

Pathology Briefing updated Feb 2021

Background to the Pathology Networks Plan

The 2008 Carter Review recommended that NHS pathology services merge into a maximum of three consolidated networks within each of the then 10 Strategic Health Authorities. More recent Carter Reports claim £5bn of annual savings are possible from NHS procurement including pathology. In 2016 NHS Improvement instructed the 44 Sustainability and Transformation organisations to build into their plans, called Sustainability and Transformation Plans (STPs), the strategy for 29 Pathology Networks throughout England. The 44 STPs have now reduced to 42 and each is now to have its own pathology network. There is no doubt that the major motivation behind STPs was to make savings but there is a lack of evidence that the network plan will improve quality or save money.¹

Hospital Trusts have generally been responsible for doing their own pathology work and that of their local communities, as in the case with Lewisham and Greenwich Trust in SE London. However in 2010 Guy's and St Thomas' NHS Foundation Trust (GSTT) and Kings College Hospital NHS Foundation Trust (KCH) – also in SE London – had outsourced their pathology service to Viapath, a private firm which was a 'joint venture' between GSTT, KCH and Serco, where the Trusts held the majority shares.² (p11). (Earlier this year Serco left the partnership for reasons undisclosed). The contract with Viapath was due to end on 31st August 2020; therefore a new provider had to be sought and under the network model, SE London was one of the first pathology networks to go out to tender.

Definition of pathology

Pathology tests cover blood tests, and tests on urine, stools (faeces) and bodily tissues and many of the decisions about patient care will be based on the results of such tests. Pathology services are mostly out of the sight of patients and the public but obviously absolutely central to the NHS, as they are used in 70% of all patient diagnoses.

In addition to pathology services required to support hospital-based care, there is a demand for pathology services from GPs and other community-based health services; this is called the Direct Access Pathology Service.

Blood tests are the bread and butter of both primary and secondary care and are probably the best example of pathology services at work for patients. The accuracy and speed of blood and other pathology tests are critical to both routine and emergency care – yet without any real transparency and debate, a massive, new, privatised and unproven pathology structure for SEL starts in April 2021.

SEL Pathology Network, Pathology Programme Board and the new, private contract.

The South East London (SEL) Pathology Network is coterminous with the SEL STP 'Footprint'. In Sept. 2017 all SEL provider Trusts and Clinical Commissioning Groups (CCGs)

created a Pathology Programme Board to drive forward the formation of the SEL Pathology Network. This process is managed by Our Healthier South East London (OHSEL), for the SEL STP which has recently become an Integrated Care System (ICS) in line with the NHS Long Term Plan. This involved the merger of the 6 CCGs in South London (previously co-terminous with the 6 SEL boroughs) into one SEL CCG in April 2020.

The Board resolved to tender a pathology network contract for a period of 15 years at a value of £2.25bn to provide 4 local trusts and Royal Brompton and Harefield NHS Foundation Trust with pathology services. Lewisham & Greenwich NHS Trust (LGT) was not included in this contract, despite being part of the SEL STP Footprint because the Trust made a principled decision to join an NHS-provided pathology service in a network partnership with Barts Health NHS Trust and the Homerton University Hospital NHS Foundation Trust.³

Following a notice in the Official Journal of the European Union, Viapath submitted a bid for the contract and was shortlisted along with two other (private) companies: a UK subsidiary of Synlab Group, called Integrated Pathology Partnerships (IPP) and Health Service Laboratories (HSL).⁴

SELSON's Initial Concerns

1. Conflict of interest

- a. Lord Carter of Coles, author of reports recommending large pathology networks, is paid chair of Health Services Laboratories and is on the board of NHS Improvement
- b. KCH and GSTT who are party to OHSEL's Pathology Programme Board, are the contracting authorities for the new service and the Boards of these two Trusts made the final decision as to which company got the contract – but they were also partners with Serco in Viapath.

2. Impact Assessments

No assurance was received that the OHSEL Pathology Programme Board was meeting its legal duties to give due regard to addressing health inequalities and advancing equality of opportunity by undertaking Health Inequalities Impact Assessments (HIIAs). Commercial confidentiality has been cited as a reason for this lack of information.

