended to this paper: there are extracts from it in the text, below, shown in italics.

An earlier version of this paper, under the title 'The Procurement Framework: a cautionary tale from Cornwall' was submitted to KCCG on December 29th, 2015 and subsequently published on WCGW's website. That earlier version comprised an Introduction and two further sections which are reproduced without modification as Parts 2 and 3 of this paper.

## **2. Detailed comments on the 'Procurement framework' document**

### Section 1, 'Introduction'

*This framework sets out NHS Kernow's management of major changes to the commissioning of services. Applying a consist (sic) approach for the gathering of evidence, exploration of options and governance, ensuring compliance to all relevant laws and guidance is key to the successful commissioning of services. NHS Kernow is committed to providing high quality clinical services that meet the needs of local communities as set out in its Corporate Objectives and Annual Delivery Plan agreed by the Governing Body. NHS Kernow will look at all options and engage as appropriate to secure the best services for the local population.*

What we see here, in the title and the very first sentence of the document, is confusion between structure and process. 'Frameworks' are commonly understood to denote structure, something relatively fixed over time, such as an organization or a contractual agreement or – more loosely – a set of arrangements; 'management' clearly refers to process, a series of steps, something that proceeds over time. A 'framework [that] sets out ... management' is a nonsense. The opening words 'This framework' suggest that the document itself is a structure, and this is a nonsense too.

Since the term 'procurement framework' is clearly a problematic one, capable of being interpreted in more than one way, it would have been helpful to a reader if the document had opened with a definition of it. In mitigation, the treatment of the term and its component parts on various NHS websites is nothing short of chaotic. On one, for example, we find that the answer to a frequently asked question 'What is a framework?' begins 'A framework agreement is ...'.<sup>3</sup> On another, belonging to NHS England, we find CCGs advised to 'establish a procurement framework for "lead providers" ...', although this merely refers the reader to a diagram listing the services that a 'lead provider' is required to offer.<sup>4</sup> (The KCCG document makes no reference anywhere to 'lead providers'.)

The opening paragraph does not state the purpose of the document, nor does it say for whom it is intended. If the document is intended to be – or to develop into – a manual or handbook, to guide the process, it should say so. But as it stands this paragraph reads as merely a piece of self-praise.

### Section 3, 'Legislation'

*Where NHS Kernow intends to work collaboratively with an existing provider to effect a major change, it will evidence how due process has been followed to ensure all risks and benefits have been appropriately evaluated adhering to all relevant national and regional guidelines.*

*When NHS Kernow intends to procure a new contract by testing the market for competition, it will ensure compliance with EU Procurement Directives as implemented by UK Law and national guidance from NHS England, NHS Improvement and Crown Commercial Services ...*

All this seems to amount to nothing more than saying KCCG will follow the rules and show that it has done so. As for the list of pieces of legislation etc. that follows (see the Appendix), the document fails to conform to the convention that pieces of legislation should be given their correct titles and, in the case of statutory instruments, their S.I. number. Presumably, by '2015 Public Procurement Regulations' the authors mean 'The Public Contracts Regulations 2015', SI 2015 No. 102. Accuracy and precision are crucial if a document of this nature is to be taken seriously.

Furthermore, it is customary in such documents to distinguish measures according to the amount of discretion – latitude – that they afford to decision takers. Thus Acts of Parliament will typically set out requirements that must be adhered to (although a requirement that an office-holder must be 'satisfied' about a proposed course of action does of course allow discretion to that person). Codes of Practice, notes of guidance, briefings, advice, recommendations arising out of research: these allow different amounts of discretion to decision takers. This document fails to note these distinctions or even list the measures in a systematic and recognisable order.

#### Section 4, 'Financial controls'

*NHS Kernow's constitution sets out the financial limits for the management best value on any purchases carried out on the CCGs behalf. ... NHS Kernow will ensure all commissioned services aim to deliver value for money ensuring best quality and price for the service supplied.*

This extremely brief section says nothing whatever about how financial controls are to be exercised. Quoting the 'motherhood and apple pie' aspiration of delivering 'value for money ensuring best quality and price' is hardly likely to assist someone engaged in the commissioning process.

#### Section 5, 'Governance'

We see from the diagram in this section of the document (but not from the text) that the oddly-named Project Steering Group (Task and Finish) – 'Specific job roles from various departments will be a core group ...' (*sic*) – will report to the Procurement Committee (and through that Committee to the Governing Body). Three of the boxes in this diagram correspond to 'chunks' of organizational structure, and have links that presumably correspond to lines of instruction and reporting, but there is a further box, containing the words 'Finance, Performance & Quality', that does not connect to any of the other three. This is more than somewhat unusual for a box diagram that purports to represent the structure of an organization. It suggests that the authors do not have a grasp of the very concept of 'organizational structure'.

#### Section 6, 'Procurement Policy'

Interestingly, there is nothing in this section about the process of forming policy: the section is devoted entirely to the principles – high aspirations: motherhood and apple pie, again – to be followed. There is one oddity, however: this section gratuitously includes the completely irrelevant information that the provisions of the Bribery Act 2010 came into force on July 1, 2011.

