

Beyond the Blame Game

A responsible and rights-centred approach to government contracting

A Report by JUSTICE

Chair of the Committee

Sir Gary Hickinbottom



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CONTENTS

INTRODUCTION BY CHAIR	1
EXECUTIVE SUMMARY	2
I. CHAPTER ONE: INTRODUCTION	4
II. A RIGHTS-BASED APPROACH	14
III. THE PREPARATORY PHASE	18
IV. PROCUREMENT	26
V. CONTRACTING	42
VI. CONTRACT OVERSIGHT AND MONITORING	56
VII. TRANSPARENCY AND ACCOUNTABILITY	62
VIII. CONCLUSION	76
RECOMMENDATIONS	77
ACKNOWLEDGMENTS	82

INTRODUCTION BY CHAIR

The last four decades have seen substantial changes to the delivery of public services, notably in the rapid increase in contracting out to the private sector (commonly referred to as “outsourcing”) and a better appreciation of the importance of the rights of individuals to whom the services are provided.

Outsourcing is here to stay. Although the devolved governments in Scotland and Wales have shown less overt enthusiasm than UK Governments, it is now embedded across national and local government. The consequent loss of experience and expertise in government and public servants means that – whichever parties may form future Governments – in many areas, a widespread reversion to the provision of such services directly by the public sector is unlikely in the near future.

Whether individual public services are outsourced is a policy decision – and an issue upon which this Working Party expresses no view. However, it is imperative that public services, however provided, are delivered in a way that is lawful and properly recognises the rights of the individuals. “Individual rights”, in this context, include not only normative human rights, but the right of an individual to be treated without discrimination and the right to procedural fairness and good administration during the processes inherent in the delivery of such services.

Compared with the private sector, government has different – and, generally, more stringent – obligations to protect the rights of individuals, whom it serves. Recent well-reported scandals have indicated that, sometimes, those obligations have not been properly upheld when public services have been outsourced.

This Working Party has looked at the risks to individual rights posed by the outsourcing of public services, and what might be done to protect those rights in the future. We hope that this Report, and the Recommendations we make, will inform future discussion on these vitally important issues.

As Chair of the Working Party, may I thank all members of the Working Party who have given their time to this project freely and generously. The contribution of each member, with their different experience and expertise, has been to the point and greatly appreciated; and has resulted in informed and lively debate within the Working Group on each of the topics we have considered.

On behalf of us all, I must also thank JUSTICE for promoting and supporting this important project; and particularly Philip Armitage, the JUSTICE Public and Administrative Lawyer who has borne much of the burden of evidence-collection and detailed drafting. His guidance and graft have been invaluable to this project.

The Rt Hon Sir Gary Hickinbottom

Working Party Chair

EXECUTIVE SUMMARY

Public services in private hands are a fact of modern government. However, these services are often opaque, unaccountable and in the hands of the lowest bidder, regardless of quality. Time and again it has taken high-profile public scandals or widespread service failure to expose human rights abuses. While the individuals involved incur real suffering, the taxpayer bears the cost of legal challenges, public inquiries and fixing a failed privatised service. Even then, there is too often a culture of denial or blame, rather than learning lessons and remedial action.

This report calls for a cultural shift: away from “*hands off*” delegation by government to the private sector, and towards a collaborative approach centred on upholding individuals’ rights and meeting governmental responsibility for its legal duties.

Our work

The Working Party focused on four key front-line service areas which directly impact individual’s fundamental rights: homelessness medical assessments; benefits health and disability assessments; adult social care; and prisons / immigration detention centres.

We took individuals’ rights to mean the range of non-delegable legal obligations owed by the state to individuals, including not just those in the Human Rights Act 1998 (‘**HRA**’) but also equality rights, common law public law rights (reasonableness, proportionality, procedural fairness, etc), and rights to good administration developed through Ombudsmen schemes.

We formed expert sub-groups in each of these areas, reviewing reports and case law of past failures, taking evidence on current services, and making request under the Freedom of Information Act 2000 (‘**FOIA**’) where necessary. We took evidence from across the UK, including devolved administrations and local government, and considered domestic and international procurement regimes.

Our Findings

We found the following recurring issues:

- (i) inadequate consideration of value and quality of service, with too much focus on short-term cost-saving;
- (ii) a failure to focus on legal obligations or individuals’ rights when contracting out a service, taking instead a “*hands off*” approach to outsourcing difficult problems (“*my mess for less*”);
- (iii) a lack of pro-active contract management to see how a service is impacting individuals;
- (iv) limited transparency of what services are being delivered and how, with inaccessible or poor-quality performance data and over-reliance on self-auditing by providers; and
- (v) insufficient accountability; not properly utilising independent oversight bodies and individuals finding it difficult to enforce their rights.

Our Recommendations

In response, our report sets out a series of recommendations to create a rights-centred and responsible approach to government contracting.

- (i) **Increase early engagement** to better assess services and the possible problems and/or solutions.
 - Early Rights Impact Assessments should be developed, which would assess the potential impact on the individual rights of service users, the risk of infringing those rights and, for medium and high-risk services, steps to mitigate risk and ensure rights are respected.
- (ii) **Emphasise value during procurement**, which must be understood to include the rights protection of (often vulnerable) service users, and the risk of unintended costs to individuals and the public authority if things go wrong.

- Value should be emphasised when defining the new Most Advantageous Tender criteria, a recommended new Procurement Policy Note on “Protecting Individual Rights”, and the new discretionary power to exclude providers in the Procurement Act 2023 (‘**the Procurement Act**’) should include serious rights breaches.
 - Affected individuals should be consulted about the delivery of a particular service and their input taken on board.
 - Policy documents should be redrafted to clarify that, if a tender process does not reveal a bidder which can meet the basic legal standards for individual rights required, then the public authority should not award the contract.
- (iii) **Use contracts to ensure rights compliance, clarify responsibilities for both parties and provide accountability.** This means having a contract in the first place (some services did not) and considering how rights can be protected through contractual provisions.
- The Cabinet Office should draft a new bespoke Individual Rights Focused Model Contract Guidance, to include model provisions on: key performance indicators (“KPIs”); training, its delivery and review; monitoring and oversight; complaints procedures; and clear, contractual penalties for breaching the rights of individual service users.
 - In the medical assessment context, there should be clear procedural safeguards in the contract, including the requirement to hear from the individual in an appropriate format.
- (iv) **Pro-actively manage contracts through monitoring and oversight mechanisms,** to ensure issues are identified earlier and resolved before becoming a more serious rights infringement.
- This includes more use of independent auditing, enhancing the role of monitoring bodies (e.g. inspectorates) where they already exist, and listening to individuals who have experienced service failures.
 - The Department of Housing, Communities and Local Government should commission an independent review into the use of contracted-out assessments, the apparent lack of contractual safeguards, the experience of vulnerable homeless individuals and the lack of available data to scrutinise such contracted-out powers.
- (v) **Improve transparency and accountability** for better governance, better decision-making and, where things do go wrong, lessons being properly learned.
- Improvements should include: an accessible list of contracted out services which states the provider and the legal authority for that procurement; monitoring by the Cabinet Office of the necessity and proportionality of redactions to contracts and tenders (on the upcoming new online platform); published KPIs and yearly monitoring for all medium and high risk services to individual rights; steps to update freedom of information law; targets to support the adoption of the open contracting data standard; and provision of clear accessible information about how affected individuals can access independent oversight bodies, make complaints and challenge decisions, as well as how they can seek legal advice and/or obtain advocacy support.
 - Case-by-case legislation should be considered when doubts arrive in a service area around the liability of providers under the HRA and there should be explicit contractual terms setting out the proposed liabilities on providers and public authorities to uphold the HRA.

Now is the time to implement these changes. Emerging technologies like artificial intelligence, largely developed by the private sector, are likely to be increasingly adopted in public service delivery in the years to come. Meanwhile the upcoming commencement of the Procurement Act provides an opportunity for change. However, that change cannot be achieved through legislation alone; wider cultural reform, along the lines of our recommendations, is required to secure what is needed: a responsible future of government contracting with individuals’ rights at its centre.

I. CHAPTER ONE: INTRODUCTION

Background

- 1.1 The nature and scale of government contracting has developed considerably especially from the 1970s, when most of the state's functions were delivered by the public sector. Governments of different political parties have increased the use of the private sector to deliver public services, including, increasingly, those that affect important rights of individuals.
- 1.2 Much of the work and research on this topic refers to "outsourcing". The Institute for Government ("IfG") defines outsourcing as '*when companies, charities or other organisations run services on behalf of the government*'.¹ The term is now often used synonymously with complete "hands off" delegation by government to the private sector; but we have used it in a broader sense to include the provision of public services by a more collaborative process between the relevant public authority and the private provider involving a rights-based approach and the maintenance of the authority's responsibility to the public it serves through active oversight.
- 1.3 In 2019, it was estimated by the IfG that around a third of public spending was on procurement. This includes the purchasing of goods and works (e.g. IT equipment, infrastructure spending or military equipment) as well as services.² The use of contracted-out services has developed considerably, from relatively simple services such as waste collection and IT support, to key front-line services, including prisons, welfare, health and social care. It is these key front-line services which impact the rights and state entitlements of individuals which are the focus of this report.
- 1.4 Governments of different political parties have continued to use external contractors to deliver public services based on the rationale that '*choice and competition*',³ can '*reduce costs and raise quality by improving efficiency*', that external expertise increases innovation and that such expertise enhances adaptability within public service delivery.⁴
- 1.5 However, there have also been ongoing concerns about the performance of many of these services and high-profile scandals affecting the treatment of vulnerable service users such as prisoners or welfare claimants. Many of these are referred to in this report, including: ATOS pulling out of its Work Capability Assessment contract in March 2014 due to the high rate of decisions being overturned;⁵ the effective re-nationalisation of the probation service after the comprehensive failure of outsourced service⁶ and the Ministry of Justice bringing G4S-run HMP Birmingham back 'in house' after an inspection found it 'fundamentally unsafe'.⁷
- 1.6 At the time of writing the Post Office scandal looms large in the public consciousness; it has been described as the most widespread miscarriage of justice in British history. At the heart of the scandal lies the failings of the privately provided Horizon IT system to Post Office Limited, a company wholly owned by the UK Government. Whilst we await Sir Wyn Williams's full report of the inquiry into the Horizon IT system, what

¹ IfG, '[Explainer: Outsourcing and privatisation](#)', (7 August 2020).

² IfG, '[Government procurement: The scale and nature of contracting in the UK](#)' (December 2018), p11.

The IfG has highlighted that publicly available data '*provides only limited insight into what government buys*', as HMT's data is broken down by function (e.g. health). Health procurement, for example, however can be '*anything from stationery and medicines, through to cleaning hospitals or outsourcing surgery to private clinics*' and the data does not differentiate between which health bodies are undertaking the procurement.

The Office for National Statistics ('ONS') do not record departmental spend on the procurement of services:

['ONS Annual Spend on Procurement of Goods and Services from 2015 to 2023'](#), Office for National Statistics (23rd February 2024).

³ IfG, '[Government outsourcing: What has worked and what needs reform](#)', (September 2019), p14.

⁴ IfG, '[Government outsourcing: What has worked and what needs reform](#)', (September 2019), p15.

⁵ Stef Benstead, '[ATOS to leave WCA Contract early](#)'. (Huffington Post, 28 March 2014).

⁶ Jamie Grierson, '[Probation will be renationalised after disastrous grayling reforms](#)', (The Guardian, 16 May 2019).

⁷ '[Government takes over 'appalling' HMP Birmingham](#)', (ITV News Online, 19 August 2018).

has already come to light demonstrates the profound consequences that can result from a lack of oversight and scrutiny of contracted out services. The sheer number of criminal convictions overturned by the courts and, more recently, Parliament, the millions of pounds already paid out in compensation, and righteous public outrage should make us reflect on how the rights of individuals can be better protected in government contracts.

1.7 During the course of this working party it was clear that there are several recurring issues throughout the contracting process, that are causing or contributing to these, and similar, failures:

- (a) **Lack of engagement and the need for pro-active contract management.** There has been a historic lack of interest, expertise or engagement by public authorities with the ongoing delivery of public services by providers. It is essential that public authorities more pro-actively work with providers to define desired outcomes and actively oversee the delivery of key services.

Far too often, it has taken a high-profile public scandal or widespread service failure before issues have been identified or addressed. Even then, there is too often a culture of denial or blame. That is not in the interests of those who rely on these services or the public authority. The Working Party considers that much more could be done to hear from and monitor the experiences of individual service users to understand issues much earlier. Independent oversight bodies, such as ombudsmen or chief inspectorates, are also invaluable in understanding where things are going wrong and should be more widely utilised.

- (b) **Insufficient focus on value and quality.** There has been a historic drive towards short-term cost-saving, with a focus at the tender and contracting stage on the lowest upfront cost as opposed to a wider understanding of public value for money and the quality of the service being delivered over time.

The report highlights examples, such as the running of Brook House Immigration Removal Centre, where key public services have been awarded to providers, despite clear concerns about the ability of that provider to deliver, and the disastrous consequences that follow. Whilst price will always be an important factor, the Working Party's view is that the recently passed Procurement Act 2023 provides an opportunity to re-focus on a wider understanding of value over time and the rights of those who will rely on the service.

- (c) **A lack of focus on the public authority's ongoing legal obligations.** Government services are (of course) always public services and, in the rights-focused services we have identified, the state has ongoing legal obligations to individuals which cannot be contracted away. A lack of focus on these rights has caused services to go wrong, with considerable impact on the public who use them, whilst leaving the state liable in time and money to pick up the pieces.

This goes to the heart of the approach which we consider inherent in the term 'outsourcing'; that difficult public service delivery problems have been given to external providers with a 'hands off' approach in the hope of cutting costs. Kevin Sadler, retired civil servant in various government departments including Acting Chief Executive of HMCTS 2020 – 2022, told us that there is a recurring problem in government contracting that '*lots of departments and organisations go for my mess for less*' where they have a difficult service and just '*hand it over as it is and say you sort it out for me*'.⁸ In the private sector, it is widely acknowledged that 'outsourcing problems' is a route to failure.

It is the view of the Working Party that such an approach does not work either for the individuals who use these services or the public authority itself. This report has set out recommendations to place much greater focus on the rights of individual service users and the legal obligations of the public authority, with the Procurement Act is a welcome potential opportunity to do so.

- (d) **Poor quality of government data and lack of transparency.** The report demonstrates that far too often both local and national government have very limited and/or poor quality data (or no data at

⁸ Evidence provided to JUSTICE

all) about the performance of key public services. Both local and national government have inadequate data about the delivery of key services and are overly reliant on information from the supplier which is not robustly or independently audited, any audit often being a self-audit of information which the provider itself has provided. This is compounded by a lack of transparency around key government contracts and services, preventing wider public scrutiny in delivery and performance. Today's technology means there is no excuse for such failings and indeed, evidence of adequate systems should be a component in supplier selection.

- (e) **A lack of accountability and oversight.** We have set out numerous examples in this report of rights breaches in services because the public authority has not more actively monitored delivery and ensured its legal obligations are being met. Whilst some of the clear examples of poor performance highlighted in this report are the fault of the provider, at least in part, we are also conscious that it is also the responsibility of the public authority to require appropriate standards. Accountability should be improved by increasing the use of independent oversight bodies and ensuring individuals have the ability to enforce their rights. During the period of accelerating provision of public services by the private sector, further tools of accountability have been adopted by Parliament (such as the HRA and FOIA); and, in this report, we discuss how the focus on individual rights reflected in these statutes might improve the provision of public services through the private sector.

The Scope of this Report

- 1.8 Whilst we have identified different political approaches between (e.g.) central and devolved governments, the Working Party approached this report on the basis that a significant amount of outside contracting in public services is likely to continue for the foreseeable future, irrespective of which parties are involved in future governments, at both national and devolved levels. This was widely acknowledged in much of the evidence we gathered.
- 1.9 This is, in part, due to the scale and the difficulty of ending ongoing public sector contracting. Whilst there have been calls for services to be “insourced”⁹, and some services such as probation and certain prisons have been re-nationalised¹⁰, this is a considerable undertaking. There is also an open question about how practical or effective it would be to “insource” services in areas where the state has had no experience for years and there has therefore been an inevitable loss of institutional knowledge and expertise, which is not quickly or easily rebuilt.
- 1.10 Having said this, we have recommended that, where the rights of service users cannot be properly protected by providers, the public authority should “insource” the service. This does not necessarily mean that there will be no contribution from the private sector to the provision of public services. It may be that, for example, the state can run the service, but sub-contract core expertise which it requires. Private providers already use sub-contractors extensively. We note that emerging technologies, such as artificial intelligence, are likely to lead to large shifts in how services are delivered in ways which both public authorities and current providers appear unprepared for. This could provide a further opportunity to re-consider how services are delivered, especially as the private sector may not have the newly required skill sets or competencies.
- 1.11 As indicated above, it is also worth noting that there is a different emphasis in the devolved administrations compared to UK wide government policy, with much less enthusiasm for contracting services which affect the fundamental rights of individuals such as prisons and benefit assessments. For example, Scotland have prohibited benefit assessments being carried out by individuals employed by private companies¹¹ and one of its private prisons has gone back into public ownership.¹²

⁹ Heather Stewart, ‘[Rachel Reeves: Labour would oversee radical insourcing of public services](#)’, (The Guardian, 7 February 2021).

¹⁰ HM Prison and Probation Service, ‘[Strengthening probation, building confidence](#)’, (16 May 2019).

¹¹ Social Security (Scotland) Act 2018, s.12.

¹² ‘[HMP Kilmarnock transfers into public ownership](#)’, (BBC News, 17 March 2024).

- 1.12 For this report, we have focused our attention on front-line services which significantly impact individuals' basic rights and entitlements. In particular, we have identified four case study areas as prisms through which to consider the overarching issues and recommendations. Those are: homelessness medical assessments; benefits health and disability assessments; adult social care decisions; prisons and immigration detention centres.
- 1.13 These areas all involve individuals with particular vulnerabilities whose voice is often not heard, for structural reasons. Homeless medical assessments/reviews and adult social care decisions have involved consideration of local government contracting. Benefit health and disability assessments and the delivery of prisons/immigration detention have focused on central government.¹³ The areas have covered key assessments which are the gateway to crucial state support (such as housing and benefit entitlements), decision-making over key issues of care and where individuals deprived of their liberty depend on the State to secure even their most basic rights.

The Procurement Regime

- 1.14 The UK procurement regime is set out in legislation and guidance, from both central government and the devolved administrations. The Procurement Act, due to come into force in October 2024,¹⁴ makes significant changes from the previous legal regime. At the time of writing this report, the guidance and regulations associated with the new Act had not been finalised.

Legislation

- 1.15 Prior to the Procurement Act, the procurement process was governed by several sets of procurement regulations made by the UK Government.¹⁵ The Public Contract Regulations 2015 were the most relevant for the scope of this report. Largely based on EU procurement law, these regulations set out various procedures to be followed before awarding a contract to suppliers and imposed obligations on authorities when making procurement decisions.¹⁶ A key problem with these regulations is that they were largely designed for the acquisition of products and had not adjusted to the extensive shift to the acquisition of services. The “tangible” versus “intangible” nature of these procurements is challenging in that evaluation and selection criteria for services are more complicated.
- 1.16 The Regulations did stress the importance of non-discrimination between suppliers, transparency and the need to act proportionately.¹⁷ However, the previous procurement regime was criticised for being too complex, burdensome on Small and Medium Enterprises (‘SMEs’) and Voluntary, Community and Social Enterprises (‘VCSEs’), inflexible to innovation, lacking complete and consistent data and making it difficult to hold suppliers accountable for poor performance.¹⁸
- 1.17 These regulations are to be replaced under the Procurement Act by a single set of regulations across the UK, excluding devolved public authorities in Scotland.¹⁹ The Procurement Act is a significant overhaul of the procurement regime and, in many respects, welcome. The stated purpose of the Act is to simplify public sector procurement, making it more innovative, transparent, and to increase opportunities for small

¹³ Although we note that the Department for Communities in NI is responsible for benefit assessments in Northern Ireland.

¹⁴ [‘HMP Kilmarnock transfers into public ownership’](#), (BBC News, 17th March 2024).

¹⁵ The Utilities Contract Regulations 2016; The Concession Contract Regulations 2016; The Defence and Security Public Contract Regulations 2011; the Public Contract Regulations 2015.

¹⁶ The regulations only applied to contracts over a certain threshold, reviewed every few years. See for example Crown Commercial Service, [‘Procurement Policy Note – New Thresholds 2018’](#), PPN 04/17, (December 2017).

¹⁷ The Public Contract Regulations 2015, regulation 18.

¹⁸ Procurement Reform Bill Impact Assessment, [‘Interventions and Options’](#), (21st April 2022), p.6 – 8.

¹⁹ The devolved Scottish Government has its own procurement laws and regulations, such as the Procurement Reform (Scotland) Act 2014 and the Procurement (Scotland) Regulations 2016.

businesses.²⁰ The Government has stated the new Act will place value for money, public benefit, transparency and integrity at the heart of procurement.²¹

1.18 The evidence gathered by this Working Party shows that a cultural shift is needed in the way that public authorities approach the delivery of core services when individual rights are at stake. The Working Party views the new legal regime under the Procurement Act as an important opportunity to put a renewed focus on the rights of service users. Our recommendations build on the following reforms in particular:

- (a) The change in award criteria from “Most Economically Advantageous Tender” to “Most Advantageous Tender”, which should encourage a broader approach to the concept of value for money;
- (b) The requirement for contracts worth more than £5 million to publish at least three Key Performance Indicators (KPIs)²² and reports published annually setting out how providers are delivering against those published KPIs;
- (c) The extension of discretionary exclusion grounds (where bidders can be excluded from a bid process) specifically to cover poor performance. This should give public authorities more confidence to exclude suppliers which pose unacceptable risks to the rights of individuals (if the contracts contain the proper requirements); and
- (d) A requirement to publish all contracts valued at over £2 million (excluding commercially sensitive data) and a new central, online platform with detailed information about the procurement of government services.

1.19 Finally, the Public Services (Social Value) Act 2012 requires public authorities who commission services to consider how they can use procurement to achieve ‘wider social, economic and environmental benefits’.²³ Commissioners are required to consider how the procurement might improve ‘the economic, social and environmental well-being of the relevant area’ and how the public authority could use the procurement process to make that improvement.²⁴ The Act is described by the Cabinet Office as a ‘tool to help commissioners get more value for money out of procurement’.²⁵ Central government policy has gone further and explicitly required social value to be evaluated for most major contracts.²⁶

1.20 Under the newly published National Procurement Policy Statement,²⁷ the national priorities under the ‘social value’ heading are creating resilient businesses and opportunities for quality employment and skills development; tackling climate change and reducing waste; and improving innovation, supply chain resilience and reducing waste. These priorities are then replicated throughout wider Government guidance and policy. For example, under the Procurement Policy Note on social value, these factors must be explicitly evaluated in all government procurement (where related and proportionate to the contract).²⁸ This goes further than the Public Services (Social Value) Act 2012, where social value is only required to be ‘considered’.²⁹

1.21 Whilst these priorities may be worthy aims, and we note the importance of supplier diversity and innovation in particular, they do not go to the core of the public service itself and the individuals who are affected by

²⁰ Government Commercial Function, ‘[The Procurement Bill – a summary guide to the provisions](#)’, (16 June 2022).

²¹ UK Government, ‘[The Queen’s Speech 2021: Background Briefing](#)’, 11 May 2021, p.74.

²² KPIs are defined as a ‘factor or measure against which a supplier’s performance of a contract can be assessed during the life-cycle of the contract’, Procurement Act 2023, s52(4).

²³ Cabinet Office, ‘[Social Value Act: information and resources](#)’, (29 March 2021).

²⁴ Procurement Act 2023, s.1(3).

²⁵ Cabinet Office, ‘[Social Value Act: information and resources](#)’, (29 March 2021).

²⁶ *Ibid.*

²⁷ Government Commercial Function, ‘[Guidance: National Procurement Policy Statement](#)’, (13 May 2024).

²⁸ Cabinet Office, ‘[Procurement Policy Note: Taking Account of Social Value in the Award of Central Government Contracts](#)’, PPN 06/20, (September 2020), p.1.

²⁹ The Public Services (Social Value) Act 2021, s1(3).

that service. There is nothing in the statement, for example, which would indicate to the Ministry of Justice that a core priority when contracting a prison service should be the welfare and rights of prisoners, or to the Department for Work and Pensions (‘DWP’) that contracted benefit assessments should be focused on a fair process to assess relevant medical conditions.

Policy and guidance

- 1.22 Alongside the legislation, the Government has also published policies and guidance which set out the government’s priorities and are designed to assist public authorities and suppliers as they navigate the procurement system.

The National Procurement Policy Statement (NPPS)

- 1.23 The NPPS is a statement which sets the strategic national priorities for public procurement. Bar some limited expectations, contracting authorities are required to have due regard to the policy objectives contained within the NPPS that is current at the time they are carrying out a procurement. It therefore shapes and guides public authorities’ approach to procurement.³⁰
- 1.24 The newly published National Procurement Policy Statement comes into effect on 28 October 2024, though can be later withdrawn, amended or replaced. It references ‘*value for money*’ which includes balancing ‘*effectiveness, efficiency and economy*’ over the life-cycle of a service. As set out above, it defines social value and highlights the importance of small and medium sized enterprises (including VCSEs).³¹ However, the NPPS contains no reference to the importance of protecting individual rights or the state’s legal obligations towards individuals.
- 1.25 The Procurement Act also provides that Welsh Ministers can publish a Procurement Policy Statement. The Welsh Government’s current Procurement Policy Statement does refer to values-based procurement, which is said to include ‘*focus on the outcomes required by the end user*’ and ‘*value from the perspective of the end user*’ and embedding ‘*equality-related considerations throughout the procurement process*’.³² However, it again does not reference the rights of individual service users at all or in the context of the quality of the proposed service.
- 1.26 The Working Party therefore recommends that **the UK Government’s National Procurement Policy Statement, and the Welsh Government’s Procurement Policy Statement, should emphasise the importance of the rights of individual service users (ideally through the principles of good administration set out above), including the need for compliance with public law principles and statutory equality and human rights obligations, and the importance of such rights when assessing the quality of the proposed service (Recommendation 1).**

The Sourcing Playbook

- 1.27 The Sourcing Playbook (the ‘**Playbook**’) is Government best practice guidance, endorsed by the Cabinet Office and an important guide for central government departments. The Playbook is aimed at those in the public sector who are ‘*responsible for the planning and delivery of insourcing and outsourcing services*’, including commercial, finance, project delivery and policy.³³ It states that whilst it is aimed at central government departments and associated arms-length bodies, who should always apply its guidelines and

³⁰ Cabinet Office, ‘[National Procurement Policy Statement](#)’, (June 2021), p.2.

³¹ Cabinet Office, ‘[National Procurement Policy Statement](#)’, (May 2024), p.6.

³² Welsh Government, ‘[Wales procurement policy statement: How we expect public bodies to undertake procurement](#)’, (22 August 2022).

³³ Cabinet Office, ‘[The Sourcing Playbook: Government guidance on service delivery, including outsourcing, insourcing, mixed economy sourcing and contracting](#)’, (June 2023), p.7.

rules, one of the goals of the latest version is for it to be more publicly accessible for those in local government and the wider public sector.³⁴

Procurement Policy Notes

1.28 Procurement Policy Notes ('PPNs') are published by the Cabinet Office and provide further guidance on '*best practice for public sector procurement*'.³⁵ For example, of relevance to this Working Party report, there are the PPNs on compliance with the Public Sector Equality Duty,³⁶ how public authorities can take account suppliers' past performance³⁷ and the requirements to publish procurement information on the Contracts Finder website.³⁸

Devolved Government Policy

Scotland

1.29 The Scottish Government has its own separate devolved public procurement policy and, as set out above, devolved Scottish public authorities are not within the scope of the new Procurement Act. It has its own devolved procurement legislation, in particular for these purposes the Procurement (Reform) Scotland Act 2016, the Public Contracts (Scotland) Regulations 2015 and the Procurement (Scotland) Regulations 2016. The Scottish Government has published statutory guidance in relation to the above legislation and has a separate guidance manual, '*Scottish Procurement Policy Manual*'.³⁹

1.30 Public bodies in Scotland are under a statutory duty, before conducting a procurement exercise, first to consider how the procurement process could improve the economic, social and environmental well-being of the public authority, promote innovation, facilitate the involvement of small and medium-sized enterprises and third-sector bodies. Second, they have a duty when conducting a procurement exercise to act with a view to securing those improvements.⁴⁰ This is referred to as the "Sustainable Procurement Duty".

1.31 The Scottish Government's 'Public Procurement Strategy for Scotland: 2023 to 2028' sets out their Sustainable Procurement Duty which requires them to buy in a way which is good for business/ employees; good for society; good for places and communities; and is open and connected. Under "Good for Society", it includes that '*we respect, protect and fulfil human rights and live free from discrimination*'.⁴¹ They have also published a 'Guidance on due diligence: human rights', intended to require an assessment of whether an individual or company has been associated with human rights abuses.⁴²

1.32 The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 set out obligations on listed public bodies to '*consider the use of equality award criteria and conditions in relation to public procurement*'.⁴³ Regulation 9 requires a public authority to have 'due regard' to whether the 'award criteria' and 'conditions' should include considerations to enable it to better perform the equality duty. The requirement should be

³⁴ *Ibid.*, p.7.

³⁵ GOV.UK, '[Procurement Policy Notes](#)'.

³⁶ Cabinet Office, '[Procurement Policy Note – Public Procurement and the Public Sector Equality Duty](#)', (January 2013), p.1.

³⁷ Crown Commercial Service, '[Procurement Policy Note – Taking Account of Suppliers' Past Performance](#)' (25th March 2015).

³⁸ Cabinet Office, '[Procurement Policy Note – update to legal and policy requirements to publish procurement information on Contracts Finder](#)', PPN 01/23, January 2023.

³⁹ Scottish Government, '[Scottish procurement: Policy Manual](#)', (30 May 2024).

⁴⁰ Procurement Reform (Scotland) Act 2014, s.9.

⁴¹ Scottish Government, '[Public Procurement Strategy for Scotland: 2023 to 2028](#)', (April 2023), p.11.

⁴² Scottish Government, '[Guidance on due diligence: human rights](#)', (14 June 2018).

