MODERNISING COMMISSIONING GREEN PAPER:
RESPONSE FROM KENT COUNTY COUNCIL

INTRODUCTION:

Kent County Council (KCC) welcomes the opportunity to respond to the Modernising Commissioning Green Paper. Much of what is suggested in the Green Paper is already best practice within local government and indeed chimes with our own new four-year corporate plan 'Bold Steps for Kent' which was agreed by the County Council in December 2010. Given the scope of the Green Paper it is clear that a significant number of the questions are not designed for, nor pertinent to local authorities, and therefore rather than answer each question in turn we have addressed key issues raised within each chapter.

NEW OPPORTUNITIES:

KCC is fully committed to further liberalising the market for public services to encourage a greater mixed economy of provision, with social enterprises and other civil society providers increasingly competing for public sector contracts. A number of the suggestions set out in the Green Paper are already being actively pursued by KCC as part of Bold Steps for Kent, however, there are a number of issues which need for development/consideration:

- **Providing capital for payment by results to work:** Whilst we accept the Governments desire to move to a model of payment by results there are concerns about how the model might work in practice. In particular, that access to working capital (at a time when capital *per se* is increasingly constrained) and the inherent level of risk that civil society providers are asked to take may be prohibitive for all but a small number of well-capitalised providers. The example cited of social bonds as a means to finance capital is innovative, but the market for capital financing of civil society organisations is immature. It is not clear that the market will develop quickly enough to support the Governments objectives nor that it is scalable to the level required in the short term. Given this, state support for civil society organisations as providers of public services should, in the first instance, help provide working capital to enable access to market opportunities to help both provider access and develop market confidence in social bonds and other innovative financial mechanisms.

- **Limiting prescription over 'right to challenge':** The 'right to challenge' set out in the Green Paper chimes with KCCs own commitment, made in Bold Steps for Kent, to introduce a 'right to bid' process that will allow civil society organisations and other providers, including local communities, to bid to run local services which they believe they can do so better than current provision or where local management can provide significant added value. KCC does not intend to be prescriptive about when this might be used, or to which service areas that the right to challenge/bid might be suited, but instead will consider each application on its merits subject to the robustness of the business case presented. This will allow it to consider any proposal in its widest sense, especially where it might impact upon wider service provision. Rather than set out where and when any right to challenge can be used, we believe that examining each bid on a case-by-case basis is the most appropriate mechanism to encourage use of the process for the Government's proposed right to challenge.

- **Clarity over staff mutuals 'negotiation of contract'**: KCC fully supports the proposal in the Green Paper for a 'right to provide' and we have proposed to extend our own 'right to bid' process set out in Bold Steps for Kent to allow KCC staff to put forward a business case to form a mutual or service co-operative. However, we have been advised that there would be no 'automatic' transfer of service contract for public sector staff establishing mutuals, but instead they would have to compete for the service contract with other providers in open competition. Whilst obviously any staff mutual would be in a strong position to compete for such a contact, given their inherent expertise and understanding of the service, the right to the contract would not be automatic. The Green Paper implies otherwise, and we would ask for clarification and guidance on this matter. It is worth noting that when this issue was flagged during KCC's own consultation for Bold Steps for Kent, local civil society organisations argued strongly against any form of preferential treatment for state employees who established public service mutuals, which might restrict their own access to public sector markets.

MORE ACCESSIBLE:

KCC fully supports the Government's objective to remove the barriers to entry into existing public sector markets, and indeed we have made this a central plank of Bold Steps for Kent, our new corporate plan. However, the barriers that generally affect civil society organisations are also those which restrict small-medium sized enterprises (SME) from being able to access public sector markets. Therefore, legislative and regulatory reforms to improve access to markets should not be restricted to those that merely impact civil society organisations, but which restrict small-scale organisations in general, either civil society organisations or SME's, from accessing markets. KCC has committed to extend its Backing Kent Business programme, which has sought to assist and inform SME's about how they can better access public sector procurement process at pre-qualification stage to social enterprises and other civil society organisations, so that they too are able to compete for KCC and wider public sector contracts.

- **No proportions/quotas for specific services to be provided independently:** We do not believe that the setting of quotas in regard to the number of service contracts that should be provided by SME's or Civil Society organisations is the best means to promote a greater mixed economy of public service provision. Whilst we are confident that KCC and local government in general would meet and exceed any quota, the net effect of such a quota would be to restrict market activity and access to contracts for some larger providers (which could be legally challengeable) whilst local governments ability to deliver the right provider for the right service at the right price would be undermined by this restricted choice.

- **Focus should be on creating recyclable funding streams to support civil society organisations:** In Bold Steps for Kent, KCC has already committed to creating a Big Society Fund for Kent that will provide start up finance and working capital for social enterprises, especially those who wish to access public sector contracts. We hope to align this fund to the proposed Big Society Bank so that we can maximise the availability of working capital for civil society organisations in Kent. A key part of our thinking is that when a profit is made from civil society organisations providing public services via funding from the Big Society Fund a proportion of this profit should be repaid in the form of a dividend to the Fund for reinvestment into other civil society organisations. We believe that the Big Society Bank should also operate on a principle of seeking to create recyclable funding streams wherever possible, so that the availability of capital to as broad a base as possible, over as lengthy a period as possible, is maintained.

