

Please Procure Responsibly

The state of public service
commissioning

Joshua Pritchard
Rose Lasko-Skinner

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Reform

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Foreword

As Chair of Parliament's public spending watchdog, the Public Accounts Committee, I see time and time again the same issues with government procurement and contracts.

Government cannot simply absolve itself of responsibility when it contracts out the delivery of services to the private sector. These contracts involve vast sums of tax payers' money and often deliver front line services to the public.

A recent example is the British Army's 10-year partnership with Capita to recruit new soldiers, worth £495 million. Capita missed the Army's annual recruitment targets every year since 2013 by quite some margin, with a shortfall that ranged from 21 per cent to 45 per cent. It turned out that the contract was overly complex and poorly implemented, with both the Army and Capita in the frame. The Army took a hands-off approach in managing its partnership with Capita and specified the contract badly in the first place. For its part, Capita took on the contract acknowledging that it was more interested in "chasing revenue" and underestimated the complexity, and the Army were far too slow to address under-performance.

Rail franchising is an area where we have seen repeated failures, with passengers bearing the brunt. The way in which the Department for Transport designed the Thameslink, Southern, Great Northern and Gatwick Express franchise meant Govia Thameslink Railway lacked the incentives to maintain performance levels for passengers. The East Coast franchise has now failed three times. With its most recent failure due to wildly inaccurate passenger growth forecast and was bought back under Government control in May 2018.

These are just a few examples among many. The Public Accounts Committee has a long-standing concern about the ability of the civil service to not only draw up contracts, but also to manage them. In the civil service commercial capability tends to be concentrated within the Cabinet Office. We have seen some improvements in commercial capability in the civil service in recent years but are concerned that the expertise and guidance is not being effectively shared more widely, both across government and the wider public sector. Government departments are still not learning from each other's mistakes and sharing their own across Government to avoid them happening again.

Another area we are becoming increasingly concerned about is contractor failure. The Government has allowed a culture to develop in which a small number of large companies believe that they are too big to fail. The 2018 collapse of Carillion remains a stark example of this. Those running the company had convinced themselves they were too big to fail and too important to Government to be let go. With Carillion the warning signs were there but not acknowledged until crunch time when the Government chose not to step in and prop up the company.

It is against this backdrop that I welcome Reform's new guide to procurement in the UK. It is not only timely, but a matter of high importance if tax payers are to see the value they should expect from government expenditure.

Meg Hillier MP, Chair, Public Accounts Committee

Executive summary

This report provides an overview of how public services are commissioned and procured. It suggests several key areas where weak or underperforming elements in the commissioning cycle have led to failings in the procurement of public services and highlights potential solutions to some of these challenges.

The procurement context

Public services can either be delivered in-house or purchased from external providers in the private or third sector. Roughly a third of all public expenditure goes on procurement, equalling some £284 billion per year. Whilst much of this spending results in efficient and effective public services, prominent outsourcing failures have emphasised that more can be done to improve public procurement and ensure high quality, value-for-money services in the long-term

A successful procurement process relies on multiple factors. Healthy public service markets are essential. Additionally, good ‘make or buy decisions’ (i.e. whether the service should be provided in-house) are critical to guarding against public service failure. Embedding social value into the process helps commissioners achieve better value for money and higher quality services. The technicalities of the procurement cycle are good purchasing and contract design, and monitoring evaluation. These are often overlooked and under-resourced, but nonetheless provide the bread and butter to successfully procuring services.

Upskilling contracting authorities

Good public procurement depends upon individuals and teams with the necessary skills and expertise to design, commission, and contract services effectively. Although central government has seen widespread improvements in capacity through the Government Commercial Function and Crown Commercial Service, some departments and local authorities require a similar investment in training in order to overcome the existing commercial skills gap. Moreover, too many resources are invested in the contracting-out phase of the procurement cycle at the expense of contract management, resulting in an imbalanced procurement cycle and a lack of effective monitoring for outsourced services. The use of cost-efficient digital training schemes and an expansion of institutions like the Public Sector Transformation Academy could help ensure a universal professionalisation of public procurement.

Accountability and transparency

Risk and accountability are still things that suffer from clarity of process. Risk has been a big focus for the Outsourcing Playbook, where the Cabinet Office have made a commitment to ensure that risk is managed by the person most equipped to do so, and if needs be shouldering more risk in the public sector. Accountability is particularly fragmented and opaque within the procurement cycle. Lessons could be learnt from the financial sector, where statements of responsibility and responsibility maps are working towards ensuring transparent and clear mechanisms of accountability. There is a significant lack of opportunity for public scrutiny and audit of public service contracts resultant. Public sector contracts need to work towards being as open and transparent as possible, without compromising competition.

Assessing the landscape

The next stage for government is to conduct a large-scale, independent and comprehensive review of public procurement, to identify precisely where resources need to be directed in the future to improve the system. Whether this is in regulation, skills and training, or transparency is unsure, but a review would enable government to improve and build upon current efforts like the Outsourcing Playbook in the future. The weak-spots in regulation identified in this paper offers the potential for a new independent regulator, tasked with providing guidance and scrutiny around the behaviour of commissioners and providers, as well as improving the stewardship and oversight of public service markets. However, it is crucial that we first understand exactly what the issues are and address those questions which can only be answered by a review.

Recommendations

- 1** The Cabinet Office should create a truly objective ‘make or buy’ flowchart to replace the Playbook’s ‘make or buy’ process, in addition to extra criteria for considering whether the nature of the service ‘naturally lends itself to outsourcing’. Both should be used by all commissioners when making ‘make or buy’ decisions.
- 2** The Department for Digital, Culture, Media and Sport should produce a national guidance framework and toolkit for public service commissioners and providers explaining how to identify and quantify Social Value in public service contracts.
- 3** The Public Service Transformation Academy should receive a block grant of £50,000 per year from the Cabinet Office to fund their work. This should be spent partly on improving the regional hubs and providing a more consistent network for local authorities and Small- and Medium-sized Enterprises and Voluntary, Community, and Social Enterprises.
- 4** In partnership with the Public Service Transformation Academy and Government Commercial Function, the Cabinet Office should take steps to introduce a national training framework for public service commissioners who contract over the Official Journal of the European Union financial thresholds for public service contracts. This should be a digital course, free at the point of access for financial and commercial staff within the civil service and local authorities, and funded from a scaled levy on public service contracts.
- 5** The Government Commercial Function should expand its role to include an advisory service for public service commissioners. This could be modelled on the Association for Public Service Excellence forum and be provided through a partnership with the Public Service Transformation Academy’s regional hubs.
- 6** All government departments that commission public services should adopt a ‘statement of responsibility’ regime and responsibility maps, modelled on the Financial Conduct Authority’s example. To ensure all managers along the supply chain are aware of what their responsibilities are and what they are accountable for in the case of failure.

- 7** The Cabinet Office should issue additional requirements for those central government departments, wider public sector organisations, and prime contractors working on government contracts (Contracting Authorities) required to publish contract awards on Contracts Finder. At a minimum the contract award should include: details about the provider (such as annual turnover, company size, and number of government contracts awarded in the past 12 months); details about the contract (including three key performance indicators, the agreed payment model, and the exit terms for both parties); and the decision-making behind the contract award (including the added value brought to the contract by the provider).
- 8** To protect commercial interests and fair competition, redaction or non-publication of contract awards may be permitted but a case must be presented to the Cabinet Office within a reasonable period of time after the contract is agreed.
- 9** The Cabinet Office should regularly publish online in an accessible manner a list of those Contracting Authorities who have been found to fail to meet their obligations regarding the publication of tenders and contract awards on Contracts Finder. This should be separate to the Public Procurement Review Service results publications. A three-strike system should result in repeat offenders being added to a public “black-list” for non-compliance.
- 10** Government should commission an independent review of the regulatory landscape of public service markets covering both hard and soft regulation. The review should focus on the independent arbitration of contract disputes; the standard collection and audit of contracts; ensuring a healthy amount of competition and supplier diversity; and other long-term market strategies such as provider behaviour and social value metrics that could be used.

Introduction

In 2018, the Government announced its intention to bring an end to the austerity policies that have dominated the last decade of public service spending.¹ Yet if the promised change of direction for services are to genuinely meet the needs of citizens, it is necessary to critically assess the mechanisms around the design, purchase, and delivery of public services and where needed, reform. The risk is that whilst the money flowing into services may increase, the outcomes these services deliver for citizens may not improve.

Public services are currently provided in partnership with the private and third sector, with an estimated £284 billion a year spent on buying goods and services from external suppliers – amounting to around a third of public expenditure.² However, following a series of high-profile public service failures involving private sector companies, in particular the collapse of the British public sector construction firm Carillion in January 2018, questions have been raised about the performance of public service contracting. The Public Administration and Constitutional Affairs Committee's (PACAC) report into Carillion highlighted the “long term failures of Government understanding about the design, letting and management of contracts and outsourcing”.³

Just over a year after the Carillion affair, another large government contractor, Interserve, seems on the brink of collapse, indicating that there are still design flaws in public service markets.⁴ The role of the market in the delivery of public services is undoubtedly at a unique juncture, with a significant amount of public and political discord towards marketisation policies. Oliver Dowden CBE MP, Parliamentary Secretary, Cabinet Office, has voiced his commitment to and belief in the benefits of outsourcing. He believes that it “provides greater opportunity, better value and more innovative public services.”⁵ At the same time, the NHS has made a commitment to move away from competition to allow joint decision-making and joint-working between providers for shared outcomes.⁶

The Cabinet Office and the Government Commercial Function published an Outsourcing Playbook in February 2019 with a number of supplementary guidance notes to help improve outsourcing practices in central government.⁷ It is an encouraging first step that marks the beginning of a much-needed system-wide improvement of outsourcing in public sector. However, there are still some questions around the civil service's capacity to implement these reforms due to the difficulty in upskilling and high turnover.⁸

This paper builds on the Government's Playbook and seeks to identify its gaps as well as recommending how these could be bridged. The primary focus is procurement practices in England, which have different policy and practice to devolved administrations. It provides a brief description of public service delivery, focusing on the role of the market and public procurement, and then focuses on the key areas for improvement. The standardisation of government guidelines around outsourcing processes such as the decision to provide a service in-house or not, the allocation of risk as well as the evaluation of social value could be improved. This would ensure government gets the best

1 Philip Hammond, 'Financial Statement'. Speech, 29 October 2018.

2 Nick Davies et al., *Government Procurement: The Scale and Nature of Contracting in the UK* (Institute for Government, Gowling WLG, & Spend Network, 2018), 2.

3 House of Commons Public Administration and Constitutional Affairs Committee, *After Carillion: Public Sector Outsourcing and Contracting, Seventh Report of Session 2017-19*, HC 748 (London: The Stationery Office, 2018), 3.

4 Will Ing, 'Interserve Set to Go into Administration', *Building*, 15 March 2019; Gill Plimmer, 'Interserve "Likely" to File for Administration after Shareholder Rebuff', *Financial Times*, 15 March 2019; National Federation of Builders, 'Interserve Highlights Need for Urgent Procurement Reform', *PoliticsHome.Com*, 15 March 2019.

5 Cabinet Office and Oliver Dowden CBE MP. 'Minister for Implementation's Speech at the CBI'. Speech, 20 February 2019.

6 The King's Fund, 'The NHS Long-Term Plan Explained'. Webpage, 23 January 2019.

7 Government Commercial Function, *Outsourcing Playbook: Central Government Guidance on Outsourcing Decisions and Contracting*, 2019.

8 Tom Sasse and Emma Norris, *Moving on: The Costs of High Staff Turnover in the Civil Service* (Institute for Government, 2019).

value for the money it spends on external providers. Similarly, a move towards better contracting mechanisms, such as outcomes-based-commissioning, and management will improve the commissioning process. Building skills and expertise at both central and local government level would ensure commissioners have the capacity to conduct technical tasks such as contract design and management, and ultimately guard against expensive or ineffective procured public services. Whilst more effective mechanisms of accountability would help to clarify responsibilities and prevent mistakes slipping through the cracks.

1

Landscape of procurement in public services

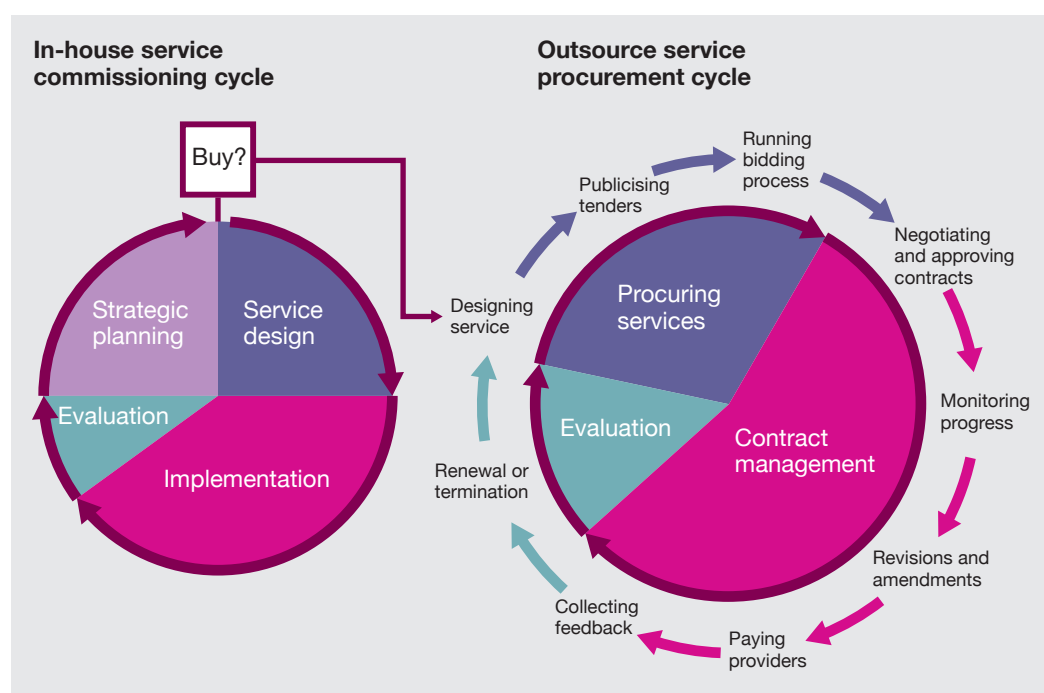
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The public sector encompasses a huge range of services from the regular (e.g. rubbish collection) to the occasional (e.g. emergency healthcare). These services are largely funded through taxation or, less commonly, through direct consumption.⁹ In healthcare, for example, most NHS services are free at the point of use, whilst others such as prescriptions charge a small (and subsidised) fee. Generally, central government sets statutory duties and budgets and then both central and local government commissions services accordingly. This chapter seeks to outline the main features of public services, the actors responsible for their delivery, and the processes that are necessary for their design, procurement, and supply.

1.1 Commissioning public services: design and co-production

Commissioning refers to the entire process by which public services are designed, acquired and delivered by the state and various subsidiary providers.¹⁰ There is no one way to commission public services, however it generally follows a cyclical model (see Figure 1) comprised of four stages: strategic planning, service design, implementation, and evaluation. In theory, service delivery should improve with each iteration.¹¹ The process involves assessing and identifying needs of citizens, planning service delivery, building capacity and developing the market, purchasing goods or services, and evaluating and monitoring contracts.¹² The ‘procurement’ aspect of this is encapsulated in Figure 1.

Figure 1: Commissioning Cycle and Procurement Cycle



Source: Adapted from Eleonora Harwich, Alexander Hitchcock, and Elaine Fischer, *Faulty by Design: The State of Public-Service Commissioning* (Reform, 2017). Segments are indicative of time spent on each stage.

The success of the commissioning process will underpin the success of the public service delivery. It is therefore important that this is done right. The cycle should provide not only a

⁹ Laurence Ferry et al., *Public Service Accountability: Rekindling a Debate* (Palgrave Macmillan, 2019), 1–2.

¹⁰ Eleonora Harwich, Alexander Hitchcock, and Elaine Fischer, *Faulty by Design. The State of Public-Service Commissioning* (Reform, 2017), 6.

¹¹ Ibid.

¹² Helen Alder, *The UK Public Sector Concept of Commissioning* (Chartered Institute of Procurement & Supply, 2010).

testing ground for innovative models of public service delivery, but should also ensure public services achieve value for money and improved outcomes for citizens.

An often overlooked part of public service commissioning is design.¹³ Design thinking is a human-centred approach, in which public service design is led by the needs of citizens (e.g. service users and public servants) rather than processes.¹⁴ It marks a “shift from ‘designing from the inside out’ to ‘designing from the outside in’.”¹⁵ The long-term benefits are a more efficient and effective service, better tailored to users,¹⁶ and increased trust between government and citizens thanks to the co-production (i.e. when users and staff, especially on the frontline of delivery, are included in design stages) of the service.¹⁷

The Government has been trying to reform the commissioning processes since the *Open Public Services* white paper 2010. It outlined the Coalition Government’s plan to increase the number and variety of public service providers.¹⁸ This has meant increasing the number and types of providers from outside the public sector (i.e. private and third sector providers), although in healthcare there is now a concerted effort to move away from these practices.¹⁹ Nonetheless, the separation between policy makers and private or third sector providers has in some cases contributed to an “incoherent service experience for citizens”, in which service design and delivery may fail to meet citizens’ needs.²⁰

Consequently, the arguments in favour of embedding design thinking in the commissioning of public services are strengthened. There is growing consensus that all stakeholders (i.e. private sector, third sector and the public) should collaborate in the design and delivery of public services and a greater voice should be given to citizens in the design process.²¹ Whether through co-production commissioning or improved service design, commissioners should be more responsive to what citizens will experience from a service and the ability of providers to meet the population’s needs.²² Proponents assert that co-production would increase the value of public services for users by improving quality and ensuring services fit their needs.²³

1.2 Public service markets

The public sector has a long history of working with the private sector to deliver public services, from outsourcing waste management²⁴ to building national infrastructure projects such as social housing.²⁵ The UK has some of the largest public service markets²⁶ with government spend on external providers estimated at £284 billion. However, some markets are far more developed than others, and some services are more dependent on third party providers. The Department for Health and Social Care, for example, spends significantly more than other departments (see Figure 2).²⁷

13 Sonja Dahl, Isobel Roberts, and Kelly Duggan, *Designing for Public Services: A Practical Guide* (Nesta, 2017).

14 Ibid., 5.

15 Ibid.

16 Marta Milkowska, ‘Design Thinking for Better Government Services’, *Government Innovators Network*, Harvard Kennedy School, 24 July 2018.

17 Dahl, Roberts, and Duggan, *Designing for Public Services*, 5.

18 Kate Blatchford and Tom Gash, *Commissioning for Success* (Institute for Government, 2012).

19 Ian Dodge and Ben Dyson, *Meeting in Common of the Boards of NHS England and NHS Improvement: Building the Case for Primary Legislative Change* (NHS, 2019); ‘The NHS Long-Term Plan Explained’.

20 IDEO, Design for Europe, and Nesta, *Designing for Public Services*, 2017, 5.

21 Ruth Robertson, ‘The Future of NHS Commissioning: No Map or Clear Destination’, *The King’s Fund Blog*, 18 September 2017; David Boyle and Michael Harris, *The Challenge of Co-Production: How Equal Partnerships between Professionals and the Public Are Crucial to Improving Public Services* (Nesta, 2009); Catherine Needham and Sarah Carr, *Co-Production: Lessons from Research* (Community Care Inform Adults, 2018); New Economics Foundation, *Commissioning for Outcomes and Co-Production: A Practical Guide for Local Authorities*, 2014.

22 Institute of Public Care, *Commissioning for Health and Social Care* (London, 2014).

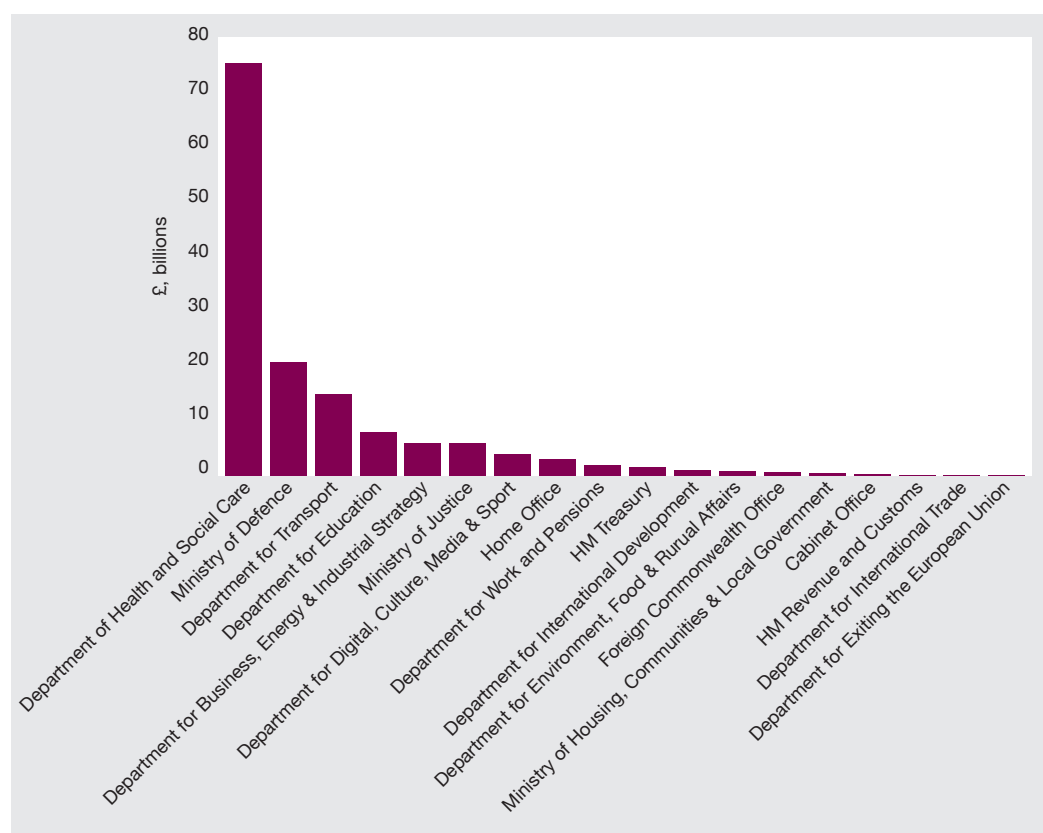
23 HM Government, ‘Civil Society Strategy: Building a Future That Works for Everyone’, August 2018; Milkowska, ‘Design Thinking for Better Government Services’.

24 Tom Gash et al., *Making Public Service Markets Work* (Institute for Government, 2013).

25 Patrick Dunleavy, *The Politics of Mass Housing in Britain, 1945-1975: A Study of Corporate Power, and Professional Influence in the Welfare State* (Oxford: Oxford University Press, 1981); John Boughton, *Municipal Dreams: The Rise and Fall of Council Housing* (Verso, 2018).

26 Gary L. Sturgess, *Just Another Paperclip? Rethinking the Market for Complex Public Services*, 2017.

27 Information Commissioner’s Office, *Outsourcing Oversight? The Case for Reforming Access to Information Law: Report of the Information Commissioner to Parliament*, 2019. Information Commissioner’s Office, 2019, 5.