## Section 7, Major commissioning change process

*The process for managing a major commissioning change within NHS Kernow covers 4 key stages:*

- 1. Pre- procurement phase (review and plan for change)*
- 2. Collaboration or Competition*
- 3. Mobilisation of the change*
- 4. Contract and performance management*

*[In the pre-procurement phase,] each commissioning change will commence with a Project Initiation Document outlining the findings following a review of the current state and where a commissioning view is that change is required. The Procurement Committee will review and endorse further work-up to a full business case for allowing a major commissioning change or advise on what further information is required to re consider the project at a later date. Development of a full business case will utilise a range of skills of individuals within the organisation and the development of a Project Steering Group as a Task and Finish Group will be established to oversee its delivery.*

Of these four stages, it is Stage 1 – and only Stage 1 – that actually comprises the decision-making part of the process. Disentangling the wording of this section – necessary because the elements are not presented in chronological order – we see that it begins with (a) 'a review of the current state', goes on to (b) the forming of a 'commissioning view ... that change is required', then (c) the writing of a 'Project Initiation Document'. Next, (d) the 'Procurement Committee will review and endorse further work-up to a full business case'. Then, (e) a full business case is developed: this includes an outline business case (see the appended document), but we are not told whether or not this precedes the Procurement Committee's decision to endorse 'further work-up'. At some point during the development of the full business case– we are not told when – (f) 'the development of a Project Steering Group ... will be established (sic) to oversee its delivery'.

Conspicuous in this description of the process is the complete absence of any reference whatever to involvement of patients or the public in this process. KCCG makes great play of its commitment to 'engagement', but when we look for some description of how this is to be incorporated in the decision-making process we find nothing at all. Worryingly, what we see here is effectively a prescription for a process of building up such a strong momentum within the KCCG organization that by the point at which the public gain entry to the process it is extremely difficult to change direction: the result, inevitably, will be confrontation and conflict.

If we take KCCG's protestations of its support for engagement at face value, this document has to be seen as a classic case of what goes wrong when drafting is carried out by people who do not appreciate the wider context within which the organization is situated and who do not fully comprehend the process and how it works. They may be fluent, to some extent, in jargon, but their words require interpreting and disentangling, as the above discussion demonstrates.

'Collaboration or Competition' is presented here as a 'key stage' in a process, but of course it is an issue, not a stage. As set out in the document, the issue is one for the Procurement Committee to decide, and to decide on the basis of the full business case. This seems bizarre, to put it mildly: collaboration and competition must surely each require their own business case. It is also an issue

on which patients, the public and health service staff all have experiences and views that deserve to be taken into account. This is another reason for opening the process up and engaging them at an early stage.

'Mobilisation of the change' and 'Contract and performance' are essentially to do with the implementation of decisions, and accordingly fall beyond the crucial steps in the decision-making process. They will need to be thought about in advance, of course, and one might have expected to see the testing of feasibility as a (recurring) stage in the process, but such a stage does not feature in the KCCG document.

### ***3. Discussion and conclusions on the 'Procurement framework' document***

From its content, it is very hard to discern the purpose and intended audience of the 'Procurement framework' document. It may be that these were not actually identified, and that KCCG was simply following an instruction to produce a 'framework'. Or that the leading lights in KCCG saw an opportunity for self-advertisement. It is certainly strange that the document makes no reference to any of the literature on commissioning already published by NHS bodies, which suggests that the authors have started from scratch and in effect embarked on 'reinventing the wheel'.

Moreover, the document contains very, very little in the way of practical guidance: instead we find high aspirations, couched in gobbledygook, such as this: 'NHS Kernow will ensure all commissioned services aim to deliver value for money ensuring best quality and price for the service supplied.'

What is really worrying is the seeming inability of the authors of the document to think in an analytical way. They have not defined the term 'procurement framework'. They have not grasped the distinction between structure and process, and are demonstrably unable to lay out the elements of the process and see how they fit together. Their jargon-laden writing style too is suggestive of an inability to think clearly. If this is an indication of the calibre of those who oversee and budget for the National Health Service in Cornwall and the Isles of Scilly, then patients, the public and health service staff have every reason to be very concerned indeed.

In appraising the 'Procurement framework' document one word comes repeatedly to mind: 'amateurish'. Judged by both its content and its presentation, it simply does not reach a professional standard. In part this may be attributable to the make-up of the CCG's Governing Body, the 15 members of which include seven General Practitioners, another Doctor member and a Nurse member. General practices are essentially small businesses, and it is hard to see how running one can be a qualification for running an organization with an annual budget of more than £700 million. It follows that the Governing Body must be heavily dependent on KCCG's paid staff for advice and guidance, and accordingly serious questions must be asked about the calibre of those staff. The recent news that, 8½ months into the current financial year, KCCG is heading for a year-end deficit of £14m, having previously forecast a surplus of £500,000, and is to have a so-called 'turnaround director' appointed, adds weight to this concern.<sup>5</sup>

What lessons can be learned from the situation in Cornwall? Kernow CCG is just one of 209 clinical commissioning groups in England, and clearly we have no grounds for generalizing from this one CCG to others. But this study does show what *can* happen when a CCG gets the bit between its teeth. KCCG seems to have gone off on an eccentric foray of its own, and it is only a matter of

chance that this latest escapade has come to light. The current financial situation, although it is now receiving attention from NHS England, seems to have been detected very late in the day, and while the diversion of resources into producing a grandstanding but ultimately useless document may not have been massive, it does raise questions about the judgment of those in charge.

So we are left with some questions. Are other CCGs grappling with the problem of having to change contracts that they have commissioned: if so, what guidance have they received from NHS England or other bodies? Is there scope for CCGs to work together on the problems that they face? Are arrangements for overseeing the work of CCGs satisfactory, or is an inspection regime of some kind called for?

And as for Cornwall itself, an improvement to the governance of KCCG is clearly urgently needed. What can be done to provide it?

#### ***Part 4. The sequel: how KCCG reacted to criticism***

The KCCG Governing Body met in public on Tuesday, January 13th, 2016. The papers for the meeting included a document headed 'Procurement framework ...': this turned out to be precisely the same document as had been offered for 'consultation', apart from the addition to the 'Governance Structure' diagram of a line connecting the 'Finance, Performance and Quality' Box to the 'Governing Body' box. No other changes at all had been made. The Governing Body was asked 'to approve the final version of the Procurement framework'.<sup>7</sup>

It was reported to the Governing Body that a total of seven organizations had submitted comments, West Cornwall HealthWatch having been one of them. Questions from the public elicited the information that these comments had not been circulated to all members of the Governing Body.

