

# **NCIA Inquiry into the Future of Voluntary Services**

**Working Paper 6**

***“The Devil that has come amongst us”***  
**The impact of commissioning and  
procurement practices**

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## **The impact of commissioning and procurement practices**

### **Foreword**

This paper has been produced as part of the NCIA Inquiry into the Future of Voluntary Services. The Inquiry is specifically concerned with those voluntary and community organisations that deliver *services* in local communities, especially those that accept state money for these activities. These are the groups that have been particularly affected by successive New Labour and Coalition Government policies regarding the relationship between the voluntary and statutory sectors, and attitudes and intentions towards the future of public services. In this and other papers we refer to these as Voluntary Services Groups or VSGs.

It has long been NCIA’s contention that the co-optive nature of these relationships has been damaging to the principles and practise of independent voluntary action. The nature and scale of the Coalition Government’s political project – ideologically driven - to degrade rights, entitlements and social protections, and to privatise public services that cannot be abolished is now laid bare. This has created new imperatives for VSGs to remind themselves of their commitment to social justice and to position themselves so that they can once again be seen as champions of positive social, economic and environmental development.

Our Inquiry is a wide ranging attempt to document the failure of VSGs, and the so-called ‘leadership’ organisations that purport to represent them, to resist these shackles on their freedom of thought and action. But it is also an attempt to seek out the green shoots of a renaissance that will allow voluntary agencies to assert their independence and reconnect with the struggle for equality, social justice, enfranchisement and sustainability.

This paper is one of a number that has been produced through the Inquiry and is concerned with the ways in which the use of commissioning and procurement approaches by public authorities has affected their attitudes towards VSGs, the impact on VSGs themselves and on the relationships between commissioners, contractors and the voluntary sector as a whole.

For more information on the NCIA Inquiry please visit our website – [www.independentaction.net](http://www.independentaction.net).

NCIA  
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# The impact of commissioning and procurement practices

## 1. Background and context

Financial support to voluntary services groups (VSGs) from state bodies has long been a feature of the UK landscape. This has been in recognition of the significant contribution made by VSGs in helping the state to provide the services and support accepted as being a requirement and right of citizenship and vibrant community life. By another test, statutory funding to VSGs can also be seen as a mechanism for returning the community's money back to the community, for the resources of the state are largely derived from the contributions of taxpayers.

Historically, the principal mechanism for state funding to VSGs has been the use of grants. A grant is a gift and the concept of a gift brings certain assumptions about the respective rights and responsibilities both of the donor and the recipient, the most important of which is that the gift, once bestowed, passes to the control of the recipient. However, over time, the idea of 'pure' grant has become a rarity. For good reasons, funders have been keen to ensure that grants are used for the purposes intended. Thus, mechanisms were developed – grant agreements, later service level agreements and finally contracts – to specify the terms and conditions agreed.

Heavier reliance on contracts, in preference to grants, was accelerated by the growth of centralised control during the New Labour years, an important element of which was the use of VSGs as arms-length delivery vehicles for state policies and intentions. These changes over time have given rise to the regime we now know as 'commissioning and procurement'. Commissioning approaches are now ubiquitous within public sector organisations and most borrow from techniques in use in the private sector.

During the New Labour period, the principal exposure of VSGs to commissioning was in the context of 're-tendered' grant programmes. The bulk of this funding supported services that were derived from *statutory powers* rather than *legal duties*. However, as the scale of public services privatisation has mushroomed, VSGs now find themselves involved in the outsourcing of mainstream public services where, if successful, they will be providing services as a formal and legal agent of the funding body. When statutory duties are involved, the framework for specification and performance management has to be clear, accountable and unambiguous.

Privatisation has also brought VSGs into closer relationships with the private sector, often as sub-contractors to a 'prime' contractor. The privatisation of employment support (the Work Programme), and now the Probation Service, is explicitly built on the assumption of VSGs sub-contracting to large private sector firms.

It is also worth noting that membership of the European Union has promoted commissioning approaches through international agreements about 'fair competition', on the back of which have been built 'rules' for the purchase of public services. Neglect of these rules can expose the funding bodies to legal challenge.

It is apparent that commissioning practices can vary considerably from one local area or service to another and there are some pockets of good practice. Nonetheless, NCIA believes that the direction of travel is clear and that the move from grants to commissioned contracts is the single most important factor in the progressive co-option of VSGs as servants of state plans and policy and, increasingly, as subservient to the profit-making activities of private companies. The result has been huge damage to the autonomy, independence and, sometimes, integrity of VSGs and a diminution both of their interest and capacity to speak out against injustice and to take their mandate from the needs of their users and communities. Speaking out against these changes has long been amongst NCIA's campaigning activities.<sup>1</sup>

## **2. Commissioning and procurement – the servant of privatisation**

In themselves the terms 'commissioning' and 'procurement' are both respectable and legitimate. It would be remiss of any funding body to neglect the assessment of need for particular services, or within communities more generally, and to agree processes for distributing funding intended to address those needs. However, it is the overall context that has determined the ways in which commissioning has impacted on VSGs.

The 'big picture' and the main story that lies behind the move to commissioning is, of course, the privatisation of public services. Privatisation involves the financialisation and marketisation of these services and thus of the VSGs persuaded to take part in this process. In response to pressure from funders and encouragement and support from local and national infrastructure groups, VSGs have been led to re-engineer themselves through the procurement strategies that have replaced grants and the introduction of competitive tendering as the mechanism for distribution. In some areas (Hackney in London being one), voluntary agencies and the voluntary sector are now collectively described – with private sector firms – as 'the market'.

This seduction of VSGs into contracting was significantly boosted by New Labour's enthusiasm for the voluntary sector as a 'preferred provider'. In later years, as contracts grew in size, coupled with recession, VSGs were wooed into believing that they could only continue by themselves becoming larger. However, it has now become clear that the government and state's preferred provider is, in fact, the corporate private sector.

Entrusting public services to a market environment (whether in the hands of private or voluntary sector organisations) is a vast, untested experiment and an experiment that bears huge risks for all of us as citizens, especially citizens who need help and protection from time to time. By involving themselves in implementing this experiment, voluntary groups are implicitly or explicitly supporting this privatisation programme. Some have already found that their involvement ends in tears<sup>2</sup> and many more are likely to follow them -

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<sup>1</sup> See, for example, <http://www.independentaction.net/wp-content/uploads/2011/03/26-good-reasons-to-oppose-commissioning.pdf>

<sup>2</sup> In a survey of 101 large charities in 2012, over 90% said they face more risk in the current commissioning environment than before, a result of new funding mechanisms (payment by results, contracts and personal budgets), pressures to operate in increasingly complex arrangements (consortia, sub-contracting and

declining income, raised contract requirements, increased demand, being forced to use reserves or unrestricted income to subsidise contracts<sup>3</sup>, falling service and quality standards ... but nevertheless finding themselves *responsible* in Law for these services. And the public who need or want these services will not know who to complain to when they are found wanting, with accountability confused further by long supply-chains. A fuller critique of this wider picture of privatisation and its ideological driver forms the basis of other papers produced as part of this NCIA Inquiry<sup>4</sup>

### 3. The nuts and bolts of commissioning – how the damage is done

If the principle problem with commissioning is that it functions essentially as a mechanism to advance privatisation, the second important problem has been the ways in which funders have approached the task. The result, both at national level and in many, many local areas, has been characterised by mistaken and misguided assumptions, and inept and incompetent execution. The cumulative effects of the commissioning approach taken towards VSGs presents a serious threat to the future sustainability of locally-based, small/medium-size voluntary agencies and community groups that have sprung from local needs and circumstances, especially those from communities kept at the margins.