Figure 2: Total procurement spend by department, 2017/18

Source: Public Expenditure Statistical Analyses 2018. This is procurement spend only, not total department spend.

Reforms over the last thirty years have tried to apply market mechanisms to the public sector. This new approach, called ‘New Public Management’, sought to take lessons learnt from the private sector—particularly around choice, competition and innovation—and apply them to public services.²⁸ This began with the introduction of “quasi-markets” and competitive tender for the delivery of complex public services in the late 1980s and early 1990s.²⁹ This was built on with the attempt to ‘open public services’ to a larger variety of external providers in 2010.³⁰

Healthcare has been uniquely affected by these reforms to the commissioning process, which sets it apart from other public services. In particular, the NHS saw concerted efforts to separate the purchasing and provision of care in the 1990s, and more recently in the Health and Social Care Act 2012.³¹ A number of services have been moved away from the central control of the Department of Health and Social Care and towards GPs and regional administrative bodies in an attempt to increase personalisation, quality, and value for money.³² However, the latest Long-Term Plan marks a clear break away from these pro-competitive reforms, in favour of cooperation and joint-working between NHS providers.

28 For more on New Public Management, see: Patrick Dunleavy et al., ‘New Public Management Is Dead—Long Live Digital-Era Governance’, *Journal of Public Administration Research and Theory* 16, no. 3 (1 July 2006): 467–94; John M. Bryson, Barbara C. Crosby, and Laura Bloomberg, ‘Public Value Governance: Moving Beyond Traditional Public Administration and the New Public Management’, *Public Administration Review* 74, no. 4 (July 2014): 445–56; Timothy Besley and James Malcomson, ‘Choice and Competition in Public Service Provision’, *Working Papers, Department of Economics, University of Oxford* (August 2016).

29 Ewan Ferlie, ‘The Creation and Evolution of Quasi Markets in the Public Sector: A Problem for Strategic Management’, *Strategic Management Journal* 13 (1 December 1992): 79–97; Julian Le Grand, ‘Quasi-Markets and Social Policy’, *Economic Journal* 101, no. 408 (September 1991): 1256–67; Julian Le Grand, ‘Quasi-Market versus State Provision of Public Services: Some Ethical Considerations’, *Public Reason* 3, no. 2 (2011): 80–89.

30 Blatchford and Gash, *Commissioning for Success*; National Audit Office, *Deciding Prices in Public Services Markets: Principles for Value for Money* (National Audit Office, 2013).

31 Nicholas Timmins, *The Five Giants: A Biography of the Welfare State*, Third (William Collins, 2017), 444–92; Nicholas Timmins, ‘The World’s Biggest Quango’, (Institute for Government, 2018).

32 Laura Brereton and Vilashiny Vasoodaven, ‘The Impact of the NHS Market’, (*Civitas*, 2010), 6–7.

Despite the public sector increasing spend on private service providers, recently public service markets have not been performing as well as hoped. A report published by the Business Services Association (BSA) highlighted a variety of problems with public service markets. The report found “A number of high-profile contracts [..had] been cancelled”, companies underperforming and some major contracts “losing money”, demonstrating a risk to financial stability in public service markets.³³ The report attributed this mainly to the decrease in funding as a result of the 2010 austerity drive, as well as other structural issues specific to public service markets, such as an adversarial relationship between government commissioners and providers.³⁴ The former point has been picked up by other organisations, with the National Audit Office (NAO) assessing that local authorities were paying 16 per cent below the rate necessary for providers to deliver a sustainable adult social care service.³⁵

There is no single market for public services. There are multiple markets for different services such as employment, offender management, healthcare and social care that have varying degrees of maturity and depth (referring to the number of providers and transactions that occur in a market).³⁶ For example, social care and end of life care have long been contracted out to external providers and therefore have a number and diversity of small providers that are both commercial and not-for-profit.³⁷ In contrast offender management services operate in a highly concentrated market. Prison management contracts open to the private sector, which are a very small proportion relative to public sector contracts,³⁸ are held by four providers: G4S, Serco, MTC Novo, and Sodexo.³⁹ This is likely to be a result of the nature of the service as well as policy and market maturity.

Interviews for this paper suggested that certain markets need more nurture than others, particularly those for complex services, in this case referring to services that deal with complex human needs.⁴⁰ These are relatively young and have been growing in response to the *Open Public Services* white paper. A more detailed and interventionist commercial strategy might be needed to ensure these markets are economically viable, innovative and contain the expertise necessary to achieve better value for money for public services.

To improve public service markets, the Outsourcing Playbook announced central government will “expect all government departments” to publish their commercial pipelines and all outsourcing projects to “conduct assessments of the health and capability of the market”.⁴¹ This demonstrated government’s intention to play a more active role in conducting market craft for complex services. Publishing commercial pipelines should help government departments build better relationships with external providers by building in more transparency and trust into the system. Additionally, it should also give public sector markets the opportunity to grow, as suppliers will be able to anticipate services or products government demands and create innovations in-line with need.

33 Sturgess, *Just Another Paperclip? Rethinking the Market for Complex Public Services*, 6.

34 Ibid., 22.

35 National Audit Office, *Adult Social Care at a Glance*, 2018, 29.

36 Trades Unions Congress and the New Economics Foundation, *Outsourcing Public Services*, (Trades Unions Congress and the New Economics Foundation, 2015) 2015, 8.

37 Ibid., 9.

38 In 2012, 14 out of 141 prisons in England and Wales were private or contracted out: Nehal Panchamia and Tom Gash, *Competition in Prisons* (Institute for Government, 2012). 1.

39 Trades Unions Congress and the New Economics Foundation, *Outsourcing Public Services*, 6.

40 Sturgess, *Just Another Paperclip? Rethinking the Market for Complex Public Services*, 6.

41 Government Commercial Function, *Outsourcing Playbook: Central Government Guidance on Outsourcing Decisions and Contracting*, 5.

1.3 Make or buy

A fundamental part of public sector commissioning is considering the ‘make or buy’ question: can a product or service be delivered at better value for money in-house or by external providers?⁴² After the collapse of Carillion, and the most high-profile recent failure in public service contracting,⁴³ the PACAC found that the Government had failed to make good ‘make or buy’ decisions.⁴⁴

In response, the new Outsourcing Playbook was published in February 2019 to provide further direction. It outlines a ‘process’ for ‘make or buy’ decision-making (see Figure 3),⁴⁵ 14 key considerations in a supplementary guidance note (see Figure 19 in Appendix),⁴⁶ and a mandatory calculation of the total estimated cost of delivering complex services – also known as Should-Cost-Models.⁴⁷ These models are meant to be used in conjunction with the Treasury’s Green Book⁴⁸ and are supposed to help commissioners assess whether outsourcing will achieve greater value-for-money.

The Playbook is a welcome improvement. Interviews for this paper highlighted that government contracts are still regularly put out to tender before commissioners have engaged with the market. This means that they might not know if the market has what they want to offer, or whether there are enough suppliers in the market with healthy finances. It is therefore promising that one of the key considerations in the playbook is pre-market engagement (see Figure 3, stage 7).

However, the ‘make or buy’ process shown in Figure 3 is not without faults. The language used at each stage of the decision-making process assumes that the service will be outsourced. For example, at stage 4, the commissioner is said to ‘have assessed that the service naturally lends itself towards outsourcing’. It does not clearly provide an option ‘to make in-house’ if key considerations cannot be met. In addition, the key considerations are more closely related to the specifics of best purchasing practice rather than objectively assessing whether to ‘make or buy’. For example, stage 10 in Figure 3, which asks ‘whether the supplier has adequate contingency plans in the contract’, generally happens once a commissioner has decided to buy and should therefore not be part of the ‘make or buy’ decision-making process.

42 Government Commercial Function, *‘Make or Buy’ Decision: Outsourcing Guidance Note*, 2019, 1.

43 House of Commons Public Administration and Constitutional Affairs Committee, *After Carillion: Public Sector Outsourcing and Contracting, Seventh Report of Session 2017-19*.

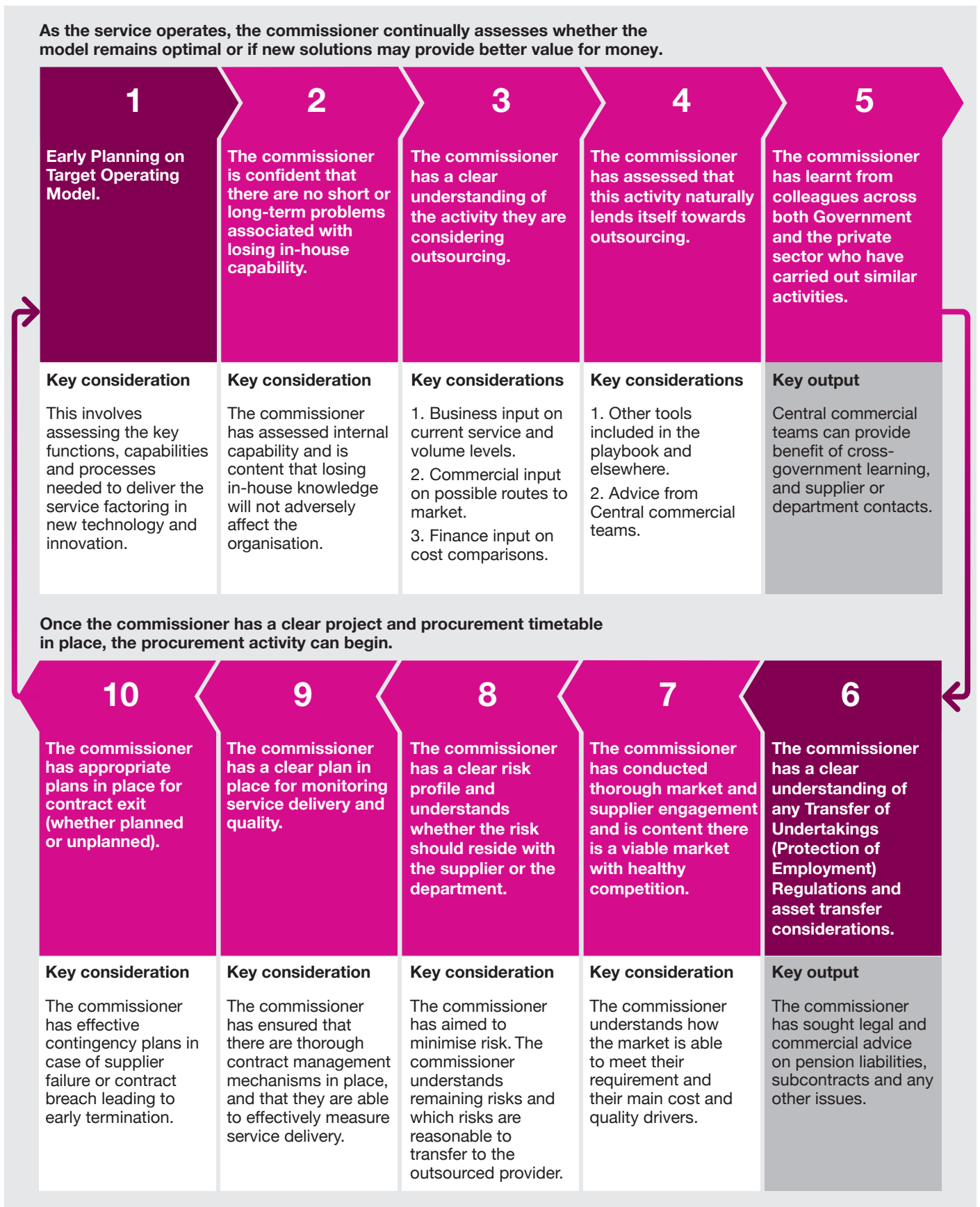
44 Ibid.

45 Government Commercial Function, *Outsourcing Playbook: Central Government Guidance on Outsourcing Decisions and Contracting*.

46 Government Commercial Function, *‘Make or Buy’ Decision: Outsourcing Guidance Note*.

47 Government Commercial Function, *Outsourcing Playbook: Central Government Guidance on Outsourcing Decisions and Contracting*, 27.

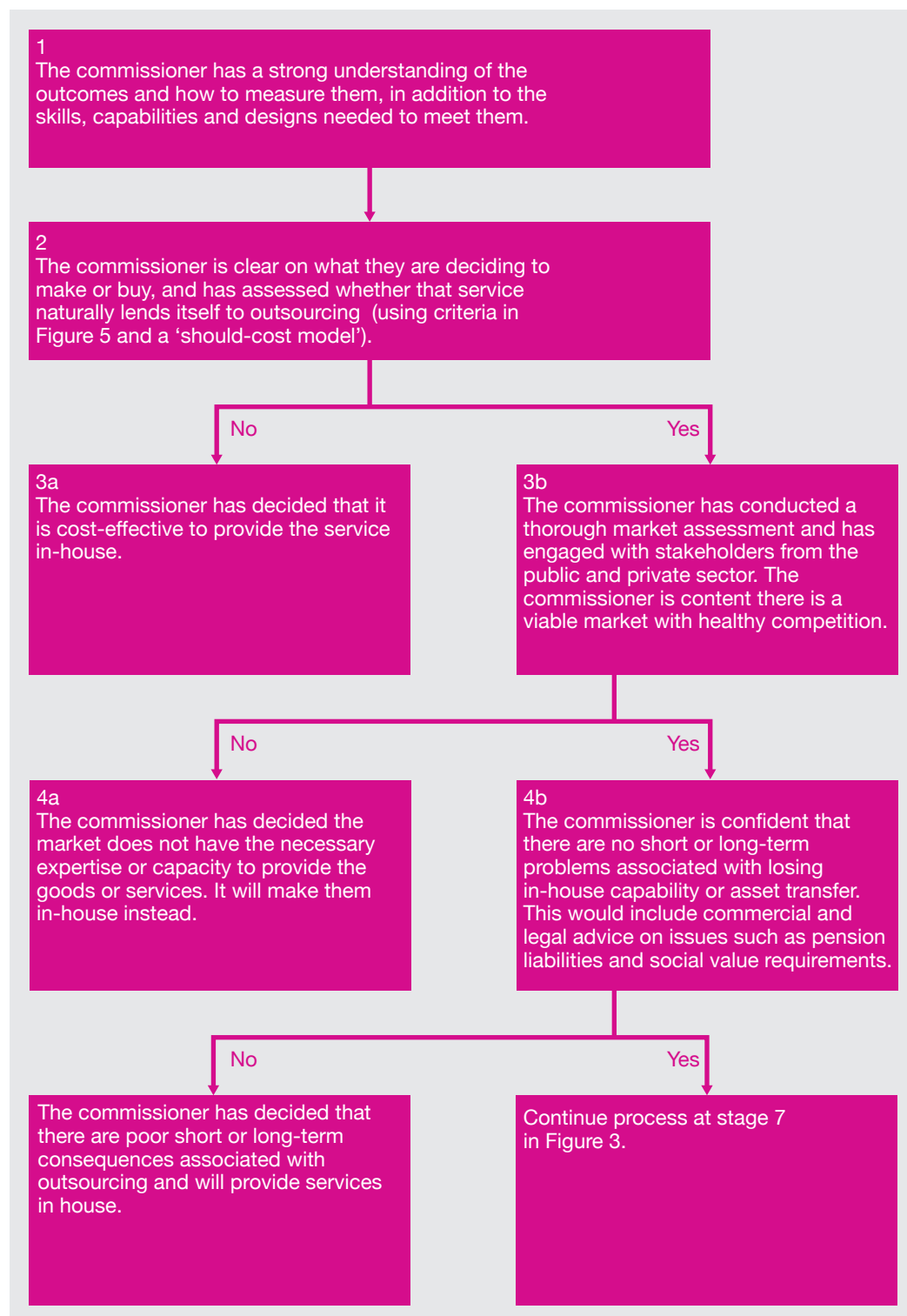
48 Ibid., 21.

Figure 3: Make or Buy Process

Source: Government Commercial Function, *Outsourcing Playbook: Central Government Guidance on Outsourcing Decisions and Contracting* (2019).

Figure 4 presents an alternative ‘make or buy’ process that could be used by a commissioner to ensure that they make well-informed ‘make or buy’ decisions. This chart is based on the first six stages (Figure 3) which have been modified to create clearer and more objective considerations in the ‘make or buy’ process.

Figure 4: ‘Make or buy’ flow chart



Source: *Reform* research adapted from Government Commercial Function, *Outsourcing Playbook: Central Government Guidance on Outsourcing Decisions and Contracting* (2019).

Furthermore guidance should include more detailed criteria on how to consider whether a service ‘naturally lends itself’ to outsourcing (stage 4 in Figure 3, or stage 2 in Figure 4). This is a key part of the decision, as it considers characteristics of the service itself, rather than the market context. Interviews for this paper highlighted that commissioners often outsource without considering whether the service itself is suitable. Concerns were raised that as a result, government is regularly trying to contract-out services that are too complex. To prevent this, the Cabinet Office should create criteria when at stage 2 in Figure 4 that would help the commissioner consider key characteristics of a service, such as whether it is easy to measure the value added by the provider (see Figure 5), that help determine whether a service naturally lends itself to outsourcing or not.

Figure 5: Ten questions for commissioners to answer before contracting out

- 1. Is it difficult to measure the value added by the provider?**
If a service lacks objective or quantifiable measures of the value added by the provider, it will be more difficult to price contracts and monitor performance.
- 2. Are service outcomes highly dependent on the performance of other services?**
If services that depend on one another to achieve their outcomes are contracted out to competing organisations, it may be more difficult to incentivise and secure the necessary cooperation between providers.
- 3. Does delivering the service require investment in highly specific assets?**
If a service requires investments in highly specialised physical or human resources, government may find it costly to attract providers and, over time, could be left vulnerable to an incumbent provider with excessive market power.
- 4. Is the service characterised by high demand uncertainty?**
If demand for a service is not known in advance, or subject to unpredictable variation, government may find it costly to incentivise investments and/or may be left vulnerable to ‘hold-up’ situations.
- 5. Is the service characterised by high policy uncertainty?**
If there are politically motivated changes in policy direction or service specification, the government may find it costly to renegotiate contracts.
- 6. Is the service inherently governmental?**
If a service involves making key policy decisions, is central to government’s law and order capability, or intimately related to government’s duty to protect the public, contractual mechanisms are unlikely to be appropriate.
- 7. Is there an existing supply of high-quality providers?**
If the market does not have a diverse supply of high-quality providers, then there might be limited gains from competition. The government might incur costs of trying to build the market.
- 8. Is there an existing workforce (either in the public or private sectors) with adequate skills and capabilities to deliver high-quality services?**
It is risky to contract-out to a provider that does not have the skills and capabilities already in-house to provide services, as they may never develop the capacity. It is therefore important consider whether there is an existing workforce with adequate skills and capabilities to provide the service.
- 9. Does the government have the organisational capability to design and monitor the use of contractual mechanisms?**
Throughout the contract lifetime, the government must have the commercial capabilities to measure and monitor performance of a contract.

10. Does the government have enough information about cost and quality to measure provider performance?

The commercial skills and capacity must be met with access to the relevant information to measure the quality and performance of providers. If it does not have this, it must also consider the costs and time frame necessary for implementing them.

Source: Tom Gash and Nehal Panchamia, *When to Contract*, Institute for Government, 2013.

Having criteria such as that written in Figure 5 is particularly important as research suggests that cultural bias can affect a commissioner's outsourcing decision.⁴⁹ There is "evidence of optimism bias towards both the government's and the market's ability to flex, innovate and deliver at significantly lower costs than [is] currently [the case]".⁵⁰ Objective guidance can therefore help commissioners make more informed decisions. Crucially, the step-by-step nature of the guidance helps to break down what is quite a challenging decision with multiple factors to consider into smaller, clearer steps.

Recommendation 1

The Cabinet Office should create a truly objective 'make or buy' flowchart to replace the Playbook's 'make or buy' process, in addition to extra criteria for considering whether the nature of the service 'naturally lends itself to outsourcing'. Both should be used by all commissioners when making 'make or buy' decisions.

1.4 Social Value

In June 2018, the Government announced its commitment to putting social value at the heart of service delivery.⁵¹ This is being woven into procurement practices by the Department for Digital, Culture, Media and Sport (DCMS) who is responsible for the policy, to ensure purchased goods or services help achieve the maximum social impact from money spent.⁵² Codified under the Public Services (Social Value) Act 2012, Social Value is defined as "how what is proposed to be procured might improve the economic, social and environmental well-being of the relevant area".⁵³

Considering a service's wider social value should be indispensable to the commissioning cycle. It should be a key consideration in the 'make or buy' decision, the procurement teams' choice of provider and the contract managers' monitoring and evaluation. However, there has been mounting criticism that outsourcing and procurement teams have regularly prioritised price over quality.⁵⁴ Given the pressing demands upon public services, from increasing homelessness to poor mental health, service commissioners, local authorities and public officials are under significant pressure to ensure that public spending achieves the greatest possible value for society.⁵⁵ Embedding social value into the procurement process is therefore an important step to maximising value from public money, and helping commissioners prioritise quality.

49 Laure Athias, and Pascal Wicht. *Cultural Biases in Government Make-or-Buy Decisions: Evidence from a Regression Discontinuity Approach*. University of Lausanne, 2013; Gabriel Bellenger. *What Motivates Public Managers to Outsource in the Public Sector? Taking Away the Veil of Prejudices or Unconscious Bias*. Universite Paris.

50 Government Commercial Function, 'Make or Buy' Decision: Outsourcing Guidance Note, 7.

51 David Lidington MP, 'Reform and Transformation: The Future of Public Service Delivery', Speech, Reform, 25 June 2018.

52 HM Government, 'Civil Society Strategy: Building a Future That Works for Everyone', 2018.

53 HM Government, 'Public Services (Social Value) Act 2012' (Chapter 3), chap. 3.

54 Sturgess, *Just Another Paperclip? Rethinking the Market for Complex Public Services*, 9; House of Commons Public Administration and Constitutional Affairs Committee, *After Carillion: Public Sector Outsourcing and Contracting*, Seventh Report of Session 2017-19, 3.

55 HM Government, 'Civil Society Strategy: Building a Future That Works for Everyone'.

Examples of social value include an organisation's commitment to employ local people, provide work experience placements, or support community projects.⁵⁶ These ensure the project benefits go beyond the boundaries of the intervention itself⁵⁷ and encourage wider social good that the market might be failing to incentivise. For example, Croydon Works, alongside helping roll-out the good employer scheme shown in Figure 6, has helped construction companies working on public sector contracts ensure projects create social value in terms of employment. The group, funded directly by central government, tries to encourage companies with contracts that include a 'Section 106' (S106) for development; which is effectively a clause for the council to place planning restrictions and obligations,⁵⁸ to improve social value. For example, according to Croydon Works' one of these goals is for companies to employ 34 per cent of labour locally.

Figure 6: Croydon Council's scheme

Croydon Council has started using a 'Good Employer Charter' (GEC), to incentivise local businesses to maximise social value with four strands: paying a London Living Wage, employing people locally, buying local goods, and promoting equality and diversity, with one-off business rates and the GEC accreditation. This has the potential to boost the local economy and employment rates.⁵⁹ At a system-wide level it helps correct flaws in the market and promotes the local economy. For instance, before the GEC, local businesses in Croydon might have been incentivised to pay the minimum wage. This however can have a knock-on effect on individuals, the local economy and public services.⁶⁰ As people on lower wages may find themselves in 'in-work poverty' without the purchasing power to contribute to the local economy and more reliant on public services if their gross annual salary does not cover their living costs.⁶¹ However, as a result of the social-value led GEC, employers are incentivised to act in a way that promotes the wider social value of the area.