The only risk assessment made available when a Freedom of Information (FOI) request was made by the London Regional Council of the British Medical Association (BMA), was of the impact of a 15-year contract.⁵

No other impact assessments were forthcoming. However, it is now clear from a report to the Lewisham Council's Healthier Communities Select Committee in November 2020, that all SEL direct access pathology (including that currently done by LGT) will be commissioned from the new network provider for 2021/22. This will result in LGT losing up to 49% of its pathology income (see below for more details). LGT staff will be moved to Barts Health Employment under the Transfer of Undertakings (Protection of Employment) Regulations

and the laboratories at Queen Elizabeth Hospital in Woolwich, will be downsized. So it is not clear if an assessment was made of the impact of this change on local NHS services.

3. Public Consultation

OHSEL did not accept that full public consultation was necessary. In a letter dated 6th August 2019 from Capsticks Solicitors, acting on behalf of the SEL CCGs, to Leigh Day Solicitors, acting on behalf of South East London Save our NHS (SELSON). Capsticks stated:

‘.....our clients do not consider that the duty of involvement under s.14Z2 of the 2006 [NHS] Act applies to the pathology procurement.’

SELSON interprets this as a claim that there would be no major changes in the delivery of services to patients. But as public updates and details of the procurement process and proposed service have been extremely sparse and brief, both verbally at Trust meetings and in writing, it was not clear then (and is not clear now) what changes in service delivery were planned and therefore it is still not clear as to whether **a formal public consultation** was necessary.

4. Large scale privatisation of a critically important service

Of great concern to SELSON is the size and length of this private contract (with no break clause). There is little evidence to suggest that the quality of the service and the savings achieved will be better than that delivered by an NHS provider. Look no further than the private sector’s involvement in the COVID Test and Trace system which has proved to be disastrous and may in time be found to have contributed to the deaths of thousands of people.

The introduction of ICSs in every STP area, accompanied by legislation planned to be in place by Spring 2022, will further enhance the leverage of providers in the making of commissioning decisions. In the interim, CCGs as the statutory bodies can progress the providers’ privatisation agenda. Going forward there will be a Pathology Network in each of the 42 STP areas. NHSE will probably encourage the local ICSs to outsource these to the private sector. This would constitute a huge privatisation of an essential NHS service; the *annual* cost of just the SEL network will be in the order of £150m (the £2.25bn contract over 15 years). The Lighthouse Laboratories (set up rapidly soon after the start of the pandemic, for testing) have given the private sector an entry to the pathology service and they will be reluctant to give this up.

Tracking the Procurement Process

Publicly available updates on the procurement process either from the OHSEL Pathology Programme Board or in the papers of the KCH and GSTT Board meetings were rare.

A letter dated 28th February 2020, from the SEL ICS Lead Accountable Officer, Andrew Bland, to Helen Hayes MP, shows that the preferred bidder invited to submit their Final Business Case (FBC) was IPP (Synlab) – not Viapath as expected.

The contract award was running well behind schedule. It was initially programmed for August 2019, with a start date of October 2020. Information from Andrew Bland via a letter to Helen Hayes MP dated 11th June 2020 showed that the FBC would go to both Trust Boards 'later in the summer' for a decision about the contract award. The letter also stated that the delay was due to the Covid Pandemic.

Box 1 Viapath's role in all this

Viapath has provided pathology services since 2009 to GSTT and (since 2010 also to KCH) as a separate and private 'joint venture' involving the 2 trusts and Serco.

Initially, GSTT and KCH provided all the capital investment; Serco's contribution was its expertise in commerce but initially it had a 51% share in the partnership. This was renegotiated when Serco's 'commercial capability' led to job cuts, a decline in expertise, lower standards and a series of clinical incidents,⁶ giving the NHS Trusts the majority share.²

There is an alternative explanation of the initial funding according to a recent HSJ article⁷ which says that the company started off with £15m loans from each of the 3 partners – which have been paid back except to KCH which has deferred the payment.

Initially Viapath acquired a very poor record on quality, honesty and value for money⁶ but performance was judged to have improved over the years according to staff at KCH, although there has not been much information forthcoming about the company over the last year.

However Viapath has been implicated in a delay to the procurement process according to the same carefully-worded article in the HSJ referred to above⁷ and in papers to OHSEL.⁸

A report to the KCH Board meeting in June 2020, quoted in the HSJ article referred to above,⁷ stated that: 'There has been some uncertainty with the Viapath position in terms of the tender process. Viapath continues to provide pathology services to the trust. A legal provision has been recognised in respect of potential costs associated with an ongoing challenge to the tender process.'