*“Commissioning has in part been conceived as a solution to the problem of government being a poor grantmaker – but broadly speaking it has just made the state an even worse funder of charity than it was before. Nor has it improved the fundamental structural problems at all – commissioned programmes remain just as vulnerable to short-term cancellation or revision. Poorly drafted contracts are as risky if not more risky for the funded charity than a grant that can be clawed back; mainly because of absurd terms that routinely impose nearly unlimited liability on the charity delivering the service, and which rule out redress for the charity if the public body breaches the contract.”*

Response to the Giving Green Paper: Directory of Social Change; March 2011 p.10

An essential element in the rise of public sector commissioning has been the creation and consolidation of procurement units, either centrally or departmentally located. These units are staffed by people whose supposed expertise is in procurement rather than the services or products being procured. The processes involved in procurement are highly regimented (in the apparent interests of probity), inflexible (in the apparent interests of fairness) and opaque (in the apparent interests of ‘commercial confidentiality’). Many of the assumptions that underpin procurement in the public sector have been borrowed slavishly from the worst kinds of private sector practices, driven by essentially for-profit motives. These are inappropriate for welfare which is not a market with ‘clients’ or customers able to define the services they need. Milbourne and Cushman argued the importance of trust relations

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‘partnerships’) and general cuts in income (especially from local government); When the Going Gets Tough: New Philanthropy Capital; May 2012.

<sup>3</sup> The Clinks State of the Sector Report (October 2013) found that 50% of respondents said that their contracts did not cover full costs and 65% were relying on reserves to cover the gap between contract payments and the cost of delivery – see [http://www.clinks.org/eco-downturn?utm\\_source=Newsflash&utm\\_medium=Email&utm\\_content=textlink&utm\\_campaign=StateofSectorOct2013](http://www.clinks.org/eco-downturn?utm_source=Newsflash&utm_medium=Email&utm_content=textlink&utm_campaign=StateofSectorOct2013)

<sup>4</sup> See NCIA Inquiry Working Paper 4: The Ideological Context by Dexter Whitfield and NCIA Inquiry Working Paper 5: Outsourcing and the Voluntary Sector by Laird Ryan.

being maintained between contractors and providers if any possibility of improving services to ensure they met users' needs was to be achieved<sup>5</sup>. The end result is a system that is not fit for purpose when viewed from the perspectives of the commissioner, the service provider or the service user.

## Needs assessment, service design and 'partnership'

During the New Labour years, much of the rhetoric on the relationship between the voluntary and statutory sectors was based on concepts of 'partnership'. Area-based Local Strategic Partnerships (LSPs) were established in all local authority areas which spawned a plethora of thematic or issue-based joint working groups. These groupings did give out the message that there was knowledge, experience and skills within VSGs specifically and the community more generally that should be harnessed in identifying community and service need and planning responses to meet those needs. Local authority grant programmes were often closely associated with LSPs and similar groupings, or used explicitly to support their work. But the underpinning purpose was not primarily about funding but about needs assessment, consultation and service design.

Highlighting partnership working of this sort is not, however, to deify it. The rhetoric did not always match the reality<sup>6</sup>, and the successive reports that document the shortcomings of the Compact, both at national and local levels, are testament to the fact that meaningful involvement from the voluntary sector in these matters has always been problematic<sup>7, 8</sup>.

The arrival of the Coalition government has been marked by a shift both in understandings about 'partnership' and in the organisational arrangements. These new arrangements involve some 'smoke and mirrors'. Under the guise of 'localism' and 'community empowerment' some top down requirements were removed (e.g. National Indicators, Local Area Agreements, Comprehensive Area Assessments). At the same time a number of new groupings have been put into place, such as Local Enterprise Partnerships (LEPs), Health and Well Being Boards, Police and Crime Commissioners, and Healthwatch panels. Though the rhetoric continues to laude the merits of partnership, many of the new bodies now concentrate power more exclusively and operate less transparently<sup>9</sup>. LEPs draw representation from the private sector and are business led<sup>10</sup>. Local Healthwatch panels are

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<sup>5</sup> Milbourne, L. and M. Cushman (2013) "From the Third Sector to the Big Society: How Changing UK Government Policies Have Eroded Third Sector Trust", *Voluntas*, 24 (2), pp. 485-508.

<sup>6</sup> See for example: The Limits of Partnership: An Exit-Action Strategy for Local Democratic Inclusion: Jonathan S. Davies; *Political Studies* 2007, Vol 55, p.779-800.

<sup>7</sup> 'Use It or Lose It'; Practical Wisdom R2Z; Commission for the Compact 2011.

<sup>8</sup> See also Chapter 6 of Milbourne L. 'Voluntary Sector in Transition, Hard Times or New Opportunities?'; Policy Press 2013.

<sup>9</sup> In West Oxfordshire, for example, the LSP has been replaced by "...a more flexible and informal arrangement between partner organisations. This would involve a loose network of informal groupings working together on areas of common interest on a task and finish basis. This community network would comprise an adaptable membership of partner organisations and community interests drawn together in response to the particular task being progressed." See <http://bit.ly/1bm69dk>

<sup>10</sup> See <http://www.smith-institute.org.uk/file/Making%20local%20economies%20matter.pdf> p.35 and [http://www.liverpoollep.org/about\\_lep/our\\_board.aspx](http://www.liverpoollep.org/about_lep/our_board.aspx) for an example of board membership.

required to operate commercially<sup>11</sup> and can be controlled by a tiny number of individuals. Police and Crime Panels comprise local authority councillors and lack effective checks on the power of the Commissioner<sup>12</sup>.

And at national level, the zeitgeist has for some time favoured a more top-down, autocratic, command-and-control ethos<sup>13</sup>. The Coalition government is more prescriptive yet about who it regards as partners, is more likely to recruit these from the private sector and lays down conditions of compliance as a requirement of participation<sup>14</sup>.

*“Integrating public, private and civil society suppliers in new hierarchical forms – so-called ‘vertical’ service delivery supply chains – has become an important trend in recent public service reforms. In addition, an emphasis on payment by results and outcomes-based commissioning has set a new climate for partnerships between the private sector and civil society. This has created an advantage for organisations with the resources to deliver and ability to demonstrate impacts and outcomes. At the same time there has been a weakening of local ‘horizontal’ partnerships, such as Local Strategic Partnerships (LSPs), following the abolition of Local Area Agreements. This has weakened the co-ordination of strategic commissioning of services at local authority level.”*

Creating effective partnerships with civil society organisations: ESRC Feb. 2013 - <http://bit.ly/1fqMYBn>

These changes should thus be viewed alongside the rise in popularity of commissioning, which has further undermined collaborative impulses, for a number of reasons:

- there is often an organisational separation between partnership activities and commissioning activities, undertaken by different people with different backgrounds and remit;
- protocols associated with commissioning frequently explicitly exclude VSGs from involvement in service planning if they are potential ‘delivery partners’, on the grounds that this creates a conflict of interest or offers preferential treatment;
- the impact of competition has made VSGs more self interested and less likely to work collectively with their colleagues – in trust-based relationships - to influence local policy and practice. Instead there is more focussed attention on specific services with individual VSGs positioning themselves for advantage in procurement exercises. This tendency is reinforced when VSGs find themselves in supply chains with in-built self serving and self protective mechanisms<sup>15</sup>.

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<sup>11</sup> See Part 6 of the The NHS Bodies and Local Authorities (Partnership Arrangements, Care Trusts, Public Health and Local Healthwatch) Regulations 2012 - <http://www.legislation.gov.uk/uksi/2012/3094/contents/made>

<sup>12</sup> See <http://www.bbc.co.uk/news/uk-25839960>

<sup>13</sup> The National Planning Policy Framework is a good example of an initiative promoted as empowerment of local people but which actually consolidates elements of more top down control.

<sup>14</sup> For example the agreement with the 9 national voluntary organisations in the government’s Strategic Partners Programme includes a commitment to promote the ‘Big Society’.

<sup>15</sup> These issues are also discussed in NCIA Inquiry Working Papers 9 and 10: Does Size Matter? 1 and Does Size Matter? 2.

# Tendering and procurement requirements and decisions

## Producing service specifications

All procurement exercises are based on a service specification which is produced by the commissioner. In rare instances a draft specification is produced and consulted on. In a few instances VSGs (especially big charities) will have some influence over the result. But more commonly, VSGs in the frame to bid for the contract will have no input into the specification, which is offered on a 'take it or leave it' basis.