⁴³ Equality and Human Rights Commission Scotland, '[Guidance. Procurement and the public sector equality duty: a guide for Scottish public bodies](#)', (May 2022), p.3.

proportionate to the *'subject matter of the proposed agreement'*.⁴⁴ The EHRC have published a guide for Scottish public authorities on the public sector equality duty and procurement.⁴⁵

- 1.33 There is a Scottish Procurement and Property Directorate in the Scottish Government which has overall responsibility for procurement in Scotland. Its role includes promoting transparency and accountability by publishing a procurement strategy,⁴⁶ document on procurement outcomes,⁴⁷ annual procurement reports⁴⁸ and award notices on Public Contracts Scotland.

Wales

- 1.34 The new Procurement Act will apply in Wales. However, we would highlight two important pieces of additional, devolved legislation. First, the Well-being of Future Generations Act 2015 sets out “well-being goals” which certain public bodies (including Welsh Ministers and local authorities) must work towards achieving.⁴⁹ Those public bodies are under a legal duty to carry out sustainable development and must set out annual reports of how they are meeting their well-being objectives.⁵⁰ The Minister for Finance in the Welsh Government says the Wales Procurement Policy Statement will *'help to define our progress against the well-being goals we are pursuing for future generations in the Well-being and Future Generations (Wales) Act 2015 at the heart of all procurement decisions'*.⁵¹
- 1.35 Second, the Social Partnership and Public Procurement (Wales) Act 2023 sets out a framework for improving public services through social partnership; promoting fair work and socially responsible public procurement. There is a new social partnership duty requiring a public body to seek consensus, where reasonable, with trade unions or other staff representatives on well-being objectives when carrying out procurement.⁵² It also has duties for Ministers to prepare a Workforce Code of Practice on employment and pensions,⁵³ prepare model contract clauses on employment matters and to have a procurement strategy on socially responsible public procurement.⁵⁴ This Act has not yet come fully into force.⁵⁵

Northern Ireland

- 1.36 The new Procurement Act will apply in Northern Ireland. In addition, the Northern Ireland Public Procurement Policy Statement defines 12 principles that govern public procurement for the devolved administration. These include *'accountability'*, requiring *'effective mechanisms'* to be in place to ensure Departmental Accounting Officers discharge their responsibilities on risk and expenditure; *'informed decision-making'*, requiring public bodies to *'base decisions on accurate information and to monitor requirements to ensure that they are being met'*; *'legality'*; and *'transparency'*, meaning *'openness and*

⁴⁴ The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012', regulation 9.

⁴⁵ Equality and Human Rights Commission ['Procurement guidance for Scottish Public authorities'](#), (26 May 2022).

⁴⁶ Scottish Government, ['The Scottish Government Procurement Strategy: April 2022-March 2024'](#), March 2022.

⁴⁷ Scottish Government, ['Outcomes for Procurement'](#), (March 2021).

⁴⁸ Scottish Government, ['Annual Procurement Report 2022-2023'](#), (January 2024).

⁴⁹ A prosperous Wales; a resilient Wales; a healthier Wales; a more equal Wales; a Wales of cohesive communities; a Wales of vibrant culture and thriving Welsh language; and a globally responsible Wales. See: Welsh Government, ['Well-being of Future Generations \(Wales\) Act 2015: the essentials'](#), (16 April 2024).

⁵⁰ *Ibid.*

⁵¹ Welsh Government, ['Wales Procurement Policy Statement'](#), (March 2021), p.2.

⁵² Social Partnership and Public procurement (Wales) Act 2023, s.16.

⁵³ Social Partnership and Public procurement (Wales) Act 2023, s. 32.

⁵⁴ Social Partnership and Public procurement (Wales) Act 2023, s. 38.

⁵⁵ The Social Partnership and Public Procurement (Wales) Act 2023 (Commencement No.2) Order 2024.

clarity on procurement policy and its delivery'.⁵⁶ We note that Northern Ireland Public Procurement Policy is nearly ten years old and many of the recommendations in this report could be included when it is updated.

- 1.37 Northern Ireland has a Procurement Board, responsible for the '*development, dissemination and co-ordination of public procurement policy and practice for the Northern Ireland public sector*'. The Board is responsible to the Northern Ireland Executive and accountable to the Northern Ireland Assembly.⁵⁷ Its role and responsibilities include developing public procurement policy, ensuring adherence to legal obligations (the HRA is specifically mentioned) and to set strategic targets for procurement performance and to monitor those targets.⁵⁸ However, the Board has been criticised for its lack of effectiveness.⁵⁹

The Working Party

- 1.38 The Working Party began its work in February 2023 and has been made up of members from across the United Kingdom with a mixture of procurement and public law backgrounds. The Working Party focused on issues with outsourcing and the contracting-out of services across a number of different sectors. We have sought to make a series of recommendations which apply across different sectors where services are being run by private providers.
- 1.39 To assist with this, we established sub-groups which covered issues within specific legal areas. These were prisons/immigration detention; benefits;⁶⁰ social care; and homelessness.⁶¹ These areas were picked to cover a wide variety of different examples of contracted-out services. They covered areas with oversight from national and local government, medical assessments relevant to entitlement of state support, the provision of care for users with vulnerabilities and situations where the state has denied individuals their liberty.
- 1.40 The sub-groups provided insight into, and examples from, their specific areas of experience and expertise. We would note that, within each of these areas, there are policy challenges which are unique. The focus of this report has inevitably been too narrow to address fully all of these policy challenges, many of which would deserve a report of this length on their own.
- 1.41 However, the sub-groups gave the Working Party real-life examples of the consequences of the contracting-out of core services. Many of these examples are found throughout this report. Whilst the sub-groups were consulted on the final recommendations, it is important to stress that the final recommendations are those of the Working Party as a whole. Whilst we believe that we have reflected the work of the sub-groups in the recommendations we have made, membership of a sub-group does not imply necessarily an endorsement of every particular recommendation in relation to the area that sub-group covered. We are grateful for all those who gave up their time to share their insights and experience.
- 1.42 We have been grateful to have members in this Working Party from across the United Kingdom. It has been our intention to make recommendations which are applicable throughout the UK, including in devolved administrations and local government. However, it is right to say that our general focus has been on policy set by the UK Government, especially in light of the new Procurement Act. Further, with some important exceptions, the general focus of the sub-groups was on policy set by the UK Government or locally in England. We note that this may, in some areas, restrict the applicability of some of our recommendations.

⁵⁶ Northern Ireland Department of Finance and Personnel, '[Northern Ireland Public Procurement Policy](#)', (August 2014), p.5.

⁵⁷ Northern Ireland Department of Finance and Personnel, '[Northern Ireland Public Procurement Policy](#)' (August 2014), p.7.

⁵⁸ Northern Ireland Department of Finance and Personnel, '[Northern Ireland Public Procurement Policy](#)' (August 2014), p.15.

⁵⁹ '*Current structures and arrangements have not provided effective leadership, governance and accountability in public procurement. Whilst a new Procurement Board has recently delivered some improvements to processes, it does not provide the strategic direction necessary to a function that spends around a quarter of the Northern Ireland block grant*'.

Northern Ireland Audit Office, '[Public Procurement in Northern Ireland](#)', (25th April 2023), p.9.

⁶⁰ Largely focused on benefit assessment contracts, such as PIP assessments.

⁶¹ Largely focused on the contracting out of homelessness assessments and reviews.

1.43 We also note that we have found it challenging to engage fully with providers of services and those who work in central Government in relation to our proposed recommendations. This has been, in part, through an understandable reticence in light of commercial sensitivities. However, we are grateful for those who generously agreed to speak to the Working Party, in particular to the Rt Hon Sir Robert Buckland KBE KC MP and Dame Meg Hillier MP who gave up time in their busy schedules to give valuable evidence and insight from their considerable experience.

II. A RIGHTS-BASED APPROACH

Introduction

- 2.1 Both the public authority and the provider have obligations towards the individuals to whom they provide public services. Throughout this report, we have come across clear examples where the rights of individuals have not been properly recognised and given appropriate priority. Far too often, those rights are paid mere lip service. There is a pressing need to put the rights of those individuals back at the forefront of government contracting at every stage of the process, and to ensure proper transparency and accountability of those delivering these vital services.
- 2.2 To do this, the Working Party has focused on how the contracting of services could better uphold individual rights. By this, we mean a wider range of rights than simply those set out in the European Convention on Human Rights ('ECHR'), including rights under other legislation such as the Equality Act 2010; common law public law rights developed by the courts through judicial review; and rights to good administration developed through the ombudsmen. These rights place substantial non-delegable legal obligations on the state.
- 2.3 Upholding these rights is of crucial importance for individual service users, to ensure that they are treated with dignity and respect, regardless of their individual characteristics. However, it is also vitally important for the public authorities: it promotes public trust and confidence in services and, given the binding nature of the rights on public authorities, ensures that they are less exposed to legal challenge.
- 2.4 As the author A.C.L. Davies has set out, whilst there are potential benefits to the public sector of the use of external bodies, those benefits '*can best be realized – and important public values protected – if government contracts are carefully regulated*'. Such regulation will '*involve the use of law, whether hard law in the form of common law and statute, or soft law in the form of government guidance*'. It '*will involve the use of legal rules drawn from public law as well as private law*'.⁶²

Public Law Principles

- 2.5 Public law governs how public bodies must operate when they interact with those they serve. Public law 'should ensure that public bodies act lawfully, rationally, fairly, and compatibly with the human rights of those affected by their actions'.⁶³ Whilst judicial review is an important means of redress, this report focusses more on what can be done at an earlier stage to uphold public law principles (derived from case-law and legislation) in the delivery of public services by contractors.
- 2.6 The following public law principles are particularly relevant in the context of the delivery of contracted public services. Our recommendations are aimed at improving compliance with these principles:
- (a) **Sufficient Inquiry (the Tameside duty)**. Decision-makers are required to ask themselves '*the right question*' when making a decision and take '*reasonable steps*' to become familiar with '*the relevant information*' to correctly answer the question. This includes having been properly directed in law.⁶⁴ This may require consultation of outside bodies with '*particular knowledge or involvement in the case*', so that they arrive at a rational conclusion.⁶⁵
 - (b) **Procedural fairness**. This notably includes the general requirement that someone who will be affected by a decision of a public authority is given an appropriate opportunity to make representations before the decision is taken.⁶⁶ This will often involve '*putting matters and allowing*

⁶² A.C.L. Davies, '*The Public Law of Public Contracts*', (Oxford University Press, 2008), xxi.

⁶³ Public Law Project. '[What is Public Law?](#)'.

⁶⁴ *Secretary of State for Education and Science v Tameside MBC* [1976] UKHL 6, para 18.

⁶⁵ *Plantagenet Alliance Ltd, R (On the Application Of) v Secretary of State for Justice* [2014] EWHC 1662 (QB), para 100.

⁶⁶ *Talpada, R (On the Application Of) v The Secretary of State for the Home Department* [2018] EWCA Civ 841, para 57.

a chance to comment, the response then being conscientiously considered by the authority'.⁶⁷ A higher standard of procedural fairness is required where the decision takes place in the context of the fundamental rights of vulnerable individuals.⁶⁸

- (c) **Unlawful fetter.** A public authority must not 'surrender its independent judgment to a third party'. Whilst outside expertise can be sought, the final decision must be 'conclusively determined' by the public body.⁶⁹ In the context of contracted assessments, it is important that the decision-maker remains the public authority and the decision is not a "rubber stamp" of the conclusion of any external (often medical) assessor. When using external assessors, public authorities are 'not entitled, nor even well advised, to demand that the opinion or advice be couched in the terms of the eventual decision'.⁷⁰
- (d) **Wednesbury reasonableness.** Decisions must be Wednesbury reasonable, i.e. they must not be arbitrary or perverse in the sense that no reasonably informed person could reasonably have come to such a decision.
- (e) **Proportionality.** Generally, where a decision may interfere with the fundamental rights of an individual, it should do so only if and to the extent necessary and proportionate to a legitimate public aim.
- (f) **Reasons.** A proper standard of reasoning is generally required in decisions. Public law requires a decision-maker to have a 'strong principled basis for requiring public authorities adequately to explain the reasons why they acted as they did'.⁷¹ Whilst standardised reasons are not inherently unlawful, it is important that reasons given 'explain adequately why the decision has been taken'.⁷²

2.7 Such principles are important in not only ensuring that individuals feel that they been listened to and fairly treated – important in its own right – but also increasing the likelihood that decisions by public authorities are well-founded and evidenced having considered all relevant factors: in other words, "good decisions" in a public law sense. This should reassure public authorities that their decisions are more likely to be lawful, and more likely to respond to the needs that the relevant public service seeks to address. As Lord Reed has stated, 'there is no doubt that one of the virtues of procedurally fair decision-making is that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested'.⁷³

Equality and human rights obligations

2.8 The HRA applies throughout the United Kingdom. Under the HRA, all public authorities are required to act in a way that does not breach the normative human rights of individuals, as defined in the European Convention on Human Rights ('ECHR'). Such rights include the right to life (Article 2), the right not to be subject to torture or inhuman/degrading treatment (Article 3), the right to liberty (Article 5) and the right to respect for private and family life (Article 8).⁷⁴

2.9 It is unlawful for a public authority to act in a way which is incompatible with a right under the ECHR and proceedings can be brought against them for breaches of ECHR rights. 'Public authority' is defined as a court

⁶⁷ Michael Fordham, *Judicial Review Handbook*, (Seventh Edition, 2020), chapter 61.5.

⁶⁸ *R (On the Application Of) v Secretary of State for the Home Department* [2020] EWHC 1912, Para 261.

⁶⁹ Michael Fordham, 'Judicial Review Handbook', (Seventh Edition, 2020), Chapter 50.2.

⁷⁰ *Shala & Anor v Birmingham City Council* [2007] EWCA Civ 624.

⁷¹ Michael Fordham, 'Judicial Review Handbook' (Seventh Edition, 2020), chapter 64.1.

⁷² Lord Reed in *Agyarko v SSHD*, Other case-law has found the simple recitation of policy (e.g. *SI (India) v SSHD* [2016] EWCA Civ 1255, para 17) or a reiteration of the legal test (e.g. *R v Birmingham City Council ex p B* [1999] ELR 305) to be inadequate.

⁷³ *Osborn v The Parole Board* [2013] UKSC 61, para 67.

⁷⁴ Articles 2 to 12 and 14 ECHR; Articles 1 to 3 of the First Protocol and Article 1 of the Thirteenth Protocol, as read with Articles 16 to 18 ECHR. Some rights are absolute (e.g. the right not to be tortured, Article 3) and some rights are qualified so can be limited/ breached for a legitimate and proportionate reason (e.g. the right to a private and family life, Article 8).

or tribunal or ‘any person certain of whose functions are functions of a public nature’.⁷⁵ Whilst government departments and local authorities are always public authorities in their actions, and cannot contract out their responsibilities under the HRA, other bodies (such as contracted out providers) are only public authorities if carrying out ‘functions of a public nature’.

2.10 The Equality Act 2010 (‘**Equality Act**’) applies to England and Wales, and Scotland. It prohibits discrimination for those with protected characteristics,⁷⁶ though indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim.⁷⁷ Public authorities, and others when exercising public functions, have a duty under the Equality Act to ‘have due regard to’ the need to:

- (a) Eliminate discrimination, harassment, victimisation and other prohibited conduct;
- (b) Advance equality of opportunity between persons who share a relevant protected characteristic and those that do not; and
- (c) Foster good relations between those who share a relevant protected characteristic and those who do not.⁷⁸

2.11 This is known as the Public Sector Equality Duty, and has been interpreted to be a ‘heavy burden upon public authorities’ and requires them to ensure available evidence to demonstrate they have discharged their duty. The purpose of this duty is to ensure that equality considerations are ‘placed at the centre of formulation of policy by all public authorities’.⁷⁹ Public authorities are specified in the Act but the test for those exercising ‘public functions’ deliberately mirrors the HRA.⁸⁰

2.12 Northern Ireland has devolved competence over equality and discrimination legislation. In contrast to Great Britain, instead of a universal piece of legislation like the Equality Act, Northern Ireland has a myriad of smaller pieces of legislation.⁸¹ The Northern Ireland Act 1998 does provide a statutory duty on public authorities to have due regard to the need to promote equality of opportunity between specified groups.⁸² Public authority includes groups such as government departments, defined in the legislation, or others designated by the Secretary of State.⁸³ Over 160 different bodies have been designated, including various housing associations and governmental bodies.⁸⁴ Bodies such as the Equality Commission for Northern Ireland have called for a single piece of equality legislation that harmonises protections on all equality grounds for those exercising public functions.⁸⁵

⁷⁵ HRA, s.6(3).

⁷⁶ Age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

⁷⁷ Indirect discrimination occurs when a policy which applies in the same way for everybody has an effect which particularly disadvantages someone with a protected characteristic (apart from pregnancy and maternity) or when a policy would put a person at a disadvantage if it were applied (e.g. deterring someone from applying for a job).

Equality Act 2010, s.19. See [Explanatory notes](#).

⁷⁸ Equality Act 2010, s.149.

⁷⁹ [Stuart Bracking & Ors v Secretary of State for Work and Pensions \[2013\] EWCA Civ 1345](#), para 60.

⁸⁰ Equality Act 2010, s. 150(5).

⁸¹ Such as the Disability Discrimination Act 1995, the Equal Pay Act 1970 and the Race Relations Order 1997.

The Law Society of Northern Ireland [‘Relevant Equality Legislation in Northern Ireland’](#).

⁸² Northern Ireland Act 1998, s.75(1) - Persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; between men and women generally; between persons with a disability and without; and between persons with dependents and persons without.

⁸³ Northern Ireland Act 1998, s.75.

⁸⁴ Equality Commission for Northern Ireland, [‘List of Public Authorities designated for the purposes of section 75 of the Northern Ireland Act 1998’](#), (March 2024).

⁸⁵ Equality Commission for Northern Ireland, [‘The need for a NI Single Equality Act’](#), (October 2022).

Wider Principles of Good Administration

- 2.13 As the Government Legal Department has said, ‘*all public bodies should aim to practice ‘good administration’: i.e. to perform their public duties speedily, efficiently and fairly*’.⁸⁶ Similarly, the Welsh Government has set out that it is ‘*imperative that public authorities respect standards of good governance and the principles of the Rule of Law*’ and that ‘*ultimately, this will lead to the making of good decisions that are capable of withstanding scrutiny and legal challenge*’.⁸⁷
- 2.14 Various Ombudsmen have set out principles of good administration which should be followed by public authorities to ensure ‘*good administration and customer service*’.⁸⁸ Whilst failing to follow these principles will not automatically lead to a finding of maladministration, they are a useful guide for best practice in how public authorities can ensure administrative justice is met. The principles are the following, summarised from the Parliamentary and Health Service Ombudsman’s version:
- (a) **Getting it right.** Those running public services should act within the law, apply relevant guidance and policy, take ‘*proper account of established good practice*’, use adequately trained and competent staff, and take ‘*reasonable decisions, based on all reasonable considerations*’.
 - (b) **Being customer focused.** Public authorities should ensure people can access services easily, be informed of the expectations for all involved, meet their own published service standards and deal with people ‘*helpfully, promptly and sensitively, bearing in mind their individual circumstances*’.
 - (c) **Being open and accountable.** Public authorities should be open about policies and procedures, ensure advice provided is clear and accurate, state its criteria for decision-making and give reasons for decisions, handle information properly, keep proper records and take responsibility for its actions.
 - (d) **Acting fairly and proportionately.** Individuals should be treated ‘*impartially, with respect and courtesy*’, avoiding unlawful discrimination and ensuring decisions are ‘*proportionate, appropriate and fair*’.
 - (e) **Putting things right.** Public authorities should acknowledge mistakes, apologise where appropriate, put mistakes right quickly and have an effective complaints procedure (with clear information about how to access it).
 - (f) **Seeking continuous improvement.** Policies and procedures should be regularly reviewed, feedback should be sought to help improve the performance of services and the public authority should learn lessons from complaints.⁸⁹
- 2.15 Whilst not legally binding in the same way as the above public law principles or legislative obligations, the Working Party views these principles as a useful guide to ensure that contracted services are accountable, accessible and transparent. We would note that there are also legal obligations on public authorities to be transparent under FOIA, as we will discuss later.
- 2.16 As the Local Government and Social Care Ombudsman (‘**LGSCO**’) has said, these are a ‘*broad framework, not a checklist to be rigidly applied*’ but ‘*a compass, not a map*’.⁹⁰ However, in our view, there is an overlap in that applying these principles will ensure that the state’s wider legal obligations (including under public law, human rights and equality law) are more likely to be met.

⁸⁶ Government Legal Department, ‘[The Judge Over Your Shoulder](#)’, (2022), p.9.

⁸⁷ Welsh Government, ‘[Making Good Decisions](#)’, (2016), p.5.

⁸⁸ Parliamentary and Health Service Ombudsman, ‘[Principles of Good Administration](#)’, (10 February 2009), p.11.

⁸⁹ Local Government & Social Care Ombudsman, ‘[Principles of good administrative practice](#)’, December 2018, p. 1.

⁹⁰ LGSCO, ‘[Principles of good administrative practice](#)’, December 2018, p. 1.

III. THE PREPARATORY PHASE

Introduction

- 3.1 Before contracting out a service, public authorities should carry out early preparation to find out more about the proposed service, the potential providers for that service and the individuals likely to use the proposed service.
- 3.2 The Cabinet Office already encourage early engagement with potential providers. They state that ‘*it can help promote forthcoming procurement opportunities and provide a forum to discuss delivery challenges and risks associated with the project*’.⁹¹ Despite this, the Working Party is of the view that insufficient early engagement is done by central and local government to ensure that the contract delivers a high-quality service, which puts individuals at its focus.
- 3.3 Instead, the focus of contracting authorities seems to be resolutely on the cost, to the detriment of all else. Whilst cost will always be an important factor, the public services we have identified in this report affect the fundamental rights of individuals and the state has ongoing legal obligations to these individuals which need to be addressed from the beginning.
- 3.4 There have been concerns that previous procurement rules,⁹² with a focus on the most economically advantageous tender, have prevented a wider consideration of value.⁹³ The Working Party believes these limitations have been overstated. In any event, the Procurement Act and accompanying legal regime present a clear opportunity to move away from cost as the paramount criterion and place a greater focus on individual rights at an early stage. This would help the state meet its legal obligations, reduce the frequency of rights breaches in the delivery of the services, and result in services which better respond to the needs they seek to address.

The importance of early engagement

- 3.5 Under the previous procurement regime, public authorities are expressly permitted to conduct ‘market consultations’ before a formal consultation process.⁹⁴ The Playbook emphasises the benefits of early engagement to ‘*understand the deliverability of our requirements, the feasibility of alternative options and whether there is appetite (within the market and the public sector) to consider innovative solutions that can help us deliver better public services*’.⁹⁵ Similarly, the Crown Commercial Service⁹⁶ is clear that early market engagement helps the public authority ‘*openly and transparently discuss “the problem” and possible solutions*’, write clearer specification requirements, encourage competition, ensure there is a ‘*good number of applications*’, gain a ‘*better understanding at an early stage of how much a contract could cost and how long it could take*’ and explore opportunities for innovation and social value.⁹⁷
- 3.6 The Playbook makes clear that a public authority should ‘*actively*’ seek out potential suppliers, including small and medium-sized enterprises (SMEs) and voluntary, community, and social enterprises (VCSEs) ‘*who are experts in the needs of service users and widely involved in the delivery of public services across the*

⁹¹ Cabinet Office, ‘[The Sourcing Playbook](#)’ (June 2023), p16.

⁹² The Procurement Act 2023 is due to come into force in October 2024.

⁹³ Cabinet Office, ‘[Transforming public procurement](#)’, (December 2020), p.35.

The prescriptive nature of the regulations in what and when evaluation criteria can be considered can restrict buyers’ ability to secure the best outcomes. MEAT can be mistaken as the need to deliver the lowest price when actually there may be scope to deliver greater value through a contract in broader qualitative (including social and environmental terms).

⁹⁴ Public Contracts Regulations 2015, Regulation 40.

⁹⁵ Cabinet Office, ‘[The Sourcing Playbook](#)’, (June 2023), p.16.

⁹⁶ An [executive agency](#) sponsored by the Cabinet Office to set out policy and advice on procurement and provide commercial services to the public sector.

⁹⁷ Crown Commercial Service, ‘[How to carry out early market engagement successfully – Procurement Essentials](#)’, (30 June 2022)

country'.⁹⁸ This must ensure, however, that no particular supplier gains a preferential advantage and that specifications are not set to suit a particular bidder.⁹⁹

- 3.7 Pre-market engagement should include identifying and exploring opportunities for social value¹⁰⁰ and be used to *'inform the development of the delivery model assessment approach, testing and pilots, the potential procurement procedure, possible bid evaluation criteria, and overall project timetable'*.¹⁰¹ It is critical that a public authority sets out its expectation for a proposed service the criteria in which it will assess provider bids.
- 3.8 Whilst the benefits of early engagement are clear, there have been concerns that public authorities were not fully reaping these benefits because of a lack of clarity in the previous procurement legal regime as to the appropriateness of such engagement.¹⁰² The Procurement Act makes clear, in primary legislation, that public authorities are permitted to engage with suppliers and relevant persons before the formal procurement process begins and emphasises the importance of doing so.¹⁰³ The Act creates a Preliminary Market Engagement Notice and there is an *'assumption that this market engagement will take place'* as public authorities will have to explain in their tender why no preliminary engagement took place.¹⁰⁴
- 3.9 Whilst such engagement is not mandatory, the Parliamentary Secretary to the Cabinet Office Alex Burghart MP during the House of Commons Committee debate of the then Procurement Bill made it clear that *'effective preliminary engagement is a great tool to improve procurement'*, allow public authorities to act as an *'intelligent customer'* and improve contracts and that the Government was *'obviously encouraging'* public authorities to pursue it.¹⁰⁵ The new Procurement Act regime should therefore reassure public authorities that, preliminary market engagement – stimulating the market and encouraging competition – is legally permissible, and indeed advisable, so long as there is the required transparency.
- 3.10 We also recognise that there are potential practical obstacles to greater early market engagement by public authorities, such as the resource constraints within government departments and local authorities, and limited timescales. The Working Party does not downplay the significant resource constraints and pressure on public authorities to act quickly. However, a failure to take sufficient time to carry out early engagement can lead to significant delivery problems, and therefore costs, later down the line. For example, Meg Hillier MP, Chair of the Public Accounts Committee, told us that *'data is a big problem'* when contract tenders are being prepared as a government department does not always have accurate information about a service they propose to contract out.¹⁰⁶

⁹⁸ Cabinet Office, ['The Sourcing Playbook'](#), (June 2023), p.16.

⁹⁹ Cabinet Office, ['The Sourcing Playbook'](#), June 2023, p.17. Pre-market engagement must not distort competition or violate the key principles of non-discrimination and transparency (Public Contract Regulations 2015, regulation 40(2)). All potential candidates and tenderers must be provided the same information (PCR 2015, regulation 41).

¹⁰⁰ Cabinet Office, ['The Sourcing Playbook'](#) (June 2023), p17.

¹⁰¹ Cabinet Office, ['The Sourcing Playbook'](#), (June 2023), p.17.

¹⁰² National Audit Office, ['Lessons learned: competition in public procurement'](#), (July 2023), p.9.

The National Audit Office heard from 'stakeholders' that *'departments often take an overly cautious approach to engagement and are not always clear on what they can do'*.

¹⁰³ The Procurement Act 2023, s.16. Defined in the Act as "preliminary market engagement". It permits public authorities to engage with suppliers and other persons for the purpose of: developing the authority's requirements and approach to procurement; designing a procedure, conditions of participation or award criteria; preparing the tender notice and associated tender documents; identifying suppliers that may be able to supply the goods, services or works required; identifying likely contractual terms; and building capacity among suppliers in relation to the contract being awarded.

¹⁰⁴ Cabinet Office, ['The Sourcing Playbook'](#), June 2023, p.17. Section 17(1) of the Procurement Act states that the public authority must publish a preliminary market engagement notice before publishing the tender or provide reasons for not publishing such a notice.

¹⁰⁵ House of Commons Official Report, ['Procurement Bill: 31 January 2023'](#), (21 February 2023), p80.

¹⁰⁶ Evidence provided to JUSTICE.

- 3.11 Further, as the Public Administration and Constitutional Affairs Committee has observed the Government is often a monopoly buyer.¹⁰⁷ It is the sole customer in certain markets (for example, the delivery of prisons or welfare assessments) and therefore has significant influence over the price and standards of quality which it insists upon. Robert Buckland MP, who served as Lord Chancellor and Secretary of State for Justice from 2019 to 2021, told us that some large private providers *‘have got the whip hand almost’* when working with the UK Government, because of their size and the amount of Government work they do. He described it as *‘crazy’* and *‘a total imbalance’*.¹⁰⁸
- 3.12 The IfG set out that Bill Crothers, chief commercial officer during the coalition government, *‘argued in 2015 that departments typically spent too little time on pre-market engagement’* which meant there was not a *‘common understanding about the service being outsourced’*.¹⁰⁹ The Conservative peer Lord Maude, Minister for the Cabinet Office, has said that tender processes are *‘often embarked on too early, without real knowledge of what you are trying to achieve or what it is possible to achieve, and then of course you get into endless alterations and changes to the procurement, which is where the suppliers make the money’*.¹¹⁰
- 3.13 It is therefore unsurprising that serious issues can arise in the delivery of contracts which have not been adequately researched, tested and piloted, especially when a new service model is being proposed. For example, HMRC in their Concentrix contract *‘had never used or managed a payment-by-results contract for tax credits compliance before’* and had not tested this during the pilot.¹¹¹ The Social Security Advisory Committee subsequently noted that this model gave *‘an incentive for Concentrix staff not to overturn decisions given it would impact negatively on their revenue’*.¹¹²
- 3.14 In relation to the attempted privatisation of Probation services, the IfG found that the rushed nature of public procurement *‘contributed to the lack of a proper assessment of the deliverability of the requirements, the adequacy of suppliers or the risks involved’*.¹¹³ The NAO found that the Ministry of Justice introduce probation reforms without adequate testing or pilots of how the services would work in practice. This meant it did not *‘have a good understanding of probation trusts’ delivery models, working practices and governance, and relied heavily on their information about costs’*.¹¹⁴

Consultees during early engagement

Service users

- 3.15 If the purpose of early engagement is to understand better the service being outsourced, then it is crucial that it involves consulting with individuals who use the service to identify the needs being addressed and find out how the service works, or should work, to meet those needs in practice. By “service users”, we include those who represent such users in one form or another.
- 3.16 As Julian Blake, a Partner at Stone King LLP who specialises in social enterprise and public procurement law, told us, *‘the expertise isn’t with the public authorities to quite a large extent in those areas, especially if you’re trying to improve things. It’s with the recipients of the service, the communities and organisations that have expert engagement with the real need’*. It is vital to *‘access that expertise and real experience as*

¹⁰⁷ Public Administration Committee, [‘The Government’s approach to contracting: managing risk’](#), (9 July 2018), para 51.

