



Modernising Commissioning

TUC submission to the Office for Civil Society
'Modernising Commissioning' Green Paper

Introduction

The TUC is the voice of Britain at work. We represent 58 affiliated unions and 6.3 million members. The TUC campaigns for a fair deal at work and social justice at home and abroad.

This response from the TUC is arranged according to the questions provided in the green paper. However, we wish to register our serious concern about the consultation process. With just four weeks (including the Christmas period) allowed, the timescale is less than half the minimum period recommended by the Code of Practice on Consultation¹ which states that *'Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible'*.

The Green Paper makes clear the Government's commitment to increasing the involvement of civil society organisations in public service delivery. For the purposes of the consultation, the Government has defined civil society in broad terms including voluntary and community organisations (VCOs), social enterprise and employee-owned mutuals or co-operatives. While this definition includes a wide range of financial, organisational and even ideological models with diverse needs and interests, there is considerable overlap in the issues related to public service delivery that merits their inclusion within a broadly defined 'civil society'.

The TUC's approach to public service reform rests on the understanding that public services provide public value, benefits that accrue not only to service users but wider society. Public value cannot be measured in simple terms of profit and loss but through the quality of service delivery and a process of democratic engagement between service providers and users, identifying priorities and strategies that most meet the needs of communities. This is why market-based approaches to public service delivery have failed over many years and continue to do so².

The TUC supports innovative and flexible public services and a greater role for civil society in working in partnership to provide added value and help facilitate community engagement. However, we believe that this approach is most effective through an 'enhanced public value' model within a framework of public sector accountability, a model that we elaborate on below. This model meets the Government's intentions to shift power towards communities and enhances efficiency and flexibility but avoids the harmful and expensive fragmentation and complexity caused by further outsourcing and marketisation.

¹ <http://www.bis.gov.uk/files/file47158.pdf>

² "Private sector not better or cheaper" Financial Times, 18 October 2010

Key Principles of Consultation

Before we address individual questions within the consultation, the TUC believes that the following key principles regarding consultation should be applied to any model of commissioning:

All stakeholders should be involved in the commissioning process at an early stage.

This should include the workforce, represented by recognised trade unions. Consultation on commissioning proposals should take place well in advance of any tendering process and consultations. The commissioning process should also fully meet the requirements of equality legislation and in particular the duty on public authorities to promote equality. Clear Government guidance on this issue should be developed. Full equality impact assessments should be conducted well in advance of the tendering process. This should include an assessment of the implications of outsourcing for the provision of services and for workforce terms and conditions. Recognised trade unions and wider stakeholders should also be consulted on the impact assessments. Such consultation should be based on written copies of the assessment and should take place at an early stage, providing time for adjustments to be made before contracts are put out to tender.

Adherence to TUPE and Two Tier Code

Commissioning models should be designed and delivered in accordance with TUPE requirements, the two tier code in local government and the NHS and the Principles of Good Employment Practice within central government.

Consultation with recognised trade unions

In addition to consultations on the commissioning process Government guidance should also emphasise the importance of employers consulting fully with recognised trade unions as required under the TUPE regulations, collective redundancy legislation and general information and consultation rules.

Q2: How could Government make existing public service markets more accessible to civil society organisations?

The TUC believes that the relationship between communities, through VCOs or, in some cases, social enterprises and the public sector can be beneficial. These benefits are derived in two main ways. First, civil society organisations are often able to engage with hard to reach clients and communities that may be beyond the scope of the public and private sector. As such, they are

positioned to provide added-value, niche services in partnership with the public sector. Second, VCOs are able to represent and articulate the needs of service users and clients, facilitating greater engagement between public service providers and the communities they serve. Enhancing the capacity and role of civil society in these areas is essential to improving public service delivery.

Public services are not discretionary commodities. They are core-welfare public goods that provide benefits not only to service users but wider society. The TUC supports public service delivery that is accountable, efficient, value for money and provides high quality, universally accessible services to the community delivered by professional, engaged and appropriately remunerated staff. The TUC believes that the founding principles of public services, namely universal access, delivery according to need, services free at the point of use, and services delivered for the public good rather than for profit should be at the heart of any model of service delivery.

