

## **Modernising Commissioning –Durham County Council response**

### ***Comments on General Questions:***

#### **In which public service areas could Government create new opportunities for civil society organisations to deliver?**

From a commissioning perspective the document fails to highlight the reality that for some parts of the country, including County Durham and other rural/larger geographic areas, this shift will be a long-term evolutionary process, which will require significant funding and capacity building ,backed up by stable funding streams if it is to become sustainable. The amount of effort required to develop a flourishing civil society cannot be underestimated.

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

We would support the general premise in the document that good commissioning / market management can have a significant impact on achieving lower costs / better outcomes / improved VFM /quality assurance, and agree with the suggested continuing role for enhanced strategic commissioning, taking in the full social, environmental and economic value/impact of service development, in line with the learning and experience from Total Place from the previous government.

The increased emphasis on outcomes rather than processes builds on outcomes-based commissioning ideas, as well as the overall thrust of "Personalisation" so is welcomed, but more clarification and detail is required about the proposed "payment by results" framework.

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

Generally we would support the greater involvement of communities and individuals in the shaping of future services but this raises issues about the mechanisms for engagement and consultation - needs to be much more robust and involve a wider audience than the proposed "Healthwatch" former Links model. Similarly ,we would be concerned about how society/community responds to the needs of the more marginalised or socially excluded groups ,as significant experience through service development/planning processes indicates that the needs of the most vulnerable and less powerful will not be addressed appropriately and the impact of the NIMBY voice can't be allowed to dominate.

The suggested "right to provide" and "right to challenge" options, which hope to give public sector employees greater power to set up their own social enterprises are both interesting concepts, but will need to be carefully managed to avoid possible conflicts of interest and to achieve transparency.

### ***Comments on specific 'Sub-Questions'***

#### **NEW OPPORTUNITIES**

##### **What are the implications of payment by results for civil society organisations? (p.9)**

A few organisations, especially those from the for-profit end of the spectrum, may welcome this. The majority of 'traditional' third sector groups are likely to consider this a considerable challenge as it is not the model they are used to.

##### **Which public services areas could be opened up to more civil society providers? What are the barriers to more civil society organisations being involved? (p.10)**

Adult social care is a potential area which could be opened up more. The personalisation agenda is actually a potential barrier here, as it prevents us from making firm commitments to providers.

Also the running of local branch libraries and other leisure/culture facilities which the Council can no longer afford to operate in the current financial climate. This is already envisaged in the terms of the Localism Bill, which will give specific powers to community groups to take over threatened services and run them themselves.

**Should Government explore extending the right to challenge to other local state-run services? If so, which areas and what benefits could civil society organisations bring to these public service areas? (p.10)**

This question could run the risk of confusion over challenge of council policy and strategy versus Procurement/ Legal challenge. Local Authorities are already overly risk-averse due to constant challenge over the letting of commercial contracts. If the government were to encourage local groups to challenge us in new areas, there would be a genuine risk that Councils would withdraw some discretionary services altogether rather than risk continuing to provide them and facing challenge. If such challenges became commonplace, it would also encourage an unhelpfully adversarial relationship between Councils and 'civil society'. However, a 'civil society' challenge of innovative service delivery options would be welcomed.

**Are there types of assets whose viability, when transferred to civil society management or ownership, would be particularly dependent on a continuing income stream from service contracts or public sector tenancies? (p.11)**

This need not be the case. Anecdotally, at our local level, a proposal has been put forward by a group of social enterprises to buy a civic office building from the council and rent space to other social enterprises, voluntary and community organisations and local enterprise partnerships. This would provide an example of a civil society-owned asset that was not dependent on public sector tenancies or contracts, although there would also be the potential for the council to rent space in the building to continue to provide some front line / first contact services without the costs of ownership and maintenance. This would offer a more mixed economy of tenancies to the civil society owners of the building, which may bring with it a greater security of rental income, although it is noted that in this case the particular appeal of the building to third and public sector organisations is its central location, which will not be the case for many other assets that local authorities may be interested to sell.