The officers also said that 'Procurement is not a policy/strategy that CCGs have to consult on' and that 'The framework that was discussed in November 2015 is the same one that was previously published on the CCG website, for the period 1st April 2013 to 31st October 2014 and is only updated with changes in the CCG structure and or legislative change'.

The officers reported as follows:

*There are two consistent themes in the comments/responses received from the consultation:*

*1. The documentation is not public facing and therefore contains a number of NHS acronyms and administrative language.*

*The framework document that went for public consultation was written for an internal NHS audience. It is not necessary for CCGs to consult on frameworks of this nature and initially it had not been NHS Kernow's intention to hold a public consultation on this updated and amended document from 2013.*

*To address this issue NHS Kernow is in the process of preparing a subsequent document that will support the framework and addresses the specific procurement regulations and the NHS requirements on competition and choice raised within this consultation. It is anticipated this document will be ready for public consumption in February and the document will be launched at an invitation event from contributors to the consultation held in December.*

*2. Public and Service User engagement is paramount throughout any service change/procurement.*

*NHS Kernow has received consistent feedback regarding engagement and as a result are in the process of creating a specific engagement group that deal specifically with service changes and procurement requirements. This group is an addition to the current engagement and service user group already established.*

Having been asked 'to approve the final version of the Procurement framework', the Governing Body duly did so.<sup>6</sup>

## **5. KCCG's constitution and legal duties**

### Involving the public: what KCCG's constitution says

Kernow CCG is required to act in accordance with its constitution,<sup>7</sup> in which there are numerous sections which refer to involving local people.

- S. 5.4.1 'The governance arrangements ... detail the way in which Kernow CCG will demonstrate principles of probity, accountability and transparency to allow the organisation to serve patients and the local population effectively.'
- S. 5.5.1 'The Group will demonstrate its accountability to ... local people in a number of ways, including by:
  - appointing independent lay members ... to its Governing Body;
  - holding meetings of its Governing Body in public (except where the Group considers that it would not be in the public interest in relation to all or part of a meeting);
  - meeting annually in public to publish and present its annual report.
- S. 6.2.1 '[T]he Group will make arrangements to secure public involvement in the planning, development and consideration of proposals for changes and decisions affecting the operation of commissioning arrangements by ...
  - working in partnership with patients and the local community to secure the best care for them;
  - involving patients and the public, encouraging and taking account of feedback in the planning of commissioning services and in developing, considering and making decisions on any proposals for changes in commissioning arrangements that would have an impact on service delivery or the range of services available to demonstrate transparency, inclusiveness, fairness and accountability in decision making;
  - making decisions in an open and transparent way so that people can understand how services are planned and delivered;
  - making it possible for patients, the public and other stakeholders to be involved in decisions about services for the local population;
  - consulting with people who are affected by service change ...'
- S. 7.5.4 The Governing Body may delegate authority to the People's Commissioning Board and make decisions on any aspect of its work deemed appropriate by the Governing Body. The Lay Member for patient and public involvement is the Chair of the People's Commissioning Board and will bring reports, recommendations and requests from it to the Governing Body. The Governing Body is required to ratify any recommendations or decisions made by the People's Commissioning Board.

- S. 8.7.1 The Chair of the Governing Body is responsible for ...
  - overseeing governance and particularly ensuring that the Governing Body and the wider Group behave with the utmost transparency and responsiveness at all times;
  - ensuring that public and patients' views are heard and their expectations understood and, as far as possible, met;
  - ensuring that the organisation is able to account to its local patients, stakeholders and the NHS Commissioning Board ...
- S. 8.11.1&2 There are two lay members appointed to the Governing Body, one to lead on audit, remuneration and conflicts matters, and one to lead on patient and public participation matters. The lay members have a non-executive role within NHS Kernow CCG.

#### Involving the public: the law

Under Section 14Z2 of the Health and Social Care Act 2012 (Public involvement and consultation by clinical commissioning groups), KCCG 'must make arrangements to secure that individuals to whom the services are being or may be provided are involved ... in the planning of the commissioning arrangements by the group, [and] in the development and consideration of proposals by the group for changes in the commissioning arrangements where the implementation of the proposals would have an impact on the manner in which the services are delivered to the individuals or the range of health services available to them'.<sup>8</sup> In other words, KCCG has a legal duty to involve the public in planning its 'procurement framework' and in the actual process of developing and considering changes in commissioning.

The law has also something to say about the role of the Lay Member on the Governing Body. There are statutory Regulations, published by the NHS Commissioning Board, which cover this.<sup>9</sup> The Lay Member has 'a lead role in championing patient involvement'. 'Their focus will be strategic and impartial, providing an independent view of the work of the CCG that is external to the day-to-day running of the organisation. ... This person will help to ensure that, in all aspects of the CCG's business, the public voice of the local population is heard ... In particular, they will ensure that the CCG ... responds in an effective and timely way to feedback and recommendations from patients, carers and the public.'

#### ***6. Is KCCG abiding by its constitution and legal duties?***

'Accountability', 'transparency' and 'involvement' are fine words but how can they be translated into practice? All of them imply a relationship with the public, so to put them into practice necessitates asking 'Accountable to whom?', 'Transparent to whom?', 'Involving whom?'

To answer these questions, within an organization that deals with the public, there have to be some people on the staff and Governing Body who are able to imagine how that organization and its behaviour look to people outside. They have to be able to put themselves in the shoes of members of the public. Sadly, despite KCCG's constitution committing it to transparency, it evidently did not occur to anyone that choosing the Isles of Scilly as the venue for its 2015 annual meeting, to publish and present its annual report, as its constitution requires, was guaranteed to prevent the attendance of any member of the public from mainland Cornwall, a plane ride away.