It is our view that through its democratic accountability, unique funding mechanism and long term integrated approach, that the public sector is best placed to provide public services that meet the criteria above, a view that appears to be supported by the wider public³

But public services need to be flexible and accountable to the communities that they serve and we support initiatives to stimulate greater engagement and dialogue between communities, service users and providers. We believe that this is best achieved through an 'enhanced public value' model, which we elaborate in our response to Question 4 below.

As it stands, the proposals in the Green Paper, particularly the stated intention to set "proportions of specific services that should be delivered by independent providers, including civil society organisations" provide a number of concerns which we outline below.

Marketisation

The conversion of parts of the public sector into worker or community mutuals and the outsourcing to VCOs or social enterprises will lead to an increased marketisation in public services.

For instance, health services that are turned into shared ownership enterprises or outsourced to CVOs or social enterprises will have to win contracts and compete with private companies to

³ YouGov survey found that 73 per cent of voters disagreed or strongly disagreed with more competition within the NHS, while another survey found that 89 per cent of the public thought that "public services should be run by the Government or local authorities, rather than by private companies" - Rethinking Public Service Reform, TUC, 2008

survive under the government's proposed "any willing provider" model and will be vulnerable to take-over from large companies and multinationals.

This is particularly true when economies of scale dictate that greater efficiencies can be derived when a number of competing enterprises are brought together under a smaller number of "super-providers". What is more the private sector's ability to undercut smaller organisations and take an initial loss to gain a market leading position provides significant competitive advantage over those third sector organisations bidding for contracts.

The case of Ealing Community Transport is instructive. Ealing Community Transport (ECT) was one of the largest social enterprises in the UK, evolving from providing community transport, into a business with a multi-million pound turnover and interests in a range of trading sectors, including, waste management, rail and healthcare recycling which grew to account for 80% of its turnover. In June 2008, ECT Recycling was bought by the for-profit May Gurney construction and support company. Other divisions of ECT were disposed of, or separated from the parent group, leaving ECT Group to focus on its core transport operations. This restructuring thus allowed assets held for the interest of the community to be transferred into private hands, despite the fact that ECT was registered as a Community Interest Company.

A report from the Third Sector Research Centre suggests that the vast majority of the 62,000 organisations designated as social enterprises under the definition used by the Office for Civil Society lack an asset lock preventing the sale of the business to a profit-making company. This means that they would not qualify for the 'Social Enterprise Mark', the quality mark promoted by the Social Enterprise Coalition that shows a business is a social enterprise.⁴ This does little to assuage concerns about the potential for the transfer of public assets and services into private companies under the Government's existing proposals.

Marketisation also incurs increased costs. The break-up of public services into competing units acts as a drain on resources which become diverted to transaction costs, such as fees, quality assurance, monitoring of contracts, advertising and invoice and billing costs. Professor Allyson Pollock estimates that marketisation in the health care system may cost up to £20bn a year.

Accountability

There is a risk that accountability and public interest may be weakened by the further disconnect of public services from the democratically elected local or central government that previously

⁴ *Third Sector*, "We must have a clear definition, says Social Enterprise Coalition", 28 September 2010

owned and governed them. This may be exacerbated by the complexity of accountability structures between commissioning bodies and independent service providers.

Demand

According to research by OPM, the potential benefits derived from employee ownership models, e.g. innovation, efficiency and creativity, only work where there is genuine employee ownership and buy-in. This process cannot be driven from the top. Experience from unions suggest that, contrary to the government's claims, moves towards mutuals and other social enterprise models have mainly been led by management rather than staff, and workers have felt under pressure to support the change. In most cases, where staff have been balloted, most have chosen to remain within the public sector and health service.

Furthermore, there seems to be a lukewarm response from the public. Research by IPSOS/Mori for Public Services 2020 suggests that while there is appetite for a greater role in shaping public service delivery, few were compelled to become involved and a clear majority *"struggle to see a compelling or urgent case for reforming public services to cope with economic pressures and social changes"*⁵

The research found that people were initially positive about the use of co-operatives in delivering public services but that this support fell away as various obstacles were revealed, particularly in relation to accountability and decision making. Support for co-operatives was most desirable in relation to *"non-core services"* and where *"local variation ... is most important"*.⁶

Service continuity

In addition the problems posed by the fragmentation and complexity of accountability posed by further contracting out, there are also concerns about the impacts on joined up services and continuity of delivery.