- **Reduced risk for providers increases risk of provider/service failure:** KCC concurs with the theme in the Green Paper that increased accessibility for civil society organisations to public sector markets requires public sector commissioners not to transfer disproportionate risk within contracts or procurement/commissioning processes. In short, public sector authorities must increase their risk appetite – principally through a less arduous commissioning/procurement process, which all too often closes out civil society providers (this is another core plank of 'Bold Steps for Kent'). However, a key part of this process must be an acceptance that increased risk might more frequently materialize in service or provider failure. In a market that is more open, with a greater number of small scale providers and where innovation in service design is increasingly encouraged, it must be accepted that service/provider failure is an inherent risk in that new model, and that public authorities should be judged on their response to failure, rather than be blamed for it and than employing mechanisms that restrict access to markets to prevent failure *per se*. Central government has a key leadership role in challenging public perceptions around provider/service failure as part of a more open and dynamic public sector market.

VALUE:

KCC fully supports the objective of delivering greater value through commissioning and procurement on the basis of a greater understanding of social, environmental and economic impact. In particular, we fully agree on the emphasis set out in the Green Paper on ensuring requirements in tenders are clear and set out the value by which bids will be judged. We agree that the public sector must get smarter about how it prepares tenders so it maximizes both fiscal and social value. However, we do have some concerns about the Public Services (Social Enterprise and Social Value) Bill. It is not clear what added value the current draft of the Bill provides in addition to already established best practice, which through focus and determination, commissioners could not improve upon through the current legislative framework. The two principal areas of concern are:

- **Potential for the Bill to add cost to commissioning/procurement processes:** The potential for the bill to add significant cost, both financial and time delay, to the procurement process by increasingly placing an expectation on local authorities to consult the intended beneficiaries at pre-qualification stage every time they go through a commissioning cycle for a service and how such intended beneficiaries are defined is likely to add cost to the procurement/commissioning process. At times this may be just be a few dozen-service users whilst at other times may be every resident in a county (some 1.4million residents in Kent's case). Either way the potential to add significant costs at a time of fiscal retrenchment may be significant.

- **Potential for the Bill to increase legal challenge:** We are concerned that the Bill may have the unintended consequence of opening up commissioning and procurement to decisions to greater legal challenge, as the decision about what constitutes 'relevant' value is inherently subjective. For example, where an authority decided not to consult the intended beneficiaries (e.g. for cost reasons or where it considered 'relevant' value to be obvious) the Bill should not become a means by which providers challenge the commissioning/procurement processes used in an attempt to get commissioning/procurement decisions overturned. In short, should the Bill be passed into law, we would wish it to provide public sector commissioners as much protection as can reasonably be provided in law from spurious legal challenges around the definition of 'relevant' value, provided it is not perverse.

CITIZEN AND COMMUNITY INVOLVEMENT:

Clearly the specific questions set out in this chapter are particularly focused towards civil society organisations themselves. However, there are a number of issues raised here which deserve specific comment:

- **Clear demarcation between civil society advocacy and provision:** The Green Paper sets out a clear desire for citizens and local communities to become more involved in the commissioning process, especially in regard to identifying local service priorities and outcomes. Whilst we fully understand the desire for Government to ensure civil society organisations can act as advocates for communities in the commissioning process, there must be appropriate distinction between civil society organisations acting as advocates for local communities in the commissioning process and civil society organisations acting as potential providers. There would clearly be conflict of interest in a civil society organization that sought to influence the commissioning process vicariously through community advocacy then bidding to run these services.

- **The need for greater Whitehall engagement on Community Budgets:** KCC fully supports the development of Community Budgets initiative and is one of the 16 pilot areas for the first phase of Community Budgets for families with complex needs. We have long advocated that the integration of services, and budgets, at the local level will provide greater efficiencies and improved service delivery by more tightly focusing on local priorities. However, from our experience following the Total Place Initiative and the shift to Community Budgets, whilst the commitment and engagement from local partners is strong, it is all too often hampered by sponsoring Whitehall departments whose accountability systems, operating procedures and local approach to service delivery is inflexible and cannot readily adapt to the needs of local service design. We are concerned by what appears to be a relatively low level of engagement across Whitehall departments in regard to Community Budgets beyond Department for Communities and Local Government (CLG) and the Department for Education (DoE) and would ask that this is addressed at the highest levels as a matter of utmost importance.

- **Personal Budgets/Direct Payments should promote individual responsibility:** KCC has been at the forefront of the personalization agenda – particularly in adult social care - over the last ten years and we continue to drive the personalization across our service offer. Our visa-enabled Kent Card pre-loaded with an individual's personal budget or cash alternative to KCC service delivery empowers service users to make their own decisions and procure services in the same way as millions of consumer transactions occur on the high street every day. We are committed to increasing the number of services where the Kent Card can be used.

  However, one of the inhibiting factors to increasing the use of personal budgets across a wider number of services is that the potential financial liability to local authorities actually increases rather than decreases with the use of personalised budgets. This is because the provision of direct payment or personalised budgets doesn't discharge an authorities duty in regard to the provision of services where entitlement exits. In that, if a direct payment is misused to the extent that an individual service user no longer has access to services they are entitled to, the local authority is obliged to make re-provision. Evidence so far suggests that the vast majority of service users do not misuse personal budgets, but the potential impact means that authorities are risk averse in the expansion of direct payment. This issue could be addressed if it was clear in law that a personal budget/direct payment does discharge an authorities obligation to entitlement of services and that re-provision, should a direct payment be considered to be misused, would not be required. Such an approach would also support the personal responsibility agenda, which is, of course, the flip side to the civil society aspect of the Big Society.