¹⁰⁸ Evidence provided to JUSTICE.

¹⁰⁹ IfG, [‘Government Outsourcing: what has worked and what needs reform?’](#), (September 2019), p.47.

¹¹⁰ UK Parliament Hansard, [‘Vol 822 Procurement Bill: Second Reading Debate’](#) (25 May 2022).

¹¹¹ NAO, [‘Investigation into HMRC’s contract with Concentrix’](#) (17 January 2017), p.26.

¹¹² Social Security Advisory Committee, [‘Decision-making and mandatory reconsideration: occasional paper no.18’](#) (July 2016), p.39.

¹¹³ Institute for Government, [‘Government outsourcing – what has worked and what needs reform?’](#) (September 2019) p47.

¹¹⁴ NAO, [‘Transforming rehabilitation: Progress Review’](#), March 2019, p.8. The NAO note that pilots that were started ended early, and others were abandoned before they started. It abandoned community pilots and ended its two localised prison pilots early – see p.28.

the starting point of any process, whether it's going to be a marketized procurement or whether it's going to be a collaborative exercise in putting together the right arrangements'.¹¹⁵

- 3.17 Presently there is limited reference in central Cabinet Office Guidance, including the Playbook, about involving the individuals who will use the potential service, their likely representatives or interest groups, at this early stage of the proposed service. Many materials prepared by the Cabinet Office and the Crown Commercial Service emphasise solely early market engagement with potential providers.¹¹⁶ This is repeated in the Preliminary Market Engagement Guidance published in respect of the Procurement Act.¹¹⁷
- 3.18 The Playbook's section on early engagement is largely focused on the market and suppliers, though there is fleeting reference to early engagement with service users in the context of social value. The section on early engagement highlights that SMEs and VCSEs *'are experts in the needs of service users'* but fails to recommend speaking to actual service users themselves.¹¹⁸ The Working Party is of the view that engagement with those who use such services should be much more clearly referenced and its value and importance having greater emphasis.
- 3.19 It is not hard to picture where such engagement could make a real difference, highlighting at an early stage issues that have subsequently come to light in the delivery of the contract: social care users and their family, might stress the importance of visitation rights; benefit claimants may highlight the difficulties in providing evidence of their mental health condition; whilst prisoners would be the most aware of the potentially degrading nature of strip searches.
- 3.20 We would observe that the PPN on the Public Sector Equality Duty does highlight in an Annex that, at the pre-procurement stage, consultation is permitted with potential users to *'establish any relevant equality-related requirements'*.¹¹⁹ An example is provided in the context of social care procurement that the authority should engage with different groups of social care residents about the care they need. The information provided should be *'used to establish exactly what the service will need to offer and how it should be delivered'*.¹²⁰ Again, the Working Party believes such engagement should have much greater emphasis given its potential benefits.
- 3.21 The Procurement Act specifically permits preliminary market engagement with "other persons", besides suppliers, to develop a service, prepare the tender and identify likely contractual terms.¹²¹ It is the view of the Working Party that this is sufficiently broad to permit engagement with those individuals who are (or are likely to be) service users. Any accompanying guidance or regulations should therefore make this explicitly clear.
- 3.22 The Organisation for Economic Co-operation and Development ('OECD') have set out the importance of carrying out a pre-tender needs assessment which should include independent external validation, including the consultation of *'representatives from end-user organisations and the wider public'*.¹²²
- 3.23 The Local Government Association ('LGA') have said, on social care procurement, that *'service users are the experiential experts of social care services' and that 'consideration should always be given to involving service users in shaping specifications and informing outcomes'*.¹²³ They encourage service users, their carers and families to be involved in the process of determining good service outcomes in pre-tendering exercises.

¹¹⁵ Evidence provided to JUSTICE

¹¹⁶ Crown Commercial Service, ['How to carry out early market engagement successfully – Procurement Essentials'](#), (June 2022).

¹¹⁷ Government Commercial Function, ['Guidance: Preliminary Market Engagement'](#), (April 2024).

¹¹⁸ Cabinet Office, ['The Sourcing Playbook'](#), (June 2023), p.16.

¹¹⁹ Cabinet Office, ['PPN: Public Procurement and the Public Sector Equality Duty'](#), (January 2013), p.5.

¹²⁰ *Ibid.*

¹²¹ Procurement Act 2023, s.16(1).

¹²² OECD, ['Principles for Integrity in Public Procurement'](#), 2009, p.54.

¹²³ LGA ['National Social Care Category Strategy for local government'](#), (October 2015), p.13.

- 3.24 The LGA cite a joint Newcastle City Council/NHS Newcastle commissioning of a speech and language therapy service which consulted parent carers, children, young people and service providers in the early stages of procurement through questionnaires and focus groups. They state that this engagement *‘uncovered a number of issues, service gaps and unmet need’*, allowed service users to have *‘greater investment in the outcomes of the commissioning exercise’* and *‘produced a more comprehensive service design’*.¹²⁴
- 3.25 The Scottish Government’s Best Practice Guidance for the ‘Procurement of Care and Support Services’ states that it is *‘crucial that the views of people who use services and their carers are considered (aiming, where possible, to engage with a diverse group of service users) in the commissioning and procurement processes for care and support services’*.¹²⁵ This should include taking account of the views of service users when developing the service specification and evaluation criteria, preparing questions for interviews with potential providers and awarding the contract.¹²⁶ Whilst this is welcome in relation to social care procurement, we consider that this could be more explicitly set out in relation to wider procurement policy in Scottish Government guidance.
- 3.26 The Working Party therefore recommends that **early engagement with service users and representative groups who act on their behalf, should be explicitly required by any regulations on preliminary market engagement, relevant Cabinet Office or devolved guidance and policies including the Sourcing Playbook and PPNs¹²⁷ (including the new proposed PPN on Protecting Individual Rights set out in chapter 4 below). This should be done as part of the new proposed Rights Impact Assessment set out below (Recommendation 2).**

Independent oversight bodies

- 3.27 Independent bodies who have oversight of the services being contracted are another important source of information which is overlooked in the current approach to preliminary engagement. These bodies often identify issues with the quality and provision of services and their input during early engagement will help to avoid repeat issues from previous procurement exercises. For example, His Majesty’s Inspectorate of Prisons (‘HMIP’), has previously raised concerns about the quality of prisons run by private providers,¹²⁸ as has the LGSCO regarding social care,¹²⁹ the Independent Chief Inspector of Borders and Immigration on immigration detention¹³⁰ and the Northern Ireland Public Services Ombudsman (‘NIPSO’) and the Social Security Advisory Committee in respect of health and disability benefit assessments.¹³¹
- 3.28 In any event, independent specialist bodies are likely to have an oversight role over the contract delivery due to their various statutory functions. It is therefore sensible to get them involved at an early stage as possible, to identify likely issues to be addressed and then address these before a final contract is agreed.
- 3.29 The Working Party therefore also recommends that **relevant policies, guidance and/or regulations should stress the importance of (and, in appropriate cases, require) early engagement with independent oversight bodies such as ombudsman and inspectorates. This should also be done as part of the proposed Rights Impact Assessment (Recommendation 3).**

¹²⁴ LGA, [‘National Social Care Category Strategy for local government’](#), (October 2015), p.18.

¹²⁵ Scottish Government, [‘Procurement of care and support services: best practical guidance’](#), (June 2021), p.18.

¹²⁶ Scottish Government, [‘Procurement of care and support services: best practical guidance’](#), (June 2021), p.21.

¹²⁷ Including devolved Procurement Policy Notes, such as Scottish Procurement Policy Notes.

¹²⁸ HMIP, [‘Report on an unannounced inspection of HMP Birmingham’](#) (2018).

¹²⁹ LGSCO, [‘Equal justice: learning lessons from complaints about people’s human rights’](#) (December 2022).

¹³⁰ David Neal, [‘I warned ministers about our disgraceful UK detention centres. Their solution? Stop the inspections’](#) (The Guardian, 19 September 2023).

¹³¹ NIPSO, [‘PIP and the Value of Further Evidence’](#) (23 June 2021) and Social Security Advisory Committee, [‘Occasional paper 24: A review of the COVID-19 temporary measures’](#) (November 2020).

Impact assessments

- 3.30 As we have set out, a greater focus on individual rights at the early engagement stage would help ensure that the state meets its legal obligations and prevents the frequency of serious issues with the treatment of such individuals at a later stage. The Working Party considers that it is therefore important that there is a procedure for assessing how the rights of individuals – all rights, and not simply (e.g.) equality rights – are likely to be affected by any proposed outsourced service and, if the procurement is to proceed, how those rights will be protected.
- 3.31 The use of impact assessments is embedded across central, local and devolved government already. As the EHRC have said, in relation to equality impact assessments, if done well, an impact assessment *‘is a tool for improved policy-making and should not result in unnecessary additional activity’* and they highlight the importance of good evidence and insights from groups such as service users.¹³² Equality impact assessments, whilst not strictly required in a prescriptive sense under the Equality Act, have become an important way of demonstrating compliance with the Public Sector Equality Duty, including during litigation.¹³³
- 3.32 The Working Party is of the view that a broader version of impact assessment, that includes the potential impact on public law and human rights as well as rights under the Equality Act, at the pre-procurement stage would be a useful tool to focus the minds of the contracting authority on the rights of the service users early on.
- 3.33 It would also be a useful opportunity to review the evidence of previous contracted services and learn lessons from previous issues. If the service has been tendered before then, as part of the impact assessment, the public authority should review what has gone well and what has gone wrong for rights protection previously. If things have gone wrong, the public authority should consider how, or if, these could be addressed either through the procurement model, the contract itself or wider oversight.
- 3.34 If this is a unique service to be contracted out, then the public authority may want to consider what issues have come up previously in similar services or where novel services have been contracted. For example, if they wanted to introduce ‘outcome-based contracts’, the public authority should consider what went wrong with the probation contracts.¹³⁴
- 3.35 The Playbook already recommends a delivery model assessment – an *‘analytical, evidenced-based approach’* on whether a public authority should deliver a service, contract out a service or have a hybrid solution. This requires a *‘comprehensive evaluation of the risks, and the possible consequences’* and is mandatory for new public services, new developments to public services and where there is a need to re-evaluate the service (e.g. due to deteriorating quality).¹³⁵ However, whilst operational risks are mentioned, this is not specifically tied to services which might impact individual rights, despite the state’s legal obligations.
- 3.36 The Working Party therefore recommends that, **when a contracted out service is being actively considered by the public authority and before a formal procurement process, there should be an early Rights Impact Assessment which assesses the potential impact on the individual rights of service users. This should incorporate an Equality Impact Assessment, but also cover the potential impact on other fundamental rights such as those arising under the HRA and wider public law rights. This must include engagement with individual service users and relevant oversight bodies (as set out above). This should be set out in the Sourcing Playbook and the Procurement Policy Note on Protecting Individual Rights. We recommend that local and devolved governments also adopt this policy (Recommendation 4).**

¹³² Equality and Human Rights Commission, [‘Assessing impact and the Public Sector Equality Duty: a guide for public authorities in Scotland’](#), July 2016, p.30.

¹³³ D. Pyper, [‘The Public Sector Equality Duty and Equality impact Assessments’](#), (House of Commons Library Briefing Paper, 8th July 2020), p.3.

¹³⁴ NAO, [‘Transforming rehabilitation: Progress Review’](#), p.9.

¹³⁵ Cabinet Office, [‘The Sourcing Playbook’](#), (June 2023), p.22.

- 3.37 We acknowledge the need to avoid being overly burdensome and proportionate to the service involved. We want the focus on rights to be primarily aimed at services which interact with individual service users and involve day-to-day decisions about their rights. In order to do that, we propose that the impact assessment should reach a conclusion as to whether there is a low, medium or high-risk on individual rights of service users. For services which are regularly contracted out on an individual basis, such as the provision of social care, an impact assessment for the service generally could be done so long as it was regularly reviewed and updated.
- 3.38 **When a public authority intends to re-tender a service that has been previously contracted out, then the Rights Impact Assessment should consider evidence of how rights were actually affected during the delivery of the service. As well as speaking to individuals directly affected and independent oversight bodies, this should involve an analysis of complaints received, and particularly:**
- (a) **relevant legal claims, including judicial review claims, coroner reports, public inquiries and data on relevant appeals; and**
 - (b) **independent reports; including those from statutory oversight bodies, national human rights institutions¹³⁶ and ombudsman complaints (Recommendation 5).**
- 3.39 Depending on the level of risk identified, different levels of information and engagement will be needed to mitigate that potential risk. The Northern Ireland PPN on Human Rights is a helpful example of how this could be achieved. Although this policy only relates to human rights, and our proposed assessment would be wider, it sets out the following:
- (a) For a low-level risk, the Contractor should self-declare that it is aware of potential human rights issues and has policies in place to address them;
 - (b) For a medium-level risk, the Contractor must *'be asked to provide a form of official policy, along with formal reporting mechanisms'*;
 - (c) For a high-level risk contract, there must be *'stringent measures in place, which could include site inspection and regular audits of sites'*.¹³⁷
- 3.40 For low-level risk services, such as cleaning or catering services, this will often be a straightforward exercise and involve very limited time for the public authority in most instances. Having said this, we would note that even the state of cleanliness in a prison or immigration detention centre can raise rights issues.¹³⁸ However, where the service is directly to deal with individual service users, particularly those with vulnerabilities, and make decisions about their rights and entitlements, a higher level of interrogation and scrutiny should be required.
- 3.41 **The Rights Impact Assessment should set out whether there is likely to be a low, medium or high-risk of impact on the rights of individual service users. Where there is a medium or high-risk, then the impact assessment should make clear what the issues are, any previous examples of good or bad practice in similar services, how the public authority intends to meet the state's legal obligation, including ensuring that any impact on an individual is necessary, reasonable and proportionate, and that any identified risks are appropriately mitigated (Recommendation 6).**¹³⁹

¹³⁶ Such as the Equality and Human Rights Commission ('EHRC'); the Scottish Human Rights Commission; and the Northern Ireland Human Rights Commission.

¹³⁷ National Insurance Department of Finance, '[PPN 05/21 - Human Rights in Public procurement](#)', (November 2021), p.9.

¹³⁸ 'Mr Tulley told the Inquiry that he would visit cells with unscreened toilets "on a weekly if not daily basis" and that detained people would often complain to him about the smell in their cells and the lack of fresh air after they had been locked in for long periods of time. It was humiliating for detained people to use the toilet without a curtain in very close proximity to others, particularly where the ventilation was poor'. The Brook House Inquiry, '[The Brook House Inquiry Report Vol II](#)' (September 2023), p28.

¹³⁹ We note that care will need to be taken in Northern Ireland in light of the potential overlap with the PPN on Human Rights in Public Procurement. However, the Working Party is of the view that, as set out in chapter 2, rights must be protected more widely than those protected in the ECHR and HRA.

- 3.42 The Working Party is clear that, where there is a medium or high risk of rights infringements, steps must then be taken at each of the procurement, contracting and delivery stage to ensure those rights are respected. As we will set out in more detail below in the chapters below, this should include having proper contractual protections, robust performance monitoring, ensuring individuals have proper information on how to enforce their rights and much greater transparency.
- 3.43 **However, if the impact assessment identifies serious concerns about the public authority’s ability to comply with its legal obligations if the service is contracted out, and the public authority is not confident that these concerns could be addressed by practical steps such as improved contractual provisions or oversight mechanism, then the proposed service should not be contracted out (Recommendation 7).**
- 3.44 The Working Party recognises that, for services that have already been contracted out for a number of years, there may be substantial financial costs in bringing the service back in house, as well as difficulties highlighted above like the loss of institutional capacity to deliver services within public authorities. This is reflected in the Playbook which highlights the *‘lack of required specialist capability internally’* as a characteristic that may make insourcing challenging.¹⁴⁰
- 3.45 However, despite this, the inability of external providers to ensure rights compliance must weigh extremely heavily in the balance given the state’s obligations. We would also note that this has not prevented the UK Government ending the privatisation of Probation services or the Scottish Government bringing disability assessments back in-house.¹⁴¹ The Playbook notes that complex services, which have *‘experienced many operational difficulties in the past’* and where there will be *‘disproportionate effort and cost to bring services back in-house in future’*, will be challenging to outsource. The rights impact assessment will be a useful tool to identify the issues and, ultimately, the rights of service users must come first in the delivery of public services.
- 3.46 One possible compromise, where it is clear that a contractor (whether new or, particularly, on a re-tender) cannot give an assurance that individual rights will not be infringed at the start of the contract period, would be to identify the potential infringements and require the contractor to give an assurance as a term of the contract that it will take steps to ensure that there will be no such infringements from a particular date within the contract period. The public authority should take proactive steps from the start of the contract to protect those rights.
- 3.47 Whilst we accept that this would not be suitable in all cases, in appropriate cases, it would reflect the state’s obligation to take steps to avoid known infringements of fundamental rights and the time which might be given to the state, in appropriate circumstances, to take such steps. This should only take place in exceptional circumstances, e.g. where rights cannot be protected by the contractor and where it is not possible for the public authority to end the contracting out.

¹⁴⁰ Cabinet Office, [‘The Sourcing Playbook’](#), (June 2023), p.28.

¹⁴¹ Ministry of Justice, [‘Justice Secretary announces new model for probation’](#) (16 May 2019); Niamh McIntyre, [‘Scotland bans private firms from carrying out benefit assessments’](#) (The Independent, 28 April 2017).

IV. PROCUREMENT

Introduction

- 4.1 The Chartered Institute of Procurement & Supply ('CIPS') define procurement as 'the buying of goods and services that enable an organisation to operate its supply chains, in a profitable and ethical manner'.¹⁴² The new Procurement Act sets the UK Government's key objectives for public procurement as being delivering value for money, maximising public benefit, sharing information to allow suppliers and others to understand procurement policies and decisions, and acting (and being seen to act) with integrity.¹⁴³ Most often, this will involve deciding what procurement process is best for the service involved, the publication of award criteria inviting bids and determining which provider is best able to meet the award criteria (if any).
- 4.2 For the purpose of this chapter, we are focused on certain key aspects of the public procurement process which should take place after the early engagement identified in chapter two; the award criteria by which public authorities assess potential providers, the relevant policies to ensure that the rights of individuals are properly considered at this stage and how the public authority proposes to work with the proposed provider to deliver the service.
- 4.3 Our research has identified that too often the concept of "value for money" has become intertwined with the lowest upfront cost of a bid. It is of course right that public authorities, with tight budgets and obligations in respect of public funds, spend public money wisely; but we favour a wider focus on the value of a service and the unintended costs (both for the individual service users and financially for the public authority) if things go wrong. Present procurement policies make limited reference to the rights of service users and we have suggested how those rights could be more front and centre in the procurement process. This should include making clear that a contract should not be awarded to a provider, if the public authority is not confident it can meet the required legal standards.

A more complete understanding of 'value'

Paramount focus on cost

- 4.4 Government policy is clear that cost should not be the only deciding factor when awarding government contracts. The Playbook states that value for money is '*securing the best mix of quality and effectiveness for the least outlay over the period of use of the good/ services bought*' and that it is '*not about minimising upfront costs*'.¹⁴⁴ It goes on to state, importantly, that cost should be '*secondary to quality in a complex outsourcing, recognising the importance of delivering quality public services*'.¹⁴⁵
- 4.5 This is reflected in other areas of procurement policy. For example, the Public Services (Social Value) Act requires those who commission public services to consider how they can use procurement to achieve '*wider social, economic and environmental benefits*'.¹⁴⁶ Commissioners are required to consider how the procurement might improve '*the economic, social and environmental well-being of the relevant area*' and how the public authority could use the procurement process to make that improvement.¹⁴⁷ The Act is described by the Cabinet Office as a '*tool to help commissioners get more value for money out of procurement*'.¹⁴⁸

¹⁴² CIPS, '[What is procurement?](#)'

¹⁴³ Procurement Act 2023, s.12.

¹⁴⁴ Cabinet Office, '[The Sourcing Playbook](#)', (June 2023), p.66.

¹⁴⁵ Cabinet Office, '[The Sourcing Playbook](#)', (June 2023), p.66.

¹⁴⁶ Cabinet Office, '[Social Value Act: information and resources](#)', (29 March 2021).

¹⁴⁷ Procurement Act 2023, s.1(3).

¹⁴⁸ Cabinet Office, '[Social Value Act: information and resources](#)', (29 March 2021).

- 4.6 The Playbook states that all complex outsourcing projects in central government should produce a Should Cost Model Estimate¹⁴⁹ and this is recommended outside of central government.¹⁵⁰ This should give the public authority a model of cost with which they can assess bids. A bid that is more than 10% lower than the estimate should be sent to the Cabinet Office for a review.¹⁵¹
- 4.7 However, despite this, there remains a concern from many that there is too much focus on initial price rather than overall value for money, including compliance with the public authority's legal obligations to service users. The Playbook itself notes the risk of 'low cost bias', when services are complex *'even if evaluation criteria are designed to balance quality and cost'*.¹⁵² The National Council of Voluntary Sector Organisations,¹⁵³ procurement experts¹⁵⁴ and contractors themselves¹⁵⁵ also agree. In the aftermath of the Carillion scandal, the Government itself *'conceded that it has been overly-focused on cost in awarding contracts'* and struggled to assess quality.¹⁵⁶
- 4.8 The Working Party, through its homelessness sub-group, has gathered evidence that local authorities are contracting out homelessness assessments of vulnerability to private providers. One of the largest such provider, NowMedical, confirmed to us that they were charging local authorities a flat fee of £40 for a GP to provide a homelessness vulnerability assessment, £80 for a psychiatric report or £20 - £30 for housing register cases.¹⁵⁷ As set out below, our homelessness sub-group raise serious concerns about the quality and utility of such assessments. Many of these concerns centre around the fact that these assessments are paper based and NowMedical rarely speak to the individual concerned. We assume that the low fees charged by NowMedical are only possible precisely because they do not speak to the individual. NowMedical state it is because they have not been instructed to do so by the local authority.
- 4.9 Kari Gerstheimer, of Access Social Care, set out to the Joint Committee on Human Rights' inquiry into how to better protect human rights in social care, that *'we are concerned that too much care is currently being commissioned purely on price and that there is not enough consideration of human rights duties'*.¹⁵⁸ A review of social care in Scotland heard that during the procurement process there was too great a focus on costs, rather than high quality, person-centred care¹⁵⁹ and on competition rather than collaboration.¹⁶⁰ The review argued for a move towards a more participative and ethical commissioning framework for adult social care services, focused on better outcomes for service users and staff delivering them.¹⁶¹

¹⁴⁹ A Should Cost Model 'produces a better understanding of the costs associated with different service delivery models and helps to protect government from 'low cost bids' Cabinet Office, ['The Sourcing Playbook'](#), (June 2023), p7.

¹⁵⁰ Cabinet Office, ['The Sourcing Playbook'](#), June 2023, p.6.

¹⁵¹ *Ibid.*, p.62.

¹⁵² Cabinet Office, ['The Sourcing Playbook'](#), (June 2023), p.66.

¹⁵³ *'Government commissioning continues to be primarily driven by price exclusively, rather than by equivalent consideration of the quality or the longer term sustainability of the public service in question'* Public Administration and Constitutional Affairs Committee, ['Written evidence from NCVO'](#) (February 2018); Public Administration and Constitutional Affairs Committee, ['After Carillion: Public sector outsourcing and contracting'](#) (3 July 2018), p.24.

¹⁵⁴ *'robustness, commitment, and long-term sustainability'* are ignored in favour of a focus on the cheapest possible price, Paul Davies, previous partner at PwC advising the public sector on procurement. Public Administration and Constitutional Affairs Committee, ['Oral evidence: Sourcing public services – lessons to be learned from the collapse of Carillion'](#), (Q584, 24 April 2018).; Public Administration and Constitutional Affairs Committee, ['After Carillion: Public sector outsourcing and contracting'](#) (3 July 2018), p.25.

¹⁵⁵ A CBI survey of 250 contractors in June 2018 found only 2% thought 'service quality was the determining factor in the award of Government contracts, whereas 60% thought it was the lowest initial bid cost'. Public Administration and Constitutional Affairs Committee, ['After Carillion: Public sector outsourcing and contracting'](#), (July 2018), p.24.

¹⁵⁶ *Ibid.*, p.25.

¹⁵⁷ Evidence provided by NowMedical to JUSTICE,

¹⁵⁸ Joint Committee on Human Rights, ['Oral evidence: protecting human rights in care settings'](#) (Q35, March 2022).

¹⁵⁹ Scottish Government, ['Independent review of adult social care in Scotland'](#) (February 2021), p.11.

¹⁶⁰ *Ibid.*, p.72.

¹⁶¹ *Ibid.*, p.74.

- 4.10 Other countries have developed a wider understanding of value when making decisions about public procurement. For example, in New Zealand a contract should be awarded to a supplier which has ‘*demonstrated that it fully understands and has the capability to deliver the requirements and meet the contract conditions*’ and ‘*offered the best public value including broader outcomes, over the whole life of the good, services or works*’.¹⁶²

Impact of the focus on cost on individuals

- 4.11 It is of course inevitable, and right, that public authorities must carefully consider the cost of the contract in any procurement exercise. However, too narrow a focus on cost has, in the Working Party’s view, often prevented a wider analysis of whether the contract will deliver the public service to the required standards. The narrow focus on cost often has led to, not only breaches of the rights of individuals, but also a more general ‘race to the bottom’ on quality, with disastrous consequences for the quality of those services and the rights of individuals. It often also leads to additional avoidable costs further down the line including the costs of legal challenges, public inquiries and having to fix a failing service.¹⁶³

Consequences for individuals

- 4.12 An undue focus on cost can have a severe impact on the quality of services. Julian Blake told us that ‘*very serious malfunctions*’ take place when providers are commissioned who focus on ‘*maximising profit*’ leads to ‘*minimising cost*’ and then ‘*lowest common denominator service provision*’.¹⁶⁴ In response to the Carillion scandal, the Public Accounts Committee heard evidence that ‘*the Government appears to focus unduly on cost in its contracting decisions, with a detrimental effect on service quality*’.¹⁶⁵
- 4.13 The IfG has also highlighted how a focus on price can lead to lower quality, unrealistic bids that damage the competitiveness of the market and undermine the ability of providers to add value in the delivery of services.¹⁶⁶ The bid process is costly and represents a reputational risks for bidders. The Working Party heard evidence that high quality suppliers who are not prepared to pretend that a service can be delivered at a discounted price therefore are unlikely to risk the expensive and reputational risk of bidding when they know they are highly unlikely to be awarded the contract due to the price.
- 4.14 Robert Buckland MP told us that, in his experience as a previous Secretary of State for Justice, it was a ‘*source of constant frustration*’ to him that the Ministry of Justice could not get ‘*smaller specialist bodies*’ who ‘*actually could do the job*’ in to provide key services. The tender process was ‘*just too hard*’ for such smaller organisations.¹⁶⁷
- 4.15 Beyond poor quality, as demonstrated by the Brook House Inquiry, there can be disastrous consequences for individuals of focusing too much on initial price rather than overall value and quality.

¹⁶² New Zealand Government Procurement Rules, Rule 46.

¹⁶³ See, for example, the cost of the Brook House Inquiry which cost tens of millions of pounds, as set out at footnote [187], or the tens of millions of pounds which the Post Office Horizon Inquiry has cost, see Post Office Horizon IT Inquiry, ‘[Financial Report 1st April 2020 – 31st March 2023](#)’, November 2023.

¹⁶⁴ Evidence provided to JUSTICE

¹⁶⁵ Public Administration and Constitutional Affairs Committee, ‘[After Carillion: Public sector outsourcing and contracting](#)’, (July 2018), p24

¹⁶⁶ IfG, ‘[Government outsourcing – what has worked and what needs reform?](#)’ (September 2019) p.49.

¹⁶⁷ Evidence provided to JUSTICE.

CASE STUDY: BROOK HOUSE IMMIGRATION REMOVAL CENTRE

Brook House Immigration Removal Centre was an immigration detention centre, contracted to be run by G4S from 2009 until May 2020. As an immigration detention centre, it primarily held individuals whom the Government intended to remove from the country including failed asylum-seekers, asylum-seekers and foreign national offenders.¹⁶⁸ A 2017 Panorama documentary, filmed undercover by a staff whistleblower, highlighted evidence of, amongst other things, the physical abuse of detainees by staff.¹⁶⁹ In 2019, a statutory public inquiry was set up to be chaired by Kate Eves and the final report was published in September 2023.¹⁷⁰

The report found 19 incidents where there was credible evidence of breaches of Article 3 ECHR (the right not to be tortured or subject to inhuman or degrading treatment).¹⁷¹ The Inquiry also heard evidence of, amongst other things, the inappropriate use of force (including the unnecessary infliction of pain), dangerous restraint techniques, *'inappropriate and humiliating comments'* towards detainees as they attempted to take their own lives, staff making *'derogatory and humiliating remarks'* and the inappropriate use of segregation powers.¹⁷²

- 4.16 Despite the official evaluation criteria stating that price and quality should be weighted 50:50¹⁷³, the contract was won by Global Solutions Limited (“GSL”) notwithstanding the Home Office having serious concerns about the quality of the bid including:
- (a) Welfare proposals which proposed a team *'without any clear leadership'*;
 - (b) Inadequate overnight staffing arrangements;¹⁷⁴
 - (c) A lockdown period which was *'excessive and not in keeping with the ethos of the rest of the estate'* with *'no justification for such a lengthy period of non-association'* and in *'apparent contradiction'* to the Detention Centre Rules;¹⁷⁵ and
 - (d) A failure to *'provide a number of commitments including dealing with 2500 admissions and 2500 discharges each month'*, which did *'not appear to have been resolved by the final assessment stage'*.¹⁷⁶
- 4.17 The Border and Immigration Agency recommended GSL’s bid which was the cheapest, on both start-up and annual costs. In its evaluation, the Home Office noted that GSL had *'delivered significant (35%) cost savings compared to the original budget'* of the Home Office. The Inquiry concluded that the Home Office’s own budget *'allowed for a higher standard'* and that, instead of using the budget to ensure a *'suitable operational contract'* was agreed, ***the primary motivator of the Home Office appeared to be cost-saving, with care and***

¹⁶⁸ Brook House Inquiry, [‘The Brook House Inquiry Report Volume I’](#), (September 2023), p58.