Likewise, it seems not to have occurred to the authors of the 'Procurement framework' document that it should as a matter of course be made public, even though the Health and Social Care Act 2012 requires CCGs to involve the public in the planning of its commissioning arrangements and in the development and consideration of proposals for changes in commissioning arrangements (see above). This rather contradicts the view expressed in the report to the Governing Body at its January 2016 meeting in the case of the 'Procurement frameworks' document that '[it] is not necessary for CCGs to consult on frameworks of this nature'. And clearly, to make no provision for involving the public in the 'Major commissioning change process' is also cocking a snook at the law.

In this context, the position of the Lay Member for patient and public involvement is of particular interest. The person appointed worked for 31 years in the NHS. At the point when he retired he was Chief Executive of two primary care trusts. His long experience and seniority will have given him considerable insight into the complexities of managing health services and a sympathetic understanding of the viewpoints of NHS staff. Within KCCG he has been appointed Chair of the Procurement Committee, although under KCCG's constitution the lay members have a non-executive role within NHS Kernow CCG (S. 8.11.1&2) and the statutory Regulations explicitly say (see above) that he must provide 'an independent view of the work of the CCG that is external to the day-to-day running of the organisation'. Perhaps it was his managerial experience rather than a grassroots affinity with patients and public that secured his appointment to the KCCG Governing Body. (Interestingly, although the KCCG constitution specifies that 'The Lay Member for patient and public involvement is the Chair of the People's Commissioning Board', there is no indication on the KCCG website that such a body actually exists.)

### ***7. The 'culture clash' between KCCG and the public: is there a way forward?***

From the point of view of an organization such as West Cornwall HealthWatch, a voluntary, independent health watchdog that exists to monitor developments and campaign to safeguard and improve existing services provided in West Cornwall by the National Health Service, KCCG's constitution says many of the right things, with its references to public involvement, partnership and so on, and especially transparency and accountability. But the experience with the 'Procurement framework' document is a case-study of the gulf between a statutory body and a local watchdog group. It is a gulf that arises from a clash between two very different cultures.

Aspects of KCCG's culture are readily apparent from the saga of the 'Procurement framework' document. Those within the organization are evidently very conscious of the boundary between the organization and those outside it. They have their own specialized language – 'administrative language' – which members of the public do not comprehend. They work in a disciplined hierarchical world, where it is very clear who is above you and who is below, and in which the higher you are the more deference you expect and are accorded. Decisions are taken in committees, where there is pressure – which may be overt or subtle – to come to agreement, to a consensus: the phenomenon of 'groupthink'. Disagreement is embarrassing, especially if it becomes public, and is consequently to be avoided if at all possible. As we have seen, the Governing Body approved the 'Procurement framework' document despite members not having read the critical comments from the public, a step that is hard to explain in terms of rational and independent consideration.

The links that KCCG people have beyond the immediate organization are with health service 'professionals', who are accustomed to possessing a domain in which they have a good deal of autonomy, scope for exercising their 'professional judgment'. (And in the healthcare world there is a pecking order of professions, to which everyone is very sensitive.) Asserting professional judgment amounts, of course, to claiming that members of the public have little or no right or competence to contest the decisions arrived at.

The culture of a watchdog group such as West Cornwall HealthWatch is very, very different from that of KCCG. There is no ingrained deference towards those high up in the hierarchy: indeed, there is hardly any hierarchy. There is a genuine desire to know what is being planned, and a desire to have matters explained, but the face that KCCG presents is seen as a smooth, hard, expressionless one, with no cracks that would allow outsiders to gain some purchase on what is going on inside. At times there will – understandably – be frustration when it appears that answers to questions are designed to fob off the questioner, and suspicion when it appears that full and accurate information and clear and convincing explanation are not being freely given. At such times some sensitivity to being treated with condescension may be evinced. Some members of the WCHW committee have worked within the NHS, so may be particularly aware of 'staff side' views. Some members are opposed on principle to policies such as 'contracting out' and other forms of privatization. (WCHW is strictly a non-political party organization, however.) But all are members of the public.

So what happens when a clinical commissioning group meets a watchdog group? One piece of evidence is KCCG's treatment of the views on the 'Procurement framework' document submitted by the seven responding groups. These views were not circulated to members of the Governing Body, and that body approved the document rather than asking for more information or referring it back for further work. We have also learned that the Lay Member for patient and public involvement (who also chairs the Procurement Committee) found WCHW's paper aggressive and hostile, and he has queried whether WCHW thinks it would be effective in changing people's minds.

What we see here is a classic case of non-meeting of mindsets. Generalizing for a moment, we have the KCCG mindset, which frames WCHW's critique as aggressive and hostile: but we can envisage the possibility of a very different mindset, which would see the WCHW critique as forthright and challenging. In the first mindset the critique is an attack, and accordingly to be repelled; the second admits of the possibility that the challenge can be constructively engaged with. One wonders, however, whether people within KCCG are actually aware of having a mindset. Organizational cultures are liable to be so dominant and all-pervading that there is no awareness of mindsets other than the one that is prevailing, no capacity to imagine that there are other ways of looking at the world.

To WCHW committee members, the point at issue over the 'Procurement framework' document is different: less subtle, more straightforward. 'You asked us what we think. This is what we think. These are the questions that we have. Oh, you don't like them! Are we meant to apologize?' Arguably, shorn though it may be of tact and diplomacy, theirs is a more honest and direct mode of discourse.

When it comes to resolving issues, there will be a similar divergence of expectations and approaches. In the present case, we wait to see what will happen next. KCCG is in the process of preparing a new document 'that will support the framework and addresses the specific procurement

regulations and the NHS requirements on competition and choice raised within this consultation'. This document is due to be published in February and 'launched at an invitation event from contributors to the consultation held in December' (*sic*). So we wait to see what is in this document, whether there will be an opportunity to read it before the 'event' and ask questions at the event itself, whether the 'Procurement framework' itself is modified, whether there is any limit on the number of people from the contributing organizations attending – and indeed whether the event is held in mainland Cornwall or on the Isles of Scilly!