Whilst primarily a procurement commitment, social value is also being embedded into the entire commissioning process. Government departments and local authorities can consider how public services can be strategically deployed so that their impacts are wider than those related to the immediate services. The construction and running of HM Prison Berwyn is an example of commissioning with social value (see Figure 7). The prison has not yet been formally inspected,⁶² so it is difficult to assess whether commissioning with social value has had benefits for the prisoners themselves, however thus far there seems to be mixed results.⁶³ A system-wide change is welcome, as interviewees particularly emphasised the need for the entire commissioning cycle to shift towards social value, if social value procurement was to achieve in practice what it intended in theory.

56 Chris White, 'Why the Social Value Act Needs Another Push', *Pioneers Post*, 18 July 2018.

57 Cabinet Office, *Social Value Act Review*, 2015.

58 Tendering District Council, 'What Are Section 106 Legal Agreements?', Webpage, 24 February 2012.

59 Rose Lasko-Skinner, 'Social Value in Public Procurement', *Public Sector Executive*, 12 November 2018.

60 HM Treasury, *The Green Book: Appraisal and Evaluation in Central Government*, Treasury Guidance (London, UK: Treasury Stationery Office, 2003); David Walker and John Tizard, *Spending Fairly, Spending Well: Time for a Radical Overhaul of Value for Money and Public Audit* (Smith Institute, 2019), 7.

61 Katie Schmucker, *Budget 2018: Tackling the Rising Tide of in-Work Poverty* (Joseph Rowntree Foundation, 2018).

62 HM Prison and Probation Services, 'Berwyn Prison Information', Webpage, 15 February 2019.

63 For more information about HMP Berwyn see: Cynthia O'Murchu and Sarah O'Connor, 'What Went Wrong at Britain's Prison of the Future?', *Financial Times*, 7 March 2019; Independent Monitoring Board, Annual Report of the Independent Monitoring Board at HMP Berwyn, 2018.

Figure 7: HM Prison Berwyn

HM Prison Berwyn is the second largest prison in Europe and the first prison designed as a 'rehabilitation prison'.⁶⁴ It is the largest publicly owned prison in England and Wales, with 34 per cent of prison services outsourced.⁶⁵ From inception, the prison has been commissioned with considerations of the wider social value of the service. The 'super' prison⁶⁶ was built in Wrexham, North Wales to help boost the local economy with targets including: 50 per cent of labour from the local workforce and £50 million spend on Small and Medium Enterprise (SMEs). In January these had been achieved with 54 percent and £82.7 million respectively.⁶⁷

It is also relatively cheap to operate in principle, with anticipated costs of just £14,000 per prisoner per year, compared to the national average of £32,500.⁶⁸ However, due to underuse (the prison is estimated to be 40 per cent empty) the prison is currently operating as one of the most expensive at £36,00 per prisoner per year.⁶⁹ The Prison Service has said it is going through a deliberate phased population increase, however in the context of overcrowding in prisons elsewhere, there have been suggestions that underuse is more closely related to poor service design.⁷⁰ In addition, there has been criticism that its remote location makes it difficult for relatives to visit prisoners, negatively affecting the families of prisoners and the prisoners themselves.⁷¹

Interviews for this paper revealed that as part of a system-wide change all providers of public services should be able to demonstrate social value. On the basis that providers directly receive public money (some are reliant on public sector contracts for over 50 per cent of their revenue)⁷² it is reasonable that they should be subject to specific social value targets.⁷³ Some academics have argued that commissioning could be made more 'ethical' if providers of public services fulfilled requirements such as: 'ethical employment, ethical tax compliance, ethical transparency, ethical localism and ethical vision'.⁷⁴ The push towards social value procurement has the potential to go further, and improve the behaviour of suppliers. The recent announcement from DCMS that procurement teams should also evaluate the social impact of the provider is therefore a welcome step,⁷⁵ although evaluating providers beyond the contract is currently illegal under The Public Contracts Regulations Act 2015.⁷⁶

Previous experiences with social value in public service procurement have highlighted difficulties in making non-quantifiable considerations of value. Many public sector commissioners require better guidance to understand how to consider social value in their procurement process for it to be successfully implemented. One interviewee commented that clearer guidance from central government would be helpful – as they currently found themselves "freestyling" when implementing social value at a local level. There are

64 HM Prison and Probation Services, 'Berwyn Prison Information'.

65 Ministry of Justice et al., 'New Prison to Be Run by Her Majesty's Prison Service (HMPS)', Press Release, 24 February 2015.

66 Lucy Ballinger, 'Inside Britain's New Super-Prison', BBC News, 27 February 2017.

67 'Economic Benefits North Wales Prison in Wrexham', Web Page, Wrexham County Borough Council, January 2017.

68 Yvonne Jewkes and Kate Gooch, 'The Rehabilitation Prison: An Oxymoron or an Opportunity to Radically Reform Imprisonment?', Web Page, 2019.

69 O'Murchu and O'Connor, 'What Went Wrong at Britain's Prison of the Future?'

70 Ibid.

71 Ibid.

72 Government Commercial Function, *Outsourcing Playbook: Central Government Guidance on Outsourcing Decisions and Contracting*, 7.

73 Cabinet Office and Department for Business, Energy & Industrial Strategy, 'Businesses Urged to Do More to Help Improve Society', Press release, 11 March 2019.

74 For more see: Bob Hudson, 'How "Ethical Commissioning" Could Curb the Worst Effects of Outsourcing', *British Politics and Policy at LSE*, 2 August 2018.

75 Cabinet Office and Department for Business, Energy & Industrial Strategy, 'Businesses Urged to Do More to Help Improve Society'.

76 HM Government, 'The Public Contracts Regulations 2015' (2015), chap. 2.

currently numerous guidelines and toolkits on social value.⁷⁷ Whilst some (like the guidance from the DCMS) provide only broad suggestions around social value and mainly focus on the tender process, others (like the Voluntary Organisations Disability Group's Social Value Toolkit) provide comprehensive, step-by-step guides to integrating social value into the contract delivery.

Recommendation 2

Government should produce a national guidance framework and toolkit for public service commissioners and providers explaining how to identify and quantify social value in public service contracts.

1.5 Purchasing and contracting

Once a public service commissioner has designed a service and decided to 'buy' goods or services, as part of the delivery they are then required to build a contract. There are multiple methods for doing so, outlined in Figure 8.⁷⁸

Figure 8: Models of Public Service contracts

Commissioning Model	Description	One Example (and Commissioning Body)
Block Grant/ Contract	Guarantees a volume of business and payment to a service provider over a set period of time, regardless of the quality of services provided. ⁷⁹	Prison Healthcare Services at Her Majesty's Prison (HMP) Bullingdon (Oxfordshire Primary Care Trust)
Capitation contract	A type of block grant, providers are given a lump-sum payment based on the number of patients in a target population, regardless of the volume of services provided. ⁸⁰	Erewash Multispeciality Community Provider (NHS England)
Concession contract	A provider is contracted to deliver a service but receives no payment from the commissioner, instead they are granted the right to receive remuneration from the exploitation of the service directly. ⁸¹	M6 Toll (Department of Transport)
Framework agreement/ Dynamic Purchasing System (DPS)	The commissioner enters into an agreement with one or more providers to enable quick spot purchasing from those providers in the future. ⁸²	Minor Building Works DPS (NHS London Procurement Partnership)
Payment by Results (PbR)/Payment for Performance ⁸³	A provider is contracted to deliver a service and receives payment only if specific pre-agreed targets are achieved (typically only a small portion of a contract is PbR but this can vary significantly). ⁸⁴	Troubled Families Programme (Ministry of Housing, Communities, and Local Government)

77 Department for Digital, Culture, Media & Sport, *The Public Services (Social Value) Act 2012: An Introductory Guide for Commissioners and Policymakers*, 2018; VODG *Social Value Toolkit: Mainstreaming Social Value in Social Care* (Voluntary Organisations Disability Group, 2016); Salford Social Value Alliance, *Salford Social Value Toolkit – Summary and Preview*, 2015; Cumbria County Council, *A Social Value Toolkit: For Commissioners and Procurers*, 2016; Sustainable Northern Ireland, *Social Value Toolkit*, 2018.

78 National Council for Voluntary Organisations, 'Contract Types', Webpage, NCVO Knowhow, 12 September 2017.

79 British Medical Association, 'Models for Paying Providers', Webpage, 24 May 2017.

80 Ibid.

81 European Commission, 'Concession Contracts – Partnerships between the Public Sector and a Private Company', Webpage, Internal Market, Industry, Entrepreneurship and SMEs – European Commission, 5 July 2016.

82 Constructing Excellence, 'What Is a Framework?', Webpage, 2019

83 The NHS uses a PbR national tariff which pays based on services rather than outcomes.

84 NCVO Knowhow, 'Payment by Results', Webpage, 2018.

Personal Budgets	Instead of the state providing a service, the citizen or a representative is given ring-fenced funding to acquire the service or products themselves. ⁸⁵	Education, Health, and Care Plan personal budget (local authorities)
Prime Contract	An organisation is given a contract to deliver a service, and sub-contracts with delivery organisations. ⁸⁶	Work and Health Programme (Department of Work and Pensions)
Private Finance Initiatives (withdrawn)	Private companies receive a contract for which they burden the up-front costs, being repaid over a longer period of time by the commissioner. ⁸⁷	Sandwell Metropolitan Hospital (Department of Health)
Reserved contract	Commissioners reserve a contract for certain “at risk” services to specific categories of providers. ⁸⁸	Pre-school education services (Department for Education)
Social Impact Bonds	Providers are contracted to deliver outcomes and paid conditional upon achieving these outcomes, with initial funding coming from private investors. ⁸⁹	One Service at HMP Peterborough (Ministry of Justice)
Spot Purchasing	One-off procurement made by a commissioner as and when needed, with no recurring contracts. ⁹⁰	Day provision for adults with learning disabilities (Islington Council)

These models may be used independently as the basis for an entire procurement process, or in conjunction within a single contract. For instance, many healthcare contracts contain a small payment by results (PbR) element tied to a larger block contract, the aim being to guarantee a steady payment to the provider whilst also incentivising performance or reflecting volume of services delivered.⁹¹

The various contract models also have positive and negative elements, often dependent upon the type of service being commissioned and the intended payment mechanism. The Outsourcing Playbook explains that there are six common payment mechanisms for public sector contracts which the specific types of contracts listed above utilise.⁹² Because each payment mechanism allocates risk in different proportions to either the provider or contracting authority, the specific mechanism used should be tailored to meet the demands of commissioner and provider as well as the metric for payment (see Figure 9).

⁸⁵ Jon Glasby and Rosemary Littlechild, *Direct Payments and Personal Budgets: Putting Personalisation into Practice*, 3rd ed., 2016.

⁸⁶ The King's Fund, 'Contractual Models for Commissioning Integrated Care', Webpage, 2018.

⁸⁷ Lexis PSL, 'PFI (Private Finance Initiative)/PPP (Public Private Partnerships) and Procurement', Webpage, Lexis PSL, 2019.

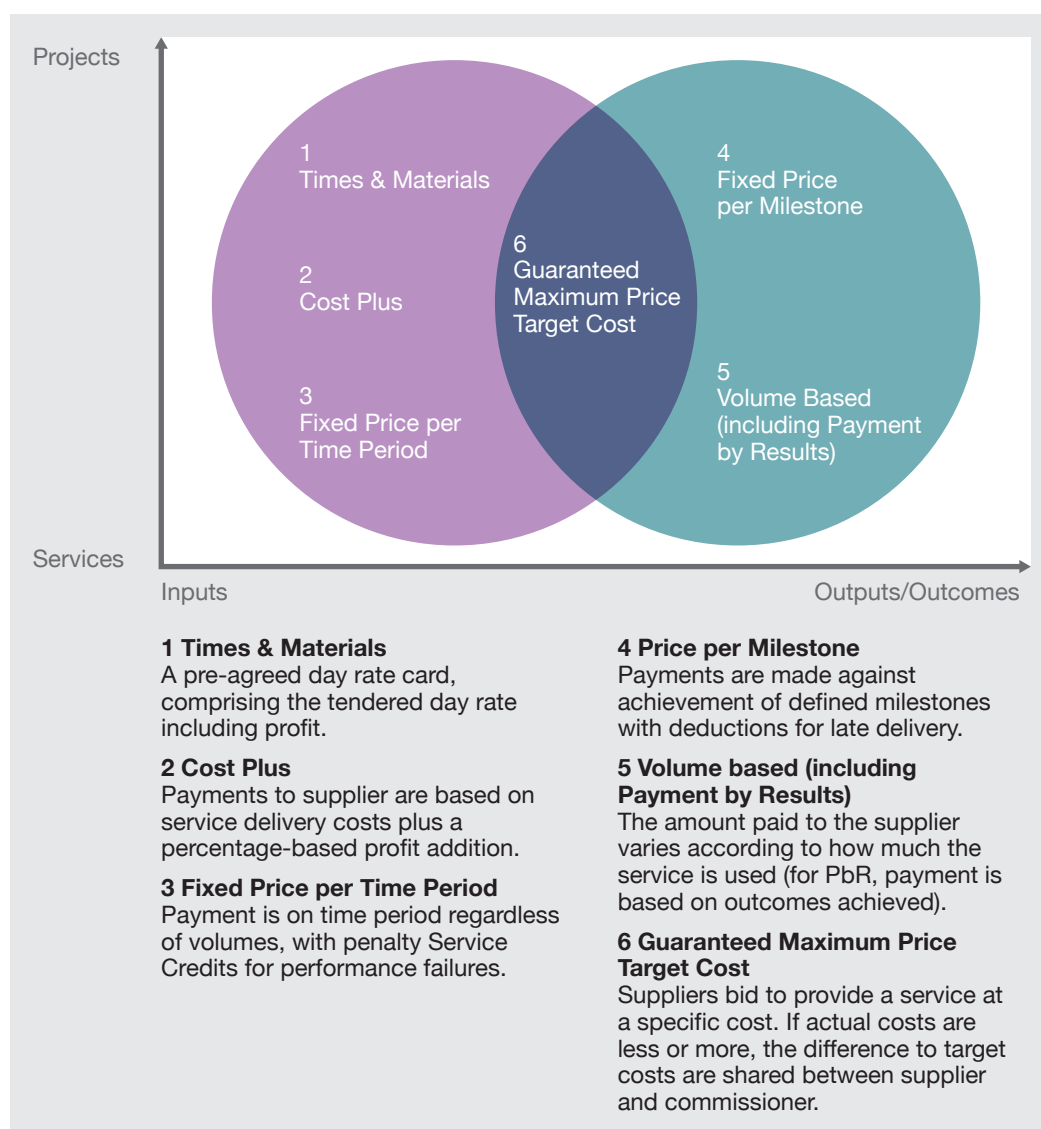
⁸⁸ Crown Commercial Service, *The Public Contracts Regulations 2015: Guidance on the New Light Touch Regime for Health, Social, Education, and Certain Other Service Contracts* (Crown Commercial Service, 2015), 13.

⁸⁹ The Care Forum, 'Spot Purchase Work', Webpage, 2019.

⁹⁰ 'Spot Purchase Work', *The Care Forum*, 2019.

⁹¹ Adam Wright et al., *Towards an Effective NHS Payment System: Eight Principles* (The Health Foundation, 2017).

⁹² Government Commercial Function, *Payment Mechanisms and Risk Allocation: Outsourcing Guidance Note*, 2019.

Figure 9: Types of payment mechanisms and applicability

Source: Adapted from Government Commercial Function, *Payment Mechanisms and Risk Allocation: Outsourcing Guidance Note (2019)*

To guide commissioners towards good practice in public service procurement, both the UK and EU have legal frameworks aimed at ensuring transparency and competition within the procurement process. These include general obligations to treat all potential providers equally and act transparently.⁹³ For contracts over a minimum financial threshold, however, there are additional requirements. These include the publication of contracts on the Official Journal of the European Union (OJEU) to improve visibility amongst providers, and a pre-qualification process that bidders must undergo to demonstrate they possess the capabilities to meet the contract's requirements.⁹⁴

Similarly, the Public Contracts Regulations Act 2015 states that contract notices or indications of tenders over a certain value are also publicly tendered on Contracts Finder, an online portal run by the Cabinet Office.⁹⁵ The financial thresholds for these regulations differ depending upon whether the commissioner is part of central government or other

⁹³ Crown Commercial Service, *A Brief Guide to the EU Public Contracts Directive (2014)*, 2015.

⁹⁴ HM Government, *The Public Contracts Regulations 2015*; Crown Commercial Service, *A Brief Guide to the EU Public Contracts Directive (2014)*.

⁹⁵ HM Government, 'Contracts Finder', Webpage, 20 July 2015; Crown Commercial Service, *Guidance on the New Transparency Requirement for Publishing on Contracts Finder*, 2015.

public sector bodies, and the nature of the services being contracted.⁹⁶ The idea behind these regulations is to increase the supplier diversity within the market by making it easier for a range of providers to bid for a contract, including suppliers from the private and public sectors, and Voluntary, Community, and Social Enterprise (VCSEs).

Yet even these regulations do not go far enough, with the PACAC revealing its concerns that large firms were able to utilise their size to expertly bid for contracts which they had limited ability to fulfil.⁹⁷ *Reform* has previously argued that as a result “in some areas, the supply side is concentrated and becoming increasingly more concentrated”, a situation which increases the risk of poor value for money and market failures.⁹⁸

Furthermore, not all purchasing decisions can be made within a market-driven model. Due to their irregular, complex, and often niche requirements (particularly for large-scale construction projects such as aircraft carriers or medical machinery), both the Ministry of Defence (MoD) and NHS often utilise non-competitive procurement models. These entail long and fragile supply chains, and the potential for poor value-for-money contracts due to the limited choice of suppliers.⁹⁹

To ensure that non-competitive contracts within the MoD achieve value-for-money, the Defence Reform Act 2014 created a non-departmental public body, the Single Source Regulations Office (SSRO) who were tasked with supporting the operation of the Single Source Contract Regulations 2014. Acting as a regulatory body, the SSRO works to strengthen the hand of commercial teams within the MoD, standardise spending, and collect, collate, and publish data surrounding MoD contracts.¹⁰⁰

1.6 Monitoring and evaluation

Once a provider has been awarded a contract, the focus of the contracting authority becomes evaluating and monitoring the public service being delivered. These areas of responsibility fall to contract management teams within the commissioning department and the specific way in which contracts are monitored will vary according to the type of contract. For most contracts, the emphasis is on ensuring that the service being delivered is of sufficient quality and meets the terms of the contract.¹⁰¹ This is typically done by assessing the inputs, outputs or processes carried out by the provider and comparing these figures with the cost of the contract to the tax-payer.¹⁰²

As a monitoring tool for public service contract, these metrics are usually based on easily measurable data and provide a straightforward indication of whether a provider is fulfilling its contract obligations.¹⁰³ However, neither inputs, outputs, activities, or cost give an indication of whether a service is meeting the needs of citizens or value is being achieved.¹⁰⁴ Quality is notoriously difficult to specify in a contract and uphold, particularly in complex service provision.¹⁰⁵

For an evaluation to consider these important criteria, it is necessary to focus instead on outcomes and value-for-money. Michael Porter of Harvard Business School explains that

96 BiP Solutions, *Advertising of Tenders – EU Thresholds 2018-2019*, 2018.

97 House of Commons Public Administration and Constitutional Affairs Committee, *After Carillion: Public Sector Outsourcing and Contracting, Seventh Report of Session 2017-19*.

98 Reform, *Sourcing Public Services: Lessons to Be Learned from the Collapse of Carillion Inquiry: Written Evidence from Reform* (Public Administration and Constitutional Affairs Committee, 2018).

99 National Audit Office, *Improving Value for Money in Non-Competitive Procurement of Defence Equipment*, HC 412 (National Audit Office, 2017).

100 Single Source Regulations Office, ‘About Us’, Webpage, 2018.

101 London Borough of Croydon, *Planning to Succeed in Contracting: A Handbook for Contract Management in Croydon*, 2017.

102 The Chartered Institute of Purchasing & Supply, *Contract Management Guide* (CIPS Knowledge Works Knowledge Insight, 2019).

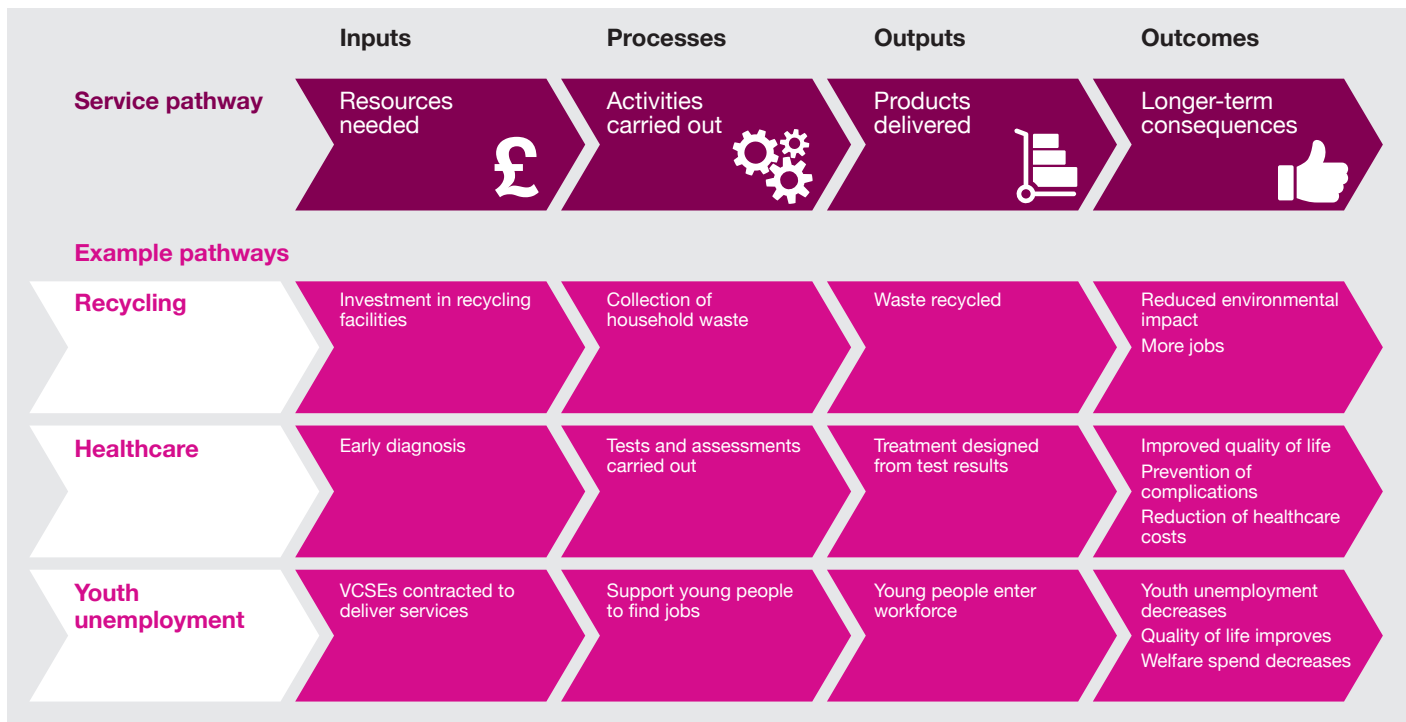
103 Civicus and PG Exchange, *Monitoring and Evaluation of Public Services* (PG Exchange, 2019).