**What are the main barriers that prevent civil society organisations taking over asset-based services? (p.11)**

Whether a civil society organisation is seeking to take ownership of an asset to directly provide a public service or for another purpose (for instance, as in the example above), the main barrier is likely to be capital. Government will have to consider means of facilitating the transfer of ownership beyond the 'right' to do so; this may include loans for investment to civil society organisations or incentives to existing owners of assets (e.g. local authorities) to sell at prices that are affordable to civil society organisations.

**How can we encourage more existing civil society organisations to team up with new employee-led mutuals? (p.11)**

It is neither clear nor apparent how this would work in reality, there is simply no incentive for public sector employees to 'take over' the services they provide and run them directly – they would be transferring risk to themselves for no appreciable benefit.

**What other methods could the Government consider in order to create more opportunities for civil society organisations to deliver public services? (p.12)**

*No response to this question.*

**MORE ACCESSIBLE**

**What issues should commissioners take into account in order to increase civil society organisations involvement in existing public service markets? (p.13)**

- Market testing to understand the capacity of the market including any civil society organisations operating in this market, and those seeking to enter it.
- Ensuring that organisations are able to bid as consortia where this will help improve access.

**In the implementation of the abovementioned measure (see p.13-14 of the green paper), what issues should the Government consider in order to ensure that they are fully inclusive of civil society organisations? (p.14)**

The basis of the measures outlined, that “many of the barriers experienced by civil society organisations are common to private sector small and medium enterprises” (p.14), is corroborated by feedback from our suppliers.

Introducing a standardised core PQQ across central government would be helpful to many smaller suppliers, but is not a particularly innovative initiative. Many commissioning and procuring organisations have already done this at a local or regional level. It should also be noted that while developing a standardised *core* PQQ can reduce bureaucracy and duplication of effort for procurers and suppliers, one size does not fit all in tender exercises, and there will remain a need for commissioners and procurers to apply careful consideration, on a case-by-case basis, of what questions and evaluation criteria are most likely to deliver the best overall outcomes for service users and the community.

The Contracts Finder system will need to understand and interface with other applications performing the same role. For instance, Mental Health North East has recently been awarded funding to develop a virtual market place for the region which would allow private and third sector opportunities to identify public procurement opportunities and potential delivery partners with whom they could collaborate to enhance their bid for work. The successful implementation of a central system would depend on an awareness of what regional and/or sector-specific portals were in existence and interfacing with these in an accessible, unconfused way. Considering that European opportunities must also be published via OJEU and that many regions operate collaborative portals, e.g. NEPO in the North East, there is a risk that the market could become unhelpfully cluttered with such applications.

**What issues should the Civil Society Red Tape Taskforce consider? (p.14)**

No response to this question as it would appear that this body, in particular, has no clear focus and does not appear to have any specific powers.

**How can commissioners achieve a fair balance of risk which would enable civil society organisations to compete for opportunities? (p15)**

It is misleading to assume that the “disproportionate levels of risk in contracts” (p14-15) originate with commissioners. The transfer of some risk to providers is, in many cases, an attempt by commissioners to achieve the “fair balance of risk” called for, considering the range and depth of financial, legal and reputational risks that commissioning bodies such as local authorities and primary care trusts already face.

At least two significant barriers exist in the commissioning and procurement process for civil society organisations seeking to do business with the public sector:

- (i) EU Treaty Principles and the facility for bidders to challenge the fairness of the procurement process has led to a more risk-averse culture in many commissioning organisations, who feel that producing contract specifications and bid evaluation criteria in a prescriptive way will offer them greater protection from challenge. In some cases the prescriptive nature of specifications and criteria will make it more difficult for a civil society organisation to meet the requirements of the contract, as compared to organisations which are (any or all of) more commercial, larger, longer established and/or have a clearer business model.
- (ii) The obligation of commissioning bodies to secure delivery and continuity of service for users can lead to levels of financial scrutiny and assurance being required of suppliers that smaller organisations, including

civil society organisations, may find prohibitive. The key issue for commissioners is that it is not clear how else they can be assured of continuity of service.