¹⁶⁹ Alison Holt, [‘What I saw when I went undercover: The 21-year-old whistle-blower at the immigration removal centre’](#), (BBC News, 4 September 2017).

¹⁷⁰ Brook House Inquiry, [‘The Brook House Inquiry Report Volume I’](#), (September 2023).

¹⁷¹ *Ibid.*, p.3.

¹⁷² *Ibid.*, p.4.

¹⁷³ Brook House Inquiry, [‘The Brook House Inquiry Report Volume II’](#) (September 2023), p.6.

¹⁷⁴ In fact, only one bidder did provide adequate overnight staffing arrangements.

¹⁷⁵ Brook House Inquiry, [‘The Brook House Inquiry Report Volume II’](#) (September 2023), p.6.

‘The purpose of detention centres shall be to provide for the secure but humane accommodation of detained persons in a relaxed regime, with as much freedom of movement and association as possible...’ Rule 3(1), Detention Centre Rules 2001.

¹⁷⁶ Brook House Inquiry, [‘The Brook House Inquiry Report Volume II’](#) (September 2023), p.7.

welfare sidelined' (emphasis added).¹⁷⁷ G4S then subsequently took over GSL's contract to run Brook House IRC in 2008, after acquiring GSL, despite having failed in their initial bid.¹⁷⁸

- 4.18 The Managing Director of Justice and Government Chief Commercial Officer of G4S said that *'the vast majority of government tendering, regardless of whether it says it is 50-50 price: quality, it's price, let's face facts'* (emphasis added).¹⁷⁹ In fairness, he emphasised in his Inquiry evidence that *'whilst, in 2007, I believe the general thrust from government was to get a cheaper price, what I can say is that has demonstrably changed since that period and there is a far bigger drive in government for value for money and quality'*.¹⁸⁰ His evidence makes clear the view that lowest price is not 'necessarily value for money'.¹⁸¹
- 4.19 As the Public Administration and Constitutional Affairs Committee has highlighted, the cost of service failure goes beyond the cost to the public purse and its particularly important to prevent this *'in cases of complex services for vulnerable people, where the risks and the consequences of service failure are most acute'*.¹⁸²

Costs further down the line

- 4.20 Having said this, an over focus on initial costs can, in addition to the human cost, often lead to large additional monetary costs further down the line. The Institute for Government has set out that *'when government focuses too narrowly on the lowest-price bid, suppliers are more likely to underbid and look to make costs elsewhere by reducing quality, charging government penalties for contract variations or adding additional services (often referred to as 'land and expand')'*.¹⁸³
- 4.21 The National Audit Office also highlighted how the agreement to terminate the Probation privatisation contracts came at a cost to the taxpayer of £171 million.¹⁸⁴ The contracts in general achieved *'poor value for money for the taxpayer'* as there was also a further £207 million paid prior to the contracts being terminated to reflect higher than anticipated fixed costs.¹⁸⁵
- 4.22 In addition, because the state has legal obligations to individuals such as immigration detainees or social care users, it cannot contract out of ultimate liability for rights breaches. The failure to properly consider these liabilities if services go wrong can then be very expensive for the state, undermining the proposed savings in the first place of the low-cost bid. For example, there has been widespread litigation around the treatment of immigration detainees (including on the issue of lock-ins¹⁸⁶) in Brook House, whilst the Brook House Inquiry itself has cost millions of pounds, leaving aside the other litigation and potential damages payouts by the Home Office.¹⁸⁷

¹⁷⁷ *Ibid.*, p.8

¹⁷⁸ *Ibid.*, p.8.

¹⁷⁹ Brook House Inquiry, '[Evidence: Day 42](#)', (31 March 2022), p.75.

¹⁸⁰ Brook House Inquiry, '[The Brook House Inquiry Report Volume II](#)' (September 2023), p.8.

¹⁸¹ Brook House Inquiry, '[Evidence: Day 42](#)', (31 March 2022), p.76.

¹⁸² Public Administration and Constitutional Affairs Committee, '[After Carillion: Public sector outsourcing and contracting](#)', (July 2018), p.25.

¹⁸³ IfG, '[Government outsourcing: What has worked and what needs reform?](#)' (September 2019), p.49.

¹⁸⁴ NAO, '[Transforming Rehabilitation: Progress Review](#)' (March 2019), p.9.

¹⁸⁵ *Ibid.*, p.38.

¹⁸⁶ See, for example, [R \(on the application of Hussein & Rahman\) v SSHD](#) [2018] EWHC 213 (Admin)

¹⁸⁷ The public inquiry itself has cost millions of pounds: £284,998 for [2019/20](#); £3,524,936 for [2020/2021](#); £10,765,302 for [2021/2022](#) and £3,191,292 for [2022/2023](#). The Brook House Inquiry, '[Financial Reports](#)'

A wider focus on quality and value

- 4.23 We understand the superficial attraction of reliance on price as the determining criterion in an outsourcing bidding process, because it is an objective measure and does not require any assessment of factors which are less simply measured. However, we are of the view that the procurement process should re-focus on what is actually most important when assessing bids; the rights of those service users who will ultimately be affected.
- 4.24 Previously, public authorities have felt that the award criterion under the Procurement Regulations – the Most Economically Advantageous Tender (“MEAT”) – meant that it was difficult for them to consider non-financial criteria when assessing bids.¹⁸⁸ Under the new Procurement Act regime, the award criterion changes to the Most Advantageous Tender (“MAT”).¹⁸⁹
- 4.25 This should encourage public authorities to consider non-financial criteria when assessing bids. This is an important reform which the Government has said *‘should provide greater reassurance to contracting authorities that they can take a broader view of what can be included in the evaluation of tenders in assessing value for money including social value as part of the quality assessment’*.¹⁹⁰ Many have said that this approach was already permitted under the previous regime.¹⁹¹ Whilst this has given rise to concerns that this change could in practice amount to merely a semantic change, the Working Party is of the view this is an important opportunity to focus on a wider concept of value aligned with the individual rights of service users.
- 4.26 As a result, the Working Party recommends that, **guidance or regulations which define the Most Advantageous Tender, should place a much greater emphasis on a concept of value which focusses on the rights of the individual service users. In particular, it should emphasise the following:**
- (a) **The importance of award criteria in addressing how the provider intends to uphold the rights of individuals when assessing the value of a service;**
 - (b) **The risk and cost of legal challenges and inquiries if the service does not deliver to the required standards for individual rights;**
 - (c) **A focus on long-term value; which should include the potential wider cost to the public authority of the failure of the service, including the time and cost of the service having to be brought back ‘in house’ (Recommendation 8).**
- 4.27 It is also important to consider price and quality separately, to ensure they are both being properly evaluated. The Scottish Government sets out that *‘as a matter of good practice, no member of the evaluation panel should assess both the quality/ technical elements and the commercial elements of the tender’*.¹⁹² The Scottish Prison Service told us that it is standard practice for them to keep the two evaluations entirely separate, with not only different people evaluating the technical and commercial aspects of the tender but with those people being “blind” to the other.¹⁹³
- 4.28 The UK Government Bid Evaluation Guidance note emphasises the importance of balancing price and quality (including social value) and that evaluation criteria needs to be not *‘based on price alone’*.¹⁹⁴ The Playbook talks about value for money being *‘the best mix of quality and effectiveness’*, that it is *‘not about minimising up-front costs’* and that the expectation is cost will be secondary to quality in complex services.¹⁹⁵

¹⁸⁸ Hugh James, [‘Procurement Bill – Most Advantageous Tender replaces Most Economically Advantageous Tender’](#), (4 April 2023).

¹⁸⁹ Procurement Act 2023, s.19(1).

¹⁹⁰ Cabinet Office, [‘Transforming public procurement’](#), (December 2020), p.101.

¹⁹¹ *‘The Public Contract Regulations 2015 provide Commissioners with a great deal of flexibility to achieve the outcomes they seek for their communities’*. F. Villeneuve-Smith and J. Blake, [‘The Art of the Possible in Public Procurement’](#), (September 2016), p.3.

¹⁹² Procurement Journey Scotland, [‘Technical Evaluation’](#),

¹⁹³ The Scottish Prison Service told us that technical aspects and commercial aspects are provided in separate Schedules and are evaluated separately from one another. They are then brought together to make the overall recommendation.

¹⁹⁴ Government Commercial Function, [‘Bid Evaluation Guidance Note’](#), (May 2021), p.9.

¹⁹⁵ Cabinet Office, [‘The Sourcing Playbook’](#), (June 2023), p. 62.

However, the Guidance and the Playbook do not make any clear recommendations for ensuring that initial cost does not become the dominant factor. Whilst each procurement process is likely to be different, the Working Party can see the clear benefit in having a “blind” process where cost and quality are, as far as possible, assessed separately by different teams.

- 4.29 Meg Hillier MP told us that tender processes at present often had ‘*all the wrong burdens*’ and that it involves ‘*ticking all the wrong boxes at the beginning*’ but ‘*actually missing the blindingly obvious*’.¹⁹⁶ She stressed to us that, ‘*you’ve got to get that balance. We talk a lot about costs, but we don’t talk enough about value, and I think value for money isn’t just the cheapest cost*’.¹⁹⁷ Kevin Sadler also highlighted the importance of ‘*end to end thinking about rights*’ and ‘*thinking about when it goes wrong and how people deal with that*’.¹⁹⁸ The Working Party have therefore also thought about how we can encourage greater focus on the rights of individuals during procurement.
- 4.30 Julian Blake told us the importance of public service delivery having a ‘*genuine focus on purpose*’ and that providers, notwithstanding their commercial interests, should have to demonstrate that ‘*their primary focus is on delivering a service with high quality*’. An assessment of public value requires consideration of ‘*the whole picture*’ which includes ‘*what the resources are available, what the costs are, what a reasonable surplus for a provider would be, and you want to ensure that you’re not purchasing on the basis that the provider will be minimising cost and extracting excessive profit*’.¹⁹⁹
- 4.31 PPNs are important documents produced by the Cabinet Office and devolved governments²⁰⁰ to provide best practice for public sector organisations.²⁰¹ There have been recent PPNs on how to tackle modern slavery in government supply chains,²⁰² social value²⁰³ and updated guidance on data protection legislation.²⁰⁴ However, there are no published Procurement Policy Notes on how to protect the rights of individual service users or how to protect the public authority’s human rights obligations.
- 4.32 We are of the view that a new proposed Procurement Policy Note on individual rights would be a helpful way to address this and set a clear direction towards a rights-based approach to contracting. The Working Party therefore **recommends that the Cabinet Office, and devolved administrations, should produce a new Procurement Policy Note²⁰⁵ on ‘Protecting Individual Rights’.** This PPN should stress the following (for medium and high-risk contracts in particular):
- (a) **The importance of setting out clearly the state’s legal obligations with respect to individual rights;**
 - (b) **Recommend that a separate team assess the quality of a bid, ideally blind to the cost. The quality assessment should explicitly include the ability of the provider to uphold individual rights;**
 - (c) **Make recommendations for how the rights of individuals can be incorporated throughout the procurement process, including in setting award criteria and during the assessment of bids;**
 - (d) **Require the resolution of any identified risks of breaches of individual rights within a specified timeframe; and**

¹⁹⁶ Evidence provided to JUSTICE

¹⁹⁷ Evidence provided to JUSTICE

¹⁹⁸ Evidence provided to JUSTICE

¹⁹⁹ Evidence provided to JUSTICE

²⁰⁰ In Scotland they are Scottish Procurement Policy Notes – see ‘[Scottish Procurement Policy Notes \(SPPNs\)](#)’, Scottish Government.

²⁰¹ GOV.UK., ‘[Procurement policy notes](#)’,

²⁰² Cabinet Office, ‘[PPN 02/23: Tackling Modern Slavery in Government Supply Chains](#)’, (25 March 2024)

²⁰³ Cabinet Office, ‘[PPN 06/20 - Taking account of the social value in the award of central government contracts](#)’, (24 September 2020)

²⁰⁴ Crown Commercial Service, ‘[PPN 03/22 - Updated guidance on data protected legislation](#)’, (30 November 2022)

²⁰⁵ Scottish Procurement Policy Note for the Scottish Government.

(e) **Require the reporting and resolution of breaches of individual rights during the term of the contract (Recommendation 9).**

- 4.33 This PPN would build upon existing policy notes, such as the Cabinet Office’s Public Sector Equality Duty PPN²⁰⁶ and the Northern Ireland Department of Finance’s ‘Human Rights in Public Procurement’ PPN.²⁰⁷ However, the proposed ‘Protecting Individual Rights’ PPN would expand rights addressed in these documents to include the state’s wider obligations towards individual rights which we have identified in this report.
- 4.34 The 2013 PPN on the Public Sector Equality Duty (‘PSED’), for example, reminds public authorities of their non-delegable legal obligations under the Equality Act stresses the importance of considering whether a contractor will need to meet Equality Act duties and that PSED requirements in relation to the PSED should ‘usually be set out in the contracts conditions’.²⁰⁸ It notes that equality considerations are likely to be greater in services which have ‘direct contact with the public’ (e.g. social care), recommends early consultation with potential service users (as we have recommended above) and the need to include relevant equality-related award criteria.²⁰⁹ The table at Annex A is of particular use and the Working Party would recommend a similar table be produced for the Individual Rights PPN proposed.
- 4.35 The Northern Ireland Department of Finance’s Human Rights PPN (issued on 22 November 2021) also makes clear that public departments have a duty to ensure human rights are respected in their commercial transactions, that they should assess the level of risk for each contract, produce a ‘procurement/ sourcing strategy’ that ‘identifies potential human rights breaches and put measures in place to mitigate them’.²¹⁰ The PPN highlights the importance of the service user (including assessing whether such a user would be aware of their rights) and considering previous incidents of human rights abuses.

²⁰⁶ Cabinet Office, ‘[PPN: Public Procurement and the Public Sector equality Duty - Information Note 01/13/28](#)’, (January 2013).

²⁰⁷ Northern Ireland Department of Finance, ‘[Procurement Policy Note PPN 05/21 Human Rights in Public Procurement](#)’, (November 2021).

²⁰⁸ Cabinet Office, ‘[PPN: Public Procurement and the Public Sector equality Duty - Information Note 01/13/28](#)’, (January 2013), p.2.

²⁰⁹ *Ibid.*, p.3.

²¹⁰ Northern Ireland Department of Finance, ‘[Procurement Policy Note PPN 05/21 Human Rights in Public Procurement](#)’, (November 2021), p.6.

DIFFERENT CONTRACTING MODELS

The Working Party heard evidence about different contracting models which could be used to achieve a more individual rights focused approach to government services. We acknowledge the work by the Government Commercial Function to develop guidance that, if effectively used and implemented, might support many of the report's findings. However, at present, there is limited evidence that these concepts for alternative contracting models are translating to application.

Whilst we are not endorsing any particular model, and in any case this will be context-specific, we are of the view that more thought needs to go into the required contracting and governance structure of the service. This should be done following the early engagement outlined in chapter 2 and proper trials of the proposed procurement model.

Some examples of alternative models are:

i. Relational Contracting

Relational contracting looks at how both parties can build and maintain trust in delivering a public service. World Commerce & Contracting, the non-profit professional association for contract and commercial management, defines it thus: "Relational Contracting" occurs when the parties establish and maintain compatibility of interests through mutually adopted principles and procedures that support a mutually successful outcome and may or may not be a formal element of the contract. The University of Oxford Government Outcomes Lab have defined it as parties aligning their interests 'around the objectives of the contract' and allowing 'greater flexibility' to adapt to unforeseen circumstances.²¹¹ A relational contract has also been described as 'a legally enforceable written contract establishing a commercial partnership within a flexible contractual framework based on social norms and jointly defined objectives, prioritizing a relationship with continuous alignment of interests before the commercial transactions'.²¹² It is designed to focus on the relationship between the parties, establish clearly-defined responsibilities and a 'robust governance framework for continuous relationship management'.²¹³ However, since relational contracting is more flexible, and less rigid than some competitive public procurement processes, there is a fear of collusion or corruption (or at least the appearance of it) so transparency is particularly important.²¹⁴

ii. Outcomes-based contracting

Instead of payment linked to the service activities themselves, outcomes-based contracting allow payments to be directly linked, at least in some proportion, to the 'achievement of outcomes with service users'. The Government Outcomes Lab have set out that its proponents suggest that it incentivises behaviour positively around outcomes of a contract, manages the financial risk for a public authority if the service fails to deliver and can encourage providers to innovate to achieve goals (rather than be overly prescriptive).²¹⁵ However, they also highlight a lack of complete evidence. Outcome-based contracts require open data and proactive contract management, which is something that historically public authorities have found particularly challenging (see chapter 6 below). It should also be noted that payment-by-results was attempted in relation to the Probation contracts, with minimal trials, and had fairly disastrous outcomes. The NAO concluded that 'the use of payment by results was not well suited for probation services' and the 'lightly specified contracts hampered its ability to hold providers to account for poorly performing services'.²¹⁶

²¹¹ N.Ball and M.Gibson, '[Partnerships with principles: putting relationships at the heart of public contracts for better social outcomes](#)', September 2022, p.2.

²¹² D. Frydinger, T.Cummins, K. Vitasek and J.Bergman, '[Unpacking Relational Contracts](#)', 2016, p.6.

²¹³ D. Frydinger, T.Cummins, K. Vitasek and J.Bergman, '[Unpacking Relational Contracts](#)', 2016, p.8.

²¹⁴ N.Ball and M.Gibson, '[Partnerships with principles: putting relationships at the heart of public contracts for better social outcomes](#)', September 2022, p.4.

²¹⁵ Government Outcomes Lab, '[Outcomes-based contracting](#)'

²¹⁶ NAO, '[Transforming Rehabilitation: Progress review](#)', (March 2019), p.9.

Training

- 4.36 Issues with service delivery for contracted out services and breaches of the rights of individuals often stem from the inadequate training of provider's staff. This is something which should, through a pro-active and collaborative approach to procurement with the provider, be relatively inexpensive to address. Given the crucial importance of adequate training, the Working Party is of the view that it is crucial that training requirements are considered early on during the procurement process.

CASE STUDY: THE UNLAWFUL STRIP-SEARCH OF PRISONERS AT HMP PETERBOROUGH²¹⁷

In the case of *LW & Ors*, the High Court found that, in breach of their rights under Article 8 ECHR (the right to a private and family life) four prisoners had been illegally strip-searched at HMP Peterborough, which at the time was run by the private provider Sodexo. Sodexo conceded that the strip searches of the Claimants were unlawful and that there had been a systemic failing to follow prison policy. However, the Claimants maintained their claim against the Secretary of State, on the basis that the Secretary of State had failed to put in place adequate and effective safeguards to protect their human rights. The Claimants were successful in their claim that the Secretary of State had breached their Article 8 rights.

- 4.37 Mr Justice Julian Knowles found that *'the failings in this case happened because of the lack of proper training'*.²¹⁸ The contract contained an absolute obligation on the contractor to train staff to a suitable level. However, there was no routine monitoring or assessment of the training by the Secretary of State. The Controller²¹⁹ stated that *'if staff are being inadequately trained, this will be apparent from the performance of the prison in the relevant respect'*.²²⁰ The court held that the Secretary of State could not rely on leaving training up to the provider as *'his obligation was to have an adequate and effective system in place to prevent infringements in the first place'*.²²¹ Such measures were required to ensure Sodexo staff were being adequately trained.
- 4.38 The judgment made a number of practical suggestions for how the Secretary of State *could* have fulfilled their *'monitoring and supervisory responsibility'*, with a framework that contained *'adequate and effective safeguards against systemic breaches'* of human rights. This included requiring Sodexo to set out details of training as part of its tender application, requiring them to specify the methods for delivering training and how staff's competency was to be assessed. The Secretary of State could have then *'continued proactively and an ongoing basis to monitor the quality of the training'*.²²²
- 4.39 The Brook House Inquiry also highlighted the lack of adequate training and oversight as factors resulting in human rights breaches, concluding for example that *'a key contributing factor to the failure of safeguards is likely to have been the unacceptable lack of training on Rule 34 and Rule 35 (and on the Adults at Risk policy) in Brook House, which appears still to be the case'*.²²³ It found that training that was available from

²¹⁷ [LW & Ors v Sodexo and Secretary of State for Justice](#) [2019] EWHC 367 (Admin).

²¹⁸ *Ibid.*, para 88.

²¹⁹ A statutory role created by s85 Criminal Justice Act 1991 for contracted out prisons in place of a governor.

²²⁰ [LW & Ors v Sodexo Ltd and Secretary of State for Justice](#) [2019] EWHC 367 (Admin), para 101.

²²¹ *Ibid.*, para 105.

²²² *Ibid.*, para 114.

²²³ [Rule 34](#) of the Detention Centre Rules 2001 requires detainees to have a physical and mental examination within 24 hours. [Rule 35](#) of the Detention Centre Rules 2001 requires reports to be prepared on detainees in certain circumstances (for example, they are a victim of torture).

Brook House Inquiry, ['The Brook House Inquiry Report Volume II'](#) (September 2023), p.77 para 23.

both the Home Office and the private providers was inadequate.²²⁴ The inquiry recommended that the Home Office ensure that mandatory training on Rule 34 and Rule 35 of the Detention Centre Rules be urgently rolled out across the entire detention estate and staff be subject to refresher training annually.²²⁵

4.40 The Inquiry concluded that *'based upon the evidence available to the Inquiry, it is not clear what training has been delivered'* and an urgent comprehensive training programme was recommended across the entire immigration detention estate on key protections for vulnerable detainees.²²⁶ The Inquiry Report recommended that refresher training should be held annually and *'consideration must be given as to whether such training should be subject to an assessment'*.²²⁷

4.41 The Brook House Inquiry also made recommendations to improve training in several further areas, including: that the Home Office and contractors should provide regular training on the use of temporary confinement²²⁸, that there should be regular, mandatory training on the use of force techniques for all detention and healthcare staff;²²⁹ mandatory training for all detention and healthcare staff on food and fluid refusal by detainees²³⁰; and regular training on investigating healthcare complaints.²³¹

4.42 A lack of adequate training is also an issue in the social care sector. The Relatives and Residents Association told the Joint Committee on Human Rights ('JCHR'):

*'There is a widespread lack of knowledge of human rights amongst care providers. This is due to a lack of training on human rights, the HRA and other laws which protect rights (including the Mental Capacity Act and Equality Act). This leads to care users' rights not being respected or protected.'*²³²

4.43 The JCHR stressed the importance of *'specific training on human rights and its effects on the provision of services'* being provided to all registered staff, with stakeholders working with the CQC to make this happen. Such training should *'demonstrate the relevance of and use of human rights in making decisions regarding care and treatment'*.²³³

4.44 There are examples where public authorities have considered their training obligations in an interesting and innovative way. For example, Durham County Council's Care Academy, offers *'a range of quality training and development opportunities to social care providers in County Durham'*.²³⁴ The Care Academy offers and funds a range of training and development opportunities for staff working in social care services commissioned by the local authority, and a more limited offer for local providers that are not commissioned too. Whilst there are still training requirements for individual providers included in contracts, the Care

²²⁴ *Ibid.*, p.78.

²²⁵ Brook House Inquiry, ['The Brook House Inquiry Report Volume II'](#) (September 2023), p.79 para 25.

²²⁶ Rules 34 and 35, Detention Centre Rules 2001.

²²⁷ Brook House Inquiry, ['The Brook House Inquiry Report Volume II'](#) (September 2023), p.79, para 25.

²²⁸ Individuals had been subject to temporary confinement for *'reasons of pure administrative convenience'* Brook House Inquiry, ['The Brook House Inquiry Report Volume II'](#) (September 2023), p.349. Recommendation 12, p.350.

Brook House Inquiry, ['The Brook House Inquiry Report Volume II'](#) (September 2023), p.350.

²²⁹ *'Staff also incompetently used authorised techniques (such as the 'prone position') in a way that became dangerous and increased the risk of injury'*. Brook House Inquiry, ['The Brook House Inquiry Report Volume II'](#) (September 2023), Recommendation 14, p.352.

²³⁰ *'It was apparent, for example, that the issue of food and fluid refusal – for which, at any one time during the relevant period, between one and eight detained people were being monitored – was not afforded the attention it merited'* Brook House Inquiry, ['The Brook House Inquiry Report Volume II'](#) (September 2023), p.356. Recommendation 18, p.357.

²³¹ Brook House Inquiry, ['The Brook House Inquiry Report Volume II'](#) (September 2023), p.362.

²³² Joint Committee on Human Rights, ['Protecting human rights in care settings'](#), (July 2022), p 19.

Whilst the report was about care provision in general, including that provided by the state directly, the Kings Fund have been clear that *'local authorities do not usually directly provide services such as home care and care homes; instead they commission them from third-party providers'* (<https://www.kingsfund.org.uk/insight-and-analysis/long-reads/social-care-360-expenditure>)

²³³ Joint Committee on Human Rights, ['Protecting human rights in care settings'](#), (July 2022), p.20.

²³⁴ Durham County Council, ['Care academy provider charging policy for training course cancellations or non-attendance'](#).

Academy means that the council can provide additional support, specialist training and respond to issues that arise from feedback about the quality of services.

- 4.45 The Care Academy told us that this ensures that smaller providers can access specialist training (the Council are able to achieve better value for money as they purchase it on a larger scale) and it is easier to challenge providers delivering a poor service in areas when free training is available. One example given was that the Care Academy funded ‘Effective complaints handling for Care Providers’ training delivered by the LGSCO. If providers manage complaints better, resolve them earlier and learn from them to improve their service delivery, this is better for individuals and also should lead to less complaints escalated to the council. This is an example of how an investment in training can lead to better outcomes for all involved.
- 4.46 The Durham County Council Care Academy model is of interest. The Care Academy told us that local providers give positive feedback on the offer and their internal reporting demonstrates that it makes a positive contribution to the improvement on the quality of services, although they recognise that improvements in service delivery are usually multifactorial and that it would be challenging to prove that its training offer is the sole causative factor.
- 4.47 These examples demonstrate the importance of training for ensuring a rights centred service provision and the need for the contracting authority to consider, during the procurement stage, important questions around its provision. These questions include:
- (a) what are the key rights issues likely to be and which individuals are most likely to be affected? (Pre-engagement with service users as recommended in chapter 3 above will assist in answering this)
 - (b) to what extent will the delivery of training be the responsibility of the provider? Will it be mandatory?
 - (c) How will they guarantee the quality of the training?
 - (d) How often does it need to be refreshed?
- 4.48 The Working Party does not want to be too restrictive about whether the public authority or provider should be responsible for training. As with the training at Brook House IRC, see above, there have been serious issues with the quality of training delivered by both the public sector and providers. However, at the procurement stage, the public authority should recognise that they have a responsibility and an interest in ensuring that adequate training on issues that affect individual rights are provided.
- 4.49 The Working Party recommends that **the proposed PPN²³⁵ on Protecting Individual Rights stresses the importance of both the public authority and provider ensuring that good quality training is provided on key rights issues. At the tender stage, if the provider is to deliver or be responsible for training, the public authority must require bidders to set out information about the means of training, who will deliver it, quality of proposed training materials, how such training will be updated during the contract and how it will be assessed as part of the award criteria. In addition, the public authority should make clear how it will oversee the quality of training to ensure that it meets the contractual requirements (Recommendation 10).** This will need to be addressed specifically in the contract, as we will set out in more detail in chapter 4 below.

²³⁵ Or Scottish Public Procurement Note in Scotland.

What to do if individual rights cannot be protected

Don't make an award

- 4.50 It is not part of this Working Party's remit to consider whether certain specific public services should be contracted out. There may be services where expert organisations, charities or social enterprises, for example, may be able to deliver a more comprehensive, specialist service than a public authority without such expertise. Hybrid services may be more effective, where the state runs certain aspects but contracts out individual elements to expert bodies.
- 4.51 There is also of course no guarantee that the delivery of the service by the public authority will be higher quality or better protect individual rights better. For example, issues with prisons are not limited to those which are run by private contractors but also exist in those which are under the control of the Ministry of Justice. Home Office administrative decision making has also been frequently criticised for being poor-quality and appeals have high success rates.²³⁶
- 4.52 However, if after the tender process, it becomes clear to the public authority that no provider will be able adequately to meet the key individual rights of service users,²³⁷ then the Working Party would emphasise that a contract should not be awarded on the basis that the particular service must be outsourced whatever the potential consequences, or because it was the best available bid. This will only increase the likelihood of issues with the service, rights being breached and ultimately the public authority having to resolve the issue in a costly way.
- 4.53 **The Sourcing Playbook, and other relevant policy (including those of devolved administrations), should be amended to clearly state that if, after a tender process, the public authority is not confident that any bidder can meet the basic legal standards for individual rights required, then the public authority should not award the contract to any bidder. The public authority should then consider either retaining the service 'in house' (i.e. not contract out the service) or addressing the issues which led to no compliant bids (Recommendation 11).**
- 4.54 We appreciate that there may be situations, following a service being re-tendered (for example, benefit assessment contracts being re-awarded), there are concerns about the public authority's ability to deliver that contract 'in house', considering the loss of institutional knowledge raised earlier.²³⁸ However, the answer in the Working Party's view is not to press on regardless but to either re-consider why no providers can meet those basic legal standards or re-build that internal capacity. For example, it may be that the public authority could do more to oversee a contract, impose more performance indicators or address why a previous contract failed. It is no answer to simply award the contract; exposing the individuals involved to breaches of their rights and the public authority to legal liability for such rights breaches.

Don't reward poor performance

- 4.55 Where a service that has been contracted out comes towards the end of its contract, the National Audit Office has highlighted how public authorities '*routinely extend contracts rather than retendering them*'. Their figures highlighted how, in 2021 – 2022, 13% of total contracts were extended though this was 34% of the total value of government contracts, suggesting high-value contracts were often extended.²³⁹ Whilst extending well performing contracts may be an understandable decision, and provides continuity, it is important that it does not become a route for rewarding poor performance.

²³⁶ The Law Society, [Press release: Home Office needs urgent overhaul new statistics show](#) (24 November 2022)

²³⁷ From the start of the contract or, in exceptional circumstances, a set date within the contract, see paragraph 3.46 above.

²³⁸ See for example, JUSTICE, '[Reforming the Windrush Compensation Scheme](#)', (JUSTICE, November 2021) and JUSTICE, '[Reforming the Afghanistan Resettlement Schemes: the way forward for ARAP and ACRS](#)', (JUSTICE, 2023).

²³⁹ NAO, '[Lessons learned: competition in public procurement](#)', (July 2023). p.14.