It was also reported briefly at that meeting (via the minutes of the March meeting of the Finance and Commercial Committee, which were included in the papers for the Board meeting) that Serco was leaving Viapath.⁹ (The same HSJ article also states that Serco was leaving Viapath and that documents at Companies House suggest that this happened at the end of May⁷).

Those minutes imply that the departure of Serco was due to the loss of work/revenue to Viapath as there has been no elective work recently because of Covid and a loss of other non-Covid work. Work was probably also restricted where Viapath operates elsewhere and of course there were also costs of the (failed) bid for the network contract.

However the buy-out was described to the HSJ: 'as part of the ongoing process to identify a pathology provider for south east London' and 'Guy's and St Thomas' and King's College Hospital Foundation Trusts have acquired Serco's share in Viapath and are now equal joint venture owners.'⁷

So it seems that the buyout is probably at least partly a result of the failed bid for the contract by Viapath and that the delay in the contract award is at least partly due to the dispute with Viapath.

Box 2 What has Viapath – particularly Serco – cost the NHS?

Viapath's most recent accounts, for 2018, show a profit of £2.5m after tax on a turnover of £122m.

Viapath has a contract with Bedfordshire Hospitals NHS Foundation Trust but most of its work is for GSTT and KCH. If Viapath failed to secure the SEL Pathology Network contract, it would lose its SE London work but it wasn't clear what would happen to the Bedfordshire work - would a smaller Viapath company continue with it? The March minutes of the KCH Finance and Commercial Committee, as reported to the June meeting of the KCH Board, say that 'the non-GSTT/Kings work was the main concern'.⁹

The company had acquired £300k of bad debts written off by the KCH Board according to the HSJ article.⁷ Are these debts because of pre-Covid issues or, because of lack of elective work, general Covid-induced lack of work, not forgetting the costs of the failed contract bid as described above – or something else?

According to the March minutes of the Finance and Commercial Committee, as reported to the June KCH Board,⁹ NHS Improvement recommended that the Trusts continue to fund Viapath's non-Covid related costs and lack of revenue 'for the next few months' if required. Why?

In addition it was reported that GSTT and KCH bought out Serco for an undisclosed and commercially confidential sum. Is Serco also going to receive compensation for the early termination of the arrangement with Viapath?

As Serco has now left the company – does it still have financial responsibility for costs still outstanding for its failed bid and for the winding down costs to the partnership? Or indeed for any other remaining costs of the whole procurement process – or will these costs fall back on the two Trust partners in Viapath?

There are undisclosed legal costs associated with Viapath's failed bid for the contract and probably also costs associated with Viapath's legal challenge to the selection of IPP (Synlab) as the preferred bidder for the contract.

What is the total cost to the NHS of Viapath's actions over the last year, particularly in relation to Serco and what does it teach us about private involvement in health services? It is likely that the NHS will be left picking up the pieces and paying the bills yet again as another partnership with a private provider fails.

Awarding of the contract to Synlab as part of a new joint venture

According to an announcement on the Synlab website in October 2020, the contract was finally awarded, a year behind programme, to Synlab.¹⁰ There was otherwise no official announcement, possibly because at that point the FBC had not been approved!

Following that, at the GSTT Board meeting of 28 Oct 2020 it was quietly mentioned in the CEO's report that Synlab was to be a new strategic joint venture partner with GSTT and KCH. It is not clear whether this new partnership will still be called Viapath but the intention is that work would start under the new contract in April 2021.

On the agenda of the SEL CCG Meeting of the 17th Sept. 2020, there was a report on the ICS Pathology Programme (Enclosure 9, p145).¹¹ The Board was asked to agree the report to meet the deadline of 30th Sept. 2020 for the annual commissioning intentions process and so that the Pathology Programme Board could finalise the contract arrangements for the new service.

The Board was also asked to agree to commission all direct access activity for 21/22 from the KCH & GSTT Pathology Partnership. No mention was made of the fact that the direct access service for the boroughs of Lewisham, Greenwich and Bexley is currently delivered by the LGT and that an undertaking was given to Lewisham Council's Healthier Communities Select Committee Meeting of Oct. 2019 that any decisions regarding the direct access service would be made locally, based on best value.¹² *Nor was it made clear that if the new joint venture did not receive the commission for the direct access service for all 6 SEL boroughs, the FBC would not be approved.*¹¹

A question was submitted to the meeting by a member of the public querying these decisions and Andrew Bland, the CCG Accountable Officer, replied that following the merger of the 6 SEL CCGs, pathology became a decision reserved for the CCG Governing Board as it covers all of SE London. The board agreed the report and at last the FBC could be approved. At the meeting of the CCG Board on the 19th Nov. the Accountable Officer reported that the procurement of the SEL Pathology Network Services had been completed.