In drawing up service specifications, it has now become very common for commissioners to 'roll up' a number of previously separate funding agreements into one larger contract, with a requirement that a single contractor be responsible for the service. Sometimes this is justified as an attempt to rationalise provision from a strategic perspective. More often, the motive is to simplify the demands of procurement and subsequent contract management, cut administrative costs and pass the risk for managing what can be complex delivery arrangements to the contractor. This practice favours large organisations with the infrastructure capacity to manage contracts of this sort and places substantial demands on them. This, in turn, increases central management costs, resources that are taken away from frontline service delivery.

## Mergers, takeovers and 'consortia'

But the effects of this practice go much wider - to encourage VSGs to expand and diversify their operations, engage in mergers and takeovers between VSGs, establish bidding 'consortia' or the use of the 'lead agency with sub-contractor' model. There are difficulties with all of these options.

Whilst it may be quite proper for a VSG to aspire to expand and diversify, to do so because contract opportunities encourage it is hardly a legitimate justification. Similarly a contract-driven pressure to merge, to takeover or be taken over encourages poorly matched and inappropriate alliances that may not be in the interests of service users and communities. Smaller, locally-based groups may not wish to throw in their lot with other VSGs, fearing the loss of their independence and relationships that may be vital to meeting the needs of their communities.<sup>16</sup> This is especially the case for VSGs working with specific ethnic or cultural constituencies<sup>17</sup>.

The use of 'lead agency' arrangements promotes a predatory attitude amongst better resourced VSGs, creates new hierarchies of control and an arbitrary approach to meeting the needs of the contract<sup>18</sup>. The arrangement can work well but this depends on the

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<sup>16</sup> See NCIA Working Paper 10: Does Size Matter? 2.

<sup>17</sup> See Ware P. (2013) "'Very small, very quiet, a whisper...'" Black and Minority Ethnic Groups: Voice and Influence' *Third Sector Research Centre*, Working Paper, 103, October 2013.

<http://www.birmingham.ac.uk/generic/tsrc/documents/tsrc/working-papers/working-paper-103.pdf>

<sup>18</sup> In conversation with the author, regarding a generic community advocacy tender, the Contracts and Procurement Manager for AgeUK East London said: "The idea is that we'll take the older people's element and find other groups to do the rest." City and Hackney MIND, the lead agency that successfully won this contract, refused even to show its 'partner' sub-contractors the successful bid. St Mungo's, a homelessness charity which also bid for this contract (an example of opportunistic diversification), built its 'supply chain' of sub-contractors through a Survey Monkey questionnaire.



integrity of the lead agency, the watchfulness of its partners and excellent facilitation and negotiation skills to manage the difficult dynamic, and the decisions required. All these are essential if the actual service provided is to successfully address its purpose. Users and communities are the losers when these conditions are not met.

Forming consortia has also been seen as a response to the demand from commissioners for contract scale. In some areas, a huge amount of effort has been put into building whole new organisations (often called Special Purpose Vehicles) to allow smaller local VSGs to join in the tendering circus. Though widely promoted by the government and VCS infrastructure organisations, consortia have had variable success in their objective of developing, or even protecting, established local VSGs. For example, advice consortia in Bolton and Stockport, mental health providers in Bolton and the Greater Manchester Learning Consortium have had some success in winning contracts. But 'Converge' in Manchester, despite building a useful collaborative network of some 60 groups, failed to win contracts<sup>19</sup>. And ConsortiCo, a Bedfordshire based bidding group of 40 local charities, established with a £60,000 loan from Futurebuilders, closed down after failing to win any contracts and being unable to meet its debts.<sup>20</sup>

### **The distortion of the 'PQQ'**

Most tendering exercises involve a preliminary stage to exclude 'unsuitable' organisations from bidding. This stage is characterised by the Pre Qualification Questionnaire (PQQ) which is largely concerned with risk assessment. In other words, is the organisation, in the view of the commissioner, equipped to operate the contract successfully? The PQQ thus focuses on financial stability (evidence of financial controls, extent of reserve funds held etc.), governance, proxy measures of quality (such as proprietary quality assurance 'badging'), and previous experience of running services similar to those being tendered. The demands of the PQQ can be substantial and are enough to favour large groups and often exclude smaller ones from the exercise, especially where, in consortium bids, each partner to the bid is required to satisfy the PQQ requirements.

### **The tyranny of cost and price**

The procurement business is essentially about cost and price. This has been especially important during the recession when an explicit objective of outsourcing has been to cut cost. Decisions on tender bids will therefore be driven routinely by bid prices and the budgets available, rather than quality or appropriateness. Some contracts are let on a 'lowest cost basis'; most contracts that VSGs will be bidding for, however, adopt the 'most economically advantageous model' (MEAT). This allocates a quality/cost ratio on which decisions will be based. Contract decisions are sometimes made on the basis of 80% cost: 20% quality; more often 60%:40%. A procurement based on 40% cost and 60% quality is regarded as very progressive by bidders seriously concerned with quality. And despite the publication of ratios or protocols such as this, there is considerable room for commissioners to manipulate scores to suit other demands or intentions<sup>21</sup>

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<sup>19</sup> Information from Alex Whinnom, Greater Manchester Centre for Voluntary Organisation.

<sup>20</sup> Third Sector online: 12<sup>th</sup> April 2012.

<sup>21</sup> For example, the author was involved in a tender exercise in which the commissioners reduced the budget after bids had been submitted, thus skewing the whole basis on which bids were prepared.

## **Gagging and self censorship**

Silencing, gagging clauses and self-censorship have been widely reported<sup>22</sup>. Once a procurement exercise has been advertised, a kind of 'purdah' is imposed. VSGs interested to enter a tendering exercise are prohibited from discussing the tender – formally or informally - with officers or elected representatives or even with colleagues in other voluntary groups. From this point onwards, therefore, VSGs adopt the status of a potential contractor or sub-contractor, assumed to be pursuing their own self interest in a competitive struggle.

## **The shroud of secrecy**

Furthermore, the whole procurement process is shrouded with secrecy. When challenged this is often justified in the interests of commercial confidentiality. The tendering process is also highly professionalised and, in many areas, almost entirely conducted by officers of statutory authorities and VSG managers. The involvement of elected representatives (in local authorities) can be emasculated and ceremonial, in attempts to avoid accusations of 'political interference'. It is also now reported that local councillors have been prevented by officers from actually seeing contracts on grounds of confidentiality<sup>23</sup>. In other areas the complaint is the other way round - that councillors constantly interfere, are more driven by price than the officers, are parochial and often just don't understand what the process is all about<sup>24</sup>. As for the involvement of service users within procurement, this is usually absent altogether and rarely taken seriously. Even when present, the influence of users is anyway unlikely to be meaningful given the arcane technocratic environment in which procurement takes place.

## **Awesome transaction costs**

The transaction costs of tendering and procurement – both for bidders and commissioners - are awesomely large and soak up resources that could otherwise be used for direct service provision. Since these costs largely involve staff time, they are rarely counted or factored into assessments of cost effectiveness.

## **Contract and performance management regimes**

If securing contracts through these processes is onerous, sadly contract terms and performance management regimes in use offer little respite. The starting point is, of course, that the whole process involves the passing of risk from the commissioner to the provider; financial risk and responsibility for correcting failings in the quality or quantity of service provided. Nonetheless, commissioners may also be called upon to account for the performance of its contractors and this is especially significant where the contract performs *statutory duties* on behalf of the commissioner. The result is that contract terms are frequently onerous and seriously disproportionate, monitoring and reporting procedures gargantuan and micro-management by officers common. For example, it is now common for a commissioning authority to insist that it holds ownership of all data generated by the service, including personal and identifiable data held on clients. This will always be sensitive information, most especially if service clients are, say, refugees or victims of domestic violence and disclosing it strikes at the heart of the trusting and confidential relationship

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<sup>22</sup> See Baring Panel on the Independence of the Voluntary Sector, Annual Report 2014

<sup>23</sup> Information from Caroline Molloy, Stroud Against the Cuts.

<sup>24</sup> Private communication from John Hedge, an established public sector consultant.

between a VSG and its users. To avoid incurring financial liability it is also reported that some commissioners are requiring providers to indemnify them against claims, often to ludicrous amounts<sup>25</sup>.