The forum of public involvement is an unruly one. Away from statutory bodies and big corporations, it is not hierarchical. Issues are not resolved by top-level negotiations between a select few senior people, to whom others defer, in private round a board-room table. Anyone can ask a question, in public, and all questions come with an entitlement to be given an answer, also in public.

For a constructive debate to take place, certainly the members of watchdog groups need to appreciate the difficulties that managers and professionals face in allocating resources and in planning and developing services.

For their part, the managers and professionals need to understand that transparency and accountability require them to be open, speak in a language that ordinary people can understand, forswear the habit of expecting deference, accept that there are valid mindsets besides their own, allow for and answer honestly questions that they might find uncomfortable, be prepared to learn from outsiders, and indeed take with a good grace some occasional mockery at times when the gulf between the cultures opens up. We trust that this is not too much to hope for.

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#### Notes

1. The document is appended to this paper.
2. Kernow Clinical Commissioning Group, KCCG, which is the CCG for Cornwall and the Isles of Scilly, also styles itself NHS Kernow. (Kernow is the Cornish language name for Cornwall.)  
<http://policies.kernowccg.nhs.uk/DocumentsLibrary/KernowCCG/WebDocuments/Internet/Engagement/ProcurementFrameworkForManagingMajorCommissioningChanges.pdf> (Accessed 27/12/2015)
3. NHS London Procurement Partnership <http://www.lpp.nhs.uk/about-lpp/frequently-asked-questions/> (Accessed 27/12/2015)
4. NHS England, Questionnaire on supporting clinical commissioning groups to buy commissioning support <https://www.england.nhs.uk/wp-content/uploads/2013/06/buy-commis-supp.pdf> (Accessed 27/12/2015)
5. BBC News, 'NHS Kernow ordered to deal with financial problems' <http://www.bbc.co.uk/news/uk-england-cornwall-35113666> (Accessed 16/12/2015)
6. <http://policies.kernowccg.nhs.uk/DocumentsLibrary/KernowCCG/OurOrganisation/GoverningBodyMeetings/1516/201601/2015062ProcurementFrameworkAndProcurementCommitteeTermsOfReference.pdf> (Accessed 16/01/2016)

7. There appears to be no link to KCCG's constitution on its own website, but that document can be found here: <http://www.rcht.nhs.uk/GET/d10316833> (Accessed 16/01/2016)

8. Health and Social Care Act 2012, S.14Z2 Public involvement and consultation by clinical commissioning groups

<http://www.legislation.gov.uk/ukpga/2012/7/part/1/crossheading/further-provision-about-clinical-commissioning-groups/enacted> (Accessed 21/01/2016)

9. *Clinical commissioning group governing body members: Roles outlines, attributes and skills*, published by the NHS Commissioning Board, October 2012, pp17-18. This version incorporates The National Health Service (Clinical Commissioning Groups) Regulations 2012S.I. 2012/1631.

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### Biographical note

Dr Peter Levin is a member of the Committee of West Cornwall HealthWatch. In a previous existence he lectured in Social Policy at the London School of Economics. His publications on public participation date back to the late 1960s. He is the author of *Making Social Policy* (Open University Press, 1997).

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# Procurement framework for managing Commissioning changes

## 1. Introduction

This framework sets out NHS Kernow's management of major changes to the commissioning of services. Applying a consistent approach for the gathering of evidence, exploration of options and governance, ensuring compliance to all relevant laws and guidance is key to the successful commissioning of services. NHS Kernow is committed to providing high quality clinical services that meet the needs of local communities as set out in its Corporate Objectives and Annual Delivery Plan agreed by the Governing Body. NHS Kernow will look at all options and engage as appropriate to secure the best services for the local population.

## 2. Guiding principles

NHS Kernow recognises the importance in making decisions about the service it commissions in a way that does not call into question the decision that has been made or the process followed. NHS Kernow will commission services in a manner that is transparent, non-discriminatory and fair way with a view to:

- Meeting the needs of the people who use the services
- Improving the quality of the services
- Improving efficiency in the provision of the services

In doing so, the CCG is committed to:

- Engaging with providers and service users about its commissioning proposals and take their responses into account
- Where appropriate, undertake formal engagement and consultation
- Act in a proportionate and transparent way
- Treat providers equally and in a non-discriminatory way, including by not treating a provider or a type of provider more favourably than any other provider in particular on the basis of ownership.

## 3. Legislation

Where NHS Kernow intends to work collaboratively with an existing provider to effect a major change, it will evidence how due process has been followed to ensure all risks and benefits have been appropriately evaluated adhering to all relevant national and regional guidelines.

When NHS Kernow intends to procure a new contract by testing the market for competition, it will ensure compliance with EU Procurement Directives as implemented by UK Law and national guidance from NHS England, NHS Improvement and Crown Commercial Services, namely:

- 2015 Public Procurement Regulations
  - 2015 Light Touch Guidance - Crown Commercial Services

- Public Supply Contracts Regulations 2006
  - Public Contract Amendment Regulations 2009
  - Public Procurement (Miscellaneous Amendments) Regulations 2011
- Bribery Act 2010
- The Equality Act 2010 (Section 149)
- The Public Service (Social Value ) Act 2012
- The NHS (Procurement, Patient Choice and Competition) Regulations 2013 which support interpretation of Section 75 of the Health and Social Care Act 2012 (11.03.13).
  - Also within the Act - Section 140 Managing Conflicts of Interest
- Procurement Guide for Commissioners of NHS funded services (DH, 30 July 2010)
- The Principles and Rules for Cooperation and Competition (PRCC, July 2010)
- Framework for Managing Choice, Co-Operation and Competition (May 2008)
- Procurement of Healthcare (Clinical) services, briefings 1-4 (NHS Commissioning Board, Sept 2012)
- Managing conflicts of interests: Guidance for clinical commissioning groups (NHS England, March 2013)
- A fair playing field for the benefit of NHS patients: Monitor's independent review for the Secretary of State for Health (March 2013)
- Commissioning Contracting for Integrated Care (Kings Fund Nov 2014)
- NHS Constitution

#### 4. Financial controls

NHS Kernow's constitution sets out the financial limits for the management best value on any purchases carried out on the CCGs behalf.