Mitigation of the risks placed on commissioning bodies would contribute to lowering the above barriers. A less risk-averse culture among commissioners would result in greater propensity for considering new ways of commissioning and procuring, including less prescriptive, more outcome-based specifications and evaluation criteria, and those which had the potential to deliver whole life (social, economic and environmental) value for service users and communities (p18).

It is worth noting that the Localism Bill presents something of a double-edged sword in this regard, devolving power to the local level but also creating an additional layer to the portfolio of risks for commissioners. There is a danger that public sector procurement will continue to be done in a prescriptive way that will narrow the range of positive outcomes it can generate, in order to safeguard against the new powers of challenge granted to civil society organisations and local people. The Government will have to consider carefully the mechanics and implications of the right to challenge, as a disproportionate power could be counterproductive to its desire to 'reduce the bureaucratic burden of commissioning' (p14).

**What are the key issues civil society organisations face when dealing with TUPE regulations, and what could government do, within existing legislation, to resolve these problems? (p.15)**

*No response to this question.*

**What issues should Government consider in order to ensure that civil society organisations are assessed on their ability to achieve the best outcomes for the most competitive price? (p.15)**

It is difficult to see when a commissioner or procurer would be interested in the operating costs of a provider rather than the price and value it offers (p.15). We would not habitually consider the overheads or other business costs of an organisation, and moreover, would actively seek to evaluate their bid for a contract based on the whole life social, economic and environmental benefits the organisation could offer. Organisations which are not necessarily the most competitive on price may still be in a strong position to win work based on the wider positive, sustainable outcomes they could deliver.

**What issues should Government consider in the development of the Big Society Bank, in order to enable civil society organisations to take advantage of public service market opportunities? (p.16)**

This does not seem to be a reliable means of funding. The report acknowledges that the "amount of funds available for distribution [...] is difficult to predict" (p.16), which makes it a very loose foundation on which to base medium term financial planning. Additionally, in its current form, there seems to be little incentive for banks and building societies to participate in what is a voluntary scheme with no significant returns on investment. Banks and building societies would need to be further incentivised to release this capital, as it is very likely at present to be more valuable as a security to the organisation.

**What issues affecting civil society organisations should be considered in relation to the extension of the Merlin Standard across central government? (p.17)**

In the first instance, the results of the pilot by the DWP clearly need to be considered before taking a decision on the implementation of the model as a common standard.

Having read the guide to the model and its principles published on the DWP's website, it does not seem to provide commissioners with any 'new' knowledge or tools. However, there are some requirements made of Prime Contractors in section (2c) of the report that, if successfully implemented in the pilot, would provide very valuable learning to other public sector commissioners and procurers as these have historically not been easy to reconcile in practice; for example, ensuring that "procurement processes are fair and transparent" while "[minimising] the bureaucratic burden on suppliers", or that "contractual documentation is legally robust" while "not [causing] undue financial risk for supply chain partners". This also leads to a concern that public sector commissioners may be

requiring standards of suppliers that they are unable to demonstrate themselves; this in itself could be evidence of placing unfair burden or risk on the supply chain.

With specific reference to civil society organisations, the principles of Merlin would make it easier for such organisations to do business with the public sector when acting as supply chain partners, for example through the requirements made of the Prime Contractor to ensure that funding arrangements are fair, support is provided to build capacity and excellence is recognised in its supply chain. However, for a civil society organisation bidding as Prime Contractor (in isolation, consortium or as a special vehicle), many of the requirements made may be prohibitively onerous.

**What barriers prevent civil society organisations from forming and operating in consortia? How could they be removed? (p.17)**

Some public sector tender processes may discourage bids from consortia because of an aversion to the risks inherent in dealing with multiple suppliers rather than a single firm. Public sector procurers should be encouraged to consider the possibility of accepting consortia bids and, in some cases, actively take steps to encourage such bids.

