Clinical Commissioning Groups:

Protecting our NHS together
What is this guide for?
This guide provides Clinical Commissioning Groups (CCGs) with suggested wording for variations they could make to the template constitution provided by the NHS Commissioning Board (NCB). CCGs adopting these variations would improve their constitutions, giving them a better framework within which to act locally to safeguard the NHS.

Donations from 38 Degrees members have funded specialist lawyers to produce this sample wording and variations. A CCG adopting these variations can be confident it will satisfy the legal requirements of the 2012 Health and Social Care Act.

Who are 38 Degrees?
38 Degrees is a UK campaigning community, with more than 1 million members. We share a desire for a more progressive, fairer society and come together to decide which issues we campaign on and the actions we take to help achieve that.

38 Degrees members often use the internet to influence decision-makers, for example by signing online petitions, emailing our MPs, or donating to fund advertising campaigns. We also take action locally, for example by meeting up to visit our MPs, hosting local discussion events, or holding local celebrations when we have a campaign breakthrough.

On this project, 38 Degrees has worked with specialist lawyers Rebecca Haynes (Monckton Chambers) and Stephen Cragg (Doughty Street Chambers). Rebecca has a diverse practice which spans all aspects of European and public law and has acted for and advised both private and central and local government clients in a wide range of procurement matters. Stephen Cragg specialises in public law in social welfare and human rights areas, and provides general advice and representation for a number of local authorities and NHS bodies.

For more information about 38 Degrees see Appendix 1. For more information about our legal team please see Appendix 5.
38 Degrees and the NHS

38 Degrees members first voted to campaign to protect our NHS in 2010.

Before the Health and Social Care Bill became law we:

• launched a petition, which attracted over 600,000 signatures
• sent thousands of messages to MPs and Lords
• hosted hundreds of local events all across the UK
• raised money to hire lawyers and run billboard and newspaper advertisements

For more information about 38 Degrees’s previous NHS activities please see Appendix 2.

After the Health and Social Care Act became law, 38 Degrees members voted overwhelmingly to carry on campaigning to protect our NHS. They voted to make it a priority to work with local doctors, other health workers, and CCGs to help health professionals safeguard the future of our health service.

For more information on the role of a CCG see Appendix 3.
The role of CCGs in protecting the NHS

A central part of the government’s changes to the NHS is the creation of Clinical Commissioning Groups. The parameters which guide these Groups - their constitutions - will be very important in shaping the way that the new health plans are implemented.

38 Degrees members are campaigning to encourage CCGs to adopt measures in their constitutions which will help safeguard the future of the NHS and ensure that patients’ voices are heard. These measures were drawn up by specialist barristers to ensure that they fit in with the requirements of the Health and Social Care Act 2012. This pack explains what changes are possible and how they may be integrated within CCG constitutions.

38 Degrees believes it is crucial that CCGs do as much as they can to:

- uphold the principle of “first do no harm” and proceed with caution in making any changes to NHS services
- spend money wisely and responsibly and avoid giving contracts to irresponsible companies
- consult local patients properly before bringing in any changes that will affect us
- provide information which is accessible to local people about what is going on in the local NHS
- encourage access to meetings and other decision-making processes for local people
- adopt policies and a constitution which reflect these values or variations

Improving your CCG Constitution

The provision for CCGs to tender for services is provided for by the Health and Social Care Act 2012 and is set out in their constitution. This is the document which details:

- the arrangements made to discharge its responsibilities and those of their governing body
- procedures for making decisions
- provisions for securing transparency in the decision-making processes of the CCG and its governing body

For a step-by-step guide to being authorised as a CCG is included at Appendix 4.

The NHS Commissioning Board (NCB) has produced a “Model constitution framework for clinical commissioning groups”.¹ This is essentially a template document which CCGs can use and adapt to produce their own constitutions.

38 Degrees have worked with lawyers to produce sample wording and variations which a CCG can adopt into their constitution. This draft wording aims to improve the NCB draft by setting a clear constitutional framework for safeguarding the NHS. It does so in a way which is compatible with the legal requirements of the Health and Social Care Act.