Under the current system, contracts to social enterprises are usually awarded for three to five years, after which there is no guarantee of what happens to the services they deliver. Instability may affect patient care.

Risk

There has been little focus on what will happen in those cases where co-operatives or other

⁵ Office for Public Management 'New models of public service ownership' August 2010

⁶ Ibid

providers fail.

The complexities of public service commissioning and the potential advantages provided by larger operators who can deliver at scale, places small social enterprises such as mutuals at a disadvantage in the market.

Furthermore, many co-operatives and social enterprises face significant barriers to accessing finance to support investment and expansion. A 2005 survey of British employee-owned enterprises found that over a third had trouble accessing finance, with private equity unavailable to those organisations based on profit making but not profit maximisation and with longer term objectives.

When failures happen, it is anticipated that the taxpayer will have to absorb costs incurred, while service users face disruption and employees face job losses and uncertain futures.

Employment Standards

While employee-owned enterprises in theory provide high quality levels of employment standards, there are serious concerns about long term impacts on equality and employees' terms and conditions as a result of the commissioning process.

Shared ownership organisations rely on generating surpluses to raise funds and maintain long term stability. How these surpluses are derived is open to question, particularly given the Government's priority for achieving savings to the tax payer.

While efficiencies may be derived from leaner structures, there will be downward pressure on wages and pensions. TUPE provisions offer some protection to transferred staff but there are very limited safeguards for new entrants, particularly given the review of 'fair deal' in pensions provision. This situation would be exacerbated should the abolition of the two tier workforce agreement be extended to Local Government or the NHS. It is unlikely that a shared ownership business model would successfully incorporate comparable terms and conditions with directly employed public sector workers.

The TUC is also concerned by the questions posed in the consultation paper relating to issues which VCOs or smaller organisations may face when complying the TUPE standards. As the Government will be aware, the UK Transfer of Undertakings (Protection of Employees) Regulations 2006 implement the EU Acquired Rights Directive, which requires that all employers, regardless of their size comply with the basic employment standards. This includes public, private and voluntary sector organisation. The TUC would be seriously concerned should the Government consider exempting any employers, including smaller organisations from TUPE rules. Such an approach, we believe, would not comply with EU law.

Q3: How could commissioners use assessments of full social, environmental and economic value to inform their commissioning decisions?

The TUC welcomes the objective to “enable commissioners to make strategic commissioning decisions on the basis of a full understanding of the social, environmental and economic impact”.

We have argued consistently over several years that greater leverage could be exerted from the £150bn annual public spend on goods and services in order to support economic, environmental and social objectives.

The TUC believes that economic, environmental and social objectives can be used in commissioning and procurement to support:

- Skills, training and recruitment, e.g. the promotion of apprenticeships
- Promoting equality, e.g. supporting workforce and supplier diversity through contract compliance and supply chain management
- Tackling poverty and social exclusion, e.g. through the use of fair employment and living wage clauses
- Sustainable economic growth, e.g. building the capacity of local businesses to bid and win contracts providing stimulus for economic growth and strategic sectors.

Existing European and national legislation provides the scope for public sector commissioners to include social, environmental and economic objectives within assessment and evaluation.

The EU Public Procurement Directive implemented in UK law in January 2006 makes explicit that contract performance conditions relating to social and environmental issues are compatible with public procurement practice provided they are non-discriminatory and are included in the contract notice and contract documents.

Guidance formulated under the previous government makes clear that their position on social issues in public procurement is that “central Government departments and their agencies should consider and incorporate social issues in their procurement where they are relevant and

proportionate to the subject matter of the contract. Social issues need to be addressed in a way that is consistent with value for money policy, procurement law and EU Treaty principles”⁷

Experience shows that this guidance has been not been implemented in a clear or consistent way and that there is often confusion as to what is permitted under either national or European legislation. We would therefore welcome a more pro-active approach from the Government, ensuring that organisations across the public sector take a more considered approach to the inclusion of social, environmental and economic objectives.

Furthermore, social, economic and environmental objectives should be applied in their broadest sense across commissioning and procurement models. Social value should not just mean the commission or procurement of services from social and civil society providers but should equally be applied to private sector contractors.