At the same time, because of rigid contract specifications, there is often little leeway to providers to adapt provision to meet changing needs or challenges. Furthermore, in these situations, involving complex services for vulnerable people, it cannot be assumed that the contract monitoring officer will have any in-depth understanding of the issues involved.

Given that control by the commissioner is the main driver for performance management, it is ironic that outsourcing actually reduces the control of the commissioning body. With directly managed services, the authority can put right things that go wrong with a service directly. Whereas, in a contractual relationship the only substantial sanction is to threaten or actually withdraw the contract. This can be difficult legally and logistically and can place the contractor in a powerful position<sup>26</sup>

Nor can it be said with confidence that securing a contract will provide any assurance about sustainability. It is common for review provisions to be built into contracts. Such reviews can be used by commissioners to cut the contract price part way through the contract, and /or impose higher outputs or outcomes targets.

## **The influence of wider legislation**

Two other statutory requirements have played an important part in the ways that commissioning and procurement have been approached by state agencies – the provisions of EU competition law and the legislation relating to transfer of employment rights (Transfer of Undertakings (Protection of Employment) Regulations or TUPE). Two other pieces of legislation may also provide levers to positively shift commissioning strategies – the general power of competence granted to local authorities by the Localism Act 2011 and the effect of the Public Services (Social Value) Act 2012.

### **EU Procurement Rules**

EU procurement rules are often cited as the reason why public authorities say they are forced to tender contracts competitively. In reality this is as much due to the fear that a decision not to tender will be challenged in the courts, that a defence will be weak and the costs of fighting the action high. The rules revolve around a contract value threshold – currently just over £170,000. Above this figure and a contract should be openly tendered. Below that figure the authority standing orders dictate the rules for procurement and there is considerable discretion and flexibility available at this level. The tendency to roll up separate funding agreements into one large contract obviously has increased the number of contracts that exceed the threshold. Once a decision to tender openly has been taken, bids have to be considered openly i.e. from private as well as voluntary agencies and from

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<sup>25</sup> For example, in Westminster in 2013 an agency serving migrants was required by the Council to increase their liability insurance cover to £10M on a contract of £40,000 value. The increased premium would have amounted to £7-8,000.

<sup>26</sup> For example, in 2013, G4S was caught fraudulently claiming payments in a 'tagging' contract. Their response was to offer the government a settlement of £23M *as a credit note*. (You have to admire their cheek!). In the end the company repaid to the government £109M in respect of this contract.

national as well as local providers. It is this provision that often puts local agencies at a disadvantage. However, authorities can devise their own (lower) thresholds provided they are reasonable and justified. The EU itself has been urging public agencies to break contracts down into smaller lots to encourage smaller local suppliers. The threshold for open tendering is soon to be increased to over £600,000, effective in UK law from summer 2014. This could dramatically improve the situation.

There is also another approach available which favours local agencies and based on the EU key policy objective of sustainable development. This holds that while the procurement of specific goods and services has one or more functional aims e.g. providing homecare services to the elderly, such services can be used to promote social, environmental and other societal objectives, not necessarily connected with the procured services' functional ones. These latter objectives have been characterised as 'horizontal', i.e. they may cut across all functional goods and services procurement. The effect is that the commissioner can define the criteria for awarding the contract in any way that meets the public's needs, including the promotion of 'horizontal' policies, to achieve social, economic or environmental objectives.

### **General Power of Competence and the Social Value Act**

The above argument feeds into the possibilities raised by the 'general power of competence' and the 'social value' legislation. The importance of the 'general power' provision of the Localism Act is that it allows a local authority to do anything that an individual with full legal capacity could do. Potentially, this opens up new opportunities to partner with, participate in, or deploy local resources to support service delivery or even remodel what 'services' actually mean, outside of a prescriptive and hidebound commissioning and procurement regime. The social value legislation imposes a new duty on local authorities to consider social value when procuring services. Again, this is about securing community benefits that go beyond the specific service concerned. A weakness of the legislation is that an authority is only obliged to 'consider' social value and is free to give this little or no priority in the final decision making. However, there is little evidence so far to indicate that the provision has dramatically improved local procurement decisions<sup>27</sup>.

### **TUPE**

TUPE regulations are also a consequence of EU law and are intended to protect employees' rights when their business is transferred to another business. These rights are important and staunchly defended by the trades unions. The regulations have, however, been weakened by the Coalition government, the most recent changes taking effect from the 31<sup>st</sup> January 2014. In the context of privatisation of public services, TUPE has provided some protection of terms and conditions for staff whose jobs have been outsourced and whose employment has been transferred to the new employer. However, a perverse effect of the regulations is that some local authorities and others have applied TUPE to the re-tendering of grant programmes. Thus a VSG that wins a rolled up contract for, say, local advice services may find itself responsible for employing the staff from the other advice agencies in the area who lost the tender. This can create serious difficulties for all involved (including the staff being transferred), and further constrain the autonomy of VSGs to determine for

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<sup>27</sup> A useful discussion of this issue can be found in Commissioning and Community Sourcing; Centre for Welfare Reform with Koru; July 2013 - <http://bit.ly/187vgBw>

themselves how they organise and deliver their services and activities. Deteriorating conditions amongst voluntary sector staff are evidenced in Unison's 2013 Survey of nearly 3,000 voluntary and community sector members<sup>28</sup>.

## The impact on VSGs of these regimes

### Competition and the race to the bottom

The essential principle that lies behind the commissioning approach to outsourcing is that competition or 'contestability' is the bedrock of a market economy and the mechanism that drives up quality, drives down costs and encourages innovation. This may be the case in relation to high tech gadgets, motor cars or coffee shops, where markets are based on the idea of consumer and product choice and where consumers are assumed to have the resources necessary to buy their choice. But in relation to public services, these assumptions just do not hold and different assumptions substitute<sup>29</sup>.

At the top end of large government contracts, it seems clear that the global firms large enough to bid are doing very well out of public sector outsourcing (perhaps Private Finance Initiative projects being the most outrageous illustration) and that this includes a good deal of sharp practice, if not outright illegal activity. Here competition seems not to hinder the upward trajectory of profits. At local level, however, a combination of public funding cuts that reduce the budgets available, and private and voluntary providers willing to cut corners, has now resulted in a position in which competition drives down costs to such an extent that the viability of many outsourced contracts is threatened. The provision of home care is a clear case in point, where costs have been reduced in many areas to the point that any semblance of a service that effectively meets users' needs is impossible to achieve<sup>30</sup>.

Many VSGs, faced with this situation, now subsidise their contract income from other sources trying to maintain standards<sup>31</sup>. The pressure to tender at levels that commissioners will pay also exerts a downward pressure on wages and other variable costs (see below section on 'managerialism'). For example, a survey in 2013 revealed that VSGs are the highest users of zero hours contracts<sup>32</sup>. In another example, in 2012 the charity Turning Point sacked its entire 2,600-strong workforce and re-employed them on new contracts in a bid to reduce costs. Unite claimed that some staff had lost up to £6,000 a year from their wages. Even according to Turning Point the changes were made to reduce "*various enhancements, including those for unsociable hours, much of which is no longer paid within the market*"<sup>33</sup>. With respect both to costs and quality, many VSGs are now truly involved in a 'race to the bottom'. Fortunately, there are now occasional reports of VSGs walking away from contracts because the costs are untenable or other terms of service unacceptable<sup>34</sup>.

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<sup>28</sup> [https://www.google.com/?gfe\\_rd=cr&ei=r1WDU\\_WaLcua\\_waKtYCQDQ&sesinv=1](https://www.google.com/?gfe_rd=cr&ei=r1WDU_WaLcua_waKtYCQDQ&sesinv=1)

<sup>29</sup> For an interesting discussion of misplaced reliance on markets see <http://www.childrenengland.org.uk/learning-the-lessons-from-residential-childcare/>

<sup>30</sup> See File on Four: BBC Radio 4; 4/2/14.

<sup>31</sup> In LVSC's Big Squeeze report for 2013, 59% of respondents from local agencies said they had used free reserves during the year 2012/13 to support running costs. Big Squeeze; LVSC; 2013.