¹ For more information please visit:
http://www.commissioningboard.nhs.uk/resources/resources-for-ccgs/ccg-mod-cons-framework
Varying the CCG Constitution

Lawyers Stephen Cragg and Rebecca Haynes have drafted content for a CCG constitution which in their view satisfies the legal requirements of the Health and Social Care Act, while also committing to protecting our NHS.

Stephen Cragg says:

“There is a lot of leeway for local CCGs to include in their constitutions provisions which ensure that the public can participate in the local administration of the health service, receive information in various formats as to what is going on, and for CCGs to set out clear patient-friendly statements about their aims and principles.

Constitutions, and changes to constitutions need to be approved by the National Commissioning Board, but the Board has to provide reasons for rejecting any proposals put forward by the CCG. In my view it would be hard for the Board to reject proposals that have the aim of increasing local involvement in the NHS, or proposals which have the aim of ensuring that commissioning is carried out in an ethical and lawful way.”

Rebecca Haynes says:

“The provisions of constitutions cannot and do not override the duties resting upon CCGs derived from EU law and the Public Contracts Regulations 2006, where those regulations are applicable. However, the constitutions can establish what is essentially a guiding framework or charter via which those duties can be fulfilled in a socially responsible manner.”

For the biographies of Stephen Cragg and Rebecca Haynes please see Appendix 5.
Are we really allowed to make changes to the NCB template constitution?

The Health and Social Care Act sets out a number of things which must by law be included in the constitution. But the Act also allows the constitution to make “further provision” on top of these things. This clearly gives CCGs a wide margin to include other items in their constitution.

So, if you think there is something important that has been left out of the constitution, a CCG does not have to say “we can’t include an amendment because it is not included in the Act”. Essentially, there is no legal restriction on the other provisions that a CCG might include in its constitution, although the constitution and any changes have to be approved by the National Commissioning Board.

Thus, if a variation has some sensible basis (such as those suggested below), then there is no reason why the CCG should not adopt it.

Is it important to listen to patients?

There are a series of duties imposed upon CCGs in the 2012 Act. Some of these are:

- to promote the NHS Constitution
- to exercise functions effectively and economically
- to improve services
- to have regard to the need to reduce inequalities
- to promote the involvement of each patient
- to enable patient choice

Many of these duties mean that CCGs will have to listen to patients and local people. There is also an important duty to secure public involvement so that patients are consulted or provided with information about planning of commissioning, development of proposals, and decisions on commissioning which affect the group. Importantly, the constitution must set out a description of these arrangements and a statement of the principles it will follow in implementing these arrangements.

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2 from section 14P to 14Z
3 section 14Z2
4 section 14Z2(3)
For CCGs wanting to introduce measures which will help to protect the NHS, there are a number of key areas in which variations can be made. Our specialist lawyers have reviewed the NCB template constitution in its entirety. They suggest ways to improve the following sections:

**Schedule E - Prime Financial Policies (Commissioning Policy)**
We propose variations which would allow CCGs to consider ethical and social factors when making commissioning decisions, in addition to purely economic criteria.

**Foreword**
We suggest using the foreword as an opportunity to provide a plain English summary of the CCG’s aims and guiding principles.

**Section 4 - Mission, Values and Aims**
We propose variations to the NCB template which would:
- set out a clear set of values for the future of the CCG
- improve accountability by placing a stronger emphasis on disclosure and public engagement

**Section 5 - Functions and General Duties**
We propose variations to the NCB which would strengthen the CCG’s commitment to public involvement, committing the CCG to proactively reach out to a broader cross-section of people to ensure the greatest number of people are involved in shaping decisions about local health services

**Section 8 - Standards of Business Conduct and Managing Conflicts of Interest**
We propose variations which would:
- strengthen requirements for transparency - both in terms of what information is placed in the public domain, and how people are informed about how to access it
- require a thorough review of conflict of interest instructions to ensure that all possible conflicts are covered by the constitution
Schedule E – Prime Financial Policies (Commissioning Policy)

The primary role of CCGs is the commissioning of services. Commissioning decides who will actually provide services to patients and who will get paid for doing this. In Schedule E the CCG has to set out the commissioning policy it will follow. Lawyers have drafted the following wording, which, while legally robust, also addresses some of the ethical and moral concerns that members of the public may have about commissioning (although it does not cover all the different ways in which a constitution might be drafted).