- 4.56 For example, the House of Commons Justice Committee report on Rainsbrook Secure Training Centre highlighted how the Ministry of Justice awarded the provider MTC the maximum possible extension despite evidence of poor performance and being under sanctions. Such issues included locking children in their cells for 23.5 hours a day, with *'limited meaningful contact'*.²⁴⁰
- 4.57 The extension was granted early in 2020 for two years, taking the end date to May 2023.²⁴¹ The Justice Committee stated they were *'concerned'* about this maximum possible extension as, based on the evidence they had heard and the findings of the inspectorate, it was *'clear that MTC have failed to fulfil a number of contractual obligations'*. The Committee stated that there was *'little justification for retaining the services of a badly under-performing contractor, and even less for giving them two more years of that contract'*. They stressed that *'consistently sub-standard performance of a contract does not merit renewal in any circumstances'*.²⁴² The contract was then ended early by the Ministry of Justice in December 2021.²⁴³
- 4.58 The benefit assessment contracts have also been repeatedly extended by the DWP, despite clear concerns about the performance of those contracts, as JUSTICE has previously highlighted.²⁴⁴ Capita's Personal Independent Payment assessment contract, for example, began in 2012 but was extended several times until February 2024.²⁴⁵ Maximus' contract to run the Work Capability Assessment contract was also extended several times after commencing in 2015.²⁴⁶ Both providers were also re-awarded contracts for the new Functional Assessment Service, though one of the largest previous providers Atos was not awarded a contract.²⁴⁷
- 4.59 The Working Party does not of course express any view about the individual decisions above to extend contracts or to re-award services to providers after a new tender. There may have been good reason why such contracts were re-awarded and explanations for the seeming poor level of performance. However, we are concerned more generally that there should be proper mechanisms and accountability when individual rights are breached by providers.
- 4.60 The Procurement Act provides an ideal opportunity to properly consider past performance and exclude suppliers bidding for a service because of a poor previous track record on individual rights where appropriate. Whilst the previous Public Contract Regulations did have a discretionary exclusion ground for *'significant or persistent deficiencies'* in contract performance,²⁴⁸ this was difficult to enforce.
- 4.61 The law firm Browne Jacobson LLP stated *'we regularly advise contracting authority clients wishing to exclude a bidder on the basis of their previous poor performance, and often find that even in cases of very poor performance, the contracting authority is unable to meet the threshold to exclude the bidder'*.²⁴⁹ Lawyers in Local Government highlighted that the threshold for exclusion may not have applied when

²⁴⁰ Justice Select Committee, ['Rainsbrook Secure Training Centre'](#), (March 2021), p 22.

²⁴¹ *Ibid.*, p.20.

²⁴² *Ibid.*, p.20.

²⁴³ Justice Select Committee, ['End of Rainsbrook STC Contract welcomed'](#), (3 December 2021)

²⁴⁴ *'Data submitted to the Work and Pensions Select committee showed that neither PIP contractor nor Maximus had met its targets in any rolling three month period up to the end of 2017. More recent independent audit data show that this remained the case from 2017 through to the end of 2019. This is despite the very low bar required to be met for reports to be considered 'acceptable'. PIP reports will still be considered 'acceptable' where they contain "clinically improbable advice such that the choice of descriptor is highly unlikely", justification which "fails to support the advice or the descriptor choice" or where important evidence has not been sought.'* – see JUSTICE, ['Reforming Benefits Decision-making'](#), (August 2021), p44

²⁴⁵ Capita, ['Capita secures extension to deliver Personal Independent Payment assessments'](#), (13 January 2023).

²⁴⁶ Rightsnet, ['DWP confirms that work capability assessment contract with Maximus has been extended by two years to 31st July 2023'](#), (31 August 2021).

²⁴⁷ UK Parliament, ['Written Statement: Health Transformation Programme Update'](#), (25 May 2023)

²⁴⁸ Regulation 57(8)(g) PCR 2015 permitted a discretionary exclusion ground for *'significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract...which led to early termination of that prior contract, damages or other comparable sanctions'*.

²⁴⁹ Browne Jacobson, ['Exclusion grounds under the new procurement regime'](#), (12 January 2022).

increased contract monitoring or remedial plans were used to rectify issues instead of terminating the contract or seeking damages.²⁵⁰

- 4.62 As the Government's '*Transforming Public Procurement*' green paper set out, past performance was allowed to be considered 'on only very limited grounds and commercial teams often have to rely on bidders' self-declarations rather than objective, evidence-based information'.²⁵¹ Further, the information that public authorities could request from suppliers is restricted.²⁵² It was highlighted that contracting authorities '*may also be reluctant to terminate contracts or provide negative feedback as doing so may be subject to legal challenge from aggrieved suppliers*'.²⁵³
- 4.63 The new Procurement Act clarifies the ability of public authorities to exclude bidders for contracts based on poor previous performance. The Working Party welcomes this. The legislation permits public authorities to exclude bidders if they have breached a public contract in the UK (including confirmed by a court) and this has resulted in termination, damages or settlement,²⁵⁴ has failed to perform a contract to an authority's satisfaction (having been given the proper opportunity to improve performance);²⁵⁵ or after publication of a notice by a UK contracting authority about a supplier's previous breaches or poor performance.²⁵⁶ There is also a discretionary ground for exclusion where a supplier, or connected person, has engaged in previous professional misconduct.²⁵⁷
- 4.64 The new debarment list is a '*robust power*' allowing public authorities to either exclude a particular supplier from all future procurement automatically for a specified time (for mandatory exclusion grounds) or '*mandate that authorities should be exercising their discretion as to whether to exclude a particular supplier in all future procurements*' (for discretionary exclusion grounds). The supplier must be notified and can challenge the decision.²⁵⁸
- 4.65 This power has limitations. First, it is a discretionary power and, given the limited providers in certain areas, the public authority may feel they have little option but to re-award to a supplier unless they are willing to consider insourcing the service. Second, the ground only applies if the contracting authority considers that the '*circumstances giving rise to the application of the exclusion ground are continuing or likely to occur again*',²⁵⁹ which gives considerable discretion. A bidder is likely to state that the issue will not rearise, so the public authority will need to properly interrogate this. There are also requirements for decision-makers to ignore certain old events²⁶⁰ and poor performance before the Schedule comes into force.²⁶¹
- 4.66 Such measures are welcome and provide potential future leverage with suppliers. Meg Hillier MP told us that accountability cannot just be about fines, as such fines can often be managed by the large providers.²⁶² The higher stakes will likely lead to an increase in litigation from suppliers and there is a risk poorly resourced authorities will revert to excess caution. This is likely to be compounded by the limited alternative providers in certain areas.

²⁵⁰ Lawyers in Local Government, '[Exclusion of Bidders due to Poor Past Performance](#)', (28 October 2022).

²⁵¹ Cabinet Office, '[Transforming public procurement](#)', December 2020, p.10.

²⁵² *Ibid.*, p.39.

²⁵³ *Ibid.*, p.39.

²⁵⁴ Procurement Act, Schedule 7 Section 12(1) and 12(2).

²⁵⁵ Procurement Act, Schedule 7 Section 12(3).

²⁵⁶ Procurement Act, Schedule 7 Section 12(4).

²⁵⁷ Procurement Act, Schedule 7 Section 11(1) and (2).

²⁵⁸ DLA Piper, '[The New Procurement Act 2023 Exclusion and debarment of suppliers: What's new?](#)' (3 January 2024).

²⁵⁹ Procurement Act, Section 57(2).

²⁶⁰ For example, breach of contract which took place more than 3 years previously – see Procurement Act, Schedule 7 15(2).

²⁶¹ See Procurement Act, Schedule 7 15(4).

²⁶² Evidence provided to JUSTICE.

- 4.67 However, in light of the serious issues we have identified throughout this report, it is important that the focus remains on the rights of individual service users. Government procurement rules in New Zealand, for example, make clear that an agency can exclude a supplier from a contract opportunity for *'human rights violations by the supplier or in the supplier's supply chain'*.²⁶³
- 4.68 The Working Party recommends that there **should be subsequent regulations and/or policy on the discretionary exclusion grounds for poor performance which makes clear this includes serious breaches of individual rights. In particular, contracting authorities should consider using discretionary exclusion grounds for poor performance in the following circumstances:**
- (a) **There has been a finding by an independent court or inquiry of a systemic breach of individual rights or a serious breach in an individual's case;**
 - (b) **The repeated failure of a provider to implement recommendations of independent oversight bodies such as ombudsman; and**
 - (c) **The repeated failure to follow relevant government guidance and policies on the rights of individuals when delivering the public service (Recommendation 12).**
- 4.69 In light of the focus in the Procurement Act on breach of contract for the discretionary exclusion grounds on poor performance, it is important that the contract properly recognises the importance of individual rights and sets clear protections for individuals. We will discuss this further in chapter five.

²⁶³ New Zealand Government Procurement Rules, ['Rule 44: Reasons to exclude a supplier'](#).

V. CONTRACTING

Contractual terms

- 5.1 The contract itself is a key document for public authorities to hold providers accountable and ensure they deliver a rights compliant service that places the user at its core. Equally, they are important documents that establish the authority's obligations and establish the ability for the provider to hold the authority to account. Written clearly, a contract ensures that there is clarity for both parties as to their individual responsibilities and enables them to both to hold the other accountable.
- 5.2 However, the Working Party notes that written contracts are too often obscure, generic, overly lengthy, or sometimes even non-existent. This means that there is confusion about the legal, commercial and operational expectations of both parties. Furthermore, they fail to contain vital provisions that would help ensure that service users are provided with a quality service and their rights respected.
- 5.3 Both Robert Buckland MP and Meg Hillier MP stressed to us the importance of getting the contract right in the first place. Robert Buckland MP stressed the importance of the contractual terms for ensuring the provider was held accountable, though noted he had concerns they were often not sufficiently robust.²⁶⁴ Meg Hillier MP highlighted the need to be clear in the contract about what the public authority is trying to achieve, in particular what they are trying to achieve for the individuals affected by the service. She highlighted that *'too often the individual at the end is forgotten'* by all parties to the contract.²⁶⁵
- 5.4 This is important as the state has legal obligations towards individuals affected by a contract which it cannot contract out of. As A.C.L. Davies puts it, *'the government does not cease to be the government simply because it is placing a contract, so public law – which is designed to regulate the government – ought to constitute an important part of the regulatory regime for government contracting'*.²⁶⁶
- 5.5 The treatment of immigration detainees at Brook House IRC (as set out above)²⁶⁷ is a good example of the problems when the original contract is inadequate. The National Audit Office highlighted that, whilst the Home Office's contract with G4S specified what constituted *'incidents of underperformance'*, this did not include the inappropriate use of force or the verbal abuse of detainees.²⁶⁸ The Home Office and G4S analysed 84 separate incidents in the Panorama documentary but the Home Office concluded that *'around half did not depict failings against the letter of the contract, but rather the spirit of the contract'*.²⁶⁹
- 5.6 The Home Office and G4S only agreed penalties for eight incidents – four penalties for serious substantiated complaints and four penalties for not filing incident reports. The total service credit penalty for the incidents documented was £2,768.00 (or 0.5% of G4S' monthly fee).²⁷⁰ The Brook House Inquiry found that the contract *'emphasised security over care'* where the *'financial penalty for an escape was penalised at three times that of a death in detention from self-harm involving a failure in procedures'*.²⁷¹
- 5.7 Our prisons and immigration detention sub-group heard evidence that the penalty points for low staffing levels were less than the equivalent salary, which provided a perverse incentive for the immigration removal

²⁶⁴ *'What I always held in my mind was that the means of accountability were the terms of the contract. Holding the other party to the terms of that contract and seeking redress where the terms of that contract were not being honoured'* Robert Buckland MP, evidence provided to JUSTICE.

²⁶⁵ Evidence provided to JUSTICE.

²⁶⁶ A.C.L Davies, 'The Public Law of Public Contracts', (Oxford University Press, 2008), p.63.

²⁶⁷ Alison Holt, ['What I saw when I went undercover'](#), (BBC News, 4 September 2017).

²⁶⁸ For which G4S could be awarded payment deductions. NAO, ['The Home Office's management of its contract with GS to run Brook House immigration removal centre'](#), (July 2019), para 13.

²⁶⁹ NAO, ['The Home Office's management of its contract with GS to run Brook House immigration removal centre'](#), July 2019, p21.

²⁷⁰ *Ibid.*, p.21.

²⁷¹ Brook House Inquiry, [The Brook House Inquiry Report Volume I](#), (September 2023). p.5.

centre to be understaffed.²⁷² We also heard that the penalties for failing to produce detainees for removal or transfer, with no equivalent penalty for the inappropriate use of force and segregation, was likely a factor in the amount of legal challenges over the unlawful use of force and segregation powers. The Inquiry considered hundreds of incidents of segregation but found that only four were properly authorised.²⁷³

- 5.8 The Home Office have since agreed the contract was ‘*not fit for purpose*’ and the National Audit Office found ‘*the inability of the Home Office to impose any significant financial consequences on G4S for the abuse of detainees highlights limitations in the contractual approach*’.²⁷⁴ The Working Party would emphasise the need for proper contractual penalties for serious breaches of the rights of detainees. We note, at the very least, that the new Serco contract to run Brook House IRC has the inappropriate use of force as a ‘*serious performance failure*’, with penalties measured per incident.²⁷⁵
- 5.9 Wider than this, we have seen how it is important to set public law rights clearly in the contract to uphold good quality decision-making. In Northern Ireland, the PIP contract required providers to inform the claimant that further evidence had been sought in relation to their claim and who it had been sought from (e.g. a relevant health professional). However, this specification was removed from the contract in June 2017.²⁷⁶ The NI Public Services Ombudsman found that the subsequent failure to inform claimants about the further evidence request meant that claimants were ‘*misled in relation to which of their health professional(s) have not been contacted*’ and were ‘*unable to make a fully informed decision in regard to the need to gather/provide their own evidence*’.²⁷⁷ Such issues continue despite the concerns raised above.
- 5.10 JUSTICE has sought to analyse fourteen private prison contracts and four immigration detention contracts as part of this report. This has been complicated by the fact that many of these contracts have been heavily redacted (including the Key Performance Indicators) or simply not published at all, which we discuss in more detail in chapter 6.
- 5.11 However, even of those contracts we were able to analyse, there are repeated themes that they make minimal reference to the rights of individual prisoner/immigration detainees and the state’s wider legal obligations. For example:
- (a) We could find only four prison contracts and one immigration detention centre contract which made any reference to human rights obligations under the HRA; all of which simply state that the Contractor is responsible for ensuring compliance with ‘*all legislation applicable*’ including, at an appendix, the HRA.
 - (b) Contractual requirements on prison training vary hugely. Some prison contracts simply state that staff should receive ‘*proper training*’, subject to approval of the public authority. Others are more detailed and require, for example, training in mental health awareness²⁷⁸ or that the provider should report the number of training days per staff member.²⁷⁹
- 5.12 As set out in chapter 4 above, one of the most important issues that should be considered when contracting out a service is training. This should include what training is required, who is responsible for delivering it and how the quality of the training will be overseen. It is of concern that there is minimal detail of what is

²⁷² There was evidence to the Brook House Inquiry that understaffing was a ‘*conscious choice by G4S*’, including to ‘*attain the profit*’ (see the evidence of Ms Sarah Newland, Head of Tinsley House IRC), however this was denied by G4S. The Brook House Inquiry, ‘[The Brook House Inquiry Report Vol II](#)’, (September 2023), p213.

²⁷³ Brook House Inquiry, ‘[The Brook House Inquiry Report Volume II](#)’ (September 2023), p.112.

²⁷⁴ National Audit Office, ‘[The Home Office’s management of its contract with G4S to run Brook House immigration removal centre](#)’ (July 2019), p.10.

²⁷⁵ Brook House Inquiry, ‘[The Brook House Report Inquiry Report Volume II](#)’ (September 2023), p171.

²⁷⁶ Northern Ireland Public Services Ombudsman, ‘[PIP and the Value of Further evidence: An investigation by the Northern Ireland Public Services Ombudsman into personal Independence payment](#)’, (2021), p.77.

²⁷⁷ *Ibid.*, p.78.

²⁷⁸ HMP Five Wells.

²⁷⁹ HMP Northumberland and HMP Oakwood.

required in the above prison contracts and, as we set out below, there should be model contract guidance on addressing training.

LOCAL AUTHORITY HOMELESSNESS ASSESSMENTS

Under the Housing Act 1996, an individual has a priority need for accommodation if they are ‘*vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason*’.²⁸⁰ The local authority therefore has an important obligation to determine whether a homeless individual is ‘*significantly more vulnerable than an ordinary person in need of accommodation and would be likely to suffer greater harm in the same situation*’.²⁸¹ In doing so, local authorities should have regard to advice from medical professionals, social services or care providers. Whilst many local authorities conduct the entirety of their assessment of priority need, including the use of “in-house” medical assessors, a significant number have contracted out medical assessments. Many use a company called NowMedical.

- 5.13 Even more concerningly, in some cases, public authorities do not appear to even have a written contract at all. As a result of Freedom of Information requests, JUSTICE discovered that many local councils who use NowMedical to provide vulnerability assessments of homeless individuals do not have a signed contractual agreement. Of 19 local councils who confirmed to us they use NowMedical, only two councils said they even required agreement of their own standard terms and conditions. Most said they had no separate contractual agreement.
- 5.14 NowMedical confirmed to us that they have ‘*no standard terms and conditions*’ and that the process is set out on their website.²⁸² Their website provides limited information about the process, beyond setting out there is an ‘*ultra-secure case portal*’ (or alternative contact details).²⁸³ Vulnerability reports will be provided within one working day, by ‘*UK-registered doctors and psychiatrists specialising in housing medical assessment*’, include references to relevant legislation and case-law and be a ‘*precise assessment of housing needs*’.²⁸⁴ The cost is also provided.²⁸⁵
- 5.15 The lack of a contract is particularly concerning in respect of these types of assessments given their importance to vulnerable, homeless individuals. Such assessments play an important role in the assessment of priority need for housing. Local authorities should not be contracting private providers to provide these assessments without a written contract in place. Without a written contract specific to the service required it is not possible to set basic safeguards and standards for the assessments.
- 5.16 Whilst it may seem basic, in light of this example, the Working Party feels the needs to recommend that, **when contracting out a service where individual rights are likely to be affected, it is essential that the public authority has a specific written contract which sets out the key requirements of the service. It should not sign up to a provider’s standard terms and conditions, unless fully satisfied that its key requirements have been met (Recommendation 13).**

²⁸⁰ Housing Act 1996, s.189(1)(c).

²⁸¹ Shelter, [‘Who has a priority need when applying as homeless’](#),

²⁸² NowMedical evidence provided to JUSTICE

²⁸³ NowMedical, [‘How it Works’](#),

²⁸⁴ NowMedical, [‘Vulnerability for Priority Need’](#),

²⁸⁵ £40 per case plus VAT for individual report with a one-day response; or £80 per case plus VAT for a psychiatric report with a 5-day response.

Model Contracts

- 5.17 The Cabinet Office and Government Legal Department have produced a range of template contracts to reflect current government priorities for contracting and ‘*recommend ways of doing business*’.²⁸⁶ The Model Services Contract for use where the services contract is valued at over £20 million, and/or is a complex, high-risk contract,²⁸⁷ including ‘*where failed delivery of the contract poses a reputational risk to the Authority such as critical or public facing requirements*’.²⁸⁸ There is also the mid-tier contract (medium value non-complex good and services under £20 million), short form contract (for non-complex goods or services) and the Framework Contract (for common goods and services).²⁸⁹
- 5.18 There is also accompanying guidance for the various contracts such as the Model Services Contract²⁹⁰ and the Mid-Tier Contract.²⁹¹ The Model Services Contract Guidance, for example, stresses the importance of clear service requirements, as it notes that misinterpretation of what a public authority wants from a provider can lead to poorly performing contracts.²⁹²
- 5.19 However, the various guidance makes only fleeting references to key protections for service users and individual rights. The Model Services Contract Guidance makes a welcome reference to the needs of obtaining ‘*accurate and realistic information regarding the actual needs of the users of the Service*’ but this is not expanded upon.²⁹³ There is no equivalent in the Mid-Tier Contract Guidance, which also does not reference equality or human rights duties. There are many more references to intellectual property rights than to the individual rights of service users in the Model Services Contract Guidance.
- 5.20 The Welsh Government’s Social Partnership and Public Procurement (Wales) Act 2023 sets out requirements on Welsh Ministers to publish model contract clauses for major construction clauses²⁹⁴ and for the Outsourcing and Workforce Code to include model contract clauses on workforce issues.²⁹⁵ Whilst not relevant to the content of this Working Party, it shows that the Welsh Government recognise the potential value of example model contract clauses.
- 5.21 The Working Party is of the view that, given the scale of issues which affect individuals in the contracts we have identified, there should be more focus on protecting those rights within the contract. We support the principle of the Cabinet Office having clear contract guidance, containing model clauses, which shares best practice for public authorities. Knowledge-sharing can be invaluable. However, given the specific issues in the contracted services we have identified and the need to focus on the individuals who are likely to be affected, we believe there should be bespoke guidance on ‘rights-focused contracts’. Such guidance should be applicable to any contract that involves the provision of services to individuals which impact their rights and entitlements, regardless of the value of the contract. It would therefore be applicable to both high-value contracts, such as prisons, and lower-value contracts, such as local authority homelessness assessments.
- 5.22 By way of example, the Northern Ireland Government have published contractual terms on compliance with human rights obligations in their Standard Conditions of Contract for Supplies, Services and ICT Contracts:
‘The Contractor shall, and shall use reasonable endeavours to ensure that its Staff shall, at all times, act in a way which is compatible with the Convention rights within the meaning of Schedule 1 of the Human Rights

²⁸⁶ Cabinet Office, ‘[Model Services Contract](#)’, (1 August 2013)

²⁸⁷ *Ibid.*,

²⁸⁸ Cabinet Office, ‘[Short Form Contract – Guidance for Buyers](#)’, (2023), p.4.

²⁸⁹ *Ibid.*,

²⁹⁰ Cabinet Office, ‘[Guidance on the Model Services Contract](#)’ (1 August 2023)

²⁹¹ Cabinet Office, ‘[Mid-Tier Contract - Guidance for Buyers](#)’, (2023)

²⁹² Cabinet Office, ‘[Model Services Contract Guidance](#)’, (2023), p.43.

²⁹³ *Ibid.*, p.44.

²⁹⁴ E.g. Social partnership and Public Procurement (Wales) Act 2023, s.27.

²⁹⁵ E.g. Social partnership and Public Procurement (Wales) Act 2023, s.33.

*Act 1998. The Contractor agrees to indemnify and keep indemnified the Client against all loss, costs, proceedings or damages whatsoever arising out of or in connection with any breach by the Contractor of its obligations under this clause 18’.*²⁹⁶

The Northern Ireland PPN on ‘Human Rights in Public Procurement’ also recommends, for example, that where there is a high risk to human rights during a contract, then there should be ‘*stringent measures in place, which could include site inspection and regular audit of sites*’.²⁹⁷ It also notes that, at a minimum, standard terms should be used to ensure compliance with ‘*all appropriate legislation in respect of human rights*’.²⁹⁸

5.23 This is a useful starting point, but there is a need for a stronger document that provides clear guidance on how to protect individual rights more widely and shared best contractual practice for enforcing individual rights, in particular in medium and high-risk contracts. The Working Party therefore recommends that the **Cabinet Office should, following detailed consultation, publish “Individual Rights Focused” Model Contract Guidance and relevant model contract clauses. The model contract clauses and guidance should address:**

- (a) **How to ensure that medical assessments (such as health and disability assessments or homelessness vulnerability assessments) are conducted in a lawful manner (see paragraph 5.58 below);**
- (b) **How to ensure that the public authority is making its own decision and not fettering its discretion unlawfully to a third-party (see paragraph 5.58 below);**
- (c) **How to ensure that individual rights are protected in the delivery of services, including the use of Key Performance Indicators;**
- (d) **The importance of training and how the public authority can ensure that training is of a high-standard and regularly reviewed (see paragraph 4.49 above) ;**
- (e) **Specific monitoring and oversight provisions; including how to improve data collection, ensure transparency, reduce the reliance on self-audits (see paragraph 6.19 below);**
- (f) **Requirements to provide clear information about complaints procedures, the rule of independent complaints bodies and how individuals can seek legal advice to challenge decisions (see paragraphs 7.49 and 7.59 below); and**
- (g) **How the public authority will hold the individual service provider accountable for individual rights breaches; and**
- (h) **provide appropriate whistle-blower protection.**²⁹⁹

Consultation by the Cabinet Office should include independent oversight bodies such as the various Ombudsmen, statutory inspectorates and expert groups like the Local Government Association. Specialist charities may also be worth consulting. Devolved governments should consider adopting the above guidance or developing their own document (Recommendation 14).

5.24 Like the Model Services Contract, this guidance is not designed to be overly prescriptive and to be used by public authorities on a template basis. The services which we have referred to in this report are too complex

²⁹⁶ Northern Ireland Government, ‘[Public Sector Standard Conditions of Contract for Supplies, Services and ICT Contracts](#)’, (25 January 2019), p.28.

²⁹⁷ Northern Ireland Department of Finance, ‘[Procurement Policy Note PPN05/21 - Human Rights in Public Procurement](#)’, November 2021, p.9.

²⁹⁸ *Ibid.*, p.6.

²⁹⁹ For example, the Brook House Inquiry highlighted how ‘*staff at Brook House lacked trust in the whistle-blowing process – when ‘Speak Out’ posters were defaced with graffiti saying “snitches” and “don’t be a rat”, they remained up for months. I found no common practice of reporting colleagues for inappropriate behaviour towards detained people...The whistleblowing policy and processes themselves were inadequate...’.*

Brook House Inquiry, ‘[The Brook House Inquiry Report Volume I](#)’, (September 2023), p.13.

and varied for a boilerplate template approach to the contract. However, especially for those contracts identified as medium and high-risk contracts in the proposed impact assessment, it should contain clear guidance of the issues which need to be thought of and examples of how they can be addressed.

- 5.25 Kevin Sadler told us that, in his view, *'it would make quite a lot of sense'* for model contract guidance to reference issues such as *'user engagement'*.³⁰⁰ Julian Blake told us that there was a *'place for model drafting'* when it is a *'framework, which has provisions in and is adaptable to the circumstances'* though was clear that it should not be a document with *'just standard drafting that's applicable in all circumstances'*.³⁰¹ This shows the importance of consultation to make sure the guidance is proportionate and realistic.
- 5.26 As we have set out above, when the delivery of these services go wrong, there can be serious consequences for the rights of service users. If the contract is not drafted to cover the point, then the public authority will struggle to hold the provider rightly accountable. This is especially important when the new discretionary exclusion criteria, discussed in chapter 3 above, makes such clear reference to providers who breach their contractual requirements. Without such clear requirements, the public authority will struggle to use the new available powers to enforce the rights of individuals.
- 5.27 The Working Party recommends that, **in the Playbook and relevant guidance (such as the Individual Rights Focused Model Contract Guidance set out above), it states that there must always be clear, contractual penalties in contracts for breaching the rights of individual service users with appropriate and proportionate penalties for doing so. This is especially important in contracts for medium and high-risk services (Recommendation 15).**

Contracts for medical assessments, including health and disability assessments and vulnerability assessments.

- 5.28 The Working Party, through our benefit and homelessness sub-groups, heard particularly concerning evidence about contracted out medical assessments. Such assessments, by their very nature, involve an assessment of individuals with vulnerabilities (such as serious mental health conditions) which goes to their entitlement to critical support from the state (such as financial support and housing). Whilst it is ultimately the public authority which is responsible for the decision on eligibility for support, these assessment reports form a key part of the state's decision-making. In order to ensure compliance with the rights of the individuals being assessed, a particular set of contractual safeguards are required as set out below.

The right to be heard

- 5.29 As set out above, it appears that NowMedical are one of the largest providers of medical assessment reports to local authorities on vulnerability for priority need.³⁰² However, it is of particular concern, from a rights perspective, that the assessments (including psychiatric assessments) are paper-based with an analysis of paperwork (such as medical records) provided by the council.³⁰³ Homeless individuals, who could have various serious medical conditions, are not even being spoken to before the assessment provider reaches a conclusion about their vulnerability.
- 5.30 The Bureau of Investigative Journalism found in 2019 that, in most cases, NowMedical's report was produced *'solely on the basis of the council's paperwork; the doctors working for NowMedical rarely meet*

³⁰⁰ Evidence provided to JUSTICE

³⁰¹ Evidence provided to JUSTICE

³⁰² According to their website, NowMedical are *'the UK's leading provider of housing medical advice'*, advising over 150 local authorities, housing associations and organisations across the United Kingdom. NowMedical, ['Who we are'](#), NowMedical confirmed to us that they have 21 doctors and undertake 50,000 cases per year.

³⁰³ NowMedical told us they often now receive an applicants' full medical records and this is a *'development we strongly welcome'*.

the person involved, and do not regularly access their full medical records or talk to their GP'.³⁰⁴ NowMedical confirmed to us that 'almost all assessments undertaken by NowMedical are "paper-based"' and that it was 'very rare for a local authority to request that an applicant is examined in person'.³⁰⁵ The experience of the members of our homelessness sub-group is that individuals who are homeless feel confused, hurt and upset by a process in which a doctor assesses their condition and consequential vulnerability without having met or even spoken to them.

'How have they come to this decision, when they have never met my daughter?' Susan asked. 'There's something very, very wrong with this system. It is unjust'.³⁰⁶

5.31 The courts have also raised concerns about the lawfulness of local authorities basing decisions on assessments conducted without speaking to the individual concerned. The Court of Appeal, in 2019, found that Lambeth Council had preferred NowMedical over a consultant psychiatrist even though 'they were less highly qualified than she is and (more importantly) they had never met or interviewed Mr Guiste'.³⁰⁷ A County Court judge, in 2017, found the council's opinion 'formed directly from the NowMedical opinions' was 'fundamentally flawed' and that "it might have helped had someone from NowMedical taken the time to see the Appellant or indeed considered her medical records".³⁰⁸ In 2021, a County Court judge was reported to have stated that NowMedical 'are not experts...they had not seen or interviewed the appellant...it is not a question of giving weight to the issue, but a question of not considering it at all'.³⁰⁹ The homelessness sub-group members raised similar concerns.