##### **Delivering Better Value**

NHS Kernow will ensure all commissioned services aim to deliver value for money ensuring best quality and price for the service supplied.

#### 5. Governance

To ensure thoroughness, consistency and to provide assurance to the Governing Body, a Procurement Committee, reporting to the Governing Body, will oversee the delivery of each project as the organisation's accountable group.

To ensure NHS Kernow has acted fairly and within the regulations and best practice guidance, each procurement commissioning change will be presented to the procurement committee for decision to proceed, auditable governance procedures must be followed to ensure that due process to minimise the risk of legal challenge of any potential or unsuccessful bidders.

Where NHS Kernow decides to procure a clinical service collaboratively with another CCG or organisation, a lead or joint commissioner will need to be identified and their governance arrangements must be used to oversee the process.

## Procurement Committee

A Procurement Committee reporting directly to the Governing Body is established to ensure robust and transparent decision making regarding the identification and delivery of major commissioning changes. A regular report will be provided at Governing Body and will include assurance on conflicts of interests.

## Project Steering Group (Task & Finish)

Formed to manage each project, this group exists for the life of the individual project and disbands after the contract is mobilised. Specific job roles from various departments will be a core group who sit on all projects and evaluation panels to ensure consistency and continuity of approach. A standard Terms of Reference to govern the duties and responsibilities and actions of the group will be used. This group will seek appropriate clinical and professional involvement as required. This group will also be responsible for ensuring robust public engagement is sought, as appropriate for the project and manage conflicts of interests.

## Resources

A few procurement projects may be running simultaneously and other projects will be drawing from the same resources.

Some activities can be outsourced to external procurement organisations but not all activities, it is recognised that the resource available internally is limited and careful management and timetabling of procurements will be required to avoid 'overload' in certain areas particularly Clinical Governance, Information Governance, Information Management & Technology, Informatics, Health & Safety, Procurement, Programmes, Estates. Reference to the workplan of current projects will be essential in deciding how to proceed with any new projects about to start and the management of the existing projects to avoid project slippage

## Conflicts of interest

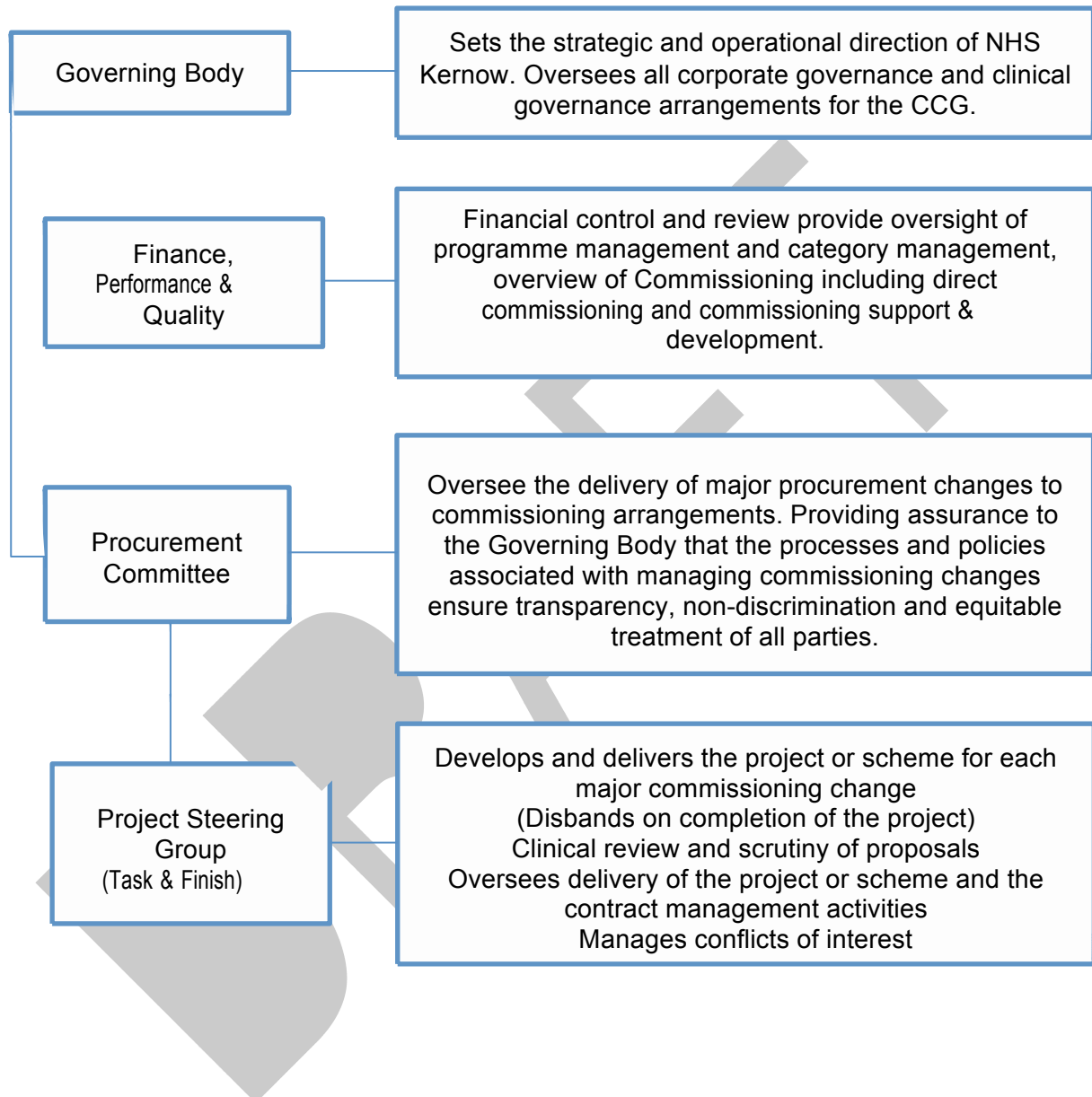
NHS Kernow recognises that conflicts of interest may arise in relating to managing a major commissioning change. For example:

- Where a proposed competitive tender is likely to attract bids from organisations in which a member of a decision making body has a financial or material interest, this interest must be declared and the group member will be excluded from relevant parts of those meetings and evaluations.
- Where a member of the Procurement Committee or key evaluation member are a member of staff or on the Board of the incumbent provider, this interest must be declared and the group member will be excluded from the relevant parts of those meetings and evaluations.

To ensure active management of this issue, NHS Kernow will maintain registers of interest, for all procurement assessment panel members. Each member will sign a Declaration of Interest form and NHS Kernow will keep records as to how conflicts of interest have been managed in line with section 14O of The National Health Service Act 2006, the NHS (Procurement, Patient Choice and Competition) regulations 2013.

# Governance Structure

The diagram below sets out NHS Kernow's governance structure for major commissioning changes.





## 6. Procurement Policy

Any procurement will be conducted in accordance with the following:

**General Fairness & Transparency:** In accordance with Clause 6.2 General Duties of its Constitution (NHS Kernow Constitution), NHS Kernow will be clear and transparent in all communications with providers about the CCG's commissioning intentions, decisions (or not) to tender, advertising of opportunities, procurement evaluation criteria, publication of decisions and mechanisms for feedback.

**Efficiency:** NHS Kernow will ensure that the procurement process is as efficient and time effective as possible for both Commissioners and Providers; as an outcome, all procurements will aim to improve productivity, efficiency and effectiveness of services whilst maintaining and seeking to improve clinical quality.

**Quality:** NHS Kernow Commissioners will procure services to meet patient needs which are of the highest possible quality standard, and use appropriate measurable performance indicators to monitor provider performance. NHS Kernow will ensure that the contract awarded as the result of a procurement process, as well as the procurement process itself, encourages all providers to deliver continual improvement in the quality of services that they are commissioned to provide.

**Continuity:** NHS Kernow will continue to work in partnership with key providers of NHS services to continually test these services to ensure that the current providers deliver best value for money.

**Equality of Treatment and non-discrimination:** NHS Kernow will clearly identify those services which will be put out to competitive tender, and to ensure that all sectors and providers (NHS and non NHS) will be treated equitably in terms of procurement rules, access to information, timescales financial and quality assurance checks, and pricing and payment regimes.

**Proportionality:** by means of advice, guidance and support, NHS Kernow commissioners will use procurement processes that are proportionate to the value, complexity and risk/benefit to patients of services procured. Different procurement routes for different types of services will enable this, potential costs to bidders will also be considered when assessing which procurement route to follow.

**Consistency:** NHS Kernow will apply national and local principles and rules consistently to all clinical procurements that they undertake.

**Professional Conduct:** NHS Kernow will ensure that all procurement personnel who undertake procurements will be subject to Professional Code of Conduct as published by the Chartered Institute of Purchasing and Supply (CIPS).

**Equality & Non-Discrimination**

The Health and Social Care Act 2012 Section 14z2 requires CCGs to ensure public involvement and consultation. The Public Services (Social Values) Act 2012 requires CCGs to ensure improvement in economic social and environmental wellbeing of the area and how any procurement would secure that improvement.

NHS Kernow will not discriminate and will promote equality of opportunity and pay particular attention to those groups or sections of society with poorer health and life expectancy. Public Sector Equalities Duties 2012 S149 promotes integration and the use of protected characteristics.

NHS Kernow will evidence through an Economic, Social and Environmental Impact Assessment for any proposed tender how it can evidence improvement to the wellbeing of the area.

**Bribery**

On July 1 2011, the Bribery Act 2010 came into force, a commercial organisation may be criminally liable for corrupt acts carried out on its behalf by third parties, and subject to potentially unlimited fines. In order to comply with the Bribery Act 2010 legislation, the CCG has put into place mechanisms to establish and maintain adequate procedures that prevent bribery.

To further comply with the Act a proper, thorough assessment of risk is essential during the procurement process. Where a proposed competitive tender is likely the CCG shall assess the level of risk and conduct a proportionate level of due diligence in order to take all necessary precautions to ensure that the CCG only forms business relationships with reputable and qualified partners and representatives.

**7. Major commissioning change process**

The process for managing a major commissioning change within NHS Kernow covers 4 key stages:

1. Pre- procurement phase (review and plan for change)
2. Collaboration or Competition
3. Mobilisation of the change
4. Contract and performance management

**7.1 Pre-procurement phase**

Each commissioning change will commence with a Project Initiation Document outlining the findings following a review of the current state and where a commissioning view is that change is required.

The Procurement Committee will review and endorse further work-up to a full business case for allowing a major commissioning change or advise on what further information is required to re consider the project at a later date.

Development of a full business case will utilise a range of skills of individuals within the organisation and the development of a Project Steering Group as a Task and Finish Group will be established to oversee its delivery.