Given the context of the Government’s deficit reduction plans and spending cuts and the drive to use commissioning models to find savings, there are concerns that social, economic and environmental objectives may be regarded as unaffordable add-ons. It remains to be seen how this will be managed when implemented within public sector organisations facing intense budget reductions.

Q4: How could civil society organisations support greater citizen and community involvement in all stages of commissioning?

We stated above that that the public sector is best placed to provide public services that accord with the founding principles of public services, namely universal access, delivery according to need, services free at the point of use, and services delivered for the public good rather than for profit. And that maintaining public services within the public sector is the most effective way to ensure accountability between those services and the democratic institutions that govern them.

However, there is a compelling case that in many situations there is disconnect between public service providers and the communities they serve. This accountability deficit creates problems such as increasing public scepticism regarding the decision making of public service professionals, a widening gap between public perception of service quality and objective criteria used to measure improvements and a lack of responsiveness to locally determined need. While public sector-delivered services have essential links to democratic institutions, more should be done to build links with service users and communities.

There is scope to achieve this within a public sector framework, whereby accountability to

democratic institutions is balanced with mechanisms for engaging the community and service users and where the public sector workforce plays a fundamental role in the consultation and negotiation process with commissioners and users of services.

The 'enhanced public value' approach is based on a process of consultation and negotiation between service users, the workforce and the commissioning bodies to identify priorities, strategy and service implementation that best meets the needs of the community, within the context of restricted public resources. In this way, services are commissioned in a way that meets local need but balances this with the broader needs of the community, the prioritisation of scarce resources and the promotion of public value.

In the report, 'Rethinking Public Service Reform' Mick McAteer identifies three key benefits derived from this approach in that it has to:

- balance the interests of the public realm and the market
- consider individuals to be citizens, not just consumers, and thus balance the interests of communities *and* individuals
- consider wider social concerns, not just narrow financial concerns.

In this way, public service reform can be driven from within a democratically accountable and joined up public sector framework. Furthermore, through placing the public sector workforce at the heart of the process alongside communities, it is able to restore links between providers and users thereby addressing the accountability deficit and restoring legitimacy to public services. What is more, staff involvement ensures that implementation of service delivery is more closely aligned with higher level strategy.

While this model has not been tested across the public sector, there are case studies of similar approaches undertaken that provide some very positive outcomes. The 'Time of Our Lives' project in Bristol City Council, the approach taken to service improvements in Newcastle City Council⁸ and the (formerly) Inland Revenue's 'Our Time' project⁹ all demonstrate a consultative process including public sector workers, through their recognised trade unions, employers and service users that provided benefits to the workforce and community, driving through public service reform from within.

In summary, the core principles underlining the TUC model of 'enhanced public value' are:

⁸ See 'Public service reform but not as we know it' Wainwright and Little 2009

⁹ See 'Rethinking public service reform' TUC 2008

- engagement with users to determine public service delivery strategies and implementation plans with a precise focus on identifying what public service users and the wider community want a service to generate
- a commitment to deliberation and negotiation in identifying that public value
- a recognition that any conception of public value must involve not just what a service should deliver but also how it can be delivered in a cost-effective way.
- the development of public service delivery strategies and implementation plans that uphold the founding principles of public services, namely universal access, delivery according to need, services free at the point of use, and services delivered for the public good rather than for profit
- the development of public service delivery strategies and implementation plans that preserve the organisational integrity of public services and which value collaboration and integration over competition and fragmentation
- full engagement with public service staff in the determination of strategies and implementation plans
- the establishment of robust feedback mechanisms for staff and users during the implementation and delivery phase of any strategy.

Through this approach, civil society could play an important role in the commissioning of services that meet community need but through a process of partnership with the public sector, including the workforce. It may well be that through this process, elements of public service delivery are commissioned in a way that provides scope for VCOs and other organisations to provide niche services. But this should be achieved through a process of negotiation and partnership between VCOs and public service providers, according to the principles outlined above. In so doing, community engagement becomes a mainstream process, with the needless adversarial implications of the current Right to Challenge proposals removed. And this too removes the need for arbitrary proportions of services to be outsourced and eliminates the threat to public service delivery caused by fragmentation and marketisation.

It is our view that approaches to public service reform along these lines should be included within the options currently being considered.