5.32 In response, NowMedical confirmed to us that their assessments did not 'constitute expert evidence (which a diagnosis by a GP would be, but a medical assessment is not)'. They told us that they were 'not required to meet with or examine homelessness applicants'.³¹⁰ The Court of Appeal in *Shala* did state that 'there is no rule that a doctor cannot advise on the implications of other doctors' reports without examining the patient'.³¹¹ However, the Court in *Shala* also stressed, absent a medical examination of the individual, a doctor's comments on the reports of other medics cannot constitute expert evidence of the individual's condition - but can only assist the authority's decision-maker in understanding the medical records.

5.33 As *Shala* indicated, to give a full assessment, such doctors may need to consider either examining the individuals themselves or obtaining the individual's consent to talk to others who treated them. In any event, the authority's decision-maker must take into account the fact that the doctor is not giving expert evidence of the condition of the patient and, in assessing medical records, has neither examined the parties nor talked to the medical practitioners who produced the contemporaneous records.³¹²

5.34 Further, although NowMedical state that they 'are providing an opinion on applicants' available medical records, and not a fresh diagnosis'³¹³, clearly the assessments are not being utilised by local authorities in this way. We have additional concerns about the overreliance on outsourced assessments as the basis for the public body's decision as we set out below. However, even where the public authority decision maker is

³⁰⁴ Maeve McClenaghan, '[How a doctor who has never seen you can say you're fit enough to sleep on the streets](#)', (The Bureau of Investigative Journalism, 18 December 2019).

³⁰⁵ Evidence provided by NowMedical to JUSTICE.

³⁰⁶ Maeve McClenaghan, '[How a doctor who has never seen you can say you're fit enough to sleep on the streets](#)', *The Bureau of Investigative Journalism*, (18 December 2019).

³⁰⁷ Mr Guiste's lawyers had recommended that NowMedical speak to Dr Freedman but this was 'not achievable'.

³⁰⁸ *Guiste v London Borough of Lambeth* [2019] EWCA Civ 1758, para 64.

³⁰⁹ *Thomas v Lambeth BC*, Central London County Court, Case No: C40CL397 (16 March 2017), para 25.

³¹⁰ Giles Peaker, '[Recitation is not application](#)', *Nearly Legal*, (21 November 2021).

³¹¹ Evidence provided by NowMedical to JUSTICE.

³¹² *Shala & Anor v Birmingham City Council* [2007] EWCA Civ 624, para 23.

³¹³ *Shala & Anor v Birmingham City Council* [2007] EWCA Civ 624, para 22 – 23.

³¹⁴ Evidence provided by NowMedical to JUSTICE.

lawfully coming to their own decision, the assessments are central to that decision. As such, they should involve speaking to the individual involved in a suitable format. However, we acknowledge that it is ultimately the responsibility of the local authority to indeed require a private provider of medical assessments to speak to the individual, by way of clear contractual terms, as well as to monitor compliance with such a requirement.

- 5.35 JUSTICE also heard mixed feedback about different format of assessment.³¹⁴ For example, some claimants find telephone assessments less stressful than face-to-face as it involves less travel, whereas it may be more difficult for those who do not speak English as a first language.³¹⁵ Similarly, video assessments may be preferable to telephone assessments as it allows for visual cues, but it may cause anxiety for others or affect those who are digitally excluded.³¹⁶ Such considerations should be taken into consideration as part of the reasonable adjustments required by the Equality Act.³¹⁷ In our report, we recommended that claimants be given the choice of assessment format and that the DWP should produce a comparative analysis on case outcomes for different formats.³¹⁸
- 5.36 The Working Party is strongly of the view that, in assessment contracts, there should be a requirement for the individual in question to be spoken to in an appropriate format. Whilst some claims may be so clear in favour of the claimant on the medical evidence that no assessment is required, an assessment report that disputes someone's medical condition or its impact should not be being made without the opportunity to hear from the individual in an appropriate format. Practically, individuals may be able to give a clear explanation for disparities in the medical evidence, for example, or at least suggest matters that require further inquiry.
- 5.37 Whilst welfare benefit health and disability assessments will always require evidence to be provided by the claimant themselves, JUSTICE's *Reforming Benefits Decision-Making* Working Party highlighted concerns about the assessments. We heard that '*claimants feel that their own account of their condition is often not believed or taken seriously by assessors*' and that informal observations (how the claimant appeared to the assessor) were used without giving the claimant the opportunity to respond.³¹⁹ Requiring a claimant to give evidence, whilst a pre-requisite to a fair assessment, is not sufficient in and of itself.

Quality of assessment process, including sufficiency of evidence

- 5.38 Our homelessness sub-group considered that the vulnerability assessment reports themselves were often very brief (so appeared to have been done very quickly), poor quality and based on insufficient evidence. NowMedical told us, in response, that all its doctors and psychiatrists were '*fully qualified*'³²⁰, '*subject to annual appraisal and revalidation by the General Medical Council*' and '*only advise on matters within their areas of expertise*'.³²¹
- 5.39 This mirrors concerns raised by lawyers who told the Bureau of Investigative Journalism that NowMedical '*churns out findings very quickly*' and '*diminish or downplay*' the severity of applicants' conditions.³²² The

³¹⁴ Telephone, video or face-to-face assessment.

³¹⁵ JUSTICE and Administrative Justice Council, [Reforming Benefits Decision Making](#), (JUSTICE, AJC, 2021), p20

³¹⁶ *Ibid.*, para 2.10

³¹⁷ Mind, '[Disability Discrimination](#)'.

³¹⁸ JUSTICE and Administrative Justice Council, [Reforming Benefits Decision Making](#), (JUSTICE, AJC, 2021), p20 and 21.

³¹⁹ *Ibid.*, p28

³²⁰ '*All of our doctors hold higher medical qualifications such as membership of the Royal Medical College, and our psychiatrists are recognised specialists and members of the Royal College of Psychiatrists. They are respected practitioners who diligently carry out their responsibilities*'. Evidence provided by NowMedical to JUSTICE

³²¹ Evidence provided by NowMedical to JUSTICE

³²² Maeve McClenaghan, '[How a doctor who has never seen you can say you're fit enough to sleep on the streets](#)', (The Bureau of Investigative Journalism, 18 December 2019).

barrister Nicholas Nicol has set out that, in his view, medical advisers are using a *'template containing standard wording'* and often fail to properly address key issues.³²³

- 5.40 NowMedical told us, in response, that it was important that assessments were *'concise and easy to understand'* and that speed was important given the individuals are homeless. They said that *'speed and brevity should not be taken as negative indicators of quality'*.³²⁴ Since they only *'opine on available medical records – rather than to diagnose an applicant'*, given their qualifications, they told us *'there is no reason that this must be a time-consuming exercise'*.³²⁵ However, there is a difference between being concise and providing limited responses which risk, in our view, not properly engaging with an individual and their condition(s).
- 5.41 The Court of Appeal has emphasised that the consideration of whether someone's mental illness made them vulnerable is *'self-evidently a very serious matter'* requiring *'careful consideration of all the relevant evidence and an adequately reasoned conclusion'*.³²⁶ The homelessness sub-group suggested there could be greater use of peer review of assessment reports, as a way of local authorities getting independent feedback on their quality.
- 5.42 A survey of over 8,000 individuals by the Work and Pensions Select Committee also raised a number of concerns about the quality and accuracy of health and disability assessments for benefits. Whilst some did have positive experiences of the assessment process, a *'substantial number'* said their benefit entitlement had been reduced due to errors and inaccuracies in assessment reports.³²⁷ Responses on why these errors had occurred included that assessors *'were not "careful or diligent" when writing up their reports'*, lacked understanding of medical conditions and treated the assessment as a *'tick-box exercise'*.³²⁸ Given the reliance of decision makers on these reports (as discussed at paragraph 5.59 below), the high overturn rate at appeal – as high as 70% for PIP appeals - also suggests the assessment reports are of low-quality.³²⁹

IMPACT OF BENEFIT ASSESSMENT PROCESS

'I am jovial by nature and self-deprecating in regard to my lifelong illness. The assessor who laughed along with me even though I was exhausted and in agony stated in my assessment that I couldn't have depression as I was joking. I also had to hang on to my husband as a walking aid and the assessor said I walked to the office unaided'.³³⁰

- 5.43 Concerns have been raised about targets for benefit assessment reports in previous contracts where *'the definition of "acceptable" leaves ample room for reports to be riddled with obvious errors and omissions'*.³³¹ PIP reports, for example, were previously considered acceptable even where they contained *'clinically*

³²³ *'The most fundamental element in considering vulnerability under section 189(1)(c) is the impact of homelessness on the patient in question. I have rarely seen a NowMedical report in which this is ever mentioned, let alone considered, save in one respect, namely the patient's ability to access medical care or support, e.g. repeat prescriptions. NowMedical invariably concludes that such care or support would remain easily accessible, which leads me to think that they are probably unaware of the research detailing the practical difficulties which arise when homeless. Even when they mention the effect of homelessness, they never state what they think those effects are'*. Nicholas Nicol, ['Standard NowMedical Arguments'](#).

³²⁴ Evidence provided by NowMedical to JUSTICE

³²⁵ Evidence provided by NowMedical to JUSTICE

³²⁶ [Troy Guiste v London Borough of Lambeth](#) [2019] EWCA Civ 1758

³²⁷ House of Commons Work and Pensions Committee, ['Health assessments for benefits'](#), (March 2023), p.76.

³²⁸ House of Commons Work and Pensions Committee, ['Health assessments for benefits'](#), (March 2023), p.76.

³²⁹ There is a 70% Personal Independence Payment (PIP) appeal overturn rate – see Ministry of Justice, ['Tribunal Statistics Quarterly: October to December 2023'](#) (14 March 2024)

³³⁰ House of Commons Work and Pensions Committee, ['Health assessments for benefits'](#), (March 2023), p.78.

³³¹ *Ibid.*, p.54.

improbable advice such that the choice of descriptor is highly unlikely'.³³² The new Functional Assessment Service contract states that fit for purpose assessment reports must '*clearly explain the medical issues raised*' and fully clarify '*any contradictions in medical evidence*'.³³³

5.44 We heard evidence from our benefits sub-group that the assessment of quality by the DWP³³⁴ for reports has largely centred on how well-written the reports are, rather than the overall quality of the assessment. The sub-group highlighted the importance of properly applying the relevant legal criteria, the quality of the assessment itself (which can be better audited with the introduction of assessment recording³³⁵) and the proper consideration of all relevant evidence. Such requirements should be properly written into the contract, with appropriate feedback given to suppliers so they can address issues identified.

5.45 One of the most important aspects of such assessments is the ability to provide supporting medical evidence. A 2016 Freedom of Information request provided examples of homelessness medical assessments prepared by NowMedical for Harrow Council.³³⁶ The assessment reports themselves are very short and have minimal justification for the conclusions reached. The information provided by medical assessors is limited and often refers to the lack of evidence provided, such as in the following examples:

- '*Depression/ anxiety – I can't find anything to indicate this consistently impedes his basic daily activities*'
- '*GP assertion of schizophrenia – not supported by the psychiatric report on file*'
- '*Seizures – No evidence of uncontrolled seizures of frequent hospital admissions*'
- '*Hepatitis C treatment – no medical information provided about this*'³³⁷

5.46 The experience of our homelessness sub-group is that, although more recent reports may contain more detail regarding the diagnosis of the individual than the above examples, the findings and reasoning are similar. This is concerning as individuals are not spoken to prior to the assessment report being finalised so are unable to provide information about issues which the assessor highlights are missing. There may, for example, be good reason for the absence of such information on file or it may be a mistake.

5.47 NowMedical said, in response to this, that they do refuse to provide assessments where local authorities have provided '*insufficient evidence*' and request further information from councils where appropriate. They estimate 10% of cases are sent back for further information. They state that the above evidence from Harrow Council is designed to assist the Council in following up on '*evidential gaps*', as is the Council's duty as ultimate decision-maker. However, we are concerned that the above assessments led to negative decisions about individual's vulnerability as a homeless individual. The case-law cited above, and the evidence of our homelessness sub-group, also suggests that further enquiries are often not made by councils before a decision.

5.48 We question the purpose of such assessments as they currently stand. NowMedical maintain that this is an assessment of a vulnerable individual by a qualified, medical expert. However, they concede that they are not diagnosing the applicant with any condition. Their service is '*solely to opine on available medical records – rather than to diagnose an applicant*'.³³⁸ If the individual has not got an adequate paper record of their stated condition, by their own admission, there is nothing which NowMedical can do to assist. It is unclear what the value of such assessments are, especially when such information could presumably often be obtained directly from the individual's medical representative. A diagnosis of the purported condition, and

³³² JUSTICE and Administrative Justice Council, [Reforming Benefits Decision Making](#), (JUSTICE, AJC, 2021), para 2.46.

³³³ ContractsFinder, '[Functional Assessment Service 2024](#)' (16 October 2023).

³³⁴ And Department for Communities in Northern Ireland.

³³⁵ DWP, '[Transforming Support: The Health and Disability White Paper](#)' (March 2023), p27.

³³⁶ Containing both positive and negative outcomes.

³³⁷ WhatDoTheyKnow, '[Freedom of Information Request: Now Medical assessments](#)', (1 December 2016).

³³⁸ Evidence provided by NowMedical to JUSTICE.

the evidenced consequences of that diagnosis, seems the minimum which such an assessment should usefully provide the council.³³⁹

- 5.49 To address this, further to the right to have an individual assessment in an appropriate venue, individuals should have the opportunity to submit supporting evidence before an assessment report is finalised. This is not to say that the Working Party endorses a model where the onus should always be on the claimant to provide further evidence. More can be done to help the claimant obtain evidence, for example, as our benefits report recommended more automatic data-sharing between the NHS and the DWP, with appropriate safeguards.³⁴⁰ However, it is important that individuals are able to provide information relevant to their case and that this information is properly considered.

CASE STUDY: THE IMPORTANCE OF FURTHER EVIDENCE

The NIPSO report highlights a PIP claimant with Osteoarthritis. They applied for PIP and, whilst they did not provide further evidence, they listed their GP, occupational therapist and physiotherapist as their health professionals. They also provided contact details for a pain management clinic they attended. No requests for further information were made by the Department for Communities or Capita (the assessment provider) before the assessment.

After a 50-minute face-to-face consultation with the assessor, the assessment report was prepared without seeking further evidence. The report findings differed from the claimant's evidence. As NIPSO make clear, *'it is disconcerting that no further evidence was sought to support or negate the impact reported, check the reliability of the consultation findings or even confirm the diagnosis reported'*.

The decision on award was overturned at appeal. Whilst the reasons for this are unknown, the case demonstrated the flaws with Capita's policy and practice of the consultation being sufficient and not seeking relevant further evidence, even when the claimant provided 'relevant and pertinent stories of evidence' in their application form.³⁴¹

The role of the public authority in overseeing contracted out assessments

- 5.50 The public authority has the legal responsibility for making the decision. They should therefore be more proactive in overseeing the quality of the assessment itself and being clear they have the required information to make their decision.
- 5.51 The Lead Nurse at Maximus has emphasised, for benefit assessments, that she was *'very conscious that the decision maker may never get to speak to or see the customer'* and so will rely on the report *'to portray the difficulties that the customer is having'*.³⁴² Whilst this is not an issue in and of itself, the public authority should ensure they are properly overseeing the quality of such assessments. For example, the expansion of audio recording of benefit assessments provides a useful opportunity to audit the quality of the assessment itself.³⁴³

³³⁹ NowMedical told us that they *'would very much welcome changes that would result in more complete medical information being received from local authorities and applicants'*.

³⁴⁰ JUSTICE and AJC, ['Reforming Benefits Decision-making'](#) (August 2021), p27.

³⁴¹ NIPSO, ['PIP and the Value of Further Evidence'](#) (23 June 2021), p102 and 103.

³⁴² Work and Pensions Select Committee, ['Health assessments for benefits'](#), (March 2023), p52.

³⁴³ DWP, ['Transforming Support: The Health and Disability White Paper'](#) (March 2023), p27.

- 5.52 The public authority can also insist on the level of expertise required for assessors. JUSTICE has previously recommended that the DWP should require the assessment of certain conditions to be done by healthcare professionals with specialist knowledge of those conditions.³⁴⁴
- 5.53 We note that the DWP have recently carried out surveys to ‘*examine the claimant experience of telephone assessments and to gauge preferences for using telephone, face-to-face or video for an assessment on an ongoing basis*’.³⁴⁵ This highlighted that, whilst 75% of PIP claimants and 94% of those undergoing the Work Capability Assessment were said to be ‘*satisfied*’ with the telephone assessment, issues with the behaviour of the assessor when conducting the assessment (for example, ‘*not appearing to listen, understand or care about the claimant’s condition*’) was ‘*the most common reason for being dissatisfied*’.³⁴⁶
- 5.54 Such surveys, carried out by a specialist research company, are a useful example of how the DWP could obtain better information about how claimants feel about the assessment process. Members of the benefits sub-group agreed that this was a potentially useful way of obtaining information about the claimant’s experience.
- 5.55 Our homelessness sub-group highlighted how it appears that, on many occasions, the local authority has a strong bias in favour of the evidence from the contracted-out assessment rather than any alternative medical evidence provided by the claimant which may contradict that. This is reflected in the case-law set out above, where NowMedical reports are preferred to, for example, expert reports obtained by claimants’ solicitors. NowMedical told us that it was the council’s ‘*duty as the ultimate decision-maker to follow-up on such evidential gaps*’.³⁴⁷
- 5.56 We agree that it is the council’s ultimate legal responsibility though maintain that, if public money is being spent on contracted-out assessments, they should insist on higher standards. If such standards cannot be agreed upon, then it should not proceed with spending money on such assessments.³⁴⁸
- 5.57 This reflects concerns that JUSTICE highlighted in our *Reforming Benefits Decision-making* report. Benefit advisors told us that there was an ‘*overreliance on the assessment reports, regardless of its quality*’.³⁴⁹ The high overturn rate at the Tribunal for certain benefit appeals, such as PIP appeals, suggests that there is a clear issue with the quality of assessments as the Social Security Tribunal effectively re-conducts the assessment.³⁵⁰ The government department, or public authority, is ultimately responsible for ensuring a high-quality assessment that respects the rights of benefit claimants. We therefore consider that specific protections are required in assessment contracts.
- 5.58 **Outsourced assessment contracts should include clear and specific protections for individuals when determining complex issues such as vulnerability or the impact of a long-term medical condition. The contract must contain:**
- (a) **A requirement that a provider must speak to the individual they are assessing (unless they explicitly consent to a paper-based assessment or refuse to take part) and, where possible, give them a choice about the format (i.e. telephone, video or face-to-face).**
 - (b) **Clear and specific standards for the assessment itself and the final report, ideally through Key Performance Indicators. This should include the requirement to follow relevant legal criteria,**

³⁴⁴ Those with mental ill-health, neurodivergent, co-morbid, complex, fluctuating or rare conditions, we recommend that these claimants should be assessed by HCPs with specialist knowledge of their conditions. JUSTICE and Administrative Justice Council, [Reforming Benefits Decision-Making](#), (August 2021), p23.

³⁴⁵ DWP, ‘[Claimant experience of telephone-based health assessments for PIP, ESA and UC](#)’ (8 February 2022)

³⁴⁶ ‘DWP, ‘[Claimant experience of telephone-based health assessments for PIP, ESA and UC](#)’ (8 February 2022)

³⁴⁷ Evidence provided by NowMedical to JUSTICE r

³⁴⁸ Social Security (Scotland) Act 2018, s.12 for instance, prohibits private-sector involvement in assessments.

³⁴⁹ JUSTICE and Administrative Justice Council, ‘[Reforming Benefits Decision-Making](#)’, (August 2021), p.33.

³⁵⁰ There is a 70% Personal Independence Payment (PIP) appeal overturn rate – see Ministry of Justice, ‘[Tribunal Statistics Quarterly: October to December 2023](#)’ (14 March 2024)

ensure reasonable adjustments are available, comply with government guidance and to allow the individual to submit evidence prior to the report which should be properly considered.

- (c) **Provision for independent audits of the quality of assessments and assessment reports.**
- (d) **Clear standards on the relevant medical qualifications of assessors.**
- (e) **Requirements for when a public authority should return an inadequate assessment, focused on the rights of the individual to have their evidence properly considered and evaluated (Recommendation 16).**

5.59 One final observation is that there is a danger with contracted out assessments that the public authority will fetter their discretion as the ultimate decision-maker to the assessment provider. This is especially problematic when the assessment reaches a conclusion on the question which the public authority is required to consider, rather than giving useful medical information with which the public authority can decide for itself. Lord Justice Sedley in *Shala & Anor v Birmingham City Council* [2007] EWCA Civ 624 emphasised that, whilst councils were entitled to seek expert medical evidence, they were *'not entitled, nor even well advised, to demand that the opinion or advice be couched in the terms of the eventual decision'*.³⁵¹

5.60 It is concerning that decisions of NowMedical advisors appear so closely to mirror the legal decision which the local authority is required to make. Most of the negative reports provided in the Freedom of Information request referenced above have a variation of the statement that *'I do not think the specific medical issues render the applicant significantly vulnerable as now defined'*. One report specifically states *'HOTAK does not apply'*, which appears to be a reference to the Supreme Court judgment in *Hotak*.³⁵² An assessment should focus on providing expert, medical information rather than whether someone meets the legal vulnerability test, which it is the responsibility of the local authority to assess.

5.61 This may be as a result of the format in which the reports are requested by the local authority or any questions or templates provided. However, whatever the reason assessment reports are phrased in this way, we are concerned that it blurs the boundaries between assessor and decision-maker; it is for the local authority to determine conclusively whether relevant case-law applies to a particular case and, whilst a medical assessor can be guided by the relevant legal test, their primary role should be giving expert advice to the local authority on relevant medical conditions.

5.62 We also had similar concerns in respect of benefits health and disability assessments from our benefits sub-group; whilst the legal responsibility for making the award decision is with the Government department (for example on the award of Personal Independence Payment), in reality the decision largely follows the conclusion of the assessment. For example, DWP data for 2021/2022 suggested that nearly 9 out of 10 points awards for Personal Independence Payment were the same as those set out in the assessor's report.³⁵³ This raised concern to some members of our benefits sub-group of the ultimate decision being, or at least appearing to be, a "rubber stamp". Similar concerns were also raised in JUSTICE's *Reforming Benefits Decision Making* report, which heard evidence from advisors on the of overreliance on assessment reports regardless of their quality.³⁵⁴

³⁵¹ [Shala & Anor v Birmingham City Council](#) [2007] EWCA Civ 624.

³⁵² WhatDoTheyKnow, ['Freedom of Information Request: Now Medical assessments'](#), (1 December 2016).

³⁵³ *'In the year 2021-22, there were 478,800 occasions where the points awarded for Personal Independence Payment (PIP) new claims and Disability Living Allowance (DLA) to PIP reassessments were the same as those recommended in the assessor's report. For some cases, point scores are missing from the data and so these have not been counted, although some of these would also be likely to have the same points recommended and awarded'*. Tom Pursglove

UK Parliament, ['Personal Independence payment: Questions for Department of Work and Pensions'](#), (20 February 2023)

The Chair of the Work and Pensions Select Committee said this equated to *'nearly 9 in 10 of all reassessments'*. Rt Hon Sir Stephen Timms MP Chair of Work and Pensions Committee, ['Letter to Tom Pursglove MP: Personal Independence Payments and reassessments'](#), (13th March 2023).

³⁵⁴ JUSTICE and Administrative Justice Council, [Reforming Benefits Decision-Making](#), (August 2021), p33.

5.63 It is therefore important that, following a contracted out assessment of the medical evidence, the decision-maker makes their own decision, based on their assessment of all the evidence and their own reasoning. As JUSTICE recommended in relation to benefits assessments, decision-makers should address contradictions between reports and other evidence, and not merely repeat and adopt extracts or summaries of the assessment report. Incomplete or inadequate assessment reports should be returned to the provider (Recommendation 17).

VI. CONTRACT OVERSIGHT AND MONITORING

- 6.1 Whilst it is vital to get the contract right, for the reasons we have set out in chapter 4, all the best contractual safeguards will be ineffective unless the public authority properly oversees the delivery of the contract and gets accurate information about how individuals are being affected in the proposed service. Both the public authority and provider should be invested in the delivery of the contract and working together to the agreed outcomes.
- 6.2 As explained by the then LGSCO, Michael King, *‘the law is clear: councils can outsource their services, but not the responsibility for them. Councils need to keep robust oversight of any organisations they contract with and have clear arrangements in place for how complaints will be dealt with’*.³⁵⁵ A more pro-active approach to contract management should also ensure that issues are identified earlier and, hopefully, resolved before becoming a more serious rights infringement; by the time judicial review claims have been issued and public inquiries commenced it is too late for the individuals involved.

Problems with Contract Management

- 6.3 The Playbook does emphasise the importance of a *‘robust contractual relationship overseen by an appropriately qualified contract manager with a clear operational understanding of the contract’*.³⁵⁶ It also states that decisions on contract management should be made at an early stage in the procurement process and highlights the importance of a *‘collaborative culture’* and a *‘partnership model’* which could include, for example, the co-location of employees.
- 6.4 As we have set out in chapter 4, the Playbook stresses that *‘appropriate specifications and performance measures’* are the foundations of a good contract. It recommends a maximum of 10 – 15 Key Performance Indicators, to avoid overcomplication, which should be *‘well-structured and relevant’*. It also refers to maintaining a *‘minimum level of customer satisfaction’*.³⁵⁷
- 6.5 The Model Services Contract has a *‘single rectification process’* for things such as material failure of KPIs. This requires the provider to inform the public authority within 3 working days and then prepare a plan within 10 working days (to be approved by the public authority). It is clear that, if there is then a material KPI failure in the next three months with *‘the same root cause’*, or if the supplier is not implementing the plan, then the public authority is permitted to terminate the contract.³⁵⁸
- 6.6 Despite this, as set out below, the Working Party has found that oversight of contracted out services and contract management is a big issue. Contract management can be seen as an optional, or avoidable cost; but we consider it is essential, and it should be a priority for government departments to ensure they have the capacity and capability to properly oversee contracted-out services.

Expertise and prioritisation within contracting authorities

- 6.7 Kevin Sadler told the Working Party that, in his view, government departments do not spend enough time on contract oversight. Within departments, he said that *‘contract management can be seen as a very boring thing and you don’t get promoted by it, you don’t get performance bonuses for it. You get promoted and performance bonuses for coming in and sorting out the contract when it’s gone wrong’*.³⁵⁹

³⁵⁵ LGSCO, [‘Golden thread of accountability often broken in outsourced council services, Ombudsman tells Parliamentary committee’](#) (March 2018).

³⁵⁶ Cabinet Office, [‘The Sourcing Playbook’](#), (June 2023), p.72.

³⁵⁷ *Ibid.*, p.39.

³⁵⁸ Cabinet Office, [‘Model Services Contract Guidance’](#), (2023), p.49.

³⁵⁹ Evidence provided to JUSTICE.

- 6.8 The National Audit Office have acknowledged there is a lack of expertise in contract management in government departments. Their ‘Good Practice Contract Management Framework’ notes how important it is that the contract manager has detailed knowledge of the contract and adequate experience for the importance of the contract.³⁶⁰ The NAO have identified the following as a cause for poor contract management:
- (a) That contract management is seen as ending once the contracts have been signed;
 - (b) Senior managers have poor visibility and lack information about contracts;
 - (c) Public departments do not see contract management as a way to enhance services and make efficiency savings.³⁶¹
- 6.9 The Justice Select Committee raised serious issues with the contract oversight by the Ministry of Justice of the youth custody facility Rainsbrook Secure Training Centre (‘STC’). They set out how *‘managers both at Rainsbrook and within the YCS [Youth Custody Service] and Ministry of Justice manifestly failed to understand what the conditions were at Rainsbrook’*.³⁶² In that case, children were being locked in their cells for 23.5 hours per day, despite this practice having been previously criticised by inspectors and assurances given by the provider and YCS that actions would be taken. The Committee found it *‘almost inconceivable that managers whose offices were a two-minute walk from children being held in their cells all day were unaware of the fact, and remarkable that none of them appears to have simply taken that walk to find out whether what they were being told about their action plans were true’*.³⁶³

Problems with data

- 6.10 The Working Party found that one of the recurring issues with contract oversight was a lack of reliable data about the performance of the service to enable the public authority to hold the provider to the contractual terms and KPIs.
- 6.11 Robert Buckland MP, who was Secretary of State for Justice during much of the fall-out of the Rainsbrook STC contract (see above), told us that it was a *‘clear example of performance failure that hadn’t been properly monitored’*.³⁶⁴ He told us that he was *‘misled’* by the provider, causing him to have to *‘go to the [Justice] select committee and basically apologise and say , “this is the last time the wool’s going to be pulled over our eyes”’*. It showed the *‘dysfunctionality’* of the relationship between the contractor and provider sometimes.³⁶⁵
- 6.12 The Brook House Inquiry highlighted there was a lack of adequate data, which the Home Office needed to hold the provider properly accountable. For example, an HMIP report into Brook House in June 2022 found that *‘there was little oversight of segregation, with no regular meetings or analysis of data to look into it use’*.³⁶⁶ The Detainee Escorting and Population Management Unit (‘DEPMU’) told the Inquiry that, though individual entries were put on its system for when Rules 40 or 42³⁶⁷ were used, they would *‘absolutely not’* be able to spot trends and there were *‘no means of collating Rule 40 statistics or analysing trends on its system’*.³⁶⁸
- 6.13 The NIPSO report into the use of further evidence in PIP claims also shows the dangers of relying too heavily on self-audits, information given by the provider with no independent analysis of its veracity. NIPSO set out how the Department for Communities had failed *‘to recognise and proactively address inaccurate*

³⁶⁰ NAO, [‘Good practice contract management framework’](#), (December 2016), p.9.

³⁶¹ NAO, [‘Transforming government’s contract management’](#), (December 2014), p. 35 - 37.

³⁶² Justice Select Committee, [‘Rainsbrook Secure Training Centre’](#), (March 2021), p.13.

³⁶³ *Ibid.*, p.14.

³⁶⁴ Evidence provided to JUSTICE.

³⁶⁵ Evidence provided to JUSTICE.

³⁶⁶ HMIP, [‘Report on an Unannounced Inspection of Brook House Immigration Removal Centre 30 May–16 June 2022’](#), (September 2022), p 24.

³⁶⁷ Rules 40 and 42 Detention Centre Rules 2001.