104 Outcomes Based Healthcare, *Contracting for Outcomes: A Value-Based Approach*, 2014; Jim Parsons, Caitlin Gokey, and Monica Thornton, *Indicators of Inputs, Activities, Outputs, Outcomes and Impacts in Security and Justice Programming* (Department for International Development, UKaid, VERA Institute of Justice, 2013).

105 Oliver Hart, Andrei Shleifer, and Robert W. Vishny, ‘The Proper Scope of Government: Theory and an Application to Prisons’, *The Quarterly Journal of Economics* 112, no. 4 (1997): 1127–61; The Office for National Statistics, ‘Quality Adjustment’, in *The ONS Productivity Handbook*, 2016.

“since value depends on results, not inputs, value [...] is measured by the outcomes achieved, not the volume of services delivered.”¹⁰⁶ Figure 10 shows the differences between inputs, processes, outputs, and outcomes as well as some examples of each.

Figure 10: Inputs, Processes, Outputs, and Outcomes pathways



Source: Adapted from Outcomes Based Healthcare, ‘Why outcomes?: Stockport Together’, Presentation, 1 June 2016; and Sustainability Business Partnership, ‘Social Impact’, Webpage, SBP Ltd, 2019

Effective monitoring and evaluation ensures that a provider meets the obligations of a contract, and helps commissioners to improve upon the services being delivered.¹⁰⁷ However, whilst a shift away from contracts based on outputs or processes has been broadly welcomed,¹⁰⁸ there remain concerns around the feasibility of outcomes as the basis for monitoring or evaluation, and the additional burdens outcomes-based commissioning places on commissioners (see Section 2.2.3).

The underlying issue behind these challenges is one of data (see Section 2.5). Commissioners are unable to gauge the success of procured services because they do not have the necessary data.¹⁰⁹ Providers are unable to accurately bid for tenders because they cannot accurately assess the costs of service delivery.¹¹⁰ As a recent report by the data analytics company Spend Network argued, this lack of data leads to a transparency gap between what is being spent and what is known about that spending.¹¹¹ Before fundamental changes can be made to what we intend to measure, it is crucial to understand how we measure. Improving the quality and types of data being collected and assessed is crucial to improving public service commissioning, and thereby the public services themselves.

¹⁰⁶ Michael E. Porter, ‘What Is Value in Health Care?’, *New England Journal of Medicine* 363, no. 26 (December 2010): 2477.

¹⁰⁷ Civicus and PG Exchange, *Monitoring and Evaluation of Public Services*.

¹⁰⁸ Erica Wimbush, ‘Implementing an Outcomes Approach to Public Management and Accountability in the UK – Are We Learning the Lessons?’, *Public Money & Management* 31, no. 3 (2011): 211–18.

¹⁰⁹ Warren Smith, ‘Improving and Opening up Procurement and Contract Data’, Webpage, Government Digital Service, 19 November 2015.

¹¹⁰ Constructing Excellence, ‘What Is a Framework?’, Webpage, 2019.

¹¹¹ Spend Network, *Assessing the Transparency Gap in Public Procurement: A Report for the Information Commissioner* (Information Commissioner’s Office, 2018), 2.

2

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For public services to deliver improved outcomes at better value and with increased accountability, attention needs to be paid to the specific mechanisms of designing, commissioning, procuring, and delivering those services to the public.¹¹² This means learning from good practice and, as with the crucial issues of accountability and regulation, also from the failures.

There needs to be confidence about what the public service commissioning landscape should look like in the future and efforts should be made at building towards that. A focus on quality rather than price, and a greater drive for transparency throughout the commissioning process – from planning to implementation and monitoring – are two crucial themes that could yield dramatic improvements.

Yet reform of public service procurement cannot happen with a focus only in one or two areas. The reality is that good commissioning is the result of multiple, intersecting themes and it is the combination of these traits which ensures good commissioning. Good quality data, for instance, provides the basis for thorough accountability by making public services and those delivering them easier to evaluate. Well-trained and professional procurement staff are required to design and manage services and contracts that deliver value-for-money, whilst also successfully clarifying and transferring risk. Solid frameworks are necessary to help guide commissioners and providers throughout the commissioning process, yet commercial expertise is also needed to ensure that outsourced goods and services are done so in an efficient and cost-effective manner.

Consequently, it is necessary to recognise that whilst individual areas such as accountability or skills can and should be discussed in terms of their own specifics, it is also important to recognise the impact that each area has on the others. In order to have public services that are commissioned more accurately, procured more effectively, and managed more proficiently to the benefit of the citizens who fund and use them, there needs to be a whole-system approach to reform.

2.1 Skills and expertise

Underpinning any improvements in public procurement must be the people responsible for designing, procuring, and monitoring those services. In 2016, the Cabinet Office explained that “while there are lots of examples of good practice, there is a need for capable, confident, and courageous people in the public sector who are responsible for designing and delivering public services offering value for money”.¹¹³ These commissioners need to be well versed in all elements of the commissioning cycle, including pre-market engagement, service design, market shaping, purchasing, and contract management.¹¹⁴ They need to recognise what model of public service commissioning and delivery will work best for a situation, and be capable of designing a contract that meets those needs and provides security against risk for both service users and government. Moreover, they need to be supported and incentivised to avoid unnecessary risk-aversion and better understand commissioning for value, rather than cost.

To that end, a focus on commercial skills is an important part of the reforms needed in the public sector. This applies not only at the top – where the Cabinet Office is already implementing changes and seeing results¹¹⁵ – but throughout the commissioning staff. There needs to be parity across local and central government to ensure that a basic standard of commercial expertise exists regardless of the public service being commissioned. A focus on skills is incredibly important given the capacity building

¹¹² Local Government Association, *Commissioning for Better Public Services*, 2012; Christopher McCrudden, ‘Using Public Procurement to Achieve Social Outcomes’, *Natural Resources Forum* 28 (2004): 257–67.

¹¹³ Cabinet Office, *Commissioning Academy Brochure*, 2016, 1.

¹¹⁴ Blatchford and Gash, *Commissioning for Success*.

¹¹⁵ Sam Rowbury, ‘Smart Public Procurement – Efficient and Modern Approaches to Public Procurement: Governing Public Procurement and Achieving Savings’ (European Commission: Internal Market, Industry, Entrepreneurship and SMEs, December 2015).

requirements that will accompany any large-scale reforms, such as those outlined in the Cabinet Office's Outsourcing Playbook.

2.1.1 Impact of skills gap

The problems that arise from a public sector without sufficient commercial expertise have been evidenced from the 1950s. Many public sector commissioners found themselves outmanoeuvred by their counterparts in the private sector due to a lack of relevant skills or experience.¹¹⁶ As the number of contracts with private sector firms increased during the 1980s and 1990s, this imbalance resulted in some contracts that failed to provide accountability, deliver value for money, or improve outcomes for service users.¹¹⁷

Over the past decade several prominent failures in outsourcing have brought attention to the relationship between the public and private sectors, these issues have become more visible. Aside from public outsourcing failures like the UnitingCare NHS contract with Cambridgeshire and Peterborough Clinical Commissioning Group in 2015¹¹⁸ or Carillion in 2018, even national Private Finance Initiative (PFI) contracts based on the standardised contract frameworks failed to empower the commissioning bodies on equal terms to the providers. For instance, many PFI projects did not contain provisions allowing the public sector body to terminate the contract on a voluntary basis without paying substantial compensation, essentially locking commissioners into unattractive and long-term legacy deals negotiated by their predecessors.¹¹⁹

The skills gap problem is likely to only be exacerbated if new models of contracting focusing on outcomes or utilising different funding sources (see Section 2.2.3) are to be employed.¹²⁰ It is challenging for government to keep pace with the changes to service design and delivery methods. Getting the fundamentals of training and upskilling right therefore enables new demands to be factored into the existing training schemes rather than having to design new training regimes.

This concept has been embraced in recent years by central government, which has sought to improve its commercial abilities through a variety of structural reforms.¹²¹ Led by Gareth Rhys Williams, Government Chief Commercial Officer, efforts have been made to ensure commercial expertise is at the centre of the whole commissioning process, particularly the design and purchase phases. These reforms focus on the recruitment of commercial specialists, the retention of existing talent, support for commercial staff, and ensuring that areas of public service with high need have access to the commercial expertise required.¹²²

Two cross-government organisations – the Crown Commercial Service (CCS) and Government Commercial Function (GCF) – play a significant role in increasing this commercial capacity. The CCS and GCF hold different but complimentary roles in improving the state of public service procurement in the UK.

The CCS is designed to act as a centralised procurement group for the public sector's common goods needs, utilising framework agreements with providers in an effort to reduce the complexity and costs of acquiring goods and services.¹²³ Many common or repeat goods (for instance utilities and daily items such as stationary) are procured by the

¹¹⁶ Dunleavy, *The Politics of Mass Housing in Britain, 1945-1975: A Study of Corporate Power, and Professional Influence in the Welfare State*.

¹¹⁷ Trevor L. Brown, Matthew Potoski, and David M. Van Slyke, 'Managing Public Service Contracts: Aligning Values, Institutions, and Markets', *Public Administration Review* 66, no. 3 (2006): 324; Damian Grimshaw, Steve Vincent, and Hugh Willmott, 'Going Privately: Partnership and Outsourcing in UK Public Services', *Public Administration* 80, no. 3 (2002): 475–502.

¹¹⁸ National Audit Office, *Investigation into the Collapse of the UnitingCare Partnership Contract in Cambridgeshire and Peterborough* (National Audit Office, 2016).

¹¹⁹ HM Treasury, *PPP Policy Note: Early Termination of Contracts*, 2015.

¹²⁰ Hannah Murphy, 'Social Impact Bonds: On the Margins', *Financial Times*, 24 September 2018.

¹²¹ Alexander Hitchcock and William Mosseri-Marlio, *Cloud 9: The Future of Public Procurement* (Reform, 2016); Benoit Guerin, Julian McCrae, and Marcus Shephard, *Accountability in Modern Government: What Are the Issues?* (Institute for Government, 2018).

¹²² Tom Gash, *Building Government's Commercial Capability* (Institute for Government, 2017).

¹²³ Crown Commercial Service, 'About Us', Webpage, 2018.

CCS on behalf of the public sector.¹²⁴ Funded by a levy on placed on suppliers through its procurement frameworks, the CCS provides a variety of digital portals and systems (including the “Purchasing Platform” for technology) which allows public sector organisations to purchase goods with minimal paperwork whilst still remaining compliant with the Public Contract Regulations 2015.¹²⁵ In 2014-15, the CCS spent around £15 billion on 1,800 procurements and had 14,500 customers across 1,400 organisations across the public sector. Whilst previously envisaged as providing a fully managed end-to-end service rather than a central standard service, the CCS nevertheless saved public sector organisations about £521 million in 2015-16.¹²⁶

The GCF meanwhile is “a cross-government network of around 4,000 Civil Servants with commercial expertise” who support “departments in managing key commercial contracts and planning for future commercial needs.”¹²⁷ Within the GCF sits the Government Commercial Organisation (GCO), which employs senior commercial professionals and provides them with accreditation, assists with their development, and acts as a network for commercial leaders within central government.¹²⁸ The intention is for all senior commercial officers across central government departments to be employees of the GCO, including most Chief Commercial Officers, thus acting as a pool of expertise for other departments to tap into.¹²⁹ Interviewees for this paper have regularly highlighted the importance of these individuals in increasing the commercial capacity of specific departments and addressing the significant gaps in commercial skills.

2.1.2 The local-national divide

The centralised nature of this commercial capacity building has seen some local authorities left-behind when it comes to commercial skills.¹³⁰ As the NAO explains, “spreading good practice is a challenge”, particularly amongst local government commissioners.¹³¹ There remains a huge variation in skillsets between public sector commissioners when it comes to procurement, both in local and national bodies.¹³² Partly this is due to the nature of commissioning at a local rather than national level and the unique procurement challenges that local authorities face when attempting to meet the needs of their local communities.¹³³ Interviewees for this paper explained that whilst some local authorities are far better at procurement than Whitehall, budget cuts and staff reductions have led to a serious reduction in the commercial capacity of many local authority procurement teams, due to a loss of expertise.

Although both the CCS and GCF have had a significant impact in many parts of central government, their reach outside of Whitehall has been severely limited.¹³⁴ Their priority has been in upskilling core government departments who procure services on behalf of large population segments rather than local authorities who for the most part procure on a much smaller scale.¹³⁵ There is a need for greater parity of commercial expertise between local authorities and central government.

A revised approach to the training of local authorities and their access to commercial expertise is needed. One solution is a shared provision of expertise across local authorities, based upon the GCF model of pooled commercial expertise and short- to

¹²⁴ Ibid.

¹²⁵ Crown Commercial Service, ‘The Purchasing Platform’, Webpage, 2018.

¹²⁶ National Audit Office, *Crown Commercial Service* (National Audit Office, 2016), 4.

¹²⁷ Government Commercial Function, ‘About Us’, Webpage, 2019; Gash, *Building Government’s Commercial Capability*, 18.

¹²⁸ Government Commercial Function, *Government Commercial Organisation* (Government Commercial Function, 2016).

¹²⁹ Government Commercial Function, *Government Commercial Function: Creating One Commercial Community* (Crown Commercial Service, 2017); Gash, *Building Government’s Commercial Capability*.

¹³⁰ William Eichler, ‘Lack of Commercial Skills in Local Government “barrier” to Outsourcing’, Webpage, LocalGov, 15 March 2017.

¹³¹ National Audit Office, *Children in Need of Help or Protection*, 2016, 8.

¹³² Tom Gash and Theo Roos, *Choice and Competition in Public Services: Learning from History* (Institute for Government, 2012), 29.

¹³³ Mike Bennett, *Commissioning in Local Government: A Research Project for Local Partnerships* (Local Partnerships, 2015).

¹³⁴ Hitchcock and Mosseri-Marlio, *Cloud 9: The Future of Public Procurement*.

¹³⁵ Gash, *Building Government’s Commercial Capability*.

medium-term secondments. The Public Services Transformation Academy (PSTA) and the Association for Public Service Excellence (APSE), a networking community for local authorities, are already acting in this role, albeit with only limited support from central government. Launched by the Cabinet Office and CCS in 2013, the PSTA (formerly the Commissioning Academy) was initially tasked with standardising procurement practises across local authorities and public bodies.¹³⁶ Now a not-for-profit social enterprise, the PSTA aims to produce commissioners who “have the confidence to challenge the status quo, take on radical change, collaborate effectively with external stakeholders, gain a deep understanding of the need and target resources effectively to meet those needs.”¹³⁷ The theory is that if commissioners are given the right skillset, then improved outcomes and value for money will follow. An early assessment by the Local Government Information Unit found that the Commissioning Academy had already had “real, tangible impact” on participating organisations, including closer partnerships and peer-to-peer learning between commissioners, which are “likely to lead to service improvements”.¹³⁸

Based around local or regional hubs, both the PSTA and the APSE seek to bring together local authority commissioners in order to provide training and expertise. This shared-basis approach to capacity building in the public sector would help reduce the reliance on consulting firms and the associated costs, as well as increasing the commercial knowledge within local authorities and central government. Interviewees for this paper highlighted the important role both the PSTA and APSE play in acting as a hub for networking between and within local authorities. The Cabinet Office has embraced a similar forum strategy between industry and central government to support its roll-out of the Outsourcing Playbook and raise awareness of the requirements contained within these new policies.

Furthermore, because training and events are done on regional or thematic areas, commissioners and procurement officers from various local authorities are able to engage more efficiently than in other forums.¹³⁹ The APSE meanwhile provides a centralised source of knowledge for local authorities to draw upon regarding commissioning of public services, both in policy and practise. The APSE provides peer-to-peer groups and forums through which authorities can share knowledge and ask or provide answers anonymously to other commissioners.¹⁴⁰

This devolved approach to capacity building within local authority commissioners also permits a greater engagement with SMEs and VCSEs. The PSTA, for instance, hosts “speed dating” nights where local authorities can liaise with smaller providers from their area who otherwise they may not have been aware of, as do many NHS trusts and CCGs. Engagement with third sector organisations (TSOs) such as VCSEs is another key area in which good commercial skills are required, both in service design and procurement. Whilst there is evidence that TSOs may suffer from diseconomies of scale, “small-scale interventions can be cheaper and better value for money than scale provision” argues one report by *Locality*, the national network of local community organisations. Based upon extrapolations from several multi-disciplinary pilot schemes, the report proposes that the possible savings for local authorities by working more closely with local TSOs and VCSEs could be as much as £16 billion.¹⁴¹ Furthermore, TSOs can potentially offer specific skills and expertise as well as delivering “niche” services at a better quality than larger organisations.¹⁴²

¹³⁶ Cabinet Office, Efficiency and Reform Group, and Crown Commercial Service, ‘The Commissioning Academy’, Webpage, 3 February 2016.

¹³⁷ Ibid.

¹³⁸ Jonathan Carr-West and Andrew Walker, *Commissioning Academy: An Evaluation by the LGIU into the Impact of the Cabinet Office Commissioning Academy* (Local Government Information Unit, 2014), 8.

¹³⁹ Public Services Transformation Academy, ‘Regional Transformation Academy’, Webpage, 2018.

¹⁴⁰ Association for Public Service Excellence. ‘What We Do’. Webpage, 2018.

¹⁴¹ John Seddon, *Saving Money by Doing the Right Thing: Why ‘Local by Default’ Must Replace ‘Diseconomies of Scale’*. (Locality, 2014), 6, 10, 40.

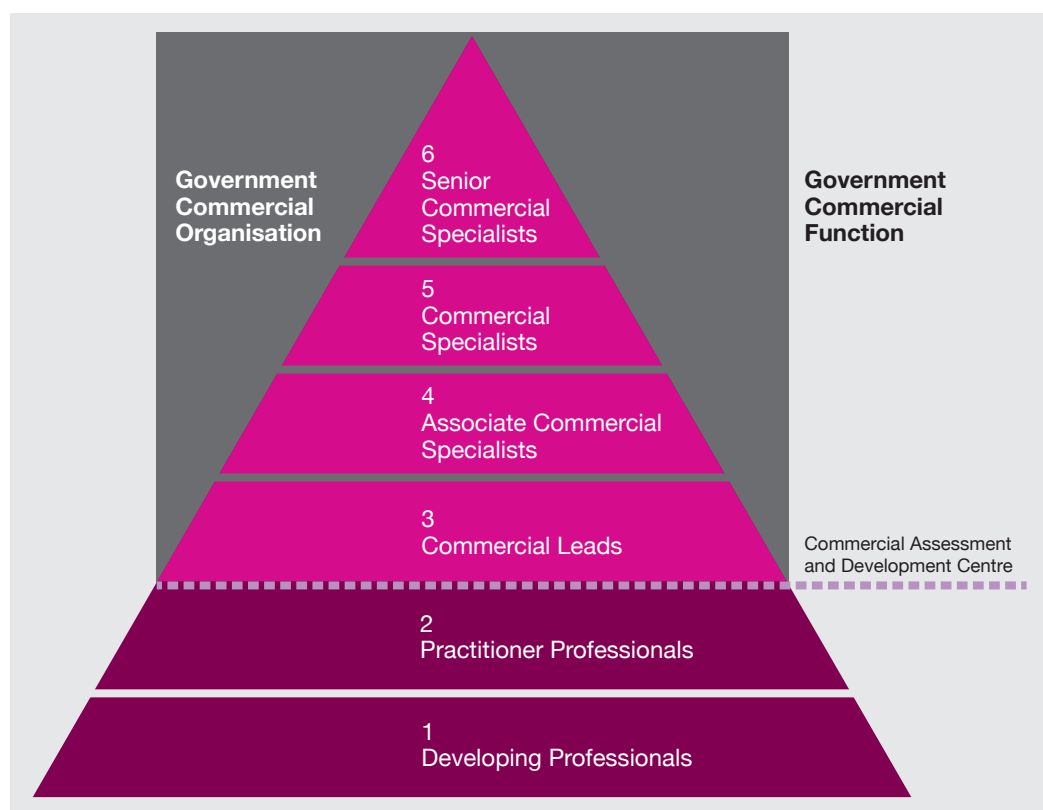
¹⁴² Seddon, *Saving Money by Doing the Right Thing: Why ‘Local by Default’ Must Replace ‘Diseconomies of Scale’*; Holly Holder, *Role of the Voluntary Sector in Providing Commissioning Support*, Research Report (Nuffield Trust, 2013), 13; *Seminar One: The Third Sector as a Public Service Provider*, ESRC TSRC Co-Centre Seminar Series 2012-13 (Economic and Social Research Council & Third Sector Research Centre, 2012).

2.1.3 Upskilling

Commissioners require a particular skill-set when contracts include multiple providers, complex outcomes, and supply markets.¹⁴³ For example, being able to recognise and manage risk (see Section 2.3) is an important part of the commissioning process and heavily dependent upon both better understandings of risk and good commercial expertise. Furthermore, an in-depth knowledge of the markets in which they operate is an important element of an effective commissioning team, as previous *Reform* research has argued.¹⁴⁴

Government is already taking steps to address this. The Cabinet Office has worked to place experienced commercial experts into senior positions, particularly through the CCS (formed in 2010) and the GCF (in 2016).¹⁴⁵ Furthermore, all senior commercial civil servants are required to pass the GCF's Commercial Assessment and Development Centre (ADC) before advancing to a certain level of seniority (see Figure 11). During a one-day multi-disciplinary examination, the ADC "assesses the commercial expertise, skills, and capability of individuals against the GCF People Standards for the Profession",¹⁴⁶ and provides an indication of whether the civil servant possesses the necessary commercial skills to fulfil their role or will require further development. If the latter, they are then enrolled on the GCO Development Programme for Senior Commercial Professionals, which provides training on two key themes: insight and leadership, and business acumen and commercial judgement.¹⁴⁷ The ADC curriculum is regularly updated to reflect the latest policies, including the Outsourcing Playbook.

Figure 11: Civil Service Commercial Pyramid



Source: Adapted from the Government Commercial Function, Commercial Assessment and Development Centre (2018), 6

¹⁴³ Dan Crowe, Tom Gash, and Henry Kippin, *Beyond Big Contracts* (Institute for Government, 2014).

¹⁴⁴ Harwich, Hitchcock, and Fischer, *Faulty by Design. The State of Public-Service Commissioning*.

¹⁴⁵ Confederation of British Industry, 'Getting a Better Purchase: CBI 2014 Public Sector Procurement Report', February 2014.

¹⁴⁶ Government Commercial Function, *Commercial Assessment and Development Centre*, 2018.

¹⁴⁷ Government Commercial Function, *Government Commercial Organisation*.