<sup>32</sup> 34% compared to 24% in the public and 17% in the private sectors - See Chartered Institute of Personnel Development: <http://bit.ly/1f4Y8h2>

<sup>33</sup> NCIA Newsletter No 35: September 2013

<sup>34</sup> See for example: NCIA Newsletter No 36: December 2013

Competitive commissioning and the practice of widely advertising contract opportunities has also encouraged the interest and involvement of large, predatory, mostly national, corporate VSGs with business plans dedicated to extending their management of local services. These agencies can offer 'economies of scale' over local providers, may have secure reserves that qualify them as a safe pair of hands, and have the resources to mount the propaganda of their own 'goodness and quality' to drive negotiations with funders. NAVCA's 2012 annual survey of their CVS membership revealed that the number of CVS chief executives who knew of a local group that has lost service contract funding in competition with a national charity had, that year, leapt from 33% to 56%<sup>35</sup>. Many of these national charities are involved in aggressive competition with each other. The battles between Voiceability and POHWER, for example, two agencies dedicated to 'community advocacy services' are legendary in the field. Between them they have had a disastrous effect on the survival of small local providers<sup>36</sup>.

In parallel to putting local VSGs out of business altogether, many – though, thankfully, not all - national service providing charities are mimicking private sector companies, by building supply chains that involve local VSGs as sub-contractors.

Equally important, the arrival of market-based competition has had drastic effects on the trust relationships between local VSGs and between local and national VSGs. Competitive outsourcing encourages tension, secretive and self interested behaviour. This seriously undermines the willingness and capacity for joint working and attempts to adopt collective and strategic approaches to tackling local issues or providing services.

Innovation too is stifled by the competitive contract regime, with its emphasis on risk avoidance and strict compliance with the terms of the contract specification. To quote the Barings Panel on the Independence of the Voluntary Sector: "*Certainly, contract funding for the delivery of public services alone is unlikely to support the experimentation and risk taking that is a key element of what is valued about the voluntary sector by many.*"<sup>37</sup>

### **The loss of core funding**

All organisations need to sustain the capacity to manage and maintain themselves, assess the present and plan for the future. VSGs need core funding to do that, funding that is committed to core, as opposed to service or project, functions. Historically, grants have for many VSGs been the source of this core funding. With the disappearance of grants, this funding has also disappeared. To some extent private trusts and foundations have also played an important role in this context. However, many of these sources also have moved towards more prescriptive – and 'outcomes' based – funding priorities and are not keen to fund core functions. The second strategy is to 'top slice' (reserve an amount for core and management costs) project and service applications and contract bids. This can be difficult to negotiate with commissioners, and who may already have reduced the contract budget below a level on which such a subsidy would be possible, whilst maintaining the service.

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<sup>35</sup> Chief Officer Survey: NAVCA 2012.

<sup>36</sup> See for example NCIA Newsletter No: 26 April 2012 and NCIA newsletter 28: July 2012 for another example involving NACRO.

<sup>37</sup> Barings Panel on the Independence of the Voluntary Sector: Annual Report 2013 p.34

Relying on this practice also increases the dependency on continuing to win work, which in turn requires that a greater proportion of core time is committed to bidding for work and contract management.

The end result is to create very unstable organisations, whose sustainability is undermined and challenged. Service development work also becomes very difficult to do organically or to find funds for. It can be said that this has always been the operating environment for VSGs and, in some respects, this is true. However, in previous environments, only a tiny number of these organisations held practical, daily responsibility for public services, where availability, quality and equity should be assured. As the landscape of provision changes, the inherent instability of VSGs has become another important reason to oppose the outsourcing of public services to their management.

### **Mission drift, ‘managerialism’ and loss of independence**

Becoming committed to a future as public service contractor or sub-contractor has certain internal implications for VSGs in terms of purpose, management approaches and styles and levels of dependence or independence to determine their own future. The moves to a more ‘managerialist’ way of operating are not inevitable but are strongly encouraged, both by the way in which commissioning is undertaken and in the propaganda support to these models that has been offered by the VCS infrastructure agencies. These are some of the hallmarks of the changes that are reported in many VSGs, at national, regional and local levels:

- VSGs are pressured to adapt or abandon their own plans and perspectives to match those of the commissioning authorities, as a route to survival;
- Closely regulated and managed relationships of this sort saps the independence of these groups;
- The ‘managerialism’ demanded by this form of operating tends to create top management elites within VSGs, divorced from the experience and concerns of their own frontline staff, let alone their membership, users or wider communities; the cult of the Chief Executive and leadership in general is very well established<sup>38</sup>
- Significant resources are committed to obtaining quality assurance certificates and badges, many of which have the chief effect of restyling (often bureaucratising) methods of work and management practices. Many also do *not* have the chief effect intended, which is to assure the quality of work or service; on the contrary substituting standardisation for standards ;
- These pressures pull the whole agency into looking upwards towards the instructions of the commissioners, rather than looking outwards towards the needs and preferences of its users or communities;
- As VSGs become bigger and especially as they operate as regional or national organisations, they tend to develop a corporate identity and momentum and decisions may be made at some distance from local service delivery and frontline staff. The shift undermines the avowed virtues and value of voluntary sector activity<sup>39</sup>;

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<sup>38</sup> The Halo Trust paying its Chief Executive £215,000, to include the cost of his children’s school fees, is merely an extreme example of a widespread belief in the voluntary sector that an organisation’s success depends chiefly on the quality of its leader. Third Sector; 28/1/14.

<sup>39</sup> A report about housing associations for the Baring Foundation, concluded that, in delivering contracts for government, housing associations had sacrificed their independence, their ability to provide user satisfaction and choice and to empower users, their ability to be respected by and work flexibly with other organisations,

- All of these forces feed into a ‘tesco-isation’ of the sector – clone-like services being offered in standardised ways according to the ‘best practice’ norms of the time.

## The end of dissent

It has always been NCIA’s contention that a distinctive role for voluntary action is as part of the struggle for social justice, equality, enfranchisement and environmental sustainability. As citizens’ organisations, Voluntary groups have the freedom and independence to make their mark in pursuit of these ideals. Given that we are far from achieving them, it means that willingness to disagree and oppose obstacles and impediments, where necessary, is likely to be needed. The forces and factors discussed in this paper act to discourage, sanction, and sometimes ban altogether, involvement in dissent.

These pressures can be explicit. For example, considerable publicity surrounded the disclosure that VSGs involved in the government’s Work Programme had gagging clauses written into their contracts. Though this publicity was overwhelmingly negative, the government continued to insist that it was reasonable to stifle criticism in this way, maintaining that it was merely an attempt “...to control the way in which data is presented to the public about how the programme is working.”<sup>40</sup>

Less formal, but nonetheless explicit, clampdowns on dissent are also reported by VSGs:

*“I have sat in a meeting and witnessed how a voluntary sector representative was trying to take the local authority to task for failing to follow its own policy only to have the strategic lead for domestic violence stare her in the eyes and say ‘Do you want funding for next year? Then I suggest you shut up.’”<sup>41</sup>*

More common is the zeitgeist effect which generates self censorship. VSGs know which side their bread is buttered and the likely consequence of alienating commissioners, councillors or other powerful individuals. This trend has been acknowledged by the Baring Panel reports on Independence<sup>42</sup> and raised by them as a serious concern:

*“Self-censorship is increasing because of the chilling effect of funding cuts, particularly the fear of loss of funding, and loss of capacity because of the move to restrictive contract funding”.*

The trend is also apparent in VSGs dealings with the private sector, including self censorship with regard to important sponsors<sup>43</sup>.

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and their ability to campaign. Housing associations in England and the Future of Voluntary Organisations: Andrew Purkis; Baring Foundation 2010.

<sup>40</sup> Nick Hurd, Minister for Civil Society, quoted in the Telegraph 22/1/13.

<sup>41</sup> Quoted in Neoliberalism and Violence: The Big Society and the Changing Politics of Domestic Violence in England: Armine Ishkanian; LSE 2014.

<sup>42</sup> Barings Panel on the Independence of the Voluntary Sector; Annual Report 2013 (p40) and 2014.

