

COMMISSIONING FAILURE: HOW TO AVOID IT, HOW TO CHALLENGE IT, HOW TO DEAL WITH REDRESS FOR ITS IMPACTS?

Steve Broach KC

Saara Idelbi

Scarlett Milligan

Ellie Mullett

When Procurement Goes Wrong:
**HOW PROCUREMENT IN SOCIAL CARE
SHOULD WORK**

Ellie Mullett

PROCUREMENT ACT 2023

- Section 9: Light touch contracts

- (1) In this Act, “light touch contract” means a contract wholly or mainly for the supply of services of a kind specified in regulations under subsection (2).
- (2) An appropriate authority may by regulations specify services for the purposes of the definition in subsection (1).
- (3) But an appropriate authority may specify services only if, having had regard to the nature of those services, the authority considers that it is appropriate for the award of public contracts for their supply to be exempted from the provisions of this Act that do not apply to light touch contracts.
- (4) In having regard to the nature of services for that purpose, the appropriate authority must, in particular, consider the extent to which [...]
 - (b) the services are supplied for the benefit of individuals (for example, health or social care services) or the community generally;

PROCUREMENT ACT 2023

- Schedule 5, Paragraph 15: The public contract is a contract for the supply of user choice services and the conditions in paragraph 17 are met.
- Schedule 5, Paragraph 16: In paragraph 15, “user choice services” means services—
 - (a) that are of a kind specified in regulations under section 9 (light touch contracts),
 - (b) that are supplied for the benefit of a particular individual, and
 - (c) in respect of which a contracting authority would, in awarding a contract for their supply, be required under an enactment to have regard to the views of the individual, or a person providing care to the individual (their “carer”), in relation to who should supply the services.

PROCUREMENT ACT 2023

- **Schedule 5, Paragraph 17: The conditions are that—**
 - (a) the individual to whom the services are to be supplied or their carer has expressed a preference as to who should supply the services, or the nature of the services to be supplied is such that only one supplier is capable of providing them, and
 - (b) the contracting authority considers that it is not in the best interests of the individual to award the contract under section 19

PROVIDER SELECTION REGIME

- Health Care Services (Provider Selection Regime) Regulations 2023
- Apply to 'relevant authorities' as defined in section 12ZB of the National Health Service Act 2006
- Regulation 3(1): apply where a relevant authority procures relevant health care services for the purposes of the health service in England, whether alone or as part of a mixed procurement

PROVIDER SELECTION REGIME

- Regulation 3(2)-(3): Mixed contracts
 - (2) In this regulation, “mixed procurement” means the procurement of—
 - (a) relevant health care services for the purposes of the health service in England, and
 - (b) other goods or services that are procured together with those health care services,
 - where both the criteria in paragraph (3) are met.
 - (3) The criteria are that—
 - (a) the main subject-matter of the procurement is relevant health care services for the purposes of the health service in England; and
 - (b) the relevant authority is of the view that the other goods or services could not reasonably be supplied under a separate contract.

PROVIDER SELECTION REGIME

- Regulation 4: Procurement principles
 - (1) When procuring relevant health care services, a relevant authority must act—
 - (a) with a view to—
 - (i) securing the needs of the people who use the services,
 - (ii) improving the quality of the services, and
 - (iii) improving efficiency in the provision of the services;
 - (b) transparently, fairly and proportionately.
 - (2) When acting with a view to the matters in paragraph (1)(a), the relevant authority may consider the value of providing services in an integrated way, including with other health care services, health-related services or social care services

PROVIDER SELECTION REGIME

- Regulation 6: Procurement processes

(1) A relevant authority wishing to procure relevant health care services to which these Regulations apply must follow the appropriate process determined in accordance with this regulation.

–Regulation 6(3) – Direct Award Process A

–Regulation 6(4) – Direct Award Process B

–Regulation 6(5) – Direct Award Process C, Most Suitable Provider, or Competitive Process

–Regulation 6(6) – Most Suitable Provider, or Competitive Process

–Regulation 6(7) – Competitive Process

When Procurement Goes Wrong:
HOW TO CHALLENGE IT

Saara Idelbi

ROUTES TO CHALLENGE

- Procurement Act 2023 (note the transitional provisions of the Public Contracts Regulations 2015)
- Judicial review
- Provider Selection Regime

STANDSTILL AND SUSPENSION

- No mandatory standstill.
- Applying to lift the suspension under PA: ParkingEye v Velindre University NHS Trust [2026] EWHC 1019 (TCC)

GROUNDS FOR CHALLENGE

- Remain the same across the routes for suppliers
 - Manifest error
 - Breach of transparency
 - Equal treatment failure
 - Conflict of interest
 - Inadequate reasons

- For others?

REMEDIES

- Interim remedies:
 - Suspension
 - Restrictions
- Pre-contractual remedies (s.103)
- Post-contractual remedies (s.104)

THE BIGGER PICTURE

- Market Oversight
- Procurement investigations
- Provider failure

When Procurement Goes Wrong:
**PRIVATE LAW ACTIONS FOR HARM TO
SERVICE USERS**

Scarlett Milligan

WHAT KIND OF HARM? WHICH DEFENDANT?