³⁶⁸ Brook House Inquiry, [The Brook House Inquiry Report Volume II](#) (September 2023), p.128.

management information provided by Capita on the overall number of further evidence requests made in claims'.³⁶⁹

- 6.14 NIPSO also highlighted concerns around the accuracy of audits undertaken by Capita. NIPSO reviewed 39 reports audited by Capita and none identified gaps 'in respect of gathering further evidence'.³⁷⁰ However, of the 37 reports where advice was said to have been 'appropriately sought and referenced', NIPSO found that, in only one of them was further evidence sought during the Assessment stage.³⁷¹
- 6.15 In *LW & Ors*, the case about unlawful strip-searches at HMP Peterborough highlighted above, the judgment highlights how the Secretary of State had relied upon a Compliance Checking Tool to ensure strip searches were lawful. It was said to test the 'type and frequency of searches' and compliance with the Prison Service Instruction ('PSI').³⁷²
- 6.16 The High Court found this was an ineffective tool as it was only capable of identifying issues after the relevant human rights breaches had occurred. However, there was a further problem in that it had 'failed to pick up that for some years prior to 2017 there had been a problem with strip-searching and that PSI 07/2016 (and its predecessor) had not been complied with on a significant scale'. No concerns had been raised about female strip searches, and no compliance testing concerns were raised, before judicial review proceedings were brought.³⁷³
- 6.17 Our research suggested that local authorities had very little information about the outcomes of homelessness medical assessments and how those assessments were taking place. Seven councils, in response to Freedom of Information requests (see para 6.25 below) could not confirm to us whether the assessments were paper-based. Many councils also had no easily accessible data on the outcome of cases following such assessments and whether such assessments have been overturned in the courts. It is unclear how local councils are able to assess the quality and effectiveness of such assessments if they do not even have basic information about their outcome.
- 6.18 As we have set out above, in chapter 3 above in relation to early engagement, it is of crucial importance that individual service users (or their representatives and close family members, if this is not possible) should have input into this process. This will help public authorities gain a more accurate picture of the services and identify issues earlier.
- 6.19 **The importance of good data in respect of contract performance cannot be overestimated. Whilst we accept that self-auditing has an important part to play, we consider that self-audits are not objectively reliable and should be avoided as the only or the predominant oversight mechanism. The PPN on Protecting Individual Rights (see chapter 4) should emphasise that it is best practice that individuals affected by contracts (or representative bodies) and specialist independent oversight bodies (e.g. HM Chief Inspector of Prisons or ombudsman) should have regular input into how contracts are being delivered.**

Independent audits of data are recommended and should be required for medium or high-risk contracts identified by the risk assessment. This should be addressed in the new "Individual Rights Focused" model contract guidance.

Oversight by the public authority should include analysis of relevant independent reports, legal decisions and complaints procedures for recurring issues that should be addressed (Recommendation 18).

³⁶⁹ Northern Ireland Public Services Ombudsman, *PIP and the Value of Further Evidence: An investigation by the Northern Ireland Public Services Ombudsman into personal Independence payment*, (June 2021), p.26.

³⁷⁰ *Ibid.*, p.119.

³⁷¹ *Ibid.*, p.119.

³⁷² *LW & Ors v Sodexo Ltd & Secretary of State for Justice [2019] EWHC 367 (Admin)*, para 102 and 103.

³⁷³ *Ibid.*, para 112.

- 6.20 We would stress that this is not hypothetical. There are clear examples that a more active approach to contract management can lead to an improvement in services for individuals. For example, following the NIPSO investigation in Northern Ireland, the Department for Communities confirmed that they had identified cases which should have been returned to Capita as “re-works”,³⁷⁴ but were incorrectly sent back as requests for further advice.³⁷⁵ After NIPSO’s investigation, the Department for Communities had issued a PIP internal bulletin providing clearer instructions on when a re-work of the assessment was required.
- 6.21 Following information being sent to case managers by the Department for Communities’ quality assurance team reminding them of when ‘re-works’ were required, there was a ‘*significant increase*’ in reports being returned to the provider.³⁷⁶ This would have been important information for the provider to receive and ensured that more inadequate reports were rectified properly. It also meant that the government department will have had more accurate information about the provider’s performance which it could use to assess their delivery of the contract.

National Government Oversight

- 6.22 When local authorities are granted contracting-out powers by central government, it is important the central government oversees the use of such powers and ensures that they are being used responsibly.³⁷⁷ This should include ensuring that there is accurate data on how such contracting powers are being used and, where serious concerns are raised, taking steps to investigate the use of such contracting powers.
- 6.23 The Department for Levelling Up, Housing and Communities does issue guidance in relation to how local authorities should use contracted-out homelessness functions. However, this is fairly limited making clear of the housing authority’s ultimate responsibility for the discharge of its functions, stressing the need to comply with Equality Act duties and insisting that ‘*housing authorities should ensure they have adequate contractual, monitoring and quality assurance mechanisms in place to ensure their statutory duties are being fully discharged*’.³⁷⁸
- 6.24 As set out above in chapter 5, the homelessness sub-group and case-law has raised serious concerns about the use and quality of contracted-out homelessness assessments. It is of particular concern, in light of this, that there is clearly a lack of data available by local authorities on the process and outcome of such assessments.
- 6.25 JUSTICE sent Freedom of Information requests to a number of councils about their use of the provider NowMedical.³⁷⁹ Of the 19 councils who confirmed to us that they instructed NowMedical for homelessness assessments, we would highlight the following:
- (a) Twelve councils could not tell us the exact number of assessments NowMedical had been instructed to undertake for them over the last five financial years.
 - (b) Only two councils could tell us how many initial decisions were found in favour of the individual following such an assessment³⁸⁰ with most councils refusing to provide this information or saying it was not held.

³⁷⁴ “Re-works” are assessment reports not contractually ‘fit for purpose’.

³⁷⁵ Northern Ireland Public Services Ombudsman, ‘[PIP and the Value of Further Evidence: An investigation by the Northern Ireland Public Services Ombudsman into personal Independence payment](#)’, (June 2021), p.110

³⁷⁶ This bulletin led to a ‘*significant increase*’ in the number of reports returned to Capita by case managers, from 267 cases in 2017 to 942 cases in 2018. *Ibid.*, p110.

³⁷⁷ For homelessness assessments, for example, it is the [Local Authorities \(Contracting Out of Allocation of Housing and Homelessness Function\) Order 1996](#)

³⁷⁸ Department for Levelling Up, Housing and Communities, ‘[Homelessness code of guidance for local authorities](#)’, (31 May 2024)

³⁷⁹ We sought information from 24 different local councils. Of those, 19 councils confirmed that they have a relationship with NowMedical to provide medical assessments for homelessness/ housing assessments.

³⁸⁰ Both councils who confirmed this information used NowMedical for less than 10 assessments per year.

- (c) Only two councils could tell us how many individuals successfully challenged their decision following the assessment³⁸¹, with most councils refusing to provide this information or saying it was not held.
- (d) Sixteen councils did not have available information about what type of homelessness or housing assessments were undertaken by NowMedical.³⁸²
- (e) Seven councils did not have information about how many assessments were solely paper-based (and the rest confirmed that all assessments were paper-based).
- (f) This was despite five councils confirming they had spent more than £100,000 on such assessments over the last five financial years.

6.26 This demonstrates a clear lack of data from local authorities on the outcome and process for contracted-out homelessness assessments. For example, if local authorities are not keeping accurate data of how many cases with contracted-out assessments are being overturned, let alone for what reason, then they will be unable to identify areas of repeat concern to address with the provider. NowMedical told us that they were ‘*not notified when a local authority’s decision is challenged by an applicant*’ or of the case outcome, unless a case was sent back to them for review.³⁸³ It is also worrying that basic information about the assessment process, such as the type of assessment and whether it was paper-based, was not available to a number of councils.

6.27 NowMedical, in response, told us the following:

*‘NowMedical’s team of qualified doctors and psychiatrists provide medical assessments to local authorities. These assessments are based on the medical records provided to NowMedical by local authority officers and are designed to help local authority officers understand those medical records (i.e., how the diagnosis of a particular condition might affect a person’s vulnerability). NowMedical is not providing a fresh diagnosis of an applicant’s condition, nor is it the ultimate decisionmaker on an applicant’s vulnerability. NowMedical welcomes all improvements to the process of homelessness applications, but cannot go beyond what is currently mandated by the law and what local authorities request from it’.*³⁸⁴

6.28 In light of these findings, we consider that there is a strong case for the Department of Housing, Communities and Local Government to commission an independent review into the use of contracted-out assessments, the apparent lack of contractual safeguards, the experience of vulnerable homeless individuals and the lack of available data to scrutinise such contracted-out powers.

6.29 This mirrors concerns about the lack of oversight by central government of powers given to local authorities in other areas. For example, the Public Accounts Committee have highlighted how they see ‘*no clear strategy*’ for the Department of Health and Social Care ‘*pulling together data from across the sectors and making it accessible*’ in adult social care. For example, ‘*the public does not yet have access to data to see how care outcomes in their local are compare nationally*’.³⁸⁵

6.30 Sir Chris Wormald (then Permanent Secretary of the Department for Health and Social Care) said in 2021 that ‘our governing legislation at the moment, as the Committee is aware, is heavily predicated on local authorities’ direct responsibilities for the care in their area’ and that, ‘while local accountability should be maintained, there ought to be greater powers of central oversight’. He went on to say that ‘it will still be mainly a local authority-run and accountable system – but there will be more powers of national inspection and national assurance and data’.³⁸⁶

³⁸¹ Again, both councils who confirmed this information used NowMedical for less than 10 assessments per year.

³⁸² The two councils which did respond confirmed it was s189(1)(c) Housing Act priority need homelessness cases for vulnerable individuals.

³⁸³ Evidence provided by NowMedical to JUSTICE.

³⁸⁴ Evidence provided by NowMedical to JUSTICE.

³⁸⁵ House of Commons Committee of Public Accounts, ‘[Reforming adult social care in England](#)’, (March 2024), p.5.

³⁸⁶ House of Commons Committee of Public Accounts, ‘[Oral Evidence: Adult Social care markets: HC 1293](#)’, (April 2021), p.8.

6.31 The Working Party recommends that **central government should properly oversee the contracting powers it gives to local authorities.**

For example, the Department of Housing, Communities & Local Government should carry out an independent review into outsourced homelessness assessments based on the information we have received (Recommendation 19).

VII. TRANSPARENCY AND ACCOUNTABILITY

- 7.1 Transparency in public procurement is essential to enable individuals to hold properly accountable both providers who are delivering services and public authorities which are meant to be overseeing such services. As the Open Contracting Partnership, an independent charity looking to open up and transform government contracting worldwide, have said, transparency is a *'precondition for accountability'*.³⁸⁷ Whilst there have been positive improvements in transparency there is still much more to be done and the Government can, and should, go further.
- 7.2 Whilst transparency may be a precondition for accountability, it is not in and of itself sufficient to both protect the rights of individual service users and ensure that such individuals are able to hold providers and public authorities accountable for the delivery of services. We have found that individuals still find it complex to determine who is ultimately responsible for breaches of their rights and to challenge decisions around contracted-out services.
- 7.3 The Working Party has therefore made recommendations to ensure there is better access to information and to simplify the law in this area so that individuals know their rights and can more easily enforce them. Ultimately, a focus on individual rights in procurement will not be effective unless individuals feel empowered and have accessible means of enforcing them. Ensuring greater transparency and accountability of such service should not be feared, but instead should lead to better governance, better decision-making and, where things do go wrong, lessons being learned.

Transparency

Importance of transparency

- 7.4 The Open Contracting Partnership has stressed how open and transparent contracting can ensure that public money is spent *'openly, fairly and effectively'*.³⁸⁸ They highlight that it improves planning, efficiency and that this should allow *'government to shape procurement to better meet users' needs'*.³⁸⁹ More transparency leads to improved competition, improved accountability, improved oversight, more innovation, sustainability of service provision, cheaper and faster development and improved integrity.³⁹⁰ In particular, they emphasised that *'there is hard evidence that collecting information knowing that it will be shared improves government's own behaviour'*.³⁹¹
- 7.5 The Open Contracting Partnership's "mythbuster" on open contracting deals with some of the key myths used by governments who are apprehensive about greater transparency. It seeks to end the *'default where contracting information is routinely classified as confidential and made secret unless proven otherwise'*.³⁹² For example, whilst there is genuinely commercially-sensitive information in contracts which should not always be disclosed, such information is often *'not legitimately sensitive forever'*, cannot be sensitive if known to competitors and, even if it is sensitive, redactions should be *'minimal'*.³⁹³ Similarly, they argue that evidence suggests that disclosing contracting information, instead of decreasing competition, often increases the number of bidders and does not deter companies bidding.³⁹⁴

³⁸⁷ Monika Bauhr, Agnes Czibik, Mihaly Fazekas and Jenny De Fine Licht, ['Greater transparency in calls for tenders could save Europe billions'](#), (Open Contracting Partnership, 6 December 2017).

³⁸⁸ [Open Contracting Partnership, 'Our vision: Better procurement for people and the planet'](#).

³⁸⁹ Open Contracting Partnership, ['Why openness matters'](#).

³⁹⁰ *Ibid.*

³⁹¹ *Ibid.*

³⁹² Open Contracting Partnership, [Mythbusting Confidentiality in Public Contracting](#), (2018), p.3.

³⁹³ *Ibid.*, p.4.

³⁹⁴ *Ibid.*, p.6.

- 7.6 The Government, and the devolved administrations, state publicly the importance of transparency. In the context of procurement, the current UK Government's stated policy is to *'adopt and encourage greater transparency in its commercial activity'*.³⁹⁵ The current Contracts Finder website, which publishes key tender documents and contracts,³⁹⁶ is said to be *'a critical part of delivering the government's commitment for transparency in procurement and for making it easier and more accessible for smaller businesses and voluntary or charitable organisations to do business with the public sector'*.³⁹⁷

Understanding what services have been contracted out

- 7.7 It is important that individuals are aware of which services the state has contracted out to providers so they know, ultimately, who is responsible for the day-to-day delivery of a service. However, the Working Party considers that, given the scale of public sector contracting, it is opaque and unclear which services have been contracted out and to which providers.
- 7.8 The House of Commons Library has set out, *'there are no comprehensive lists showing which authorities have outsourced which services, or which companies are contracted by which authorities'*.³⁹⁸ In 2020, the Ministry of Housing, Communities and Local Government (as it then was) did not have the information about which local authorities contract out their statutory homelessness duties.³⁹⁹ There are also less strict requirements for uploading public contracts onto the ContractsFinder website for local authorities⁴⁰⁰ and this is a difficult website to navigate, especially if you are unaware the service has been tendered or contracted.
- 7.9 It is important for legal certainty that the public authority is confident that it has lawfully delegated powers to a private body. Otherwise, they risk a messy and complicated public law challenge. The public body needs to be confident that it has an express, or implied, power to delegate a function to a provider.⁴⁰¹ The High Court case of *Halton Borough Council* showed the considerable legal complexity when a relatively straightforward service was delegated without being clear about the power to do so.⁴⁰²
- 7.10 Such delegation *'can also raise complex issues of legality, particularly if there is no express statutory delegation power'*.⁴⁰³ In the context of outsourced assessments, it is important that the public authority does not fetter its ultimate decision-making authority, as we have set out above. The *'exercise of public discretionary power requires the decision-maker to bring his mind to bear on every case'*.⁴⁰⁴
- 7.11 The Working Party stresses that it is preferable for each public authority to be well aware of their demarcated responsibilities when contracting out a particular service. To assist with this, provide confidence to the public about the lawfulness of such contracting and ensure that the public authority is acting lawfully, we recommend that there should be more transparency about services which are contracted. We recommend that **public authorities, including local authorities, should publish in a clear and accessible location the list**

³⁹⁵ Crown Commercial Service, ['Public procurement policy'](#), (3 April 2023).

³⁹⁶ All tender documents and contracts over £12,000.00 (for central government authorities) and £30,000.00 (for sub-central authorities) must be published on the Contracts Finder website. Cabinet Office, ['PPN – Update to legal and policy requirements to publish procurement information on Contracts Finder'](#) (January 2023).

³⁹⁷ Crown Commercial Service, ['Public procurement policy'](#), (3 April 2023).

³⁹⁸ Mark Sandford, ['Briefing Paper: Local Government: alternative methods of service delivery'](#), (House of Commons Library, 9 September 2019), p11.

³⁹⁹ Ministry of Housing, Communities and Local Government, [Freedom of Information Response 7273673](#), (8 June 2020).

⁴⁰⁰ If the contract value is at least £30,000 compared to £12,000 for central government. Cabinet Office, ['Guidance on the Transparency requirements for Publishing on Contracts Finder'](#), (18 January 2023).

⁴⁰¹ See [R \(on the application of Halton Borough Council\) v Road User Charging Adjudicators and Damian Curzon](#) [2023] EWHC 303 (Admin), para 53.

⁴⁰² [R \(on the application of Halton Borough Council\) v Road User Charging Adjudicators and Damian Curzon](#) [2023] EWHC 303 (Admin).

⁴⁰³ Local Government Lawyer, ['Ceasing discretionary functions and powers'](#), (29 January 2021).

⁴⁰⁴ [Secretary of State for Communities and Local Government v West Berkshire District Council and Reading Borough Council](#) [2016] EWCA Civ 441, para 16.

of services which have been contracted out, the supplier and the legal authority for that procurement (Recommendation 20).

Publication of contracts

- 7.12 Currently, under the Public Contract Regulations, there is a requirement for information about central government contracts worth over £12,000, or £30,000 for sub-central contracting authorities (such as local authorities)⁴⁰⁵ to be published. This includes the publication of contract opportunities⁴⁰⁶ on the Find a Tender website ('FTS') and the Contracts Finder website,⁴⁰⁷ and details when a contract is awarded on Contracts Finder.⁴⁰⁸ In its action Plan for Open Government 2021-2023, the Government committed to publishing 90 per cent of central government awards on Contract Finder within 90 calendar days by March 2024.⁴⁰⁹ There is no equivalent target in the 2024 – 2025 action plan.⁴¹⁰
- 7.13 However, further to this, it is Government policy that central government organisations should publish the awarded contract documents on Contracts Finder within 30 calendar days after the award date. This should include the specification, terms and conditions and associated schedules.⁴¹¹ The publication of these documents is subject to exemptions which may be permitted under FOIA, such as national security, data protection and commercial sensitivity grounds.⁴¹²
- 7.14 The Government has previously noted that '*transparency in public procurement is still inconsistent*' and that '*there are still data gaps and limitations that make it difficult for the public sector, the private sector, civil society organisations and citizens to understand the full pattern of government procurement spend*'.⁴¹³ The latest National Action Plan for Open Government states that the Procurement Act intends to embed '*transparency throughout the commercial lifestyle so that the spending of taxpayers' money can be properly scrutinised and collecting information that will help analyse the overall health and fairness of the UK procurement market*'.⁴¹⁴
- 7.15 The Procurement Act reforms transparency in several ways. First, all contracts agreed must now be accompanied with a published contracts notice within 30 days of execution.⁴¹⁵ Second, there will now be a legal requirement to publish a contract with an estimated value of more than £5 million within 90 days of the contract being entered into.⁴¹⁶ The Working Party is clear that, despite this legal threshold, Government policy should continue to push forward with their policy of routinely publishing government contracts (as set out above). The Government should also consider amending the financial threshold for when contracts must be published.
- 7.16 There will also be new notices such as pipeline notices and contract change notices. Pipeline notices will set out '*specified information about any public contract with an estimated value of more than £2 million in respect of which the contracting authority intends to publish a tender notice or transparency notice during*

⁴⁰⁵ The Public Contracts Regulation 2015, regulation 109(2).

⁴⁰⁶ The Public Contract Regulations 2015, regulation 110.

⁴⁰⁷ Cabinet Office, '[Guidance on the Transparency Requirements for Publishing on Contracts Finder](#)', (January 2023).

⁴⁰⁸ Including name of contractor, date on which contract entered into, value of contract and whether contractor is an SME/ VCSE on Contracts Finder – The Public Contract Regulations 2015, regulation 112.

⁴⁰⁹ UK Government, '[UK National Action Plan for Open Government 2021-2023](#)', (23 August 2022). [We could not find](#) published information confirming if this target had been reached.

⁴¹⁰ UK Government, '[UK National Action Plan for Open Government 2021-2023](#)', (18 December 2023).

⁴¹¹ Cabinet Office, '[Guidance on the Transparency Requirements for Publishing on Contracts Finder](#)', (January 2023), p.7.

⁴¹² *Ibid.*, p.7.

⁴¹³ UK Government, '[UK National Action Plan for Open Government 2021-2023](#)', (23 August 2022).

⁴¹⁴ *Ibid.*

⁴¹⁵ Or 120 days if it is a "light touch" contract – Procurement Act 2023, s.53.

⁴¹⁶ Or 180 days if it is a "light touch" contract – Procurement Act 2023, s.53.

the reporting period'.⁴¹⁷ This is designed to give information about 'current and future public contract opportunities' over the preceding 18 months.⁴¹⁸ They are required to be published when the authority considers it will spend £100 million on contracts in the coming financial year.⁴¹⁹ Contract change notices require details of a significant contract change to be published.⁴²⁰

- 7.17 Critically, the Procurement Act does require government to establish a new online system for the purpose of publishing notices, documents and other information under the Act, which must be 'free of charge' and accessible.⁴²¹ Such a new system would replace the current Find a Tender Service and Contracts Finder websites. This is welcome provided, as the Local Government Association has highlighted '*it is well-designed with user input and is sufficiently resourced*'.⁴²²
- 7.18 The Working Party is of the view that the current Contracts Finder website is not fit for purpose and does not meet the requirements of an open, transparent procurement system. The Working Party's experience of the website itself is that it is clunky, hard to navigate and not user-friendly.
- 7.19 The NAO has found that most departments '*do not consistently publish all contracts within the required time*'.⁴²³ This is reflected in our own research, which found that key contracts that do not appear on the Contracts Finder website. For example, there is no uploaded contract for large private prisons, such as HMP Doncaster or Dungavel Immigration Removal Centre.
- 7.20 Of the prison and immigration detention contracts which were published, there were often significant and extensive redactions of public information. For example, HMP Dovegate's published contract has over 200 pages of redacted schedules, including the performance measures.⁴²⁴
- 7.21 **The Working Party supports the Procurement Act's replacement of the Find a Tender Service and Contracts Finder websites with a single online platform. However, the Cabinet Office must robustly monitor this new platform to ensure that key contracts, notices and documents are fully uploaded, redactions are limited and proportionate, and that the service is user friendly and accessible. The investigatory powers in the Procurement Act should be used to this effect (Recommendation 21).**⁴²⁵

Contract information

- 7.22 The NAO have highlighted that the '*poor quality of much of government's published data on contracts reduces transparency and makes it harder to identify and promote best practice*'. In addition to the failure to publish contracts, those that are published often contain missing information.⁴²⁶ The Public Accounts Committee reported last year that the Cabinet Office acknowledge that the '*data they hold and publish is not good enough*'.⁴²⁷ We have found evidence that key information about important government contracts are often extensively redacted.
- 7.23 For example, we analysed prison and immigration detention centre contracts found on the ContractsFinder website and found that large sections in relation to performance measures and KPIs have been completely

⁴¹⁷ Government Commercial Function, '[Guidance: Pipeline Notice](#)', (April 2024), p.2.

⁴¹⁸ *Ibid.*, p.2.

⁴¹⁹ *Ibid.*, p.3.

⁴²⁰ Procurement Act 2023, s.75.

⁴²¹ Procurement Act 2023, s.95(4) and (5).

⁴²² LGA, '[Procurement Bill, Second Reading, House of Lords, 23 May 2022 \(24 May 2022\)](#)'.

⁴²³ NAO, '[Lessons learned: competition in public procurement](#)', (July 2023), p.11.

⁴²⁴ ContractsFinder, '[HMP Dovegate](#)', (12 January 2023)

⁴²⁵ Procurement Act 2023, s.108 permits an '*appropriate authority*' to investigate a contracting authority's compliance with the Act, including the publication of the results of an investigation.

⁴²⁶ NAO, '[Lesson learned: competition in public procurement](#)', (July 2023), p 11.

⁴²⁷ House of Commons Committee of Public Accounts, '[Competition in public procurement](#)', (December 2023), p.5.

redacted. For example, in eleven private prison contracts we analysed, there are no published performance measures.⁴²⁸ By contrast, the contract for HMP Bronzefield had key performance measures published. Whilst the contracts for Harmondsworth/ Colnbrook IRC and Yarl’s Wood IRC both had published performance measures, their “operational requirements” were fully redacted.

- 7.24 One of the central changes in the Procurement Act is that, for public contracts with an estimated value of more than £5 million, a public authority must set at least three Key Performance Indicators (‘KPIs’) which must be published.⁴²⁹ Not only do the KPIs have to be published, but under section 71 Procurement Act, a public authority must assess performance of the provider against those KPIs and publish information (to be specified in regulations) about that assessment every 12 months.
- 7.25 The Minister Alex Burghart MP said in the Commons Committee debate that the requirement ‘*is a new requirement and will ensure that we have visibility of how well individual suppliers are delivering in the public sector*’.⁴³⁰ It was intended to ‘*bring transparency to the management of significant public sector contracts, allowing citizens and others to see how suppliers are performing*’. The Minister also said that it should ensure ‘*that companies that repeatedly fail to deliver to not win additional business*’.⁴³¹
- 7.26 The Working Party welcomes the requirement in Section 52 Procurement Act requiring the publication of all key performance indicators for any contract worth over £5 million and, critically, for yearly reports to be published about whether those KPIs have been met (Recommendation 22).
- 7.27 However, for this to be effective, it is important as set out above that key protections for individual rights are included as KPIs. Otherwise, the public, including the service users, and the public authority will not be able to hold the provider accountable for its protection of individual rights.
- 7.28 It is also of concern that the above only applies to contracts worth over £5 million, which would include many but not all of the services referenced in this report. The Working Party therefore also recommends that Cabinet Office guidance should make clear that for medium and high-risk contracts, irrespective of the value of the contract, public authorities should publish both the KPIs and yearly reports about how those KPIs have been met (Recommendation 23).

Open Contracting Data Standard

- 7.29 The Open Contracting Data Standard (OCDS) is a ‘*free, non-proprietary open data standard for public contracting*’ which sets out ‘*how to publish data and documents about contracting processes for goods, works and services*’.⁴³² It is built upon three concepts:
- (a) Open Contracting: This is about ‘*publishing and using open, accessible and timely information on public contracting to engage citizens and businesses to fix problems and deliver results*’. Such results ‘*include improving the efficiency, effectiveness and integrity of a public contracting system*’.⁴³³
 - (b) Open Data: Data should be ‘*freely used, modified and shared by anyone for any purpose*’ and means the data must be ‘*accessible and machine-readable, and for permission to be granted for reuse*’.⁴³⁴

⁴²⁸ HMP Ashfield, HMP Altcourse, HMP Dovegate, HMP Forest Bank, HMP Fosse Way, HMP Five Wells, HMP Northumberland, HMP Oakwood, HMP Parc, HMP Peterborough and HMP Rye Hill.

⁴²⁹ Procurement Act 2023, s.52(1) and 52(3). Though s.52(3) states this obligation does not apply if the ‘*contracting authority considers that the suppliers performance could not be appropriately assessed*’ through KPIs. It also does not apply to certain contracts under s.52(6), including framework, utilities contracts, concession contracts or light-touch contracts.

⁴³⁰ House of Commons Official Report, ‘[Procurement Bill](#)’ (7 February 2023), p.155.

⁴³¹ *Ibid.*, p.155.

⁴³² Open Contracting Data Standard. ‘[What is the OCDS and why use it?](#)’.

⁴³³ *Ibid.*

⁴³⁴ *Ibid.*

(c) A Data Standard: This defines *‘the structure and meaning of data in order to resolve ambiguity and help systems and people interpret it’*.⁴³⁵

7.30 The Open Contracting Data Standard is said to help *‘increase transparency, enables deeper analysis of contracting data, and facilitates the use of data by a wide range of stakeholder’*.⁴³⁶ The Open Contracting Partnership have set out that more than 50 countries, including the United Kingdom, are now making *‘open contracting reforms’*, and that there are clear benefits.⁴³⁷ For example, they set out that *‘there is hard evidence that collecting information knowing that it will be shared improves government’s own behaviour’ as ‘sharing in public allows other actors...to track the money and the results from that spending better themselves, feeding back their insights and advice’*.⁴³⁸ A study of 3.5 million government contracts across Europe also suggested that every additional item of information shared about a tender decreased the risk of a single-bid contract.⁴³⁹

7.31 The UK Government has stated that it is the first G7 country to commit to the Open Contracting Data Standard for contracts administered by the Crown Commercial Service.⁴⁴⁰ They state that *‘this means the whole process of awarding public sector contracts will be visible to the public for the first time’* and that open contracting means that *‘all data and documents are disclosed at all stages of the contracting process’*, increasing transparency and analysis of data by a wide range of users.⁴⁴¹ This is an important statement of intent.

7.32 The most recent UK National Action Plan for Open Government 2024 – 2025 sets out that open contracting is at the heart of the Procurement Act reforms. This states that transparency will be enhanced through *‘more procurement data being published using the Open Contracting Data Standard’* and that *‘open contracting will help to transform contracting authorities’ approach to data to help improve decision-making and innovation at all levels of government’*.⁴⁴² Whilst such statements of intent are important, these are not specific targets like those which have been set out in previous Open Government Plans.⁴⁴³ We appreciate that the priority is the full implementation of the Procurement Act, but think ambitious targets in this area would help ensure progress continues to be made.

7.33 As the Institute for Government have highlighted, *‘data on the performance of contracts is often not collected, is of poor quality or is held by suppliers and not accessible to government’*. They also note that *‘assessments of performance are patchy’* especially when *‘in most areas, measuring performance is down to officials managing contracts, yet officials lack information’*. Often, *‘the public have only discovered that contracts were failing as a result of investigative journalism’*.⁴⁴⁴ The Working Party is of the view the full application of the Open Contracting Data Standard would help address this.

7.34 The IfG recommends that the Cabinet Office should mandate clear standards for the collection of data in line with the Open Contracting Data Standard and provide guidance on *‘how access to performance data should be written into contracts’*.⁴⁴⁵ We agree. **The Working Party supports the full adoption of the Open**

⁴³⁵ *Ibid.*

⁴³⁶ *Ibid.*

⁴³⁷ Open Contracting Partnership, [‘Open contracting: impact and evidence’](#).

⁴³⁸ Open Contracting Partnership, [‘Why openness matters’](#).

⁴³⁹ *Ibid.*

⁴⁴⁰ Crown Commercial Service, [‘Open Contracting’](#).