<sup>43</sup> See for example, reports of Dominic Nutt who alleged that Save the Children had backed off from criticising potential corporate sponsors – Third Sector 13/1/14



## The impact on service users

The overwhelming thrust of contemporary discussion within voluntary and community groups is the effect that these changes are having on the role and sustainability, even survival of their organisations. This paper is no exception. However, the real importance of all these debates about public services, privatisation and VSGs roles is whether these changes improve or degrade the extent to which public services of the sort involved provide effective support and social protection to those intended to be served.

An important historical role for the voluntary sector has been its critical stance in relation to some public services (housing, benefits, services for older and disabled people, for example) and it is clearly true that VSG involvement in providing innovative and alternative approaches to service delivery has been an important influence. However, there are also many examples of excellent public services run as directly managed services by state agencies. The answer to the question of what makes a good public service should not therefore be viewed wholly in structural terms but should take into account a range of other contingencies. Certainly, there is no compelling evidence that contracted out public services are in themselves more efficient, cheaper, or achieve better outcomes for users and communities than well organised, directly managed services<sup>44</sup>.

Furthermore, having public services provided by contractors and sub-contractors is confusing for users and the public, and especially difficult when things go wrong (who is responsible, who is accountable, who is to blame and who remains to provide independent advocacy?). When private or voluntary sector providers go 'belly up', users can be left without services or recourse to any public sector fail-safe that can pick up the responsibility.

## 4. The arrival of the private sector – new threats

In relation to some types of welfare provision, employment support and some other arenas (leisure services, for example) there has long been an overlap between the activities of the private and voluntary sectors. On the whole these have occupied separate domains, however, and direct working links between the two sectors have been uncommon. Within the last five years or so this situation has changed dramatically. Reasons behind this include:

- the scale and pace of public services privatisation which has brought huge private sector interest (indeed an 'arms race') in gaining a slice of the action;
- the apparent attractiveness of locally-based VSGs who can both improve the image of private contractors (so-called 'bid candy') and offer the prospect of accessing populations deemed 'hard to reach';
- the general exhortation to VSGs to become more like private businesses which has made many VSGs open to influence and collaboration with the private sector;
- related to the above, the rise of 'social enterprises' as the apparent win-win marriage between private profit and public good (the position of social enterprise and

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<sup>44</sup> See for example Milbourne, L. (2013) *Voluntary Sector in Transition: Hard Times or New Opportunities?* pp 94-96; 216; 222-224. Bristol: Policy Press

- investment is the subject of a separate paper produced as part of the NCIA Inquiry<sup>45</sup>);
- a rise in pragmatism on the part of VSGs facing drastic funding cuts and increases in demand, making them more receptive to working arrangements that might previously have been rejected as a matter of principle.

The morphing of public, private and voluntary sectors is now highly advanced as a result of government policy and propaganda, mainstream media reporting and the position of VCS infrastructure groups who have accepted this 'new normal' with hardly a squeak of protest.

Many of the developments in these new relationships have arisen as a result of commissioning and procurement practices on the part of public authorities. And what is frequently lost in the public debate of this phenomenon is an analysis of the power relations involved. For the new 'partnership' between VSGs and private companies is inevitably based on a contractor-sub contractor relationship, with VSGs in the latter, subservient position. This landscape is also dominated by global, firms – those most often visible being A4E, Capita, G4S and Serco, though there are many others. These companies command vast economic and political power. This places VSGs in a vulnerable position. And behind the practical arrangements lies an enormous matter of principle that is hardly ever voiced within the voluntary sector – how can it be acceptable that the resources of charitable organisations be committed to maximising the profits of private companies? This point is especially poignant where VSGs use the time freely given by volunteers to meet their contractual obligations to these corporations.

These new private-voluntary partnerships also raise questions of reputational damage. Hard on the news that A4E was being investigated for fraud came the revelation of the extent to which the then Chair and daughter of the founder, Emma Harrison had enriched herself at public expense<sup>46</sup>. G4S's failings were revealed in the Olympics security scandal, whilst both G4S and Serco have been found to have fraudulently claimed payments in public sector contracts<sup>47</sup>. And both companies have been found to be guilty of violence and oppressive behaviour towards prisoners and asylum seekers<sup>48</sup>. Meanwhile firms like Capita openly boast of their insider political connections that can open doors to influence and advantage<sup>49</sup>. Whilst NCVO teamed up with Barclays Bank in 2012 and 2013 to offer the 'Barclay's Leadership Development Programme'; this hardly seems likely to present a model of charity leadership with which the public will easily and sympathetically identify.

The experience of private-voluntary partnerships has not so far been good. The highest profile case has been that of the government's Work Programme. All but two of the massive contracts involved went to private companies many of whom had set up supply chain arrangements with VSG sub-contractors. Damning indictment of the programme came from

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<sup>45</sup> See NCIA Working Paper 3: The Rise and Influence of Social Enterprise, Social Investment and Public Service Mutuals by Leslie Huckfield.

<sup>46</sup> See <http://www.telegraph.co.uk/finance/jobs/9788801/A4es-Emma-Harrison-paid-1.5m-dividend-despite-pre-tax-loss.html>

<sup>47</sup> See Chris Grayling, Justice Secretary's statement to the Commons - <http://www.parliament.uk/documents/commons-vote-office/December%202013/19%20December/11.%20Justice-Contracts%20Update.pdf>

<sup>48</sup> See <http://www.corporatewatch.org.uk/?lid=3739> and <http://www.corporatewatch.org.uk/?lid=4264>

<sup>49</sup> See for example, paras. 2.19-2.20 of Schedule 3 Continuous Improvement Plan: Model Contract Schedules; Capita and the L.B. of Barnet 2013.

the National Audit Office<sup>50</sup> and the Public Accounts Committee<sup>51</sup> and even from NCVO and ACEVO who, nonetheless, continue to support the principle of these partnerships.

London Voluntary Services Council reported to the Baring Panel on Independence that an informal survey of 16 London-based VCS 'tier 2' subcontractors found that, almost 10 months into the programme, 11 had received no referrals. Five were considering pulling out of the programme, two had already withdrawn and one never signed a contract and should not have been on the list of contractors. Only one of the organisations said it was happy with how things were going<sup>52</sup>. NCVO also published a report on the experience of VSG subcontractors which found that just under half of the 98 voluntary groups polled were subsidising the delivery of the programme from their own reserves<sup>53</sup><sup>54</sup>. In another example of the vulnerability of VSGs in these arrangements, NCS Network, a Serco-led prime contractor for the National Citizen Service, announced in December 2012 that it was reducing payments to sub-contractors in 2013 by 25%, from £1300 per place to £980<sup>55</sup>.

Even those from the social enterprise field and entrepreneur end of the voluntary sector are upset by the direction of travel and have resorted to special pleading in efforts to keep space open for their own brand of commercial welfare-ism - *"Charities and social enterprises are being squeezed out of delivering public services by a small number of large companies favoured by local and central government commissioners"* bemoans a 2012 report from Social Enterprise UK<sup>56</sup>.

Much of the criticism of the Work Programme was based on the use of payment-by-results (PBR), a regime that in itself favours large organisations with good reserves and cash flow. Rather than seeing the failings of Work Programme and PBR as a structural issue, the national VCS support organisations seem to believe that they are all part of some kind of misunderstanding. Karl Wilding, Director of Public Policy at NCVO, for example, was reported in December 2013 as saying that it supported the use of PBR because it encouraged commissioners to focus on procuring for good outcomes, rather than services. Their report at the time concluded that it was not surprising that PBR faced problems, because it was a new type of contracting with potential teething problems<sup>57</sup>. And more in the 'misunderstandings' vein, NCVO has published a joint Code of Guidance with SERCO "to improve the relationships between prime and subcontractors in public services"<sup>58</sup>.

PBR has now become a fad that is sweeping the public sector to the point that it has even trickled down to VSG lead agencies who are writing PBR conditions into their own sub-

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<sup>50</sup> [http://www.nao.org.uk/wp-content/uploads/2012/01/10121701\\_work\\_programme\\_design.pdf](http://www.nao.org.uk/wp-content/uploads/2012/01/10121701_work_programme_design.pdf)

<sup>51</sup> <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/777/77704.htm>

<sup>52</sup> See NCIA Newsletter No 27: May 2012.