- Cases broadly split into:
 - harm from the commissioning process (e.g. under funding, poor specification, delays)
 - harm in the delivery of the goods/services by the supplier

Cause of action	Likely Defendants
Negligence / personal injury	Supplier, Commissioning authority (CA)?
Human Rights Act 1998	CA, Supplier?
Equality Act 2010	Supplier, CA
Breach of contract	Supplier

NEGLIGENCE / PERSONAL INJURY / FATAL CLAIMS

- The **supplier** (and/or any relevant subcontractor) is likely to be the main target
 - Will usually owe a primary duty of care to users/residents
 - Employers' liability and vicarious liability
 - Occupiers' liability
- The **CA** is unlikely to owe a direct duty
 - Statutory duties/functions alone do not give rise to a duty of care
 - Failure to confer a benefit vs causing harm/making it worse
 - Assumption of responsibility
 - ***Poole BC v GN* [2019] UKSC 25; *HXA / YXA* [2023] UKSC 52**
 - Vicarious liability in exceptional circs: ***Armes* [2017] UKSC 60** re foster carers
 - Contrast ***SKX* [2021] EWHC 782 (QB)**

HUMAN RIGHTS ACT 1998

- The **CA** is a public authority for the purposes of s.6 HRA 1998. ECHR articles likely of relevance include:
 - Article 2 – Right to life (+ investigative duty)
 - A 3 – protection from inhuman and degrading treatment (+ investigative duty)
 - A 5 – deprivation of liberty/false imprisonment - **AGNI Reference [2026] UKSC 16**
- The **supplier** is unlikely to be (but may be!) a public authority
 - Exercising a function of a public nature?
 - **YL v Birmingham CC [2007] UKHL 27**
 - Section 73 of the Care Act 2014 (reverses **YL** for registered adult care paid for by LA)
 - Possible exception: action in tort for trespass to the person

EQUALITY ACT 2010 – PART 3 PRIVATE LAW CLAIMS

- **Both the supplier and the CA** may be liable, as services and public functions are caught within the scope of s.29 EA 2010
- Relevant actionable provisions:
 - **S13 direct discrimination** – less favourable treatment because of a PC
 - **S19 indirect discrimination** – provision, criterion or practice that disadvantages a group with the PC
 - **S15 discrimination arising from disability** – unfavourable treatment because of something arising in consequence of a disability
 - **S26 harassment**
 - **S27 victimisation**
 - **Sections 20 and 21 (and Sch2) – duty to make reasonable adjustments**
- Possible justifications – s.15, s.19 (proportionate means of achieving a legitimate aim)
- County court may award damages for injury to feelings, injunctions, declarations

BREACH OF CONTRACT

- If a user contracts directly with the **supplier**, e.g. with a direct payment or personal budget
- If the contract is between a supplier and the CA, the general position is that the user is not privy to the contract and cannot sue on it
 - Contract (Rights of Third Parties) Act 1999 – subject to
 - (i) the clause, and (ii) exclusion

LITIGATION ESSENTIALS

- Limitation periods
 - See table on next slide
 - The limitation clock may be affected by the claimant being a child / lacking capacity (s.28 Limitation Act 1980). Have they been throughout? Role of expert evidence.
- Funding arrangements and costs recovery
 - CFA/DBA, QOCS
- Procedural burdens
 - CPR Part 21 for protected parties
 - Court's approval of settlements
 - Involvement of the Court of Protection if C lacks capacity

LIMITATION PERIODS

Cause of action	Limitation period (generally)	Key considerations
Negligence / personal injury	3 years	Date of knowledge? (s14) Court's discretion to extent (s33)
Human Rights Act 1998	1 year	Court's discretion to apply equitable extension – s.7(5) HRA 1998
Equality Act 2010	6 months less 1 day	Court's discretion to apply just and equitable extension – s.118; or if a 'continuing act'
Breach of contract	6 years	Establish the date of the breach of contract

AND for all of the above:

- (i) Claimant lacking capacity s.28 LA 1980;
- (ii) deliberate concealment s.32 LA 1980

TIPS FOR CAS THE PROCUREMENT STAGE

- **Include detailed specification requirements**
 - Compliance with health and safety legislation, HRA 1998, other policies
 - Reasonable adjustments, non-discriminatory duties
 - Safeguarding provisions
 - Scrutinise fee methodology/funding – and query abnormally low quotes; s.19 PA 23
- **Insurance requirements**
- **Indemnities (consider broader group structures)**
- **Handling of litigation and co-operation in claims, investigations, inquests**
- **Consider whether to exclude Contracts (Rights Against Third Parties) Act 1999**

THANK YOU FOR LISTENING!

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD. 39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services. 39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39essex.com

BARRISTERS . ARBITRATORS . MEDIATORS

LONDON . SINGAPORE . KUALA LUMPUR