Nevertheless, the GCF's focus is largely on the procurement leadership. In an effort to ensure that a basic commercial level was achieved across all public sector commissioners, several schemes have been introduced by central government, including the Procurement Professional Curriculum and Civil Service Learning schemes (which includes Commercial Master Classes and a one-day course in managing contractors).¹⁴⁸ The PSTA similarly provides training to commissioners in local authorities, although interviewees noted that it has struggled to secure consistent funding since the Cabinet Office outsourced it and currently runs at a loss (see Figure 22, Appendix). Neither the effectiveness nor take-up of these training opportunities has been assessed, leading to a lack of understanding as to where their impact could be improved.

Recommendation 3

The Public Service Transformation Academy should receive a block grant of £50,000 per year from the Cabinet Office to fund their work. This should be spent partly on improving the regional hubs and providing a more consistent network for local authorities and Small- and Medium-sized Enterprises and Voluntary, Community, and Social Enterprises.

Recommendation 4

In partnership with the Public Service Transformation Academy and Government Commercial Function, the Cabinet Office should take steps to introduce a national training framework for public service commissioners who contract over the Official Journal of the European Union financial thresholds for public service contracts. This should be a digital course, free at the point of access for financial and commercial staff within the civil service and local authorities, and funded from the levy on public service contracts.

According to a white paper from the Recruitment and Employment Confederation, the professional body of the UK recruitment industry, the public sector continues to find it hard to attract and retain key staff, particularly in management positions.¹⁴⁹ The Institute for Government has similarly found that eight central government departments have an annual staff turnover over 15 per cent, with turnover highest amongst senior officials with seven departments suffering 30 per cent of senior officials leaving the department in two years.¹⁵⁰ The creation of the GCO has sought to rectify this issue amongst commercial leaders, but some interviewees for this paper reported turnover within the commissioning staff of their government department at around 40 per cent every two years.

Furthermore, commissioners may only design and tender for a specific service a couple of times in their careers given their often-broad remit, and simultaneously managing such a high volume of contracts in total that it is difficult to affect change.¹⁵¹ Consequently, it seems likely that specialist advisory units housed within central departments like the CCS, or external intermediaries for specific funding models (as with Social Impact Bonds, a form of privately-funded Outcomes-Based Commissioning in public services¹⁵²), will continue to play an important role alongside commissioners.¹⁵³ This is especially true for local authorities who are even less affected by central government efforts.

¹⁴⁸ Sarah Jane Squire and Ivor Beazley, *Increasing Professionalism in Public Finance Management: A Case Study of the United Kingdom* (World Bank, 2016), 41–43.

¹⁴⁹ Recruitment and Employment Confederation, *Public Sector 2025: The Future of Jobs – What This Means for the Public Sector*, 2018.

¹⁵⁰ Sasse and Norris, *Moving on: The Costs of High Staff Turnover in the Civil Service*, 9.

¹⁵¹ Bennett, *Commissioning in Local Government: A Research Project for Local Partnerships*.

¹⁵² Kevin Albertson and Chris Fox, *Payment by Results and Social Impact Bonds: Outcome-Based Payment Systems in the UK and US* (Policy Press, 2018).

¹⁵³ AFSCME et al., *A Guide to Evaluating Pay for Success Programmes and Social Impact Bonds* (AFSCME, 2015); Stellina Galitopoulou and Antonella Noya, *Understanding Social Impact Bonds* (OECD, 2016); David Floyd, *Social Impact Bonds: An Overview of the Global Market for Commissioners and Policymakers* (Social Spider, 2017).

Whilst the centralised and shared model of expertise capacity building is the correct one, current efforts do not go far enough to maximise the potential. The GCF, for instance, presents a huge pool of expertise yet is utilised only by central government to the detriment of local authorities.

Recommendation 5

The Government Commercial Function should expand its role to include an advisory service for public service commissioners. This could be modelled on the Association for Public Service Excellence forum model and be provided through a partnership with the Public Service Transformation Academy's regional hubs.

2.2 Contract design and management

Contracts are defined as the key component of “an economic exchange among actors in which the government’s central management challenge is to align public values, institutions, and service-market conditions across the three contracting phases [decision, selection, deployment].”¹⁵⁴ Good contract management is important, not only to ensure that services are delivered to a sufficient quality but to incentivise providers to overcome challenges and strive to improve the services they deliver. Contracts provide a tangible means to ensure risk is both proportional to the service value, and within the capacity of the service provider and commissioning body.¹⁵⁵

2.2.1 Mechanisms and intent

Commissioning, procurement, and contract management are all stages in the same public service cycle. However, all have very different challenges. Interviewees for this paper routinely highlighted that programme directors, for instance, are often good at procurement because there is a clearly defined framework and process, and contracts are restrictive in their scope. Yet the same individuals can be bad at commissioning which requires more flexibility and innovation.

Commissioners need to be able to understand and convey what they wish to get from a contract, both in terms of core and added value, and be realistic in their goals. Too often procurement teams may be placed in a difficult position of trying to acquire a service that has been designed without fully understanding the commercial requirements or being able to solidify these within a contract.¹⁵⁶

As *Reform* has previously argued, in such cases the result can be the imposition of contracts suitable for large providers like G4S or Serco, onto SMEs and VCSEs.¹⁵⁷ These smaller organisations can lack the capacity to either fulfil contractual obligations around data or Key Performance Indicators (KPIs), and also lack the financial liquidity to burden financial uncertainty or delays. Smaller providers also lack the capacity to deal with the “onerous bidding process involving hundreds of meetings and documents”.¹⁵⁸ The government’s Civil Society Strategy published in August 2018 outlined how determined the government is to “work alongside the social sector”.

Much of this is due to the demand for accountability and in that regard all providers should be treated equally. However, it is in the contract design and management that a “lighter touch” is needed.¹⁵⁹ Contracts need to be designed with a flexibility to tailor them to meet the needs of specific providers, such as VCSEs. For this, skilled procurement and

¹⁵⁴ Brown, Potoski, and Van Slyke, ‘Managing Public Service Contracts: Aligning Values, Institutions, and Markets’, 323.

¹⁵⁵ Simon S. Gao and Morrison Handley-Schachler, ‘Public Bodies’ Perceptions on Risk Transfer in the UK’s Private Finance Initiative’, *Journal of Finance and Management in Public Services* 3, no. 1 (2006): 25–40.

¹⁵⁶ Crowe, Gash, and Kippin, *Beyond Big Contracts*, 43–45.

¹⁵⁷ Reform, *Sourcing Public Services: Lessons to Be Learned from the Collapse of Carillion Inquiry: Written Evidence from Reform*.

¹⁵⁸ House of Commons Public Administration and Constitutional Affairs Committee, *After Carillion: Public Sector Outsourcing and Contracting, Seventh Report of Session 2017-19*.

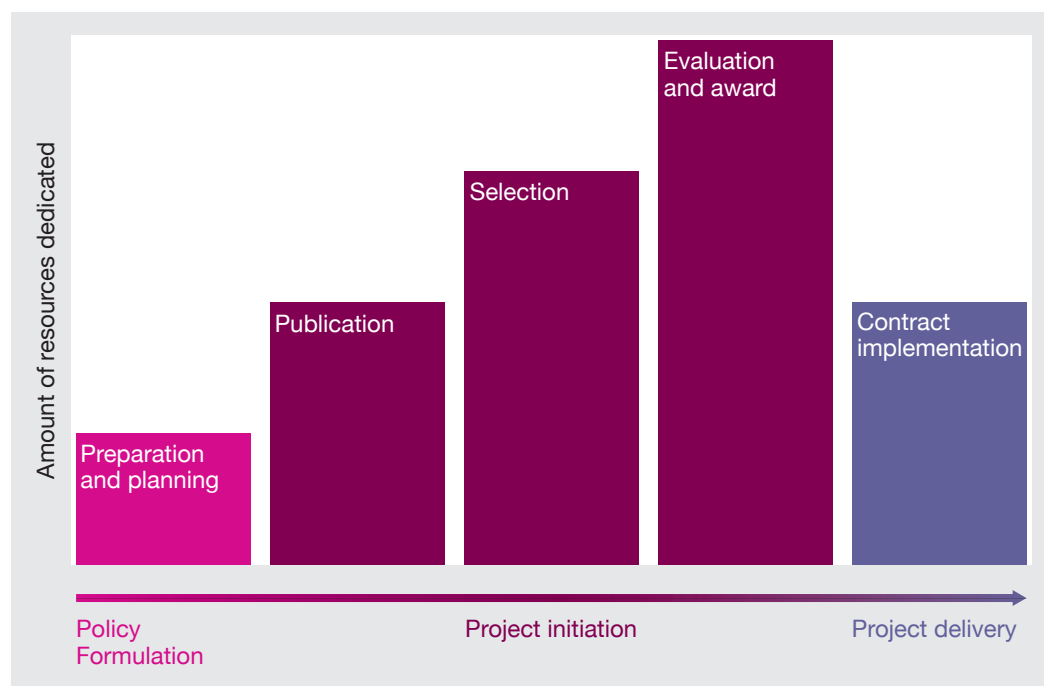
¹⁵⁹ Philip Heath, ‘Light Touch Procurement’, *Harrison Clark Rickerbys*, 10 November 2015.

management individuals are needed. If done right, good contract design and management can enable services to be monitored more effectively, requirements (such as social value) to be considered more centrally, and specific outcomes to be targeted in advance. It can also encourage new firms to bid for tenders, and to engage with different models of contracting.

Partly this is an issue of skills and expertise (Section 3.1). However, it is also an issue about the prioritisation of resources within the civil service. Interviewees for this paper highlighted that one of the consistent problems with public service commissioning remains contract management. Whilst many contract issues stem from government insisting on contracting for complex services which should not be contracted for, the management of existing contracts is equally culpable for many failures.

There is a need to professionalise contract management teams and the individuals responsible for this management. The upskilling across the workforce discussed in Section 2.1.3 would work to rectify this but fundamental issues around contract design, flexibility, and evaluation will need to take precedence. Too much emphasis is placed on the procurement stages of commissioning and not enough on the design or management of the contract (see Figure 12), a stage which may last for years and have the largest impact on the total cost of the service to commissioners.¹⁶⁰

Figure 12: Resources allocated during the commissioning cycle



Source: Based upon responses from interviewees for this paper. Designed only to give a general indication of the attention and effort dedicated to each stage of the procurement process, as laid out in the GCF Outsourcing Playbook 2019. Resources refers to the amount of time, money, effort, individuals, and expertise.

A greater degree of professionalisation amongst the contract management teams in the public sector is needed to ensure that the focus of government does not end with the contract design. Specific training for contract management teams (see Section 2.1.3) and the use of open contracts (see Section 2.5.1) will both play an important role in addressing this imbalance. However, there is also a fundamental need to make commercial expertise available to the contract management teams within central

¹⁶⁰ The Chartered Institute of Purchasing & Supply, *Contract Management Guide*.

government and local authorities. Building this capacity is the responsibility of the CCS and GCF. Both should look to ensuring senior commercial professionals are given a mandate to review contract management teams on an equal footing to both those involved with pre-tender engagement and the procurement process. Doing so would greatly improve the abilities of departments to effectively monitor contracts, thereby affording opportunities for improvement based on immediate feedback, and highlighting potential areas of failure or poor performance before these issues become unmanageable.

2.2.2 Flexibility

Many contracts fail because they are overly prescriptive or too rigid to permit any alterations, a result of either under-skilled management teams or poor contract design.¹⁶¹ The impact of this inflexibility is often a decrease in the quality of the service being delivered, or an increase in cost for the commissioner or provider, and often both simultaneously.¹⁶² Ultimately, it is the people using the service who suffer.

Contract renegotiations are a part of public service commissioning, and particularly of outsourcing. Yet as interviewees for this paper explained, flexibility in outsourcing is also expensive. Changes in contracts result in expensive costs to the commissioner, at the risk of service failures. The NAO, for instance, found that “renegotiations occurred in 33 per cent of PFI projects signed by central government departments between 2004 and 2006 [...amounting] to a value of £4m per project per year, equivalent to about 17% of the value of the project.”¹⁶³

Whilst much of this flexibility is dependent upon effective economic evaluations during the early commissioning stages, it is also a crucial part of good contract management. Yet there is a distinct lack of experience when it comes to ensuring flexibility is a key part of any contracting, as seen in Figure 13.

Figure 13: Capita-British Army Recruiting Partnering Project

In 2012, the British Army entered a £495 million contract with the private firm Capita for the latter to provide substantial recruitment and marketing expertise to the recruitment process for regular and reserve officers and soldiers. As part of a 10-year £1.36 billion partnering agreement, Capita and the Army sought to outsource part of the recruitment process (including the IT element) in an effort to make the recruitment process more efficient and increase the number of officers and soldiers recruited.¹⁶⁴

An NAO evaluation in 2018 concluded that the programme has been marked by failures. These included: the required number of recruits not being met in any year of the programme (shortfall between 21 per cent and 45 per cent each year); a 52 month delay in introducing the online recruitment system at a cost of £113 million to the Army; significant problems in the online system which further reduced number of successful recruits; failure to trail the new system within the Army recruitment environment; and no reduction in the time taken to complete the recruitment process.¹⁶⁵

In April 2017, the Army was forced to revise the performance levels within Capita's contract for the British Army Recruitment Partnering Project (RPP) as they were “already deducting the maximum service credits and considered there was little prospect of Capita's performance improving without agreeing to concessions”.¹⁶⁶

¹⁶¹ Jean Beuve, Marian Moszoro, and Stephanie Saussier, ‘Political Contestability and Contract Rigidity: An Analysis of Procurement Contracts’, *Journal of Economics & Management Strategy* Forthcoming (2019).

¹⁶² Ibid.

¹⁶³ Elisabetta Iossa and David Martimort, ‘Risk Allocation and the Costs and Benefits of Public–Private Partnerships’, *RAND Journal of Economics* 43, no. 3 (2012): 445.

¹⁶⁴ National Audit Office, *Investigation into the British Army Recruiting Partnering Project*, 2018.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid., 9.

Interviewees explained that when the tender process fails to align with the core contractual requirements it is usually the result of a lack of prior engagement between commissioner and provider around the aims of the contract. In the case of the Capita-British Army Recruiting Partnering Project, the results were low quality service delivery and escalating costs for both provider and commissioner over several years. As one interviewee for this paper stated, the British Army were bad customers and Capita were bad clients.

The lack of flexibility in the contract meant that the collapse of the contract would lead to financial losses and the redeployment of military personnel which they were trying to avoid by outsourcing in the first place. When senior MoD commercial professionals were brought into negotiations, the decision was made that “resetting” the relationship and reducing performance markers was seen as the preferable alternative despite the additional costs.¹⁶⁷

2.2.3 Outcomes-Based Commissioning

Whilst seeking to reduce risk, contracts should also provide suppliers with the ability to trial innovative models of service delivery. OBC provides a potential solution to this inflexibility. Initially codified by the 2010 *Open Public Services* white paper,¹⁶⁸ OBC seeks to use market forces to improve the quality and reduce the costs of public services.,¹⁶⁹ The emphasis is shifted from “what commissioners plan to buy” to “what citizens may want”.¹⁷⁰ Services are commissioned with an explicit focus on the social, personal, or clinical outcomes which are intended to be achieved or improved as a result of the service provision within a targeted cohort.¹⁷¹ Providers are then paid, at least in part, proportional to their successes in achieving those outcomes.¹⁷²

Within OBC, commissioners are encouraged to be strict with the outcomes, timelines, and target cohort when contracting, but to also “grant the provider freedom to operate” and not be “overly prescriptive about the means by which outcomes are achieved”.¹⁷³ Because the methods of delivering outcomes are undefined there is capacity for individual tailoring between commissioners, providers, and citizens to best recognise individual needs and ensure a personalisation of the delivered service.¹⁷⁴ Social Impact Bonds (SIBs) provide one method of trialling these interventions and have been the subject of much debate around the often significantly improved outcomes versus additional resource demands.¹⁷⁵

Since 2012, there has been a significant increase in the number of outcomes-based payment schemes behind public service provision.¹⁷⁶ In 2015, the NAO found there were 52 Government schemes containing PbR elements, worth a total of at least £15 billion (although the NHS's PbR national tariff is not a form of OBC).¹⁷⁷ These covered diverse areas including criminal justice, overseas development, social work, and welfare to work programmes.

167 Public Accounts Committee, *Oral Evidence: Capita's Contracts with the Ministry of Defence*, HC 1736 (London: The Stationery Office, 2019).

168 HM Government, *Open Public Services White Paper* (London: The Stationery Office, 2011).

169 Social Finance, *Commissioning for Outcomes across Children's Services and Health and Social Care*, 2015; Caroline Glendinning et al., *Outcomes-Focused Services for Older People* (Social Care Institute for Excellence, 2006).

170 Harwich, Hitchcock, and Fischer, *Faulty by Design. The State of Public-Service Commissioning*, 9.

171 Glendinning et al., *Outcomes-Focused Services for Older People*.

172 Government Outcomes Lab, *A Guide to Determining Whether an Outcome Based Commissioning Project Is Viable* (Government Outcomes Lab, 2017), 6.

173 Ibid., 8; Rupert Dunbar-Rees, 'Paying for What Matters Most: The Future of Outcomes-Based Payments in Healthcare', *Future Healthcare Journal* 5, no. 2 (2018): 98–102.

174 Jenny Harlock, *From Outcomes-Based Commissioning to Social Value? Implications for Performance Managing the Third Sector*, 2014; Outcomes Based Healthcare, *Contracting for Outcomes: A Value-Based Approach*.

175 Dear et al., *Social Impact Bonds: The Early Years*; Kevin Albertson, 'Outcomes Based Commissioning: Payment by Results and Social Impact Bonds', Academy for Social Justice Commissioning, 27 March 2018; Bridges Fund Management, *Better Outcomes, Better Value: The Evolution of Social Impact Bonds in the UK*, 2018; Cabinet Office, Department for Digital, Culture, Media & Sport, and Office for Civil Society, 'Social Impact Bonds'. Webpage, 26 September 2017; Albertson and Fox, *Payment by Results and Social Impact Bonds*.

176 National Audit Office, *Outcome-Based Payment Schemes: Government's Use of Payment by Results*, 2015, 5.

177 Ibid., 13.

Given the data-rich environment generated within the NHS,¹⁷⁸ it is unsurprising that outcomes have seen a concerted drive in healthcare that far exceeds other areas of public services.¹⁷⁹ Consequently, some of the points raised below may be more relevant to public services beyond healthcare. However, data governance and privacy requirements also provide particular challenges in healthcare, especially regarding outcomes measurement. Previous *Reform* work, for instance, has shown that despite the popularity of an outcomes-based approach to commissioning, this support has not translated into tangible policy changes in most areas of public services.¹⁸⁰ Although eager to realise the potential improvements for service-users and value-for-money, many commissioners and providers outside of healthcare remain reluctant to embrace the switch to OBC. Interviewees highlighted three particular issues behind this hesitation: that outcomes remain hard to measure and contract for; that the necessary data is often poor quality; and that designing and managing outcomes-based contracts can be more time consuming than other contract types.

First, contracting for outcomes requires identifying and understanding the needs of a target cohort and defining the desired changes in the circumstances of those individuals, both of which can be difficult to do effectively and hard to put into a contract.¹⁸¹ Although the health data analytics organisation, Outcomes Based Healthcare (OBH), note “we have yet to come across any satisfactory technical reason why outcomes [in healthcare] can’t be measured”,¹⁸² quantifying outcomes in many other public services remains more challenging than assessing inputs, outputs, or activities.¹⁸³ This is partly due to the sheer breadth of potential outcomes, and the challenges of measuring these outcomes.¹⁸⁴

Secondly, although there are currently several useful frameworks and toolkits for commissioners considering OBC, there is a lack of a clear framework around data for monitoring and evaluation.¹⁸⁵ Poor quality data reduces both the ability of commissioners to successfully design a contract around specific outcomes and measure the outcomes during and after the programme.¹⁸⁶ If contracts are based on inconsistent, inaccurate, or incomplete data, the “resultant targets [may] be unrealistic or unrepresentative of the target populations”, concludes an *ICF International* report.¹⁸⁷ Improving the quality of data collected and use of that data is key to effective evaluation.¹⁸⁸

Finally, in comparison with other models of public service procurement, many commissioners continue to feel that contracting for outcomes is significantly more difficult and time-consuming than block payments.¹⁸⁹ After a decade of austerity-driven reductions in skilled commissioners, some local authorities can lack the capacity to collect and assess the data required to effectively measure outcomes, particularly in local

178 Eleonora Harwich and Rose Lasko-Skinner, *Making NHS Data Work for Everyone* (Reform, 2018); Jessamy Bagenal, and Annemarie Naylor, ‘Harnessing the Value of NHS Patient Data’, *The Lancet* 392, no. 10163 (2018).

179 Dunbar-Rees, ‘Paying for What Matters Most: The Future of Outcomes-Based Payments in Healthcare’; M Sanderson et al., *New Models of Contracting in the NHS: Interim Report* (Policy Research Unit on Commissioning and the Healthcare System, London School of Hygiene and Tropical Medicine, 2017); Outcomes Based Healthcare, *Outcomes Myths?*, 2014; Outcomes Based Healthcare, *Contracting for Outcomes: A Value-Based Approach*; Jennifer Clawson et al. *Competing on Outcomes: Winning Strategies for Value-Based Health Care*. Bcg.Perspectives, 2014.; Elizabeth H. Bradley et al. ‘Health and Social Services Expenditures: Associations with Health Outcomes’. *BMJ Quality & Safety*, (2011).; Joanne Lynn et al., ‘Using Population Segmentation to Provide Better Health Care for All: The “Bridges to Health” Model’, *The Millbank Quarterly* 85, no. 2 (2007): 185–208; Outcomes Based Healthcare, *Segmentation for Outcomes: Segmentation Approaches for Outcomes Based Commissioning* (Outcomes Based Healthcare, 2016).

180 Harwich, Hitchcock, and Fischer, *Faulty by Design. The State of Public-Service Commissioning*, 9–16.

181 Sutton Council and Commissioning Academy, *Commissioning Case Study: Commissioning for Outcomes and Measuring Social Impact in Sutton*, n.d.

182 Outcomes Based Healthcare, *Outcomes Myths?*, 7.

183 Paul O’Hare, ‘Outcomes-Based Contracting: Past, Present and Future’, *National Outsourcing Association: Outsourcing Yearbook 2016*, 2016, 44–45.

184 James Mensing, ‘The Challenges of Defining and Measuring Outcomes in Nonprofit Human Service Organizations’, *Human Service Organizations: Management, Leadership & Governance* 41, no. 3 (2017).

185 National Audit Office, *Payment by Results: Analytical Framework for Decision Makers*, 2015; Government Outcomes Lab, *A Guide to Determining Whether an Outcome Based Commissioning Project Is Viable*.

186 Social Finance, *Commissioning for Outcomes across Children’s Services and Health and Social Care*.

187 Paul Mason et al., *Payment by Results: Learning from the Literature* (ICF International, 2015), 6.

188 Harwich, Hitchcock, and Fischer, *Faulty by Design. The State of Public-Service Commissioning*, 14–16.

189 Government Outcomes Lab, *A Guide to Determining Whether an Outcome Based Commissioning Project Is Viable*.

government.¹⁹⁰ Partly, this is due to the lack of established outcome metrics for many public services, leading to commissioners having to create these criteria themselves.¹⁹¹ Sometimes it is the result of the market and providers failing to respond to outcomes based activity.¹⁹²

The data requirements for accurately measuring outcomes and targets also present an added difficulty to OBC.¹⁹³ This includes the quality and access to appropriate datasets, as well as ethical and legal considerations around data.¹⁹⁴ Evaluating outcomes often requires both personal data and population-level data, each of which requires different governance and regulation.¹⁹⁵ All of these considerations complicate the process of contracting for outcomes.