The Business Case evidence will include:

### **An Outline Business Case**

- Project Initiation Document
- Provider Engagement
- Service Review
- Contract Review
- Case for Change (draft)

### **Development into a Full Business Case**

- All OBC content plus
- Market Assessment/Procurement strategy
- Service Redesign plans
- Case for Change (after full engagement)
- Service Model delivery options
- Procurement delivery options
- Contracting Strategy
- Stakeholder Engagement & Comms. Plans
- Co-operate or Competition Decision options
- 20 questions evidence

A major change commissioning project process has been developed to navigate through each of the key areas above to ensure consistency of approach, full compliance with all legislation, best practice guidance, and clarity for the individual in the organisation who is responsible for each task.

## **7.2 Collaboration or competition**

The Procurement Committee will need to consider the content of the full business case and decide the best option from either collaborating with the existing Provider or running a procurement to test the current and alternative Providers.

In particular the NHS (Procurement, Patient Choice & Competition) Regulations 2013 place a specific duty on NHS Kernow to procure services that are:

- Most capable of securing the needs of patients, improving the quality and efficiency of services.
- Provide best value for money

These Regulations also make it clear that:

- Where it can be robustly demonstrated that only one provider is capable of providing a particular service, there is no requirement to put a contract out to competitive tender.
- Monitor has no power to force the competitive tendering of services. Decisions about how and when to introduce competition to improve services are solely up to CCGs. However, a court continues to retain the power to force a competitive tendering process to be undertaken by issuing an injunction if it determines that a CCG has acted unlawfully and is in breach of EU Procurement Regulations.

- Competition should not trump integration; commissioners are free to use integration where it is in the interests of patients. However, competition and integration should be seen as complementary rather than mutually exclusive. A well-designed competitive process can be used to achieve integration.
- The over-arching legally binding objectives of procurement are to secure the needs of patients and improve quality and efficiency.
- Legal advice on the interpretation of these regulations recognises that each situation is unique and requires due and careful consideration of all the circumstances. It is recommended that:
  - It can be inferred from the 2013 Regulations that there is an obligation to advertise (or competitively tender) where the services to which the contract relates are not capable of being provided by only one provider (Regulation 5).
- The “single provider” test is a hard evidential burden to satisfy. The circumstances under which the test may be met include for example:
  - i) that the provider is the only provider with the skills or capability to deliver the services
  - ii) that the provider is for reasons of patient safety, the only provider capable of delivering that service or
  - iii) following a reconfiguration services are required to be provided in a certain location by a particular provider.

### 7.2.1 Collaboration

When the CCG is satisfied it can meet the requirements of the Single Provider evidence a Collaboration/Co-operation Commissioning Change Project Process will be followed.

Notifications to the market (VEAT Notices or Contract Award Notices) cannot be issued without the Procurement Committee’s approval

### 7.2.2 Competition

When considering whether or not a service should be competitively tendered, NHS Kernow will ensure that any decision taken complies with the Regulations and Guidance set out in this Framework. The financial control limits, the scale of the procurement, the degree to which the service specification and funding model has been developed and the number of potential providers for the service.

Notifications to the market (Prior Information Notices or Adverts) cannot be issued without the Procurement Committee’s approval.

The Procurement Committee will agree with the Procurement Team which is the most appropriate organisation to run each procurement based on the following:

Contract Value £	NHS Kernow Responsibility	External	Comments
As per constitution	To ensure quotations are received in line with SFI’s/SFO’s requirements, using	Tenders could be carried out on NHS Kernow’s behalf by :-	Proportionate effort, value and risk may determine the

Contract Value £	NHS Kernow Responsibility	External	Comments
	<p>standard templates with a clear audit trail.</p> <p>Are there any benefits to NHS Kernow in collaborating or outsourcing the work?</p> <p>In-house if:</p> <p>Service is solely for a service for Cornwall &amp; Isles of Scilly and</p> <ul style="list-style-type: none"> <li>NHS Kernow has capacity to manage</li> <li>It relates to integration of services with Cornwall Council</li> <li>Provider/Suppliers would be discouraged to bid if the tender covered a larger geography</li> <li>The Specification is unique to Cornwall</li> <li>Specialist Procurement skills/experience sit within NHS Kernow</li> <li>There would be a conflict of interest if outsourced</li> </ul>	<p>The local CSU</p> <p>Another CSU</p> <p>Accessing a Framework Agreement and running mini competition in house</p> <p>Cornwall Supplies</p> <p>Consideration needs to be given to</p> <ul style="list-style-type: none"> <li>Capacity: does the external organisation have the resource capacity?</li> <li>Expertise: does the external organisation have the expertise?</li> <li>Timing: is one of the external organisations running a similar procurement for another CCG? Economies of scale to collaborate.</li> <li>Scope and/or Scale: would Providers be encouraged to bid if the tender covered a larger geography or wider remit?</li> </ul>	<p>organisation best to carry out the tender process on NHS Kernow's behalf.</p> <p>No requirement for OJEU notice where 2015 Light Touch Regime applies</p>

Contract Value £	NHS Kernow Responsibility	External	Comments
		NHS Kernow can adopt a more generic specification to accommodate a collaborative approach?	

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NHS Kernow's Procurement Department will prepare a work plan of approved projects for the Procurement Committee and provide updates of progress on all in house and outsourced projects.

### **7.3 Mobilisation and implementation of the change**

NHS Kernow is committed to ensuring new services and changes to services are fully implemented following a major commissioning change. Working with the outgoing Provider to ensure a smooth exit strategy that is seamless to patients and protects patient safety. Working with the new Provider to ensure smooth transition, applying appropriate resources to ensure communication to relevant groups, operational procedures are set up and financial and contractual processes are in place.

### **7.4 Contract and performance management**

Contract and Performance management will take over responsibility for the new contracted service after the commencement date of the new contract. Until that point the new service remains the responsibility of the Project Steering Group and the decommissioning of the old service remains the responsibility of the Contracts Team.

## **8.0 Appendices**

*(under development)*