<sup>53</sup> The Work Programme: Perception and Experiences of the Voluntary Sector; NCVO: September 2012.

<sup>54</sup> See also Rees et al, Support for all in the UK Work Programme? Differential payments, same old problem... TSRC Working Paper 115, 2013.

<http://www.birmingham.ac.uk/generic/tsrc/documents/tsrc/working-papers/working-paper-115.pdf>

<sup>55</sup> See NCIA Newsletter No 30: December 2012.

<sup>56</sup> The Shadow State; SEUK: December 2012.

<sup>57</sup> Payment by Results Contracts: A Legal Analysis of Terms and Process: NCVO October 2013.

<sup>58</sup> Third Sector 11/4/13. Of this code, Nick Hurd, Minister for Civil Society, was quoted as saying: "I welcome this Code of Practice which provides an important framework for VCSE and private sector organisations to strengthen their partnerships, in order to grow the market and deliver better public services."

contractor arrangements. More sensibly, the shortcomings of the PBR approach are being highlighted by the ‘Kittens are Evil’ initiative. This is supported by Vanguard Consulting, a consultancy with a good record of helping the public sector improve services without privatising them. This has run a series of regional events to highlight the mistaken assumptions that lie behind ‘outcomes-focused’ contracting and has spawned a small ‘say no to PBR’ campaign<sup>59</sup>.

Not that such opposition has slowed the onward march of PBR, the focus on multi-million pound private companies and deification of private/voluntary partnerships. The privatisation of the Probation Service, now (May 2014) in its procurement stage, repeats the mantra that VSGs are an essential component of an outsourcing strategy that will be based on large corporate and mostly private sector ‘prime’ contractors. As a result of the overcharging scandals both G4S and Serco have been excluded from this privatisation as prime contractors (but not as sub-contractors)<sup>60</sup>. But there are plenty more where they came from – the shortlist of 30 main contractors was announced in December 2013<sup>61</sup>. Besides a number of in-house management bidders (‘mutuals’), the list is dominated by private contractors and, where voluntary groups are included they are (with one exception) corporate national players like Crime Reduction Initiatives and the Shaw Trust or partners with a private firm (Turning Point and St Giles Trust being examples). Also worrying is that more than 550 voluntary groups expressed interest in being part of the supply chains<sup>62</sup>.

Finally, what has been so depressing about the arrival of the private sector into the world of voluntary action has been the almost entire absence of a debate about two crucial matters. Firstly, how do VSGs view their active complicity with the privatisation of public services? Secondly, what possible positive future can be predicted for VSGs working as sub-contractors to serve private interests in the wider context of an emasculated welfare state?

## 5. In defence of grants – why do they matter?

Despite many technicalities and much confusion, the essential and substantive difference between a grant and a contract is well summarised in a definition produced by HM Treasury some years ago:

*“A grant maker is not contracting for a service that forms part of its own business. It is offering financial support in an area of work designed by the third sector, which it wishes to sponsor. The work would add value to the funder's overall aims and objectives. The organisation retains considerable freedom in the way in which it carries out the work.”*

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<sup>59</sup> See <https://www.vanguard-method.com/news/?story=28&curpage=0> for a report of one of these events and [www.saynotopbr.net](http://www.saynotopbr.net) for the campaign.

<sup>60</sup> This must have been as big a blow to the Ministry of Justice as to the contractors, for during the first year of the Coalition government more than half of spending on private contractors by the UK Borders Agency and the National Offender Management Service went to these two firms – a total of £383M – see <http://www.crimeandjustice.org.uk/ukjpr1pressrelease.html>

<sup>61</sup> See <https://www.gov.uk/government/news/best-in-the-business-bidding-to-rehabilitate-offenders>. See also Third Sector: 20/12/13.

<sup>62</sup> For a useful discussion of VSG involvement in criminal justice contracting see <http://www.independentaction.net/wp-content/uploads/2013/10/Complying-transforming-or-resisting-Milbourne-Cushman1.pdf>

Voluntary organisations decide for themselves, by reference to their users and communities, what services or activities they feel are needed and how they can best provide for that need. They then look for the resources to support that work. This process is certainly competitive and may involve negotiating with funders or fitting into their guidelines. If the application is rejected, the group looks elsewhere, funds the work from its own resources or abandons the proposal. But the relationship is based on the supposition that the funder is supporting a proposal that has come to it rather than a proposal it has designed and specified itself. This indicates a fundamentally different set of understandings between funder and funded; understandings built around the principle of independent thought and action.

Critics of grant regimes can point to examples where arrangements have become stagnant, if not overtly corrupt, where little attention was paid to evaluation, and which have displayed poor governance, grant dependency and resistance to diversification. Nonetheless, stressing the independence of the relationships generated by grants is significant. It is the pluralism that is generated by this relationship that encourages the important contribution voluntary agencies make to a vibrant civil society. Many benefits flow from grant relationships. For example, a study in the North West in 2010 highlighted twelve values to grant making and illustrated through case studies how these benefits played out in practice<sup>63</sup>. Grants also create 'leverage', enhancing VSGs ability to bring additional funding from outside the local area<sup>64</sup> and can be redeployed quickly and flexibly when needs or circumstances change.

There is also a crucial additional benefit of independent VSGs – a grant regime makes it easier for VSGs to protect their freedom and capacity to develop and pursue perspectives divergent from those of the funder. When VSGs have the freedom to design and run services in an autonomous or semi-autonomous way, it allows orthodoxies (about treatment for example) to be challenged, new ideas and ways of working to improve services tested out, or priority to be shifted towards hard-to-reach groups. Historically, we have all benefitted from the situation whereby VSGs, located outside of the statutory sector, with working skills, insight and experience of needs and services, were able to develop a critique of mainstream public services and at a level of detail needed to achieve tangible, practical improvements. Being independent also meant that these VSGs were empowered to express these views, forcefully where necessary. This ability and willingness to give voice to criticism, dissent, even resistance to the policies, practices or services is crucial where these are held to disadvantage VSGs users, beneficiaries or communities.

During the New Labour years, the fashion for moving from grants to contracts was poorly resisted from within the voluntary services sector. Many VSGs viewed the changes as inconsequential (business as usual), as positive (believing a contract gives more certainty of

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<sup>63</sup> Demonstrating the local economic and social value of grant-making with the VCS: Centre for Local Economic Strategies and Voluntary Sector North West; July 2010.

<sup>64</sup> A study of advice agencies in Hackney showed that the Council contributed only £660,000 per year of a total spend of £1.9M; the balance was generated from outside of the area.

funding, and better opportunities for planning ahead<sup>65</sup>) or inevitable (therefore, no point in objecting)<sup>66</sup>. Nonetheless, some moves were made to restate the advantages of grant aid. The most visible of these initiatives was the Local Grants Forum, a grouping of 17 national organisations convened by NAVCA<sup>67</sup>. However, these moves were directed towards protecting grants rather than criticising contracts. The latter was avoided by arguing that grants should be included as part of a 'mixed economy' of state support to VSGs<sup>68</sup>. An extension to this argument also became popular – that grants were essential for small community groups (who lacked the skills, knowledge, size or management capacity to handle tendering etc.) whereas contracts were quite OK for the larger VSGs, able to handle the processes and the heat of competition.

Now, in 2014, the national 'leadership' bodies are adopting a low profile on the grants v contracts issue. The Local Grants Forum issued a press release in March 2012 and its last publication was in October 2012<sup>69</sup>. It met again in March 2014, though attendance was low and follow up minimal<sup>70</sup>. NCVO's 'practical support' page on grants actually devotes more space to setting out the disadvantages of grants than promoting their merits<sup>71</sup>. ACEVO, never a member of the Local Grants Forum, publishes nothing to promote grants (although happy to administer them as government agent) and indeed has many times indicated a preference for contracts<sup>72</sup>. Even the Directory of Social Change, which has been a staunch defender of grants<sup>73</sup>, has published nothing publically about the issue since March 2011<sup>74</sup>, although "...banging the drum for grants and against commissioning.... is still very much a position of DSC and at the core of our beliefs as an organisation."<sup>75</sup>

With respect to local authorities, NHS and other statutory bodies historically involved in grant giving, the transformation from grants to contracts is widely regarded as a done deal. In many cases this shift has been accompanied by the loss of specific voluntary sector liaison and development posts, depriving the authority of vital information and understanding about the local voluntary sector and its contribution to community life. In its place, responsibility for voluntary sector funding is transferred to procurement units, often with little knowledge of the voluntary sector and frequently with little knowledge of the actual services being procured.