Nevertheless, these challenges can be overcome. Lessons learnt from early work on OBC in healthcare and local authorities about good quality and well-shared data show that OBC can prove very effective at improving outcomes and achieving value for money. However, until data standards across the public service landscape are improved, gaining traction on OBC will remain challenging for many areas of public services.

2.3 Understanding and transferring risk

Currently, sharing accountability for service failure often translates to allocating risk to providers through a contract. Good risk management is essential to the successful delivery of public services.¹⁹⁶ When done well, it drives the best value for products or services and maintains service continuity.¹⁹⁷ However, the collapse of Carillion¹⁹⁸ and the recent abolition of PFI contracts¹⁹⁹ have thrown into question government's aptitude for managing risk in the delivery in public services. The inquiry held by the PACAC concluded that government was often trying to outsource risk when it was not possible.²⁰⁰

2.3.1 Aggressive risk transfer

Poor practice and lack of understanding have been described as the “main cause” of issues pertaining to risk allocation.²⁰¹ In particular, the attempt to ‘aggressively’ transfer risk has had ramifications for the public and taxpayer.²⁰² Commissioners have tried to pass on too much risk to providers. A case in point being the collapse of Carillion who (among other things) had been shouldering risks “that they [...could not] possibly manage.”²⁰³

190 Crowe, Gash, and Kippin, *Beyond Big Contracts*, 43–44; Alisa Cook, *Delivering Change, Defining Outcomes and Capturing Evidence: What Can We Learn across the UK?*, Event Report (Alliance for Useful Evidence, 2017), 8; Helen Thomas, *Understanding Commissioning and Procurement: A Guide for Local Compacts* (Compact Voice, 2013), 11.

191 Government Outcomes Lab, *A Guide to Determining Whether an Outcome Based Commissioning Project Is Viable*; Chris Paley and Colin Slasberg, ‘Implementing Outcome-Based Commissioning’, *Journal of Care Services Management* 1, no. 4 (2007): 353–61.

192 Bennett, *Commissioning in Local Government: A Research Project for Local Partnerships*, 7.

193 Michael J. Roy, Neil McHugh, and Stephen Sinclair, ‘A Critical Reflection on Social Impact Bonds’, *Stanford Social Innovation Review*, 2018.

194 Sarah Timmis, Luke Heselwood, and Eleonora Harwich, *Sharing the Benefits: How to Use Data Effectively in the Public Sector* (Reform, 2018).

195 *Ibid.*, 39–40.

196 Sally Brown, Deborah Fitzsimmons, and Matthius Beck, ‘Does the UK Local Finance Improvement Trust (Lift) Initiative Improve Risk Management in Public-Private Procurement?’, *Journal of Risk and Governance* 1, no. 2 (2008); Rose Lasko-Skinner, ‘Risky Business? An Introduction to Risk in the Procurement of Public Services’, *The Reformer Blog*, 5 April 2018; National Audit Office, *Good Practice: Managing Risks in Government* (National Audit Office, 2011), 4.

197 Government Commercial Function, *Risk Allocation: Outsourcing Guidance Note*, 2019, 1.

198 House of Commons Public Administration and Constitutional Affairs Committee, *After Carillion: Public Sector Outsourcing and Contracting, Seventh Report of Session 2017–19*; National Audit Office, *Investigation into the Government's Handling of the Collapse of Carillion*, vol. HC 1002, 2018.

199 Rob Davies, ‘Hammond Abolishes PFI Contracts for New Infrastructure Projects’, *The Guardian*, 29 October 2018.

200 House of Commons Public Administration and Constitutional Affairs Committee, *After Carillion: Public Sector Outsourcing and Contracting, Seventh Report of Session 2017–19*, 3.

201 Government Commercial Function, *Risk Allocation: Outsourcing Guidance Note*, 2.

202 Public Administration and Constitutional Affairs Committee, ‘Oral Evidence: Sourcing Public Services: Lessons to Be Learned from the Collapse of Carillion’.

203 House of Commons Public Administration and Constitutional Affairs Committee, *After Carillion: Public Sector Outsourcing and Contracting, Seventh Report of Session 2017–19*.

Other reports have argued that the drive to aggressively transfer risk is tied to the budgetary constraints faced by commissioners since 2010.²⁰⁴ This has meant that commissioners have attempted to transfer as much risk as possible to the provider.²⁰⁵ One of the mechanisms for this has been to include a ‘full liability clause’ in contracts, which means the providers take on all risk, irrespective of their aptitude to manage it.²⁰⁶ This might include unmanageable risks such as economic downturn that the public sector should not attempt to transfer. Many interviews carried out for this paper argued that this was having poor consequences on providers who were not in a good position to bear these kinds of risks, with negative effects on the service’s overall quality and increasing costs. The Outsourcing Playbook has recently amended that policy, so that government departments are expected “not to ask suppliers to take unlimited liabilities”.²⁰⁷

It should not be overlooked that aggressive risk transfer can also happen at policy level, with knock-on effects for public sector markets. For example, parent-company guarantees, which are a mandatory insurance for SMEs, have been a barrier to establishing competitive and sustainable public sector markets.²⁰⁸ The guarantee has been considered an aggressive attempt by government to transfer financial risk onto smaller providers.²⁰⁹ In the Work and Health programme, this guarantee prevented SMEs and third sector organisations taking on contracts from government as the cost of insurance was too high for smaller organisations to bear,²¹⁰ ultimately preventing them from providing services.²¹¹ The effect at a national level of such restrictions is the increased oligopoly²¹² of large providers in public sector markets, and Government’s dependence on them.

2.3.2 Clarifying and transferring risk

The government is responsible for providing services and therefore ultimately responsible for public services not being delivered (see Figure 14). Nonetheless, government can and should share risk with its partners, not least as a way of ensuring they are held to account. There have been various issues with this, such as confusion in government about what risk is.²¹³

Figure 14: Definition of risk in public service delivery

In the public sector risk is to do with uncertainty. The uncertainty that the goods or services will be delivered at the right time, at the right cost, in the right volume, in the right condition etc.²¹⁴ Risk in public service procurement can therefore be either a threat or an opportunity. It is possible that the service will be delivered cheaper or faster, as well as later or more expensive, than negotiated.²¹⁵

204 Reform, *Sourcing Public Services: Lessons to Be Learned from the Collapse of Carillion Inquiry: Written Evidence from Reform*; Sturgess, *Just Another Paperclip? Rethinking the Market for Complex Public Services*.

205 Sturgess, *Just Another Paperclip? Rethinking the Market for Complex Public Services*.

206 Ibid., 33.

207 Government Commercial Function, *Outsourcing Playbook: Central Government Guidance on Outsourcing Decisions and Contracting*, 39.

208 Alexander Hitchcock, Charlotte Pickles, and Alasdair Riggs, *The Work and Health Programme: Levelling the Playing Field* (Reform, 2016), 20.

209 Sturgess, *Just Another Paperclip? Rethinking the Market for Complex Public Services*, 34.

210 Hitchcock, Pickles, and Riggs, *The Work and Health Programme: Levelling the Playing Field*, 20.

211 Ibid.

212 Defined as an industry or market with limited competition, dominated by a small number of companies

213 Government Commercial Function, *Outsourcing Playbook: Central Government Guidance on Outsourcing Decisions and Contracting*; Government Commercial Function, *Risk Allocation: Outsourcing Guidance Note*; Sturgess, *Just Another Paperclip? Rethinking the Market for Complex Public Services*.

214 National Audit Office, *Supporting Innovation: Managing Risk in Government Departments* (National Audit Office, 2000).

215 Ibid., 1; HM Treasury, *The Orange Book: Management of Risk- Principles and Concepts* (London: Stationery Office, 2004), 9.

Whilst risk can never be wholly transferred in public services,²¹⁶ it is important that the public sector transfer some types of risk (see examples in Figure 15) to the provider when they are more suited to managing them. For example, sometimes the provider is best placed to manage financial risks, as they might be responsible for forecasting expenses or delivering services within the contracted budget (see Figure 9 for examples of how financial risk can be transferred through contracts).

There are different types of risk relating to the failure of service provision (see Figure 15) which can be used in a contract (see Section 1.5) to distinguish contractors' responsibilities. Currently there is no consensus over what different types of risk are or how many there are (Figure 15).²¹⁷

Figure 15: Examples of types of risk

Market risk: the risk that the public sector market will change. For example, an economic shock might increase unemployment thereby changing the profiles of people referred to employment services.

Financial risk: the risk that the project will cost more than expected, which can be broken down further. It might be the result of the changing price of a certain commodity or the project overrunning. For example, a failure in the supply chain may force a company to buy goods at a higher price.

Political risk: the risk that a change in policy or political climate will affect the demands of the service. For example, a change to health and safety regulations could prohibit certain medical treatments in the UK. The provider responsible may have to supply new treatments at a different price or quantity.

Reputational risk: the risk that the delivery of a service may be unpopular or unsatisfactory among the public or in the political sphere, which may threaten the reputation of the organisation. For example, the private-sector provision of sensitive services, such as work-capability assessments, are more likely to receive criticism based on the nature of the service being outsourced, rather than the quality of delivery.²¹⁸

Whilst the nature of risk is inherently circumstantial and should not be managed under a 'one-size-fits-all' strategy, procurement and public-private partnerships more broadly would benefit from clarity of process, especially considering risk appraisal is something that is often shared across departments and organisations. Using a common standards framework that can then be applied to services could mitigate confusion and improve inter-departmental and external communication.

2.3.3 Risk and contingency planning

Once risks have been identified and assessed, a risk strategy that includes contingency plans for service failures should be created.²¹⁹ Part of this will involve allocating risk,²²⁰

²¹⁶ Lasko-Skinner, 'Risky Business? An Introduction to Risk in the Procurement of Public Services'; House of Commons Public Administration and Constitutional Affairs Committee, *After Carillion: Public Sector Outsourcing and Contracting, Seventh Report of Session 2017-19*.

²¹⁷ See references for various different definitions: National Audit Office, *Supporting Innovation: Managing Risk in Government Departments*, 5; Sturgess, *Just Another Paperclip? Rethinking the Market for Complex Public Services*, 33–34; HM Treasury, *The Orange Book: Management of Risk- Principles and Concepts*, 2004, 15–17; European Commission and Directorate General for Research, *Risk Management in the Procurement of Innovation Concepts and Empirical Evidence in the European Union: Expert Group Report*. (Luxembourg: Publications Office, 2010), 17; Cabinet Office, 'Management of Risk in Government: A Framework for Boards and Examples of What Has Worked in Practice', January 2017, 6–7.

²¹⁸ HM Treasury, *The Orange Book: Management of Risk- Principles and Concepts*, 6–7.

²¹⁹ European Commission and Directorate General for Research, *Risk Management in the Procurement of Innovation Concepts and Empirical Evidence in the European Union*; HM Treasury, *The Orange Book: Management of Risk- Principles and Concepts*; Cabinet Office, 'Management of Risk in Government: A Framework for Boards and Examples of What Has Worked in Practice'.

²²⁰ European Commission and Directorate General for Research, *Risk Management in the Procurement of Innovation Concepts and Empirical Evidence in the European Union*, 11.

ideally to those that are most suited to manage them.²²¹ In contract terms, these responsible parties would be declared ‘risk owners’ and become culpable for such risks.²²²

This is one of the key areas the new Outsourcing Playbook provides guidance on. It outlines three main areas that government departments need to get right: identification (scoping the market to gauge what the service might be at risk from); quantification (assessing how likely the risks are); and allocation (working out who is best suited to manage risk).²²³

Good contracting will assign the risks that can be clearly defined: for example, political risk or specific financial risks to separate players rather than overall service risk.²²⁴ Some types are better managed by the supplier and others by the government or commissioner.²²⁵ The new Playbook provides “generic” examples of types of risk and recommends which party is best suited to managing each type.²²⁶ For instance, it recommends “volume change risk” (i.e. a change in demand for a public service, leading to more or less resources needed) should “not be wholly transferred to the supplier” and managed by government, unless the “underlying business model of the supplier / market allows for volume change (e.g. cloud based IT services)”.²²⁷ The rationale for this is that the service provider does not have control over service demand.

The ‘*Make or Buy*’ *Decision Outsourcing Guidance Note* is not a well sign-posted document. It is recommended by the Playbook in addition to various other guidelines such as the Treasury’s *Orange Book* without explaining which takes precedent. Additionally, it does not include guidance for how to practically manage risks by either the provider or public sector. This seems misguided, as once risk has been apportioned, individual organisations should have a specific risk management strategy that responds to the potential threats to the services.²²⁸ For instance, an insurance scheme so that if delivery goes over budget, the bill will be picked up by an external company.²²⁹ These management strategies should be in accordance with the overall service strategy.²³⁰ Currently the guidance note does not suggest strategies for practically managing risk.

2.3.3.1 Resolution planning

The Government has recently mandated companies with either “Critical Contracts” or “other contracts with an estimated value exceeding £10m per year” to create ‘Resolution Plans’ internally.²³¹ This is essentially key information about the supplier, such as its degree of dependency on other suppliers, and its public sector contracts. The ‘Resolution Plans’ include information about what happens if the contract or company is at risk of failure or insolvency, and crucially how the contracted services might continue to be delivered in the short-term.²³² It will also include a plan for what happens if a contract needs to be terminated for reasons outside of failure.²³³

The ‘Resolution Plans’ are in response to the response to the call for ‘living wills’, which are a plan for how the public service can continue to be provided if a company should fail, without cost to the taxpayer.²³⁴ These were suggested to encourage the company to be

²²¹ HM Treasury, *The Orange Book: Management of Risk- Principles and Concepts*, 16.

²²² Ibid.

²²³ Government Commercial Function, *Outsourcing Playbook: Central Government Guidance on Outsourcing Decisions and Contracting*, 39.

²²⁴ Government Commercial Function, *Outsourcing Playbook: Central Government Guidance on Outsourcing Decisions and Contracting*; Cabinet Office, ‘Management of Risk in Government: A Framework for Boards and Examples of What Has Worked in Practice’, 15.

²²⁵ Sturgess, *Just Another Paperclip? Rethinking the Market for Complex Public Services*; National Audit Office, *Supporting Innovation: Managing Risk in Government Departments*.

²²⁶ Government Commercial Function, *Risk Allocation: Outsourcing Guidance Note*, 5.

²²⁷ Ibid., 1.

²²⁸ National Audit Office, *Supporting Innovation: Managing Risk in Government Departments*; HM Treasury, *The Orange Book: Management of Risk- Principles and Concepts*; European Commission and Directorate General for Research, *Risk Management in the Procurement of Innovation Concepts and Empirical Evidence in the European Union*.

²²⁹ HM Treasury, *The Orange Book: Management of Risk- Principles and Concepts*, 27.

²³⁰ Ibid.

²³¹ Government Commercial Function, *Resolution Planning: Guidance Note*, 2019.

²³² Ibid., 5–6.

²³³ Ibid., 3.

²³⁴ Cabinet Office, ‘New “Social Value” Contracts to Revolutionise Government Procurement’, Press release, November 2018.

more active in managing risks associated with public service delivery. The PACAC post-Carillion inquiry endorsed the creation of living wills, adding that:

*The Government should lay out in their response to this report what these living wills will contain [...] and clarify whether these wills would only apply when a contractor goes bankrupt, or whether they would also apply when a contractor withdraws effectively from a contract.*²³⁵

The report also notes that “some failure of suppliers is inevitable”, indicating that irrespective of recent disasters, it is important for companies to bear some responsibility for the risks of their own collapse.²³⁶

2.3.4 Responsible bidding

Whilst good risk and contingency planning are the responsibility of providers, in some cases companies are bidding for contracts they know are not, or are unlikely to be, profitable.²³⁷ This might be for a host of reasons. Rupert Soames, Chief Executive Officer of Serco, commented after Carillion’s collapse that providers felt compelled to deliver the growth they had promised, meaning they accepted contracts that were unprofitable and took on risks that were unmanageable.²³⁸ In this situation, Soames argues “nobody is blameless”, company boards should not dress up margins and present overly optimistic forecasts in order to win contracts, whilst government should not put unreasonable contracts out for tender.²³⁹ The latter issue resulting in a ‘race to the bottom’, where government procurement teams have evaluated purely on price rather than quality – driving down the prices of contracts to an unsustainable level.²⁴⁰

There are other reasons why companies bid for unfeasible contracts, as revealed by interviews carried out for this paper. First, that it is cheaper to run a contract at a loss long-term than shut down enterprise altogether, and second, that continued bidding for cheap contracts will ensure companies maintain, or increase, their market share.²⁴¹ Whatever the drive is for companies to bid for contracts at prices they cannot deliver on, it is ultimately the company’s responsibility to accurately assess their own capacity to provide services.

2.4 Accountability

Accountability is a key concern in public service delivery, as failure can have a serious impact on society and people’s lives.²⁴² Government accountability is defined as either “giving account of your actions to someone (for example, through a reporting requirement), or being held to account for your actions (such as a select committee questioning officials about departmental performance in a formal evidence session)”.²⁴³ It is therefore about transparency and openness, ensuring people who are responsible for failures are penalised and, crucially, helping organisations learn from mistakes. Whilst both commissioners and providers need to be incentivised to deliver the highest-quality and most innovative public services, they also need to be held accountable.

A recent report found that “weaknesses [in accountability] have contributed to repeated failures, which harm the public and undermine the trustworthiness of public institutions”.²⁴⁴ Some of these issues are specific to public services, which are increasingly

²³⁵ House of Commons Public Administration and Constitutional Affairs Committee, *After Carillion: Public Sector Outsourcing and Contracting, Seventh Report of Session 2017-19*, 33.

²³⁶ *Ibid.*, 35.

²³⁷ Sturgess, *Just Another Paperclip? Rethinking the Market for Complex Public Services*, 19.

²³⁸ Business leader, ‘Carillion Halted Stupid, Unthinking Outsourcing. Now It’s Time for Reform’, *The Guardian*, 25 February 2018.

²³⁹ *Ibid.*

²⁴⁰ Sturgess, *Just Another Paperclip? Rethinking the Market for Complex Public Services*, 6.

²⁴¹ For further explanation see: *Ibid.*, 27–30.

²⁴² Ferry et al., *Public Service Accountability: Rekindling a Debate*, 1.

²⁴³ National Audit Office, *Accountability to Parliament for Taxpayers’ Money*, 2016.

²⁴⁴ Guerin, McCrae, and Shepherd, *Accountability in Modern Government*, 3.

complex organisations²⁴⁵ and delivered by a mix of external providers – accountability therefore is a practical challenge.²⁴⁶ In addition, devolution agendas have led to changes in governance frameworks that accountability has not kept up with.²⁴⁷ For example, the Sustainability and Transformation Partnerships (STPs) in healthcare have required new forms of collective governance to function, resulting in gaps in accountability.²⁴⁸ In short, mechanisms for accountability have not matched a shifting landscape of public service design.²⁴⁹

2.4.1 Blurred lines of accountability

The *Ethical Standards for providers of public standards framework*, set by the Committee on Standards in Public Life,²⁵⁰ outlines that “holders of public office are accountable to the public for their decisions and actions and must submit themselves to the scrutiny necessary to ensure this”. Holders of public office are defined as “all those involved in the delivery of public services”.²⁵¹ This means all types of providers are accountable for their actions and responsible for their part of service delivery if it goes wrong. However, the framework also states government bodies commissioning and procuring services “are ultimately responsible and accountable for those services [...]. Accountability does not end and should not dissipate on the commissioning or contracting out of public services”.²⁵² Indicating that whilst there is some sharing of accountability among providers, government remains ultimately responsible and accountable to the public for delivering public services. This somewhat blurs the boundaries of accountability, as the accountability of government bodies can overlap with that of external providers. The attempt to pass some accountability to providers whilst retaining ultimate accountability makes the system at risk of confusion over who is accountable for what and to what degree.

2.4.2 Weak mechanisms for accountability

It is important to recognise that these issues of accountability in public services are arguably part of wider systemic failures of accountability in government and Whitehall.²⁵³ A House of Commons research paper found a lack of clarity between ministers and the civil service with respective accountabilities and obligations, compounded by a lack of consensus of where culpability should fall.²⁵⁴

Nonetheless, there are areas which are particularly weak, such as financial mismanagement and the collapse of service or chronic underperformance.²⁵⁵ The drivers of these being both a lack of clarity over who is responsible for performance and the consequences for when these go wrong in addition to a lack of publicly available information.²⁵⁶

²⁴⁵ Harwich, Hitchcock, and Fischer, *Faulty by Design. The State of Public-Service Commissioning*.

²⁴⁶ Ferry et al., *Public Service Accountability: Rekindling a Debate*; Guerin, McCrae, and Shephard, *Accountability in Modern Government*.

²⁴⁷ Hugh Alderwick et al., *Sustainability and Transformation Plans in the NHS: How Are They Being Developed in Practice?* (The King's Fund, 2016), 5.

²⁴⁸ Ibid., 4.

²⁴⁹ Guerin, McCrae, and Shephard, *Accountability in Modern Government*; Tom Christensen and Per Lægheid, *The Routledge Handbook to Accountability and Welfare State Reforms in Europe* (Taylor & Francis, 2016).

²⁵⁰ The Committee on Standards in Public Life is responsible for: advising the Prime Minister on ethical issues relating to the standards in public life; conducting broad inquiries into standards of conduct (this does not include investigations into individual allegations – this is the role of regulators); and promoting 7 principles of public life. For further information see: Committee on Standards in Public Life, ‘About Us’, Webpage, 2019.

²⁵¹ Committee on Standards in Public Life and Lord Paul Bew, *Ethical Standards for Providers of Public Services*, 2014.

²⁵² Ibid., 17.

²⁵³ For more on these issues, see: Oonagh Gay, *Individual Ministerial Accountability* (House of Commons Library, 2012); National Audit Office, *Accountability to Parliament for Taxpayers' Money*; Guerin, McCrae, and Shephard, *Accountability in Modern Government*; Christensen and Lægheid, *The Routledge Handbook to Accountability and Welfare State Reforms in Europe*.

²⁵⁴ Gay, *Individual Ministerial Accountability*.

²⁵⁵ Guerin, McCrae, and Shephard, *Accountability in Modern Government*, 3.

²⁵⁶ Ibid.