**What approaches would best support commissioning decisions that consider full social, environmental and economic value? (p.18)**

Commissioners and procurers must move away from prescriptive and/or technical specifications and evaluation criteria, and assess suppliers based on their ability to deliver positive, sustainable outcomes. There is reluctance among some commissioners and procurers to ask questions that are not perceived as having direct relevance to the nature of the contract, whereas questions about the nature of the organisation and how it operates will often provide a clearer picture of the 'whole life value' that could be achieved through the award of a contract.

Durham includes sustainability questions in an increasing number of its contract and tender documents, and has an ambition to see such questions be included 'as standard', while maintaining relevance and proportionality to the nature and value of the contract.

Examples of technical questions include what measures the organisation has taken to minimise the carbon impact associated with its activities; whether and how it helps provide employment, education and training opportunities to typically disadvantaged groups such as the long-term unemployed, ex-offenders and people with disabilities; whether and how it has worked across sectors to help develop a more mixed economy of service provision and build skills in its supply chain; what wider positive outcomes it will create for the local economy or community if awarded the contract.

Responses to questions of this nature are evaluated alongside an organisation's ability to technically deliver the requirements of the contract, seeking to ensure that the whole life value offered by a particular supplier is taken into consideration when awarding a contract. This is a means by which many civil society organisations may be able to 'make up' marks that they lose on questions that assess purely on capacity and technical capability.

**What issues should Government consider in taking forward the Public Services (Social Enterprise and Social Value) Bill? (p.19)**

This is a very significant piece of legislation to which Durham County Council should give its full support. In taking the Bill forward towards becoming law, the main issue will be to respond to the fact that some councils and suppliers have a limited understanding of some of the concepts of whole life value and may need support and assistance in getting 'up to speed' on this.

## **CITIZEN AND COMMUNITY INVOLVEMENT**

**What role and contributions could civil society organisations place, through Local HealthWatch, in informing the local consumer voice about commissioning? (p.20)**

*No response to this question.*

**What issues relating to civil society organisations should the Government consider when refreshing the Joint Strategic Needs Assessment Guidance? (p.21)**

*No response to this question.*

**How could civil society organisations facilitate, encourage and support community and citizens involvement in decision making about local priorities and services commissioned? (p.21)**

There seems to be some confusion arising over what the role of civil society organisations will be. There will need to be a separation of organisations whose role it is to facilitate public decision making and design of services, and those organisations who are seeking to provide them. There is otherwise a conflict of interest, in which civil society organisations could be influencing the design of a service in such a way that they are best (or uniquely) placed to provide it which may cause conflict with Treaty principles/ Public Contract Regulations.

**What forms of support will best enable statutory partners and civil society organisations to improve their working relationships? (p.22)**

It would need to be made clearer what is up for consideration here. Many civil society organisations would most appreciate support in the form of funding or loans for investment, e.g. to buy assets or develop capacity and capability to deliver services. Where the 'support' offered does not include direct financial contributions, it is extremely difficult to say what would be most helpful to this agenda, as the strength of existing working relationships between statutory commissioning bodies and civil society organisations will vary hugely from one region to another. There are relatively close links in the North East between such organisations, and a package of support that included, for example, facilitated workshops or co-ordination of networking would probably not be the best use of resources. The situation may be different for other regions.

**What issues should the government consider in the development of the future programme of training public service commissioners? (p.22)**

*No response to this question*

**What can civil society organisations contribute to the roll out of community budgets? (p.22)**

*No response to this question.*

**What can civil society organisations contribute to the roll out of Local Integrated Services? What barriers exist to realising this contribution? How can these barriers be removed? (p.23)**

The Local Integrated Services (LIS) concept presented in the report is not immediately apparent. Having searched for an example of the model on Turning Point's website it could not be located. Step (ii) is to "commission whoever is best placed to deliver the service, including civil society organisations", whereas step (iii) is to "co-design service solutions with the local community and service users". It is clearly impossible to commission the organisation best placed to deliver a service before that service has been designed.