This paragraph is based on - and supplements - the model constitution drafted by the NHS Commissioning Board. Essentially, it sets out a basic charter for socially responsible procurement which takes into account matters beyond price and economic criteria and extends to matters of employment, environment, tax avoidance, and equal opportunities. Taking such matters into account, both in establishing contractual provisions governing service provision and in the setting and evaluation of tender criteria, is permitted by the Public Contracts Regulation 2006 and Community law, provided that they are not discriminatory.

The Group:

- will, consistently with its obligations under, inter alia, the Public Contracts Regulations 2006 and applicable Community law, ascertain whether it is necessary, desirable or appropriate to invite competition when purchasing in order to ensure it will incur only budgeted, approved and necessary spending
- will seek value for money for all goods and services by reference to the optimum combination of whole life cost and quality;
- shall ensure that, subject to the threshold provisions of the Public Contracts Regulations 2006, competitive tenders are invited for
  - the supply of goods, materials and manufactured articles;
  - the rendering of services including all forms of management consultancy services (other than specialised services sought from or provided by the Department of Health); and
  - for the design, construction and maintenance of building and engineering works (including construction and maintenance of grounds and gardens) for disposals
- will, in relation to each purchasing decision concerning health care and social services
  - consider the extent to which the Public Contract Regulations 2006 require any form of competition and consider the most appropriate process and procedure for awarding the relevant contract or contracts; and
  - in that regard give consideration to whether the use of a framework agreement, including the use of approved lists, is the most appropriate means of appointing providers;
- shall, wherever possible and where it is consistent with legal requirements, ensure that contractual provisions, procurement procedures and selection and award criteria are designed to ensure that contractors and providers are:
  - good employers who comply with all relevant employment legislation, including the Public Interest Disclosure Act 1998;
  - maintain acceptable standards of health and safety and comply fully with all legal obligations;
  - meet all tax and National Insurance obligations;
  - meet all equal opportunities legislation;
  - are reputable in their standards of business conduct;
  - respect the environment and take appropriate steps to ensure that they minimise their environmental impact.
• will, in each procurement and consistently with the relevant law, exclude companies which have been convicted of offences, or whose director(s) or any other person or company who has powers of representation, decision or control of the company has or have been convicted of offences in the conduct of their business or committed an act of grave professional misconduct in the conduct of their business, such as breaches of employment, equal opportunities or environmental legislation. However, any corrective/remedial action taken by the company in response to such an offence should also be taken into account in determining its suitability as a bidder.

• will, in each procurement and consistently with relevant EU and international law, ensure that contractual provisions, procurement procedures and selection and award criteria prohibit or restrict contractors’ use of offshore jurisdictions and/or improper tax avoidance schemes or arrangements and/or exclude companies which use such jurisdictions and/or such schemes or arrangements.

The [insert name of committee, e.g. governing body] may only negotiate contracts on behalf of the group, and the group may only enter into contracts, within the statutory framework set up by the 2006 Act, as amended by the 2012 Act. Such contracts shall comply with:

(a) the group’s standing orders;
(b) the Public Contracts Regulation 2006, any successor legislation and any other applicable law; and
(c) take into account as appropriate any applicable NHS Commissioning Board or the Independent Regulator of NHS Foundation Trusts (Monitor) guidance that does not conflict with (b) above.

In all contracts entered into, the group shall endeavour to obtain best value for money. The accountable officer shall nominate an individual who shall oversee and manage each contract on behalf of the group.
Foreword
The draft constitution includes a space for a foreword. This would be an excellent place for a CCG to set out in plain English a summary of the main provisions in the constitution, and a brief outline of the CCG’s aims and guiding principles.

Section 4 - Mission, Values and Aims
Values
This is a section which is not required by law to be completed by the CCG but this is a good opportunity for the CCG to set out to local people the values that it aspires to.