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<sup>65</sup> See, for example, Scott, D. and L. Russell (2001) 'Contracting: The Experience of Service Delivery Agencies' in *Voluntary Organisations and Social Policy in Britain*, Harris, M. and C. Rochester (eds) Palgrave, Basingstoke, pp. 49-63

<sup>66</sup> For a useful discussion of the effect on local agencies of the shift from grants to commissioning see *Voluntary Sector in Transition*, Chapter 4: Linda Milbourne; Policy Press 2013.

<sup>67</sup> *Defending Local Grants*: NAVCA; 2009.

<sup>68</sup> *Sustaining Grants*: NAVCA; 2007.

<sup>69</sup> 5 ways to protect grant funding: NAVCA; October 2012.

<sup>70</sup> The only action resulting from this meeting was a letter to the Public Administration Select Committee – see <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public-administration-committee/citizen-and-public-services/written/9307.html>

<sup>71</sup> See <http://www.ncvo.org.uk/practical-support/funding/grants?highlight=WyJncmFudHMlLCJjb250cmFjdHMiXQ==>

<sup>72</sup> See for example <http://www.guardianpublic.co.uk/third-sector-funding-grants-contracts>

<sup>73</sup> See for example *Towards A Fair Deal on Grants*: DSC; August 2010.

<sup>74</sup> *Response to the Green Giving Paper*: DSC; March 2011.

<sup>75</sup> Email communication from Jay Kennedy; 29/1/14.

On the ‘revivalist’ side, some commentators<sup>76</sup> are seeing a renewed interest in grants from NHS Clinical Commissioning Groups and Police and Crime Commissioners. It is too early to say whether this is significant or will impact on concurrent procurement practices.

It is also important to note the particular position occupied by personalisation in the context of this discussion. The implementation of personal budgets is now widespread and expanding and has significantly redefined the three-way relationship between statutory funder, service user and VSG. Many VSGs have found difficulties in dealing with personal budgets such as high levels of uncertainty, lack of the reserves and cash flow needed to frontload services, and inexperience in the business planning, marketing and branding needed to compete in a market. These problems are especially severe for small VSGs and most especially for user-led groups. Here there is a good case for grants and in some places this has kept good VSG providers going, but their situation remains fragile.

## 6. Is there a better way?

This paper paints a bleak picture of relationships between statutory and voluntary agencies, dominated by contractual and commercial arrangements. It tends to the conclusion that the system is broken and cannot be fixed. Only by a return to the assumptions that underpinned grant relationships can the independence and autonomy of VSGs be reinstated and that, from the commissioners’ perspective too, this is likely to result in more transparent and democratic decision making, better deployment of resources, improved services and fewer transaction costs. This is perhaps the first plank of our manifesto for change – an overarching political proposal that posits a fundamental shift in the ways in which all parties view the role of VSGs within communities and within public services provision.

Moving to such a position will require many VSGs individually to re-visit and re-examine and state the values, principles and political perspectives that underlie their role and purpose. This should encompass a strategic perspective, especially the extent to which, by their own actions, they wish to conspire with, or oppose, government policies to remove rights and social protections, abolish or downgrade public services, and privatise what remains. It should also include domestic concerns – how does involvement in contracting (in general and in relation to specific contracting opportunities) affect internal relationships with users, communities of interest, staff and volunteers; and external relationships with colleagues both in the statutory and non-statutory sectors?

Secondly, this organisational-level debate needs to be replicated on a national and sector-wide basis. Individual VSGs and commissioners are affected by the ‘mood music’ of the world they inhabit and there is an urgent imperative to change the mood and the music. Though one hesitates to conjure up the image of a ‘Compact’, given the appalling deficiencies of the current offering, such a statement of a new ‘settlement’ between the statutory and non-statutory sectors could help materially to reshape assumptions, understandings and operating principles. The likes of NCVO and ACEVO will not undertake

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<sup>76</sup>“ ... some of the new bodies are acknowledging use of grants – so I am seeing more CCGs joining the grant club and Police & Crime Commissioners certainly seem to favour small grant programmes.” Richard Caulfield, Voluntary Sector North East: email communication 29/1/14

this task, given the depth of their complicity with the government agenda. We will have to find other ways. One beacon here is the soon-to-be released (expected June) joint 'Declaration of Inter-Dependence' from Children England and the TUC. Though specific to children's services, the principles of maintaining a public sector ethos, resisting marketisation and constructing more participative and effective devices for commissioning are applicable across the voluntary and public sectors.

The demand for a new settlement with the voluntary sector should also include the specific demand about a return to grant aid (or 'contracts' that embody the characteristics of grants) as the assumed norm in state funding to VSGs. In pursuit of this demand, the NAVCA-convened Local Grants Forum could be an important vehicle.

In addition, it can be persuasively argued that things cannot improve as long as the drivers for outsourcing and procurement remain the need to cut costs and public expenditure. Some of our respondents felt that a number of the so-called 'public sector markets' are actually close to meltdown and collapse because prices have been reduced to unsustainable levels. Actively fighting 'austerity', i.e. cuts in public spending and living standards, is thus an integral part of the realignment that we seek.

Meanwhile, all involved have to cope with the situation now in real time and this means coping with existing commissioning and procurement practices. We know that there are many VSGs who have been working hard to defend their values, fight off damaging demands that have come with contracting, and maintain the integrity of their relationships with users and communities. We know that there are civil servants, officers and councillors who understand the difficulties and wish to ameliorate them. We also know that circumstances vary hugely from one local area to another and that what is 'reasonable' can be highly contingent on those circumstances. We even know that there are some who see commissioning as a positive device to re-design stagnant or ineffectual services.

This highlights an urgent need for better information and intelligence sharing about positive initiatives where these are occurring. For example, within the local authority world it is said that the 'co-operative councils' initiative is successfully re-shaping assumptions and relationships through the use of 'co-production' ideas, and basing decisions about services on genuine engagement with users, communities and providers<sup>77</sup>. This point also extends to information and intelligence about the more imaginative use of procurement technicalities that could get better results for all concerned - such as use of the Social Value legislation, manipulation of EU rules and procurement thresholds, ring fencing tenders to established local VSGs, positive 'localist' initiatives and the building of authentic collaborative partnerships between VSGs and with statutory bodies.

Efforts to make such alternative approaches visible and replicable can also help to build the political alliances needed to shift the scene more fundamentally. Developing and co-ordinating relationships between VSGs and radical councillors, officers and civil servants disenchanted with current arrangements, and with the public sector unions offers the chance of creating real traction for change.

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<sup>77</sup> See for example <http://www.coopinnovation.co.uk/>



Lastly, individual VSGs and the sector as a whole have to formulate a more robust response to the arrival of the private sector, and most especially the massive global corporations that are taking over the management of public services. This, of course, references back to the whole issue of privatisation and willingness, or not, to conspire with this. But it goes beyond this, as the processes of marketisation and financialisation involved require changes in the ways that VSGs think and behave and this, in turn, impacts (detrimentally in our view) on relationships with and between trustees, staff, volunteers, users and communities. Disengagement from the private sector will, for most VSGs, be a vital step towards reasserting their independence and their place in the 'ungoverned space' of civil society.

## The Author



Andy Benson cut his teeth as a community activist in the early 1970s, working as a rights and community worker at Blackfriars Settlement in South London. There followed 8 years of work in the housing and homelessness sector before going freelance in 1986. Since then, his consultancy work has taken him into most corners of the voluntary sector and public sectors – community groups, service-providing voluntary agencies, national charities, local authorities, NHS and central government departments.

Increasingly concerned about erosion of the independence, plurality and diversity of voluntary action, in 2006, and with his partner Penny Waterhouse, he set up the National Coalition for Independent Action, where he continues to work as Co-convenor.

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