The goals of the model would seem to be better achieved by commissioners working more closely with local people to identify priorities and design services that are specific to their needs. There may be a role within this for civil society organisations to provide the 'voice' of the service users but, as stated previously, there would in such cases need to be a clear separation of organisations acting as facilitators or champions of local needs and those seeking to provide the service.

Note that the Public Contract regulations would not allow for a contract to be awarded to an organisation and then to be significantly altered from what was originally specified. This would not be fair or transparent to other suppliers, who would have the right to challenge this.

### **What changes do both commissioners and civil society organisations need to make to adapt to an environment where citizens are commissioning their own services? (p.24)**

The role of the commissioner has the potential to change from one that is designing full packages of services for users to one that is responsible for ensuring quality, consistency and value for money at the 'back end' of the process. Category management will be key to this; for example, if a number of individuals are using personal budgets to buy the same service, e.g. self defence lessons or help around the home, a commissioner at a local authority may be able to establish or make use of a contract or framework arrangement that is able to provide these services, e.g. as part of its Sport and Leisure or Social Care categories. In many cases the commissioner may be able to procure these services at a lower price, and pass these savings on to the users, as well as undertaking an assessment of the quality and safety of the service that would be more difficult for individuals.

### ***General Comments***

Many of the questions in the paper seem to suggest a certain model of civil society delivery of public services. Questions focus on how *this specific model* will operate what the barriers are and how to overcome them, rather than seeking views from commissioners and civil society organisations on *what models* are desirable and feasible and how these might interact with service design and delivery. Too many assumptions appear to have been made about the appetite, capacity and capability of civil society organisations to deliver services.

The paper seems to link with the general direction of travel for the coalition, as indicated in their wider "Our Programme for Government," and the creation of Big Society, as well as the specifics signposted in the proposed Public Service Reform White Paper and the Department of Health's Vision for Adult Social Care. In this document more emphasis is placed on what are called Civil Society organisations - their new term to cover "mutuals, cooperatives, charities and social enterprises."

There is an inaccurate perception/massive assumption in the Value section of the document that much of commissioning is based solely on price and risk rather than on the development of effective, vfm services. In contrast, much of our recent commissioning activity already bears in mind some of the wider strategic impact factors and involves local stakeholder involvement in the development of specifications and has a stakeholder role in tendering assessment etc.

### **What is "Commissioning"?**

The definition of "commissioning" used in the Green Paper is extremely broad. It includes commissioning and procurement, and also appears to include services provided directly by given public sector bodies. It is important to bear this broad definition in mind when considering the questions posed in the Paper.

### **"Sector" terminology**

In the 'context' section (p.5), the Green Paper defines its scope as covering "civil society organisations" which include both non-profit and profit-making organisations. It then goes on to refer to "the sector" (p.9) when making reference to these organisations.

The references to "the sector" also cite financial data from the NCVO which is specifically a third sector representative body and does not represent profit-making enterprises. This is confusing and unhelpful. There is no recognised "civil society sector" and therefore a clear definition of "the sector" needs to be determined quickly.

### **Timescale**

The Green Paper was published on 7<sup>th</sup> December and whilst the Government acknowledges the fact that the deadline for responses is 5<sup>th</sup> January and therefore a regrettably short consultation period. Given that Xmas and New Year occur within this period, the government is giving less than three working weeks to respond. It is disappointing that such a small window of consultation has been allowed, as this is bound to effect the quality and quantity of feedback received.

### **Conflict with Localism Bill**

Some of the areas the Green Paper talks about include (p.6):

- Promoting independent provision in key public services
- Developing new rights for communities and public employees to buy and run services

These issues are addressed in the Localism Bill, which has already been introduced to Parliament. What is the value of 'consulting' on them further in a Green Paper when legislation is already going through Westminster?

Also, the Green Paper talks about "increasing democratic accountability at a local level". This is in conflict with the Localism Bill, which abolishes the Standards Board and reduces the level of scrutiny faced by elected members.