Thus, this section of the draft constitution could include:

The values that lie at the heart of the group’s works are:
(a) A commitment to providing the best healthcare to those living in the group’s area.
(b) A commitment to commissioning and procuring services in a fair and ethical manner.
(c) A commitment to the optimum involvement of local people and service users in the group’s decision-making processes and service planning.
(d) A commitment to openness and transparency in the group’s decision-making processes, and service planning.
(e) A commitment to equality and fairness in considering the healthcare needs of different groups in the CCG’s area.

Accountability
Knowing what is going on is an important factor in ensuring that the CCG is serving local people well. The National Commissioning Board draft constitution seems to provide a high degree of accountability. It is also possible to include additional items in the section on accountability such as a commitment to:

(a) disclose upon request all information that can lawfully be disclosed, rather than simply all such information that must be disclosed.
(b) publish all commissioning decisions and consultation exercises on its website.
(c) hold a number of events each year with local people and organisations to explain the progress and work of the CCG.
(d) publicise meetings of the CCG well in advance on the CCG’s website, the local press and in local libraries and GPs’ surgeries.
Section 5 – Functions and General Duties

Securing public involvement
In Section 5.2.1 the CCG must set out its arrangement for securing public involvement. A statement of principles should be inserted at this point. Some CCGs may include a bland statement which might not provide any detail as to how the duty will be met.

A more detailed statement could read:

The CCG will endeavour to work with as wide as possible cross-section of the people who use or who may use the services provided, and the groups which may represent such people, to provide them with information about the services provided by the CCG in a variety of ways, tailored to the needs of the local community. The CCG will consult as widely as it can on planning and development of services, and take into account the views expressed when making decisions.

The CCG will take all steps that it can to ensure that engagement is adapted to meet the needs of various groups and service users. The CCG will monitor on a regular basis its compliance with this statement of principles.

Section 8 – Standards of Business Conduct and Managing Conflicts of Interest

Conflicts of interest
In section 8.2.3 of the NCB template the CCG must set out its own list of conflicts of interest. A specimen list is included in the template. This includes conflicts of interests which must be declared as follows:

- Someone who might benefit from a commissioning decision (for example because they are a provider of services or might otherwise benefit from a commissioning decision)
- Someone who has a position with a not-for-profit organisation which might be bidding for a contract
- Someone who might otherwise benefit from decisions made (the example is given of a person who might benefit if a busy clinic next to their house is closed).
- Someone who is closely related to a person who might benefit in one of the ways described above

It is important to check that the CCG has included all these categories in its list. The list is not exhaustive and if there are any other conflicts which could arise locally then these could be proposed to be added to the list. It is also important that the list of conflicts of interest are accessible for the public to see, both on the CCG’s website and by other means.
Transparency
Transparency means enabling the public to understand the decision-making processes of the CCG, including details of meetings of the CCG and its Governing Body. The NCB template constitution sets out in 8.6.3 its proposals in relation to transparency, but appears to suggest that internet publication is sufficient. Further means of publication could be added by something like:

In addition, information about the CCG’s key communications can be inspected at the CCG headquarters, which will be provided to local libraries and will be sent upon request by email to local organisations and individuals.

Conclusion

Stephen Cragg says:

“It is clear that the Health and Social Care Act 2012 intended that local people and patients should be involved in the work of and delivery of services by CCGs. The constitution of the CCG provides for the setting up of the CCG and describes the way it should work. It is a key document which will shape the delivery of the NHS locally for years to come.

It is clearly important and appropriate that local people know what is being submitted by the CCG to the National Commissioning Board and exercise their ability to put forward their proposals for improvements to the CCG.

There is nothing in the 2012 Act which prevents members of the public having their say, or the CCG taking account of proposals for the constitution which have been put forward.”

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Appendices

Appendix 1:
Do 38 Degrees members make a difference?
38 Degrees members have shown that by working together, citizens can make a positive difference.

38 Degrees members led the successful campaign to cancel the government’s plan to sell off England’s woodlands. We helped block Rupert Murdoch’s bid to take full control of BSkyB. We helped persuade the government to sign up to the European Directive on human trafficking, which improves protection for victims of trafficking.

Appendix 2:
38 Degrees and the NHS
38 Degrees members first voted to scrutinise the government’s plans for the NHS in 2010. We organised a series of local get-togethers, where 38 Degrees members discussed the proposals in the 2010 White Paper. In many cases local GPs joined these discussions.