A report giving an update on Pathology was submitted to Lewisham Council's Healthier Communities Select Committee Meeting on the 11th Nov. 2020; no CCG officer was available to present the report because of COVID pressures. Again, no mention was made of the previous undertaking given to the committee. The committee resolved to note the report and asked for an update in a year's time.¹³

What is the future for pathology services in SEL?

This may be very uncertain judging by the widespread building and use of private laboratories via the network of Lighthouse Laboratories (with poor health and safety and quality records) and the plans to expand this project to 29 private networks, to the detriment of local services, as reported by The Lowdown.¹ There is a possibility that the SEL procurement exercise could have been an expensive waste of time.

It is noteworthy that Andrew Bland gave a very vague and uninformative answer to a question about this, in the letter to Helen Hayes MP of 11th June 2020, mentioned above. The answer is quoted below and seems to leave the options as to future pathology provision very open:

'With regard to the provision of Covid-19 related services, the current providers of pathology services have worked flexibly to develop the additional capacity and capability to support testing in hospitals and care homes in south east London, as well as across the wider system where needed. The sourcing of reagents for these new tests, of course, was managed nationally and not by the service providers.

I would like to reassure you that any future contract for pathology services will be structured in ways that allow such flexibility to be provided in terms of responding to future changing testing needs or pandemic responses over the life of the contract. This has always been part of the procurement specification, which the Foundation Trust boards will consider very closely when making their decision to award a contract later in the summer'.

Further concerns arising from SELSON's observation of the procurement process

It is clear from the above that there are substantial **costs** associated with this protracted procurement exercise. Some of these costs relate to Viapath and Serco and are described above. From a FOI question ¹⁴ it is known that the legal costs relating to the production of the tender documents were £124,000 but there are no doubt other legal costs. A report in The Lowdown shows that costs for a proposed pathology network in Lancashire had reached over £1m even before a business case had been produced.¹⁵

The lack of **probity** in relation to some of the decisions made by the KCH and GSTT Boards is concerning. Once it was agreed that Synlab was the preferred bidder, it is obvious that intense negotiations took place so that KCH and GSTT could terminate their partnership with Serco and form a new relationship with Synlab. It would seem that the decision for Viapath to release Serco was endorsed by the same people who made the decision not to select Viapath as the preferred bidder i.e. members of the Trust Boards of GSTT and KCH, which went on to enter a new partnership with Synlab.

It seems all organisations involved in the procurement have been determined to avoid engaging with the public, frequently hiding behind the veil of commercial confidentiality. The procurement represents a major expenditure of public money but the publicly accountable bodies responsible for the procurement did not provide regular updates and used the excuse of COVID and the CCG merger to cancel meetings and not even attempt to achieve a basic level of transparency and accountability.

Conclusions.

A. SELSON's initial concerns were:

1. Conflicts of Interest
2. Lack of Impact Assessments
3. Public Consultation
4. The size of the contract.

During this whole process of setting up the South East London Pathology Network, none of these concerns have been satisfactorily addressed, either by responses to emails and FOIs or by what observation has been possible of documents and meetings related to the whole sorry saga.

In addition:

B. The boards of KCH and GSTT manipulated the procurement process thereby ensuring that their organisations were on the winning team.

C. SEL CCG side stepped the "standard annual commissioning process"¹³ (Para. 4.5) to ensure that the FBC of the joint venture contract was viable and in the process reneged on

an undertaking given to Lewisham Council's HCSC in Oct. 2019. Also, this in itself is an illustration of the loss of local accountability following the merger of 6 SEL CCGs.

D. A significant amount of public money was potentially wasted in the course of this mockery of a procurement exercise and once again Serco is probably laughing all the way to the bank.

E. SELSON's investigation illustrates that, regardless of the seeming robustness of the system, in this case the SEL Pathology Programme Board, the private sector will, through lack of transparency and accountability, manage to manipulate the process to achieve its aims.