High-profile outsourcing errors, from the collapse of Carillion²⁵⁷ to the offender-monitoring tag scheme (which has so far cost the taxpayer £60 million without coming to fruition),²⁵⁸ have both highlighted areas of weak accountability. In the example of the offender-monitoring tag scheme, neither the government department nor private provider correctly accounted for the spend of public money over a period of eight years. Similarly, in the example of Carillion, neither the company nor government department effectively monitored the companies' market health before awarding or taking on public sector contracts. It should be noted that both examples have had an inquiry but, notwithstanding Carillion directors losing their jobs, so far no individual or organisation has faced direct legal repercussions for the misspend of public money or service failure. The inquiry found Carillion directors responsible for collapse,²⁵⁹ none of whom have faced a penalty, but are still being investigated.²⁶⁰ The responsibility for the overcharging of offender monitoring tags also remains unresolved. The companies have repaid the money, but no one has been fined or faced legal action.²⁶¹

A lack of accountability is particularly felt by the public towards private providers. Whilst large private providers such as G4S and Serco are heavily scrutinised by the media, research has found that the public feel unable to hold providers, in either the public or private sector, to account,²⁶² and can feel their voices are often unheard.²⁶³ A recent Information Commissioner's Office (ICO) report revealed only 23 per cent of the public thought information about private sector companies operating in the public sector were accessible.²⁶⁴ Furthermore, in some services such as social care, a perceived lack of accountability has been particularly aimed at private providers, where users have felt it was harder to complain about a service as a result of them being run by a private company.²⁶⁵

It is primarily the role of Parliament to ensure accountability for the people it represents,²⁶⁶ however the public should be able to scrutinise providers and hold them to account themselves, rather than solely relying on top-down mechanisms such as financial incentives or penalties. So far, 'bottom-up' forms of accountability (such as consumer choice in quasi-markets or public opinion through league tables)²⁶⁷ that enable the public to hold providers of services to account themselves have "rarely matched the rhetoric" and have been "very contextually dependent" in terms of impact.²⁶⁸

257 Reform, *Sourcing Public Services: Lessons to Be Learned from the Collapse of Carillion Inquiry: Written Evidence from Reform*.

258 House of Commons Committee of Public Accounts, *Offender-Monitoring Tags: Fifteenth Report of Session 2017-19*, HC 458 (London: The Stationery Office, 2018).

259 House of Commons Business, Energy and Industrial Strategy and Work and Pensions Committees, *Carillion: Joint Inquiry Report*, HC 769 (London: The Stationery Office, 2018).

260 Work and Pensions Committee, 'Carillion Joint Inquiry'. Webpage, 2019; For more see: Unite the Union, *Ending Bandit Capitalism: Learning the Lessons Following Carillion's Collapse* (Unite the Union, 2017); Gregory Dy, 'Carillion Bosses Face New Inquiry from Insolvency Service', *Finance*, 30 December 2018; Liam Kelly, 'Ex-Bosses Philip Green and Richard Howson Face Ban in Carillion Inquiry', *The Sunday Times*, 30 December 2018; James Pugh, 'Carillion Bosses Face Fresh Questioning over Collapse', 1 January 2018; Gill Plimmer, 'Moves to Oust G4S and Serco as Tagging Suppliers Fail', *Financial Times*, 15 September 2015; James Meikle, 'G4S and Serco Hand over Offender Tagging Contracts over Fraud Claims', *The Guardian*, 12 December 2013; Kate Hall, '£60m, Five Years Late... Tag Criminal Tagging as a "catastrophic Waste" of Taxpayers' Cash', *The Register*, January 2018; Alan Travis and home affairs editor, 'Offender Tagging: Serco to Repay More than £68m in Overcharging', *The Guardian*, 19 December 2013.

261 Plimmer, 'Moves to Oust G4S and Serco as Tagging Suppliers Fail'; BBC News, 'G4S Pays £108.9m for Tagging Scandal', *BBC News*, 12 March 2014; Meikle, 'G4S and Serco Hand over Offender Tagging Contracts over Fraud Claims'; Hall, '£60m, Five Years Late... Tag Criminal Tagging as a "catastrophic Waste" of Taxpayers' Cash'; Travis, 'Offender Tagging: Serco to Repay More than £68m in Overcharging'.

262 Deborah Wilson, *Targets, Choice and Voice: Accountability in Public Services* (2020 Public Services Trust, 2010); Rachel Ashworth, and James Downe, *Achieving Accountability in Public Services*. Public Policy Institute for Wales, 2014.

263 NHS Future Forum, *Patient Involvement and Public Accountability: A Report from the NHS Future Forum*. NHS Future Forum, 2011.

264 Information Commissioner's Office, *Outsourcing Oversight? The Case for Reforming Access to Information Law: Report of the Information Commissioner's Office to Parliament*, 2019, 6.

265 Robin Pharoah and Alex Dark, *My Expectations for Raising Concerns and Complaints* (Health Service Ombudsman, Local Government Ombudsman Healthwatch England, 2014).

266 Parliament, 'Parliament and the Government'. Webpage, 2019.

267 For more on these, see: Wilson, *Targets, Choice and Voice: Accountability in Public Services*; Stephen Gibbons, Stephen Machin, and Olmo Silva, 'Choice, Competition, and Pupil Achievement', *Journal of the European Economic Association* 6, no. 4 (June 2008): 912-47; Julian Le Grand, 'Delivering Britain's Public Services through "Quasi-Markets": What We Have Achieved so Far', *Research in Public Policy*, no. 13 (Winter 2011): 3-4.

268 Wilson, *Targets, Choice and Voice: Accountability in Public Services*, 7.

There is a lack of opportunity for the public to scrutinise government. A report found it was “almost impossible for the public to find out from the Department of Health’s Annual Report and Accounts how much is being spent” on services.²⁶⁹ Interviewees were deeply critical of the fact that contract data and performance data are not routinely collected or published in the public domain. Indeed, in some cases even the NAO, let alone the public, does not know how much public money is being spent on private and third sector providers and consequently whether money spent is achieving value for money.²⁷⁰

2.4.3 Improving mechanisms for accountability

There is a clear need to improve mechanisms for accountability, from improving the audit of public money to clarifying responsibilities. However, these do not necessarily need to involve stricter punishment. When asked about accountability, interviewees for this paper argued that it is right for both parties to share responsibility for service failure, but for commissioners and government departments to remain ultimately responsible. They also commented that mistakes in such complicated services were somewhat inevitable and were rarely made with intent. It is therefore not in the service’s interest to have stricter penalties for failure. This opinion is reflected in an Institute for Government report, which argues accountability is too focused on blame, rather than improvement.²⁷¹ Nonetheless, it remains essential that when accountability is shared that all parties and individuals are clear on what they are responsible for, and the penalties they may face if they fail.

The division of labour in the ‘Commissioning Cycle’ (see Figure 12) within the civil service and local government, has been targeted by some interviewees as an area where improvements could be made. There is a complex chain of practices and roles, from design to monitoring and evaluation, which can cause gaps in accountability. For example, the procurement team might be responsible for writing the contract, putting it out for tender and choosing a bidder, whilst the ‘contract manager’ is responsible for ensuring the contract follows through, meaning the latter may be responsible for the legacy of someone else’s work. One interviewee argued that there was no way of getting around this division of labour, and that this division is ultimately a good thing as it means that each task is professionalised.

Within the division of labour in the commissioning cycle, accountabilities should be clarified. The example of ‘Statements of Responsibilities’ (SoR) and responsibility maps used in financial services (see Figure 16) should be applied to public service commissioning. The SoR and responsibility maps clarifies responsibilities and would ensure that contracting authorities and their respective teams along the commissioning cycle are aware of what they are ultimately accountable for.²⁷² This could be particularly useful when responsibilities are not clearly demarcated by job descriptions. For example, whilst the contract manager is responsible for the performance of the contract (see Section 2.2) they are not responsible for writing the contracts and therefore should not be held accountable if contract failure is the result of a poorly written contract.

²⁶⁹ House of Commons Public Administration and Constitutional Affairs Committee, *Accounting for Democracy: Making Sure Parliament, the People and Ministers Know How and Why Public Money Is Spent: Fourteenth Report of Session 2016-17*, HC 95 (London: The Stationery Office, 2017), 19.

²⁷⁰ Walker and John Tizard, *Spending Fairly, Spending Well: Time for a Radical Overhaul of Value for Money and Public Audit*; Spend Network, *Assessing the Transparency Gap in Public Procurement: A Report for the Information Commissioner*.

²⁷¹ Guerin, McCrae, and Shephard, *Accountability in Modern Government*, 6.

²⁷² Financial Conduct Authority, ‘The Senior Managers and Certification Regime: Guide for FCA Solo-Regulated Firms’. Financial Conduct Authority, July 2018.

Figure 16: Learning from financial services

As part of the new Senior Managers and Certification Regime (SM&CR) the Financial Conduct Authority (FCA) has recently published a new guidance and framework to improve mechanisms of accountability at individual level within financial services. It explains:

“The SM&CR aims to reduce harm to consumers and strengthen market integrity by creating a system that enables firms and regulators to hold people to account. As part of this, the SM&CR aims to:

- > encourage staff to take personal responsibility for their actions
- > improve conduct at all levels
- > make sure firms and staff clearly understand and can show who does what”²⁷³

This includes two new methods of practice around accountability, the first ‘statements of responsibilities’ (SoR) which is for some companies a legal requirement, and a second: ‘responsibilities maps’.²⁷⁴ The SoR is a one-page document in which each senior manager clearly explains “what a Senior Manager is responsible and accountable for, under the ultimate accountability of a firm’s governing body” including what other managers are accountable for, how this can be distinguished from theirs and the reasoning for these decisions.²⁷⁵ The SoR’s are also checked against the firms ‘Overall Responsibilities’ to ensure that at least one senior manager is responsible and accountable for every area of the firm’s activities so that there are no gaps.²⁷⁶ The ‘responsibilities map’ “provides an overview of how a firm is managed and governed. It should be a practical document that is clear and easy for regulators and people who work for the firm to understand”.²⁷⁷ This is ultimately an organogram that goes a step further to demonstrate flows of responsibility.

Bottom-up accountability could be improved through increasing transparency (see Section 2.5) and the potential for the public to audit public money. The ICO has recently recommended that the Freedom of Information Act be extended to major organisations that deliver public services or perform public functions, arguing that any provider of a public service should be subject to public scrutiny.²⁷⁸

Recommendation 6

All government departments that commission public services should adopt a ‘statement of responsibility’ regime and responsibility maps, modelled on the Financial Conduct Authority’s example that ensure all managers along the supply chain are aware of what their responsibilities are and what they are accountable for in the case of failure.

2.5 Transparency and oversight

As private sector providers receive taxpayers’ money to deliver public services, any firms operating in the public sector need to provide a certain degree of transparency. This is partly to ensure the accountability of private providers (see Section 2.4), but also to encourage the delivery of value for money. Public sector organisations and staff involved in the commissioning process also need to be held to account. Transparency is key to these efforts. Transparency about the whole commissioning process, including the

²⁷³ Ibid., 6.

²⁷⁴ Ibid., 5.

²⁷⁵ Ibid., 6.

²⁷⁶ Ibid., 7.

²⁷⁷ Ibid., 24.

²⁷⁸ Information Commissioner’s Office, *Outsourcing Oversight? The Case for Reforming Access to Information Law: Report of the Information Commissioner’s Office to Parliament*, 2019, 6.

“audition”, reasons for outsourcing and the bid process, would help build a trustworthy system and help restore public confidence in the aftermath of the collapse of Carillion..

Yet several interviews for this paper revealed that there are issues around making data available to provide the necessary levels of transparency for good oversight. There are challenges around access to private sector data due to commercial sensitivity (see Figure 21 in Appendix).²⁷⁹ In addition, there are quality issues with the currently collected data for the evaluation of contracts, such as incorrect datasets or data that fails to meet required minimum standards for analysis.²⁸⁰ There is also a lack of consistency within and between departments in the way that evaluations are carried out, meaning that whilst some public services contracts are rigorously monitored and analysed, others are not which increases the risk of failures, poor services, or unanticipated costs.²⁸¹ Upskilling commissioners could deliver significant improvements in value for the Government, yet there remain limitations if transparency issues are not addressed. *Reform* has previously argued that Government can design effective contracts only if it has a thorough understanding of the multiple elements surrounding that contract.²⁸²

2.5.1 Open contracts

In 2010 and 2011, the Government argued increasing the transparency around public service commissioning would not only strengthen public accountability and improve public services through comparative data and user choice, but also stimulate “wider economic growth” by enabling all stakeholders to innovate based on public sector information and experiences.²⁸³ Other observers have argued that transparency is an important means of ensuring that public service contracts are efficient and effective.²⁸⁴ Improving transparency in public services should focus on two main principles: the use of open contracts and a greater emphasis on the evidence and evaluation of these public service contracts.²⁸⁵

Transparency is crucial to building accountability and efficiency into public service commissioning. The Public Contracts Regulations Act 2015 already require that details of awarded public sector contracts over a minimum financial threshold are published on the Government’s “Contracts Finder” system.²⁸⁶ However, the mandatory information consists of little more than the name of the winning contractor, the date and value of the contract, and whether the contractor is an SME or a VCSE.²⁸⁷ Furthermore, there is little risk of commissioners being held accountable by Government for failing to record this information on the system, particularly as financial or legal penalties are difficult to bring against non-compliant individuals or contracting authorities under the Public Contracts Regulations Act 2015 (see Figure 20 in Appendix).²⁸⁸ ‘Naming and shaming’ remains the most useful and prominent form of penalty and acts as a deterrent to companies and contracting authorities. One interviewee for this paper emphasised that there is little appetite for punitive actions for companies that fail to adhere to the regulations, particularly as there is no mechanism to automatically check whether a contract has been published to the database or not. In time, smart contracts could change this as they are in essence an automated way of enforcing the obligations set out in an agreement.²⁸⁹

279 Information Commissioner’s Office, *Freedom of Information Act: Commercial Interests (Section 43)* (Information Commissioner’s Office, 2017).

280 Davies et al., *Government Procurement: The Scale and Nature of Contracting in the UK*; National Audit Office, *The Nuclear Decommissioning Authority: Progress with Reducing Risk at Sellafield* (National Audit Office, 2018), 14; National Audit Office, *Investigation into the British Army Recruiting Partnering Project*.

281 John Sharland et al., *Tender Evaluation: How Not to Do It* (Sharpe Pritchard, 2017), 4.

282 Hitchcock and Mosseri-Marlio, *Cloud 9: The Future of Public Procurement*, 38.

283 National Audit Office, *Implementing Transparency: Cross-Government Review* (National Audit Office, 2012), 5.

284 Chris Wajzer, Tom Gash, and Ian Magee, *Enhancing Transparency in Public Service Contracts*, 2015.

285 National Audit Office, *Implementing Transparency: Cross-Government Review*.

286 HM Government, *The Public Contracts Regulations 2015*.

287 Crown Commercial Service, *Guidance on the New Transparency Requirement for Publishing on Contracts Finder*, 3; Crown Commercial Service, *Procurement Policy Note – Legal Requirement to Publish on Contracts Finder*, 2016.

288 Patrick Parkin, ‘Crown Commercial Service Issues New Guidance on the Use of Contracts Finder’, Webpage, Burges-Salmon, 26 July 2016.

289 Government Office for Science, *Distributed Ledger Technology: Beyond Block Chain*, 2016, 18.

Both the contract information required to be made public and the penalties for failing to do so should be strengthened to ensure that transparency is an integral part of public services. The Trade Union Congress recently called for the creation of a greatly improved unified database of public sector contracts from across central and local government to more effectively monitor performance of public services.²⁹⁰ However whilst such a programme would substantially improve the current piecemeal approach to contract publishing, the concept remains problematic. For instance, interviewees for this paper noted that without systematic changes to how data around these contracts is obtained and distributed, the burdens of such a database would greatly hinder both smaller providers and thinly-spread contract management teams. Moreover, the data submitted to the database would need to be standardised prior to submission.

The inclusion of more information about the data and contract mechanisms involved in the commissioning process could greatly increase the utility of these contracts to other commissioners, providers, and citizens. Enabling contracting authorities to utilise a centralised-pool of skills and expertise, and the ability to utilise or adopt metrics designed and trialled elsewhere, would prove a huge benefit to public sector commissioners. Access to the mechanics of contracts designed and implemented by other public sector commissioners would help reduce the time and administrative costs involved in producing similar contracts in other local government or national departments. The use of open contracts could further permit a better understanding of how to commission for non-conventional results, such as outcomes. This transparency would also work towards addressing the skill-imbalance that can exist between local authorities and the private sector, and between local and central governments.

Building upon models and experiences from other areas of the public and private sectors including the SSRO and FCA, the most effective and efficient model for this open contracting would be to improve the contracts finder system to act as a mandatory element of any public procurement. Both commissioners and providers would be required to publish the required information as a part of the procurement process, as per Cabinet Office guidelines.

Recommendation 7

The Cabinet Office should issue updated guidance on additional requirements for those central government departments, wider public sector organisations, and prime contractors working on government contracts (Contracting Authorities) required to publish contract awards on Contracts Finder. At a minimum the contract award should include: details about the provider (such as annual turnover, company size, and number of government contracts awarded in the past 12 months); details about the contract (including three key performance indicators, the agreed payment model, and the exit terms for both parties); and the decision-making behind the contract award (including the added value brought to the contract by the provider).

Recommendation 8

To protect commercial interests and fair competition, redaction or non-publication of contract awards may be permitted but a case must be presented to the Cabinet Office within a reasonable period of time after the contract is agreed.

²⁹⁰ John Tizard and David Walker, *A Domesday Book for Public Service Contracts – Better Data, Better Value for Money* (TUC, 2019).

Recommendation 9

The Cabinet Office should regularly publish online in an accessible manner a list of those Contracting Authorities who have been found to fail to meet their obligations regarding the publication of tenders and contract awards on Contracts Finder. This should be separate to the Public Procurement Review Service results publications. A three-strike system should result in repeat offenders being added to a public “black-list” for non-compliance.

2.5.2 Evidence and evaluation

It is a paradox of public procurement that the more money being spent, the less that seems to be known about that spending.²⁹¹ Improving this situation would permit “government to manage contracts more effectively”, whilst also enabling citizens to hold commissioners to account.²⁹² Accountability, regulation, and effective commissioning practises are all dependent upon being able to evidence what works. This requires good data about contract performance, published without a significant delay after capture, and with performance metrics made easily accessible. More importantly, there needs to be a greater alignment and integration between different stages of the commissioning cycle to ensure consistency across the public sector.

Despite making some progress in recent years, such as the creation of the Office of Budget Responsibility, the Government continues to fail in some areas of evaluation and oversight. These issues can vary from poor-quality data,²⁹³ to missing datasets,²⁹⁴ to a lack of clarity around what data departments are required to publish.²⁹⁵ A 2017 PACAC report on accounting transparency complained that whilst there was a good base of solid financial reporting amongst departments, there was also room for improvement, particularly when it came to transparency.²⁹⁶ During the Capita-British Army recruiting contract, failure to identify precisely what data was required to monitor the project meant it was not until 2018 (six years after the start of the programme) that the right data began to be collected.²⁹⁷ This presented significant problems when it came to renegotiate the contracts due to poor performance (see Figure 13). Other issues raised around data include incompatible systems, even within the same organisation, and the use of departmental-specific metrics for measuring the same intended outcomes.²⁹⁸

The standardisation of processes is important to overcome some of these barriers. Whilst reforms have been headed in the right direction, efforts thus far have been largely department-specific. For instance, the SSRO has attempted to drive performance in non-competitive MoD contracts by using contract transparency to incentivise better performance. Yet the SSRO has no mandate over other single source contracts in other government bodies, such as the NHS, meaning that valuable lessons learnt about difficult procurement situations are not being transferred.

As discussed in Section 2.4, regulation and oversight have also remained largely fragmented around departments. This means that whilst some areas of public services are well-regulated (for instance, the NHS), other departments find themselves with most accountability coming either from internal audit departments or from parliamentary select committees (such as the MoJ).

²⁹¹ Spend Network, *Assessing the Transparency Gap in Public Procurement: A Report for the Information Commissioner*.

²⁹² Gavin Freeguard, *Gaps in Government Data: Five Things the UK Government Should Publish*, IfG Insight (Institute for Government, 2018).

²⁹³ National Audit Office, *Implementing Transparency: Cross-Government Review*.

²⁹⁴ Freeguard, *Gaps in Government Data: Five Things the UK Government Should Publish*.

²⁹⁵ House of Commons Public Administration and Constitutional Affairs Committee, *Accounting for Democracy: Making Sure Parliament, the People and Ministers Know How and Why Public Money Is Spent: Fourteenth Report of Session 2016-17*.

²⁹⁶ Ibid.

²⁹⁷ Public Accounts Committee, *Oral Evidence: Capita's Contracts with the Ministry of Defence*; National Audit Office, *Investigation into the British Army Recruiting Partnering Project*.

²⁹⁸ The Business Services Association, *Driving the Data Revolution in Public Service Delivery* (The Business Services Association, 2015).

Implementing comprehensive standard regulations across the whole public services is impossible and restrictive. What is required instead is the nuanced introduction of minimum data requirements regarding the performance of providers and effectiveness of a contract. If these minimum requirements were accompanied by a guiding framework to enable the tailoring of evaluations to specific public services, the potential increase in monitoring and evaluation standards is significant.

Furthermore, a degree of standardisation would enable commissioners in different departments to more easily develop their own expertise on the basis of examples from other public services. Given the small evidence base many commissioners are reliant upon when commissioning a public service, the need for transparency is evident if efficiency and value are to become an integral part of public service delivery.²⁹⁹ Understanding why some services fail whilst others succeed is possible only if the accompanying data can be readily accessed and evaluated.³⁰⁰

2.6 Towards a regulatory review

Regulation is key to improving the delivery of public services and ensuring accountability is maintained. It allows government to protect people by ensuring that quality and safety standards are upheld (see Figure 17)³⁰¹ and addresses failures in public sector markets.³⁰²

Figure 17: Medicines and Healthcare products Regulatory Agency

The Medicines and Healthcare products Regulatory Agency (MHRA) is an executive agency of the Department of Health and Social Care, responsible for regulating “medicines, medical devices and blood components for transfusion in the UK.”³⁰³ This includes ensuring standards of quality, safety and efficacy (of products stated purpose) for medicines and medical products; the supply chains for such are safe and secure (for example considering how best to continue supply of medicines in the event of ‘No Deal Brexit’)³⁰⁴; and influencing the UK, EU and international regulatory frameworks so they optimise public health.³⁰⁵ Ultimately the body ensures that medical devices on the market are safe.

There are multiple approaches to regulation, with varying levels of strength. Figure 18 depicts different regulatory solutions and examples that currently exist for the public sector.