When the White Paper became the Health and Social Care Bill, we organised a petition which grew to over half a million names. It was delivered by local 38 Degrees members to more than 200 MPs, including several Cabinet members and Nick Clegg. Some commentators attributed the “listening exercise” in part to pressure from 38 Degrees members.

Following the conclusion of the “listening exercise” 38 Degrees members donated money to hire legal experts to scrutinise the revised proposals. Our lawyers focused on two key areas of concern for 38 Degrees members: the Secretary of State’s duties, and the question of how competition law might apply.

The resulting legal opinions helped prompt a fresh round of amendments to the legislation. 38 Degrees members also lobbied MPs and peers online, and raised £300,000 for a national advertising campaign urging David Cameron to listen to the concerns of medical professionals.

For more information about what 38 Degrees members achieved together please visit: http://blog.38degrees.org.uk/2012/03/21/nhs-roundup/

Appendix 3:
The role of a CCG

CCGs now have huge power and responsibility over our NHS. CCGs will be making important decisions about the provision of health services locally and who will be providing them. CCGs will be responsible for commissioning routine, emergency, and urgent care. They will also be responsible for commissioning healthcare services to meet the needs of the people for whom they are responsible, including (but not limited to):

- Community health services
- Maternity services
- Elective hospital care
- Rehabilitation services
- Older people’s healthcare services
- Healthcare services for children
- Healthcare services for people with mental health conditions
- Healthcare services for people with learning disabilities
- Continuing healthcare

Step by step guide to being authorised as a CCG

The following provides a brief description of some of the main provisions in the Health and Social Care Act 2012 (which actually add sections into the NHS Act 2006) about the constitutions of CCGs.
1. CCGs must submit their proposed constitution to the National Commissioning Board (NCB).

2. A CCG is allowed to include other items beyond those required by law or suggested in the draft constitution provided by the NCB. This is referred to as “further provision”. There is no restriction on the other items that a CCG might include in its constitution (as long as it has some sensible basis).

3. The NCB must grant an application by a CCG if their constitution complies with the regulations and “is otherwise appropriate”.

4. The constitution can be modified with the agreement of the NCB at any time before the application is determined.

5. When the NCB grants an application by the CCG then the constitution of the CCG comes into effect.

6. After the NCB approves an application, any change to the constitution has to be made by way of an application to “vary” the constitution.

7. The CCG Regulations set out the factors to be taken into account when considering an application to make a variation. Essentially the NCB will consider the likely impact of the variation, especially on the people the CCG serves, and the extent to which it has sought the views of local authorities, other CCGs affected and any person affected.

8. The NCB must provide reasons for its decisions in writing. If the Board refuses the application there is no appeal to challenge the refusal. The only appeal against the Board would be a judicial review.

9. The constitution (and any variation) of any CCG must be published.

10. Each CCG must maintain and publish a register of interests and management of conflicts of interest and ensure this is accessible to the public.

11. There is a series of duties imposed upon CCGs which are important. They include:
- to promote the NHS Constitution
- to exercise functions effectively and economically
- to improve services
- to have regard to the need to reduce inequalities
- to promote the involvement of each patient
- to enable patient choice.

12. There are also important duties which secure public involvement.

Appendix 5:
Stephen Cragg is a barrister at Doughty Street Chambers in London specialising in public law in a number of sectors including the NHS. He usually acts for claimants in judicial review cases, but has also acted for a number of PCTs and local authorities, providing advice and representation. The professional directories list him as a leader in his field in both administrative law and human rights law. More information about him can be found at: www.doughtystreet.co.uk

Rebecca Haynes is a member of Monckton Chambers and is a specialist in procurement law, her practice having been based, since her call to the Bar in 1994, on a strong foundation of all aspects of EU law, including competition, taxation, health and environment, together with a diverse range of public law fields. As part of her specialist practice, Rebecca has developed a particular expertise on matters of healthcare services and NHS purchasing and has advised and acted for a wide range of both private and public sector clients. More information about her can be found at: www.monckton.com

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5 from section 14P to 14Z