F. Despite the effort made in procuring the SEL Pathology Network Services, it looks ever more likely that the establishment of the Lighthouse Laboratories will lead to a major national reorganisation of the delivery of pathology services.

G. Finally and very importantly health campaigners in other areas of England need to be aware of the story of SEL pathology privatisation and be very vigilant that a similar lack of accountability and disregard of democratic bodies does not occur in their patch. There are two sets of risks here – one is the expansion of local services to a much larger hub and spoke network and the second is the privatisation aspect.

As mentioned above, the original 29 new pathology networks have increased to 42 to match the new ICS footprints. A minority of the 29 were private but this could change. If privatisation of pathology services does increase, it could represent a huge budget shift from the public to the private health sector and would be catastrophic if – as in so many cases – the private sector fails to deliver. Blood and tissue analysis is used in 70% of all clinical diagnoses; any breakdown in the pathology service would be disastrous.

¹ https://lowdownnhs.info/analysis/nhs-lab-network-undergoes-rapid-private-expansion-amid-performance-issues/?utm_source=NHS+Supporters&utm_campaign=7ccd18df9a-Fund+Our+NHS+-313183429&mc_cid=7ccd18df9a&mc_eid=a0972f09e1

² https://www.grantthornton.co.uk/globalassets/1.-member-firms/united-kingdom/pdf/publication/nhs-companies-an-enterprising-approach-to-health.pdf_p11

³ https://www.hsj.co.uk/barts-health-nhs-trust/three-trusts-agree-pathology-hub-model-expected-to-save-51m/7028156.article?mkt_tok=eyJpIjoiTXpRNE1UVTNPVE13TmPObCIsInQiOiJ1bnZ4ZVwvekPzZzB2cW9sdG9RbnhVbIBKeGFMXC9ZOFrJdmNnT1N3Q1B6U2Y5MldYXC9SZkhYc0JsWWtDNEtPcVgxazhFc01HZEhUV0FnZDNwXC9LSXVlc3VnYnJRVDA3QnlQSUVlWZGRkUDZXNk5cL3JzcVBnY212QXJTXhIMEidTRXIn0=

⁴ https://www.hsj.co.uk/service-design/trio-of-private-providers-fight-for-22bn-london-contract/7024446.article?mkt_tok=eyJpIjoiTnpreFlUQXdNbVUzTTJKayIsInQiOiJhMlRoWUQyVDFncUUYyQkd3U3IBc08yY25ySndBdlV4aXBNS1drbkdsbFZndkF6MTByRk1Pd3VwVDNMNHpLa212NVwvY1lacKfuVzNHOWMzSjNMTIFqN2JCc1wvNUg0TytJNXhBNnp1eFRoQitoQ2ROK01ObjRzSzRnTIZHNk9YS3Q4In0%3D

⁵ FOI 88190 response dated 5.6.20 from GSTT and FOI 6701 dated 4.6.20 from KCH

- ⁶ <https://www.independent.co.uk/news/uk/politics/exclusive-overcharging-by-outsourcing-giant-serco-costs-nhs-millions-9695342.html>
- ⁷ <https://www.hsj.co.uk/finance-and-efficiency/trusts-to-buy-serco-out-of-joint-venture-after-losing-major-contract/7027868.article>
- ⁸ <https://www.ourhealthiersel.nhs.uk/Downloads/Meetings/OHSEL%20Board-SPG/25%20Sept%202019/D%20-%20M5%20PMO%20Highlight%20Reports%20Collated%20vF.pdf> p6
- ⁹ <https://www.kch.nhs.uk/Doc/corp%20-%20661.1%20-%20bod%20agenda%20and%20papers%20jun%2018%202020.pdf> p165-6
- ¹⁰ <https://humanmedicine.synlab.co.uk/partner-in-major-pathology-contract/>
- ¹¹ <https://selondonccg.nhs.uk/events/governing-body-meeting-2/>
- ¹² https://councilmeetings.lewisham.gov.uk/documents/s68067/06%20LGT%20Pathology%20Services%20Briefing%20LBL_081019.pdf
- ¹³ <https://councilmeetings.lewisham.gov.uk/documents/s75900/05%20Pathology%20update%20-%20111120.pdf>
- ¹⁴ FOI.19.SOU240 response dated 17.2.20
- ¹⁵ <https://lowdownnhs.info/news/1m-to-set-up-lab-project-but-still-no-business-case/>