299 Wajzer, Gash, and Magee, *Enhancing Transparency in Public Service Contracts*.

300 National Audit Office, *Implementing Transparency: Cross-Government Review*.

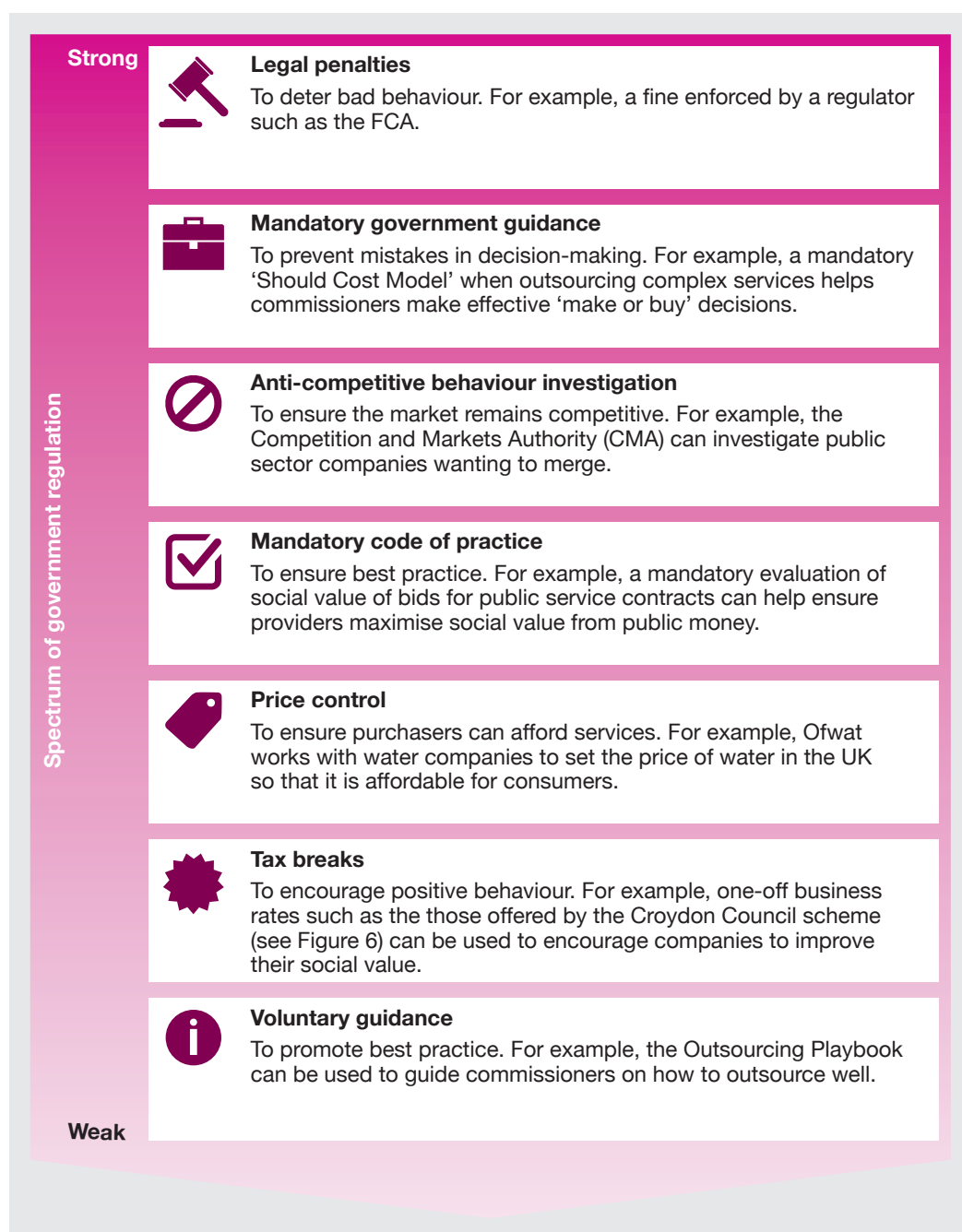
301 Ibid.

302 National Audit Office, *A Short Guide to Regulation* (National Audit Office, 2017), 6.

303 Medicines and Healthcare products Regulatory Agency, ‘About Us’, Webpage, 2019.

304 Medicines and Healthcare products Regulatory Agency, ‘MHRA Releases Response to Consultation on EU Exit No-Deal Legislative Proposals’, Press Release, 3 January 2019.

305 Medicines and Healthcare products Regulatory Agency, ‘About Us’.

Figure 18: The spectrum of government regulation

Source: *Reform* research, adapted from National Audit Office, *A Short Guide to Regulation* (National Audit Office, 2017), 8.

However, some of these public sector regulators have been under criticism for not having the necessary powers to hold providers to account or for creating a complex landscape. For example, in the case of the water industry 'scandal', where water companies were criticised for high-pay dividends in the context of rising costs for consumers,³⁰⁶ ministers reacted by boosting the power of water regulator Ofwat to ensure corporations acted more responsibly with long-term capital investments.³⁰⁷ Whereas, in other sectors such as

³⁰⁶ Nick Cohen, 'The Scandal of Privatised Water Is Going to Blow', *The Spectator*, 16 September 2017; Rupert Neate, 'Water Bosses' £58m Pay over Last Five Years a "National Scandal"', *The Guardian*, 4 June 2018.

³⁰⁷ Department for Environment, Food & Rural Affairs and The Rt Hon Michael Gove MP, 'Michael Gove Speech on UK Climate Change Projections', Speech, 26 November 2018.

healthcare, there have been claims that there are too many regulators with overlapping or over-complicated aims.³⁰⁸

A report from the Smith Institute has argued there is a lack of regulation in terms of the audit of public money and ensuring value for money across public services.³⁰⁹ The report found currently there is a fragmented system with a variety of auditors that fail to provide clear and consistent information on the performance of public services and providers. It argued that the NAO had regularly reviewed policies and services that had often been dismissed or ignored by policymakers and government. It cites the example of Universal Credit, arguing the NAO found early evidence “about inefficiency and unfairness” but nonetheless the “Treasury nodded” it through.³¹⁰ It argues therefore that there should be stronger regulation of the audit of public money – that could be achieved through the creation of a new body that replaces the NAO value for money work that works to “push, challenge, inform, enlighten and perhaps shame them [commissioners, ministers and councillors] into action”.³¹¹ However, whilst the argument for stronger regulation is compelling, whether there needs to be a wholly new regulator (rather than increasing the NAO’s capacity to increased regulate rather than simply audit) is questionable.

Several interviews carried out for this paper revealed that there was potentially a gap in the regulation of public service providers in comparison to the utilities and financial service markets – which have their own bespoke regulator responsible for long-term market strategies such as pricing and provider behaviour. One interviewee made the case that long-term market strategies could make invaluable improvements to the sector, to ensure markets remain sustainable and public service users are protected from market failures. The NAO has also recommended that departments engaging in procurement should work more closely with the CMA and other regulators “to raise awareness, standards and enforce rules and the right market behaviour” to ensure long-term market sustainability.³¹² In a later review of public service markets, academics endorsed this recommendation, arguing in social care markets there was a “strong need for a regulator to take on the role of overseeing those care providers whose services, for whatever reason, would be hard to replace if failure occurred”.³¹³

It was also argued by interviewees, in some cases quite strongly, that a new regulator was needed by virtue of its independence from government. As an independent arbitrator, it would be able to act as an intermediary between government, industry and the third sector in order to promote the needs and protection of users of services.

There are various gaps in the system, from accountability and audit of public money, to ensuring transparency and the collection of a good evidence base, to the fair allocation of risk and responsible bidding for contracts through competitive tender. There is reason to consider whether outsourcing, and particularly public service markets, need better regulation. Indeed, there is a clear need for government to listen to these calls and conduct a review the current regulatory landscape of outsourcing in public services as well as the audit of how public money is spent.

308 David Williams and Lawrence Dunhill, ““Ruthless” Rationalisation of Regulators and CCGs Could Save £1bn, Says Mackey”, *Health Service Journal*, 11 December 2017; Denis Campbell, ‘Jeremy Hunt to Consider Merging Health Regulation Bodies’, *The Guardian*, 8 February 2017; The King’s Fund, ‘The Regulation of Health Care in England’, Webpage, The King’s Fund, 2019.

309 Walker and John Tizard, *Spending Fairly, Spending Well: Time for a Radical Overhaul of Value for Money and Public Audit*.

310 Ibid., 9.

311 Ibid., 11.

312 National Audit Office, *Deciding Prices in Public Services Markets: Principles for Value for Money*, 18.

313 Xenia Dassiou et al., ‘Public Service Markets: Their Economics, Institutional Oversight and Regulation’, *Palgrave Communications* 1, no. 1 (December 2015): 11.

Recommendation 10

Government should commission an independent review of the regulatory landscape of public service markets covering both hard and soft regulation. The review should focus on the independent arbitration of contract disputes; the standard collection and audit of contracts; ensuring a healthy amount of competition and supplier diversity; and other long-term market strategies such as provider behaviour and social value metrics that could be used.

Conclusion

Prominent failures in outsourced public services such as the UK Border Agency's multi-billion-pound eBorders programme³¹⁴ and G4S's children's services contracts with the MoJ³¹⁵, not to mention the collapse of Carillion or financial instability of Interserve, continue to overshadow the billions of pounds spent on outsourced services that deliver to and often above their contractual obligations. Last year alone, the Government spent £284 billion on purchasing goods and services from external providers, despite the abolition of PFIs.³¹⁶ To ensure that commissioners use this taxpayer money efficiently and effectively, the CCS and GCF have been created and expanded to act as centralised pools of knowledge and support. Government has further worked to create guidance around new policies, such as the Outsourcing Playbook, and improved their engagement with industry and the third sector to better understand all stakeholders.

Yet as this report has highlighted, there is still more work to be done. Public commissioning and procurement remain beset by a lack of clarity that complicates an already complex system. The commissioning and commercial skills of local authorities and central government can vary greatly, resulting in contracts which fail to deliver value for money or improve outcomes. Not enough attention is paid to the 'make or buy' element of the commissioning cycle, resulting in the outsourcing of public services which should not be contracted for. Similarly, not enough emphasis is placed on contract management, increasing the risks that come with insufficient monitoring and evaluation. Existing guidance, although published widely, can often be conflicting or confusing to commissioners already trying to balance multiple considerations in their decision-making process. New considerations, such as social value or a shift to outcomes-based commissioning, only further add to the burdens on commissioning staff.

Tackling these issues is challenging but feasible. This report argues that getting the basics right is crucial. The Cabinet Office's Outsourcing Playbook has made a significant step in the right direction when it comes to accountability, contingency planning, and transparency but it also fails to address several key issues. Most notable is the problem of upskilling commissioners and procurement teams with the necessary commercial skills and expertise to effectively design and acquire value-for-money services that work for the citizens. Whilst the GCF has done much to improve the commercial expertise within central government, experience in local authorities remains piecemeal and inconsistent, with individuals dependent upon under-funded external organisations like the PSTA for training.

A consistent approach to transparency and accountability is also important. Commissioners should know exactly what they are required to publish around the commissioning process, and greater emphasis needs to be placed on ensuring their decision-making process and the effectiveness of their commissioning is made clear. The Cabinet Office's requirement that three KPIs are published from every outsourcing contract addresses the monitoring side of the problem, but fails to shed light on the decision-making and bidding process. Lessons should be learnt from other sectors like finance where the FCA have sought to make accountability and effective regulation a key part of the sector. Mechanisms and tools like accountability statements improve the ability of an independent regulator to ensure that companies do not transfer risk to the public. Applied to public services, all of these approaches could dramatically improve public procurement in the UK by improving outcomes and value-for-money and reducing the risks inherent in large-scale spending with private and third-sector providers.

314 Gurjit Degun, 'Home Office Ordered to Pay £224 Million to Former Border Security IT Supplier', Webpage, Supply Management, 19 August 2014.

315 Simon Hattenstone and Eric Allison, 'G4S Should Be a Failed Company by Now. But the Government Won't Allow It.', *The Guardian*, 23 December 2016.

316 Davies et al., *Government Procurement: The Scale and Nature of Contracting in the UK*.

Research and interviews for this paper have highlighted the potential for a holistic regulator of public services, whose focus is not only on the enforcement of accountability, effective market shaping, and general good practice within the public procurement landscape, but also on enabling industry and government to have a relationship that is more open and transparent. These obligations currently fall on several different bodies including the Cabinet Office, CMA, NAO, and external auditors like KPMG, Deloitte, PWC, and Ernst & Young. This new organisation could support and work alongside these existing organisations by removing some of the burdens upon them, whilst also bringing to bear effective regulatory and oversight powers in the same manner as the FCA.

However, there first needs to be a comprehensive independent review of outsourcing in the UK. It is crucial to understand where exactly the system is broken before attempts can be made to fix it. Questions need to be asked including when and where did procurement happen, for what services, and why it has worked better in some areas (of both geography and policy) than others. Furthermore, this review needs to not only look at the specific instances of outsourcing (the contracts, providers, and cost), but also the landscape itself. There is a need to identify where the gaps in regulation are and where the current structures are inadequate, as well as where they are working well.

As Sir Amyas Morse, Comptroller and Auditor General of the NAO, recently stated: “the less transparent you are, the more suspicious people get about what you are not telling them.”³¹⁷ Public procurement can resolve many of the issues it currently has by ensuring that transparency is installed into the heart of the system. But doing so requires a better focus on data, risk, accountability, contracting, and skills to enable commissioners to be more transparent and more effective in their commissioning.

³¹⁷ Amyas Morse, ‘Sir Amyas Morse Keynote Speech’, Speech, Institute for Government, 12 March 2019.

Appendix

Figure 19: Considerations for 'Make or Buy' Decisions

Before you start, identify and appoint suitably skilled individuals that can support the make or buy decision process. When determining the best route to delivering future services, having sufficiently experienced individuals can provide greater insight into the key elements to consider in any outsourcing decision.

Early planning on Target Operating Model: Assess the key functions, capabilities and processes needed to deliver the service early in the process. These decisions are time consuming and affect many parts of the department and wider government. Whilst the process should be commercially led, it is not merely a commercial decision: senior officials within policy, commissioning and operations should be involved from the outset, to provide optimal Ministerial advice. Decisions made with short deadlines create risk.

Clearly define both the components ('service stack') and the bounds of the service: The Contracting Authority can minimise the commercial and operational risk of delivery by taking time to fully understand the service. It should be noted that whether or not a service is 'commoditised' or deemed 'complex' can often depend on where the service boundary is drawn. For example, services may be deemed less complex if the outsourced element excludes the making of discretionary decisions affecting citizens.

Losing short or long-term in-house capability: Consider both long term and short term perspectives. Once service delivery has been contracted with the private sector it can be difficult and costly to revert back to public sector provision if required, be it on contract expiration, early termination or Contracting Authority step in.

Clear understanding of the activity you are proposing to outsource: Fully understand what is being outsourced. There should be caution when attempting to outsource something for which there is little or no extant supply market. In certain cases it might be justifiable to make a market, but creating market capability brings its own challenges. The Contracting Authority should define the current service operating model, the target operating model, and what is needed to move from the former to the latter. The Contracting Authority should then clearly identify, and where necessary segregate, resources such as people, facilities and technology required to deliver the service.

Address resolvable internal issues: Prior to outsourcing for efficiency gains, unless the Government has made the supplier aware that they are outsourcing or transitioning services which have fallen into specific problems, consideration should be given to the maxim "don't outsource a problem." However, where the problem is well defined, and risks appropriately managed, departments should consider whether the innovation and expertise of the private sector can be utilised.

Learn from the past and experience of others: Government should draw on the considerable experience and skills of colleagues across government and the private sector, who have worked on similar programmes, to enable a best practice approach. Planned consultations with others should be a key part of the decision-making process to capture a broader range of opinions and evidence that helps to challenge bias or historic norms. Central government teams can provide benefit of cross government learning and supplier or department contracts. The private sector can provide feedback directly if consulted in the make or buy decision process.

A clear understanding of any TUPE considerations or asset transfer considerations: Ensure you have sought legal and commercial advice on any issues. Please note that asset right to use may also be considered. Pensions may also be an issue in relation to TUPE.

Conducting thorough supplier and market engagement and ensure you are content there is a viable market with healthy competition – You need to understand how your market is able to meet your requirement and understand its cost and quality drivers. **Conduct a comprehensive supplier analysis.** This should include an analysis of the strengths and weaknesses of the market and public sector in providing the total service and/or the individual components of the 'service stack. Benchmarking of both costs and processes should be undertaken to establish what 'good' looks like. The Government should have a full understanding of the true capabilities, aptitude, assets, intellectual capability and maturity of the market to deliver the service.

A clear risk profile and understanding of the risk allocation: You should aim to minimise risk. You should understand the remaining risks and which risks are to be reasonably allocated to the service provider (See Guidance Note on risk allocation). There should be a clear plan in place for monitoring service delivery and quality. This should also link to your benefits realisation plan.

Ensure there are thorough contract management mechanisms in place and you are able to monitor performance effectively: You must ensure you have sufficiently skilled individuals in place to manage and support the process and appropriate plans in place for contract exit whether planned or unplanned.

You have effective contingency plans in case of supplier failure or contract breach leading to early termination (See Financial Distress Guidance Note). Government ultimately remains responsible for the delivery and continuity of public services and therefore it is essential that plans are in place to ensure this in the case of supplier failure.

Consider both long term and short-term perspectives: Departmental priorities, resources and skill sets change over time. Reverting back to public sector provision means the Government will also need to consider the cost and complexity of TUPE transfer.

Source: 'Make or Buy' Decision: Outsourcing Guidance note, Government Commercial Function (2019).

Figure 20: Contracts Finder requirements in The Public Contracts Regulations Act 2015

Publication of information on Contracts Finder where contract notices are used

106.

(1) Where a contracting authority sends a contract notice to the EU Publications Office for publication, the contracting authority shall cause information to be published on Contracts Finder within 24 hours of the time when the contracting authority becomes entitled, in accordance with regulation 52(3) and (4), to publish the notice at national level.

(2) The information to be published on Contracts Finder shall include at least the following:—

- (a) the internet address at which the procurement documents are accessible;
- (b) the time by which any interested economic operator must respond if it wishes to be considered;
- (c) how and to whom such an economic operator is to respond; and
- (d) any other requirements for participating in the procurement.

(3) In complying with this regulation, contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office in relation to the form and manner in which information is to be published on Contracts Finder.

(4) Paragraph (5) applies if such guidance confirms that, for the time being, arrangements have been put in place by or on behalf of the Cabinet Office under which the information referred to in paragraph (2) will, without further action by contracting authorities, be extracted and published on Contracts Finder following the publication of contract notices by the EU Publications Office.

(5) In those circumstances, contracting authorities shall be deemed to have complied with paragraph (1) by virtue of sending the contract notice to the EU Publications Office for publication in accordance with regulation 51.

[...]

Publication of information on Contracts Finder about contracts awarded

108.

(1) Paragraph (2) applies where a contracting authority—

- (a) sends a contract award notice to the EU Publications Office for publication; or
- (b) awards a contract based on a framework agreement.

(2) In those circumstances, the contracting authority shall cause at least the following information to be published on Contracts Finder:—

- (a) the name of the contractor;
- (b) the date on which the contract was entered into;
- (c) the value of the contract.

(3) But the contracting authority may withhold information from publication where its release—

- (a) would impede law enforcement or would otherwise be contrary to the public interest,

(b) would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or

(c) might prejudice fair competition between economic operators.

(4) Contracting authorities shall comply with paragraph (2) within a reasonable time.

(5) But where a contracting authority sends, or intends to send, a contract award notice to the EU Publications Office for publication, the contracting authority shall not cause the information to be published on Contracts Finder earlier than the time at which the contracting authority becomes entitled, in accordance with regulation 52(3) and (4), to publish the notice at national level.

(6) In complying with this regulation, contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office on—

(a) the form and manner in which the information is to be published on Contracts Finder; and

(b) what is a reasonable time (having regard, where relevant, to paragraph (5)) for the purposes of paragraph (4).

(7) Paragraph (8) applies if such guidance confirms that, for the time being, arrangements have been put in place by or on behalf of the Cabinet Office under which the information referred to in paragraph (2) will, without further action by contracting authorities, be extracted and published on Contracts Finder following the publication of contract notices by the EU Publications Office.

(8) In those circumstances, contracting authorities shall be deemed to have complied with paragraph (2) by virtue of sending a contract award notice to the EU Publications Office for publication in accordance with regulation 51.

(9) In this regulation, “contract award notice” means a contract award notice referred to in regulation 50 or 75(3).

[...]

Publication of contract opportunities on Contracts Finder

110.

(16) In complying with this regulation, contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office in relation to—

(a) the form and manner in which information is to be published on Contracts Finder;

(b) what is a sufficient but not disproportionate period of time for the purposes of paragraph (9).

Source: HM Government, ‘The Public Contracts Regulations Act 2015, Part 4 – Miscellaneous Obligations, Chapter 7 – Additional rules for part 2 procurements (2015)

Figure 21: Commercial interests in The Public Contracts Regulations Act 2015**Notices of decisions to award a contract or conclude a framework agreement****86.**

(6) A contracting authority may withhold any information to be provided in accordance with the preceding requirements of this regulation where the release of such information—

(a) would impede law enforcement or would otherwise be contrary to the public interest;

(b) would prejudice the legitimate commercial interests of a particular economic operator, whether public or private; or

(c) might prejudice fair competition between economic operators.

Source: HM Government, 'The Public Contracts Regulations Act 2015, Part 3 – Remedies, Chapter 5 – Facilitation of Remedies' (2015)

Figure 22: Sustainability and impact of the Public Service Transformation Academy

The PSTA was established in April 2016 to:

- > win and deliver the concession contract for the Cabinet Office Commissioning Academy (unfunded, continuing to deliver the Academy which many partners had contributed to designing and delivering)
- > continue the work of the Public Service Transformation Network to support inter-disciplinary, cross-sector, place-based, and cross-organisation transformation We are a not-for-profit social enterprise and partnership. Our mission is to enable public services to transform themselves. We do this through:
- > The Cabinet Office Commissioning Academy – our 'jewel in the crown' offer, an approach to building capability across public services which is based in adult learning, peer learning, 'warts and all' cases studies, and learning from taking action. This is delivered in many variants – national, organisation- or theme-based, place-based etc
- > Regional Transformation Academies, drawing on the same kind of learning model to suit different contexts.
- > Other variant Academies such as intensive 'policy lab' type approaches.
- > Leading Transformation – a blended learning, 24-module 'mini MBA'
- > The Service Transformation Programme – experiential, fun, two-day service-level change courses
- > Coaching and mentoring for commissioning and transformation
- > Skills-building and consultancy for implementation of commissioning approaches
- > The annual social care providers and commissioners conference, run jointly with the LGA
- > Support to develop a new public service commissioning level 7 apprenticeship
- > Attendance at the Public Sector Solutions Expo to promote commissioning and transformation
- > Numerous additional events around market stewardship, social investment, social value, systems thinking, systems leadership, etc And our annual State of Transformation survey, report, and conference, which draws 200 transformation leaders. The PSTAs profile and impact has continued to rise, and we continue to

explore commercial opportunities, partnerships, and fundraising. The impact of our work is set out below.

Since its inception, the PSTA has benefited from a £75,000 working capital facility extended by its lead partner, public service consultancy RedQuadrant.

As a start-up the PSTA has yet to break even, which is not unusual. Losses to date, have been £32.6k and £24.5k in our first two years, and we expect £13k this year on a turnover which has now risen to approximately £400k per annum. The reduction in losses has been achieved by growth in sales and rigorous cost-cutting, including wages, as well as an increase in pro-bono support from our partners.

However, in a very difficult market for sales to the public sector, total debt has risen to £70.1k, and unless we can confidently predict that we will break even and begin to repay loans in 2019-20, we will be forced to scale back our activity significant and move to a skeleton staffing model. That would mean no proactive working, no further business development, and we would only be able to respond to incoming demand.

An annual grant of c£50k would support basic administrative activity and free key individuals to expand and develop our offer. It would also allow the cost of the National Academy, which we cut from £2,500 to £2,000 when taking on delivery, to be reduced to increase overall volume of delivery so that more commissioners can benefit, and our impact can be scaled.

As a not-for-profit Company Limited by Guarantee, once we break even and repay our loan, any additional income will be reinvested for development and delivery, creating a virtuous cycle which will allow us to expand our reach and impact.

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