⁴⁴¹ *Ibid.*

⁴⁴² UK Government [‘UK National Action Plan for Open Government 2024-2025’](#), (18 December 2023).

⁴⁴³ The 2021 – 2023 plan committed to publishing 95% of above threshold tenders and 90% of central government awards (within 90 calendar days) on the Contracts Finder website. UK Government, [‘UK National Action Plan for Open Government 2021 – 2023’](#) (23 August 2022).

⁴⁴⁴ IfG, [‘Government outsourcing: what has worked and what needs reform?’](#), (September 2019), p.65.

⁴⁴⁵ *Ibid.*, p.65.

Contracting Data Standard, across central, local and devolved government, with the need for clear targets to be set to achieve this (Recommendation 24).

Freedom of Information Act 2000

- 7.35 One of the primary mechanisms for transparency in the public sector is FOIA. This gives the public the right to information held by public authorities unless one or more of a number of exemptions applies.⁴⁴⁶ In general, FOIA has enabled much greater access to public information and led to an increase in the accountability of public bodies.⁴⁴⁷ In the Working Party's view this access to information about public services should not depend on whether that service happens to be delivered by a private provider or directly by the public authority. However, in practice there are a number of issues with the application of FOIA in the context of contracted out services. As the Institute for Government has concluded "*FOI law has not kept up with dramatic changes in how public services are delivered over the past 40 years*".⁴⁴⁸
- 7.36 The Information Commissioner's Office ('ICO') have set out that, since public services are delivered by organisations that are not public authorities, there is a '*clear risk to transparency and accountability when information held by such organisations is removed from the scrutiny offered by access to information law*'. The ICO set out how the '*current law is not fit for purpose*' and needs to '*keep pace with the changes in the modern public sector and public expectations*'.⁴⁴⁹
- 7.37 For example, a Grenfell Tower resident's request for information about the building refurbishment to the Kensington and Chelsea Tenant Management Organisation was refused as release might '*prejudice the commercial interests of the contractor*'. This was three years before the Grenfell Tower disaster.⁴⁵⁰
- 7.38 In responses to Freedom of Information requests we have made, we are concerned at the use of 'commercial confidentiality' as a justification to deny access to important information in the public interest. The Ministry of Justice refused to provide us the key performance measures for HMP Ashfield's contract on the basis of the commercial interests of the department and third parties.⁴⁵¹ The Home Office also refused to provide the key performance measures for Yarl's Wood IRC and the operational specification for Colnbrook and Harmondsworth IRCs, relying in part on the commercial interests exemption.⁴⁵²
- 7.39 There is evidence that major suppliers are supportive of reforms to Freedom of Information law. The House of Commons Public Accounts Committee met with four of the largest outsourced providers – Atos, Capita, G4S and Serco – who all '*accepted they needed to be more open and transparent*', and '*were content that Freedom of Information provisions should apply to public sector contracts with their companies*'.⁴⁵³ The Institute for Government found similarly that '*large outsourcing companies themselves have said they would be happy for the law to be extended to cover them*'.⁴⁵⁴
- 7.40 The Working Party therefore agrees with the following recommendations of the ICO:
- (a) **There should be a comprehensive review of all proactive disclosure provisions regarding contracting, and which affect the public sector. This would include a review of the publication**

⁴⁴⁶ Absolute exemptions apply in all cases. Qualified exemptions require a public authority to consider, in all the circumstances, a public interest test.

⁴⁴⁷ House of Commons Justice Committee, '[Post-legislative scrutiny of the Freedom of Information Act 2000](#)' (3 July 2012), p.16.

⁴⁴⁸ IfG, '[Government outsourcing: what has worked and what needs reform?](#)' (September 2019), p.66.

⁴⁴⁹ Information Commissioner's Office, '[Outsourcing Oversight? The case for reforming access to information law](#)', (2019), p.6.

⁴⁵⁰ Robert Booth, '[Grenfell refurb details 'kept secret to protect commercial interests'](#)', (The Guardian, 10 October 2018).

⁴⁵¹ Ministry of Justice, '[Response to Freedom of Information Request 240120010](#)' (19 February 2024).

⁴⁵² Both also relied on exemptions based on the law enforcement operation of immigration controls and health & safety. See: Home Office, '[Response to Freedom of Information Request 2024/00994](#)' (20 February 2024) and Home Office Commercial Directorate, '[Response to Freedom of Information Request 2024/00993](#)', (20 February 2024).

⁴⁵³ House of Commons Committee of Public Accounts, '[Contracting out public services to the private sector](#)' (26 February 2014), p4.

⁴⁵⁴ IfG, '[Government outsourcing: what has worked and what needs reform?](#)' (September 2019).

scheme provisions in FOIA, and how they complement other procurement laws and government requirements. This should consider how such provisions are monitored and enforced, and what resources are available (Recommendation 25).

- (b) Following consultation, the Government should consider amending section 3 of FOIA (held on behalf of provisions)⁴⁵⁵ to give a clearer legislative steer about when information regarding a public sector contract is held for the purposes of legislation and introduce a legal requirement to report regularly on the coverage of the legislation (Recommendation 26).
- (c) The Government should use existing powers under section 5 FOIA to designate contractors as public authorities in respect of the public functions they undertake where this would be in the public interest (due to the scale, duration or public importance of the contracts). They should designate a greater number of organisations exercising functions of a public nature, and do so more frequently and efficiently. The public would then be able to make requests directly to these organisations and require them to proactively disclose information in line with a publication scheme (Recommendation 27).

Accountability

7.41 When there are breaches of individual rights in contracted-out services, it is important that there are proper, independent mechanisms for holding providers and public authorities accountable. As we have seen earlier in this report, whilst we have made clear recommendations to improve government oversight, considering previous failings this cannot be solely left to the public authorities themselves.

Independent oversight

7.42 One of the best ways of improving the accountability of key public services is to ensure that there is greater independent oversight of their delivery. There are a number of expert bodies which do an effective job of scrutinising the delivery of contracted out services.

7.43 Statutory oversight bodies, such as HMIP are one such example. HMIP is an independent inspectorate, inspecting places of detention to report on conditions and treatment, and promote positive outcomes for those detained and the public. They have written important reports raising concerns about the quality of services and impact on individual prisoners.⁴⁵⁶

7.44 In 2019, following a Justice Committee recommendation, HMIP introduced Independent Reviews of Progress, an independent assessment of how far prisons had implemented HMIPs recommendations.⁴⁵⁷ This is a potentially useful way of ensuring that progress on recommendations is monitored.

7.45 Independent Monitoring Boards ('IMBs') were discussed in the Brook House Inquiry report. IMBs 'operate within IRCs to provide regular and independent oversight with a focus on the welfare of detained people' and members can access IRCS 'at any time' to speak to detained individuals.⁴⁵⁸ The Brook House Inquiry report set out, however, that the Brook House IMB had not been '*sufficiently challenging of G4S or the Home Office*', that many detained people were unaware of them, that it was reliant on volunteers '*lacking expertise*' and had no power to '*enforce change*'.⁴⁵⁹

⁴⁵⁵ FOIA, s.3(2)(a) currently provides that information is held by a public authority for the purposes of the Act if it is held by another person on behalf of the authority.

⁴⁵⁶ For example, HMIP, '[Report on an unannounced inspection of HMP Birmingham](#)' (2018) or '[Heavy criticism for privately-run Doncaster jail](#)' (ITV Calendar, 13 August 2014).

⁴⁵⁷ '[Independent Reviews of Progress](#)', GOV.UK.

⁴⁵⁸ Brook House Inquiry, '[The Brook House Inquiry Report Volume II](#)' (September 2023), p.305 and 306

⁴⁵⁹ *Ibid.*, p.372.

- 7.46 The Inquiry noted that there had been improvements in the Brook House IMB which were *'to be commended and must be maintained'*, including the use of a *'rights-based form'* for visits.⁴⁶⁰ The Inquiry recommended that the role of the IMB should be enhanced, including by publishing responses to all concerns raised by the IMB about immigration detention centres, amending the Detention Centre Rules to reflect their current role and considering putting them on a statutory footing. This shows that it is not enough that there are independent oversight bodies, they must be given the required powers to independently investigate rights breaches.
- 7.47 Ombudsman schemes provide independent, free, and impartial complaints service. Ombudsmen are appointed to investigate complaints about companies and organisations, varying from the public to the private sector.⁴⁶¹ As we have seen above, the Northern Ireland Public Service Ombudsman has played an important role in upholding individual rights through its finding of systemic maladministration on how further evidence is assessed for PIP benefits claims.⁴⁶²
- 7.48 JUSTICE has previously highlighted issues in certain contexts, where there is no independent reviewer or regulator. Our Reforming Benefits Decision-Making report⁴⁶³ recommended that the Government creates a statutory role for a permanent independent reviewer or regulator for welfare benefits. The report identified significant gaps between what the DWP said was meant to be happening with benefits on the one hand and claimants' and advisers' experience of the benefits system on the other. The Working Party viewed the introduction of an independent regulator as vital. Their functions would include assessing and reporting on standards of decision-making in relation to benefits and monitoring the use of automated decision-making.
- 7.49 **The Individual Rights Focused Contract Guidance should stress that independent bodies should be identified for each for outsourced service in the contract which can both investigate poor service provision (e.g. independent inspectorates) and make recommendations following complaints in individual cases (e.g. ombudsman) (Recommendation 28).**
- 7.50 We also note the importance of national human rights institutions, such as the EHRC, Scottish Human Rights Commission and Northern Ireland Human Rights Commission. Further independent oversight should alert human rights and equality concerns to such bodies, who may then decide to use their powers to investigate. For example, the EHRC has recently announced an investigation into whether the DWP has failed to make reasonable adjustments for disabled people during health assessment determinations.⁴⁶⁴

Individual Challenges

- 7.51 A central aspect of public law, and the rule of law more generally, is that everyone is able to enforce their rights against those that deliver the public services they rely upon. As we have set out in this report, when public services are contracted out, individuals are often unclear who is ultimately responsible for upholding their rights and who they should be complaining to. It is therefore even more important that individuals understand their rights and how they can challenge breaches of those rights.

Complaints

- 7.52 One of the main issues with accessing complaints procedures is individuals need to be aware of who they should be complaining to and what the procedure is. Previous LGSCO Michael King has noted that they see

⁴⁶⁰ *Ibid.*, p.314.

⁴⁶¹ Cabinet Office, '[Guidance on new Ombudsmen scheme](#)' (26 May 2022).

⁴⁶² NIPSO, '[PIP and the Value of Further Evidence: An investigation by the Northern Ireland Public Services Ombudsman into Personal Independence Payment](#)', (June 2021).

⁴⁶³ JUSTICE and AJC, '[Reforming Benefits Decision-Making](#)', (August 2021), p.64 - 65.

⁴⁶⁴ EHRC, '[Department for Work and Pensions under investigation for treatment of disabled benefits claimants](#)', (22 May 2024).

*‘cases where it is unclear who is responsible for putting things right and people’s ability to complain to us is masked, because of the complexity of the service provision arrangements.’*⁴⁶⁵

- 7.53 The importance of various Ombudsmen in protecting the rights of individuals can be demonstrated through the work within the social care context of the LGSCO. The Ombudsman can investigate complaints about most council services, including adult social care, children services, housing, and benefits.⁴⁶⁶

CASE STUDY: UNSAFE TREATMENT BY COMMISSIONED CARE PROVIDERS

The LGSCO highlight the case of Adam, who had a learning disability at a residential care home, run by a provider, but commissioned and funded by the local council. His parents complained that he was *‘excessively and unnecessarily given sleeping tablets’*. The care provider said that the medication was given by the GP to be taken *‘when needed’* but had then *‘directed its staff to give it every other night to sedate’* Adam.

The LGSCO found that Adam had received *‘unfavourable and unsafe treatment’*, due to his learning disabilities, which impacted on his Article 8 and 14 ECHR rights.⁴⁶⁷ The care home refused to apologise for 12 months and *‘its communication with the family lacked empathy or contrition’*. The LGSCO found that the council had failed to take into account Adam’s human rights when it provided this care.

In responding to this case, however, there were examples of good practice. The Council started a safeguarding investigation and contacted the Care Quality Commission which led to improvements in the service and how the care home responded to complaints. The council also *‘made positive changes to the way it monitored its third-party contractors’* and agreed a payment to the family for avoidable distress.⁴⁶⁸

- 7.54 The EHRC carried out an inquiry to understand people’s experiences of challenging, or trying to challenge, local council decisions about adult social care or support.⁴⁶⁹ They similarly found a lack of clear and accessible information for individuals, confusion, inconsistency and delays in the complaints process and challenges for individuals to access advocacy or legal support.⁴⁷⁰
- 7.55 They also raised concerns about the accuracy of information being provided to social care users about how to challenge decisions by way of complaint or appeal. The EHRC report found that there were disparities with the ways in which social care users could challenge decisions, the complaints process was found by many to be complicated, stressful and often delayed, there was a perception of a lack of independence in certain circumstances for complaints and people were reluctant to challenge decisions (fearing negative repercussions).⁴⁷¹
- 7.56 Members of our social care sub-group told us there needed to be greater simplicity and transparency in complaints procedures. We also heard that advocacy support was important to navigate complaints processes which can be complex.
- 7.57 JUSTICE’s report on benefits decision-making highlighted that the contracting out of assessments had caused *‘confusion for claimants who are seeking redress’*.⁴⁷² Once the provider’s complaints process was exhausted,

⁴⁶⁵ LGSCO, [‘Golden thread of accountability often broken in outsourced council services, Ombudsman tells Parliamentary committee’](#), (March 2018).

⁴⁶⁶ Note, the LGSCO cannot make findings of ‘breaches’ of rights, rather findings of ‘fault’ will be made against councils and care providers who have failed to properly have regard to, for example, the Equality Act and/or HRA.

⁴⁶⁷ The right to a private and family life (Article 8) and the right to not be discriminated against (Article 14).

⁴⁶⁸ LGSCO, [‘Equal Justice: learning lessons from complaints about people’s human rights’](#), (December 2022), p.10.

⁴⁶⁹ EHRC, [‘Challenging adult social care decisions in England and Wales’](#), (2021).

⁴⁷⁰ EHRC, [‘Challenging adult social care decisions in England and Wales’](#), (2021), p.9.

⁴⁷¹ EHRC, [‘Challenging adult social care decisions in England and Wales’](#), (2021), p.16.

⁴⁷² JUSTICE and Administrative Justice Council, [Reforming Benefits Decision-Making](#), (August 2021), p37.

they could make a complaint to the Independent Case Examiner. However, the *'remit and powers of the ICE are limited, and it takes on average a year and half for cases to be resolved'*.⁴⁷³

- 7.58 The follow-up NIPSO PIP report in Northern Ireland welcomed that Capita and the Department for Communities had made it clear to claimants how they could make a complaint and that case managers who make the ultimate decision were not notified of the complaint (and that they do not have routine access to information about complaints).⁴⁷⁴ NIPSO stressed the importance *'for claimants to be aware of the need to provide supporting information to both the claim and complaints process, and not be disadvantaged by believing it is automatically shared'*.⁴⁷⁵
- 7.59 **Providers and public authorities should be required under the contract to provide clear information about how individuals can make complaints, access independent oversight bodies and seek legal advice or advocacy support to challenge decisions made about their rights (Recommendation 29).**

Legal Challenges

- 7.60 Whilst judicial review is an important remedy of last resort to allow individuals (and relevant interested bodies) to challenge unlawful public decision-making, it is complicated in the context of contracted out services. Individuals have found it hard to bring judicial review claims challenging decisions to contract out services to private bodies, with stricter rules for standing in such cases.⁴⁷⁶ Due to these limitations, *'challenges by 'third parties' to decisions taken during the contract award process are likely to be rare'*.⁴⁷⁷
- 7.61 There are however legal avenues where individuals can challenge services which have, in full or in part, been contracted out to providers. For example, benefit decisions based on a contracted-out health and disability assessment can be challenged to the First Tier-Tribunal (Social Security and Child Support). Decisions by local authorities, based on homelessness vulnerability assessments, have a right to appeal to the County Court. In order to ensure individuals can properly access such avenues, it is important that individuals are fully aware of the decisions which have been made, the basis on which they have been made, the role of the provider and can access legal advice. As we have set out above, it is also important that public authorities learn lessons from negative decisions received to improve the initial provision of service delivery.

The Human Rights Act

- 7.62 The HRA is essential for holding public sector bodies accountable by providing a legal framework for the protection of rights set out in the European Convention on Human Rights ('ECHR') and ensuring that public authorities must act compatibly with those rights.⁴⁷⁸ Section 6(3) HRA provides an open definition of "public authority" - *'a court or tribunal, and any person certain of whose functions are functions of a public nature'*.⁴⁷⁹
- 7.63 During the HRA's passage through Parliament, the then Home Secretary, Jack Straw in a House of Commons debate confirmed that *'as we are dealing with public functions and with an evolving situation, we believe that the test must relate to the substance and nature of the act, not to the form and legal personality'*.⁴⁸⁰ As

⁴⁷³ UK Parliament, ['Independent Case Examiner: Questions for Department for Work and Pensions'](#), (9 January 2020).

⁴⁷⁴ NIPSO, ['PIP and the Value of Further Evidence'](#), (May 2023), p.16.

⁴⁷⁵ *Ibid.*, p.16.

⁴⁷⁶ Richard Clayton KC, ['Austerity and Public Law: Richard Clayton. QC: Accountability, Judicial Scrutiny and Contracting Out'](#), (UK Constitutional Law Association, 30th November 2015).

⁴⁷⁷ A.C.L Davies, *'The Public Law of Public Contracts'*, (Oxford University Press, 2008), p.167.

⁴⁷⁸ HRA, s.6.

⁴⁷⁹ HRA, s6(3).

⁴⁸⁰ UK Parliament Hansard, ['Acts of Public Authorities, Volume 314'](#) (17 June 1998), column 433.

the nature of public service delivery has changed, and the increased use of contracting, the courts have played a significant role in interpreting in what context a provider is operating as a public authority.

- 7.64 One of the most important, and leading decisions, was the House of Lords decision in *YL* which found by a narrow majority that *YL*'s care provider, run by a private company but largely funded by a local authority under national legislation, was not a public authority for the purposes of the HRA.⁴⁸¹ The House of Lords concluded that the private company was not exercising statutory powers, that there was a distinction between a general '*core public authority*' and an authority funding services for an individual, and that the relationship between *YL* and the provider was regulated by a private law contract. The provider was a '*private, profit-earning company*'.⁴⁸²
- 7.65 By contrast, the minority dissent of Lord Bingham and Baroness Hale said that the provider was 'performing a function of public nature' and that '*this was a function performed for YL pursuant to statutory arrangements, at public expense and in the public interest*'.⁴⁸³ The then Government noted at the time, following the decision in *YL*, that there was a '*serious misconception*' about the effect of the judgment and that '*many people receiving publicly-arranged social care were under the impression that, as a result of YL, they had "lost their human rights"*'.⁴⁸⁴
- 7.66 Recent examples have also shown that the legal position remains unsettled and in need of clarification. A Scottish Inner House of the Court of Session case, *Ali v Serco*,⁴⁸⁵ considered whether Serco (a private company) was a public authority under the HRA as a provider of temporary asylum accommodation for asylum-seekers. In 2018, Serco announced a new policy of evicting asylum seekers who they considered had no entitlement for asylum accommodation (locks were changed without a court process).
- 7.67 The Outer House found that Serco was a public authority as they were '*taking the place of central government in carrying out what in essence [was] a humanitarian function*'.⁴⁸⁶ The Inner House however disagreed, finding that any claim should be brought against the Home Secretary. The Court made a distinction between the Home Secretary, who was charged with the public law responsibility for providing accommodation for asylum seekers, and Serco who was '*merely subject to a private law contract with the Home Office to provide the necessary services. The fact that those services are ultimately intended to fulfil a public law responsibility is immaterial; they are still provided on a private law basis*'.⁴⁸⁷ The case set out there was no '*single test of universal application*' for a public function.⁴⁸⁸
- 7.68 The recent case of *Carr v G4S Care and Justice Services (UK) Ltd*⁴⁸⁹ also showed the lack of clarity in this area for provider and claimant. G4S sought strike out and summary judgment of a claim that that, as private contractor for HMP Birmingham, they owed a "general duty" under Article 2 ECHR to have adequate systems in place to prevent individuals consuming dangerous drugs (in this case, a synthetic cannabinoid, i.e. "spice"). The claim was brought by a mother of a prisoner who died after taking spice, during a period where healthcare services had been called to 311 drug incidents in six months.⁴⁹⁰

⁴⁸¹ [YL v Birmingham City Council](#) [2007] UKHL 27.

⁴⁸² *Ibid.*, para 116.

⁴⁸³ *Ibid.*, para 73.

⁴⁸⁴ Ministry of Justice, '[The Human Rights Act 1998: the Definition of "Public Authority". Government Response to the Joint Committee on Human Rights](#)', (October 2009), p.21.

⁴⁸⁵ [Ali v Serco](#) [2019] CSIH 54.

⁴⁸⁶ Euan Lynch, '[Serco's Evictions of Asylum Seekers in the Scottish Courts: A Question of Public Authorities in the Human Rights Act 1998](#)', (UK Human Rights Blog, 26 November 2019).

⁴⁸⁷ [Ali v Serco](#) [2019] CSIH 54, para 54.

⁴⁸⁸ *Ibid.*, para 13.

⁴⁸⁹ [2022] EWHC 3003 (KB).

⁴⁹⁰ Doughty Street Chambers, '[G4S owed a duty under Article 2 to prevent ingress of drugs into HMP Birmingham](#)', (November 2022).

- 7.69 G4S argued that the alleged breaches of the general duty to have adequate systems in place for the preservation of the life of prisoners was the responsibility of the Ministry of Justice rather than a private contractor. However, Mrs Justice Hill DBE refused to strike out the claim arguing that the claimant had an arguable case that G4S did owe a ‘general duty’ under Article 2 ECHR (the right to life) as a public authority.
- 7.70 Whilst it is unknown what happened in the outcome of this particular claim, G4S did recently settle a similar claim where a man died after taking spice at HMP Birmingham accepting that its failures in the running of HMP Birmingham amounted to a breach of the Article 2 systemic duty, potentially the first formal admission of its kind.⁴⁹¹
- 7.71 The Scottish Human Rights Commission have raised concerns about the ‘*longstanding and ongoing lack of clarity*’ regarding public functions under the HRA and the ‘*unintended accountability gaps*’.⁴⁹² The Commission set out that ‘*uncertainty over the application and scope of human rights legislation not only creates unintended and unequal outcomes for individuals; it also undermines the vision that human rights should be central to public service delivery*’.⁴⁹³ This was in the context of the Scottish UNCRC Bill and its proposed definition which mirrored section 6(3) HRA.

A case-by-case approach to reform

- 7.72 We consider that it may have been preferable at the time to provide a clearer definition of public authority in section 6(3) HRA, particularly in relation to contracted out services, rather than rely on an open-ended definition to be interpreted by the courts. However, the Working Party is conscious that the HRA has, in recent times, been subject to considerable political and legal uncertainty.⁴⁹⁴
- 7.73 The HRA is an important legal safeguard for people up and down this country. The Government’s own Independent Human Rights Act Review found, led by Sir Peter Gross, it has ‘*generally been working well*’.⁴⁹⁵ JUSTICE has been clear that it is a ‘*well-crafted, delicately balanced piece of legislation*’ which carefully balances individual rights and Parliamentary sovereignty.⁴⁹⁶
- 7.74 There is, and may always be, debate around our human rights legislation. As such, we consider that any suggested amendment to section 6(3) would only serve to create confusion which, as we set out above, is one of the barriers to complaint and redress. The Working Party does not think that amendments to the legislation, and associated discourse around the HRA’s general effectiveness, would serve the interests of those individuals with vulnerabilities who rely on its protections for individual rights.
- 7.75 However, we do believe there is a strong case for consideration on a case-by-case basis when issues arise with the interpretation of section 6(3) HRA. This is an approach which different Governments have supported over the years around social care providers and should be built upon.
- 7.76 Following the House of Lords case of *YL*, Parliament acted to address concerns. Section 145 of the Health and Social Care Act 2008 set out that, when care was provided under certain statutory provisions, private care homes should be viewed as public authorities for the purpose of section 6(3) HRA.⁴⁹⁷

⁴⁹¹ Deighton Pierce Glynn. ‘[G4S admits its failures in the running of a prison amounts to breach of the Article 2 systemic duty](#)’ (02 March 2023)

⁴⁹² Scottish Human Rights Commission, ‘[UN Convention on the Rights of the Child Bill, Equalities and Human Rights Committee Inquiry](#)’, (October 2020), p.7.

⁴⁹³ *Ibid.*, p.7.

⁴⁹⁴ In particular, the debate around the Bill of Rights Bill was concerning to many across the UK, risked de-stabilising the devolved settlement (including the Good Friday Agreement) and would have reduced human rights protections in the UK. JUSTICE, ‘[Bill of Rights Bill Second Reading Briefing](#)’ (September 2022).

⁴⁹⁵ Though suggested a modest package of proposed reforms to the legislation. Joshua Rozenberg, ‘[Raab’s reforms under attack](#)’, (A Lawyer Writes, 31 March 2022).

⁴⁹⁶ JUSTICE, ‘[Human Rights Act Reform: A Modern Bill of Rights: Consultation response](#)’, (March 2022), p.4.

⁴⁹⁷ It did not however cover all care service users or even all residential care service users – see UK Parliament, ‘[Care Bill 2013 Lords Committee Stage: Amendment of Lord Low of Dalston](#)’.

- 7.77 During the passage of the Care Act 2014, the then Government were initially reluctant to support a wider amendment. They set out that *'each time specific provision is made with respect to a particular type of body; we weaken the applicability of the existing provision and raise doubt about all those bodies that have not been specified explicitly in the legislation'*.⁴⁹⁸
- 7.78 The Joint Committee on Human Rights was clear that the argument that claims could be made against local authorities as the *'inadequacy of such indirect protection has long been a matter of consensus in debates and reports about this issue'*.⁴⁹⁹ They also noted that since *'the Government has made clear that it wishes all providers of publicly arranged care services to consider themselves bound by the Human Rights Act, including private providers under contract with local authorities, we presume that it too considers that a service user's remedies against the arranging authority are not sufficient'*.⁵⁰⁰
- 7.79 In the end, the then Government compromised and proposed their own amendment, Section 73 Care Act 2014, which sets out the *'circumstances in which the protections of the HRA apply to the provision of care and support which has been arranged or paid for by a public authority'*.⁵⁰¹ The Working Party is of the view that, in the same way that the then Government approached the issues of social care providers in the Care Act 2014, there is a strong argument for considering the scope of human rights obligations on private providers on a case-by-case basis.
- 7.80 There may already be legal certainty on the issue, in which case further reform would unnecessarily complicate matters. **However, where there are doubts amongst individual service users and providers in particular sectors about the human rights obligations of private providers, we recommend that the Government should consider legislating on a case-by-case basis to address the issue (as was done with section 73 Care Act 2014) (Recommendation 30).**
- 7.81 The Scottish Human Rights Commission also recommended addressing the issue in future legislation and addressing human rights in specific contractual terms.⁵⁰² As we set out in chapter 5 above, of those we sought to analyse, it was of concern that we could find only four prisons and one immigration detention centre contracts which made even limited reference to obligations under the HRA.⁵⁰³ We have recommended that specific contractual protections should be in place for human rights breaches, as well as wider breaches of individual rights.
- 7.82 As Meg Hillier MP told us, *'these are people providing a public service on behalf of the taxpayer and just because they are a private company, [they] should not be off the hook on human rights grounds at all'*.⁵⁰⁴ We agree.
- 7.83 The Working Party is clear that **there should be explicit contractual terms in central, local and devolved government contracts setting out the proposed liability under the HRA (using the Individual Rights Focused Model Contract Guidance set out above) (Recommendation 31).**

⁴⁹⁸ UK Parliament, ['Care Bill 2013 Lords Committee Stage: Amendment of Lord Low of Dalston'](#), p. 3.

⁴⁹⁹ Human Rights Joint Committee, ['Legislative Scrutiny: Care Bill'](#) (22 January 2014), para 75.

⁵⁰⁰ Human Rights Joint Committee, ['Legislative Scrutiny: Care Bill'](#) (22 January 2014), para 75.

⁵⁰¹ Joint Committee on Human Rights, ['Protecting Human Rights in Care Settings: Government's Response to the Committee's Fourt Report'](#) (14 December 2022), p15.

⁵⁰² Scottish Human Rights Commission, ['UN Convention on the Rights of the Child Bill, Equalities and Human Rights Committee Inquiry'](#), (October 2020).

⁵⁰³ We sought to analyse information on ContractsFinder of 14 prison contracts and 4 immigration detention centre contracts. Many contracts were wholly, or partly, redacted.

⁵⁰⁴ Evidence provided to JUSTICE.

VIII. CONCLUSION AND RECOMMENDATIONS

- 8.1 JUSTICE established this Working Party because of the need to address the legal issues which have come from the accelerating use of external providers in the delivery of core public services. Whilst we have previously addressed issues with specific services (e.g. benefit assessments), we considered it was imperative to look at the outsourcing of services which impact individual rights more generally.
- 8.2 The current approach far too often fails to take properly into account and protect individuals and their rights. This causes significant harm and distress to those affected, who are very often in vulnerable circumstances, as well as resulting in substantial costs of putting right the failures.
- 8.3 We are conscious that this report and its recommendations do not identify any remedial silver bullet. Given the diversity of issues which we have identified, that is inevitable. However, we consider that, if accepted, our overarching recommendation – that government outsourcing should be better focused on the rights of individuals – will result in a more balanced and responsible regime.
- 8.4 Far too often in the past, the focus has been on individuals only when a service has failed and serious rights breaches have occurred. In our firm view, it is in the public interest that focus on individual rights should be before, during and after a service is contracted out. The acknowledgment of, and respect for, the rights of individuals affected by a public service are of vital importance for their own sake, particularly where (as is so often the case) those individuals are experiencing vulnerabilities. However, we consider that a rights-based approach to outsourcing will have other substantial benefits, including that services will be of greater value, quality and will avoid the unintended costs of fixing services when they go wrong.
- 8.5 Furthermore, we do not regard individuals affected as bystanders to the contract between the provider and public authority. They and their representatives will often have experience and expertise in the services to be provided that will assist in the setting up and monitoring of outsourcing arrangements. Hence, our recommendation that they should be involved in the process. Their views should be sought out in early engagement before a service is tendered in the proposed Rights Impact Assessment, and during the performance of a contract as part of the audit process. If things do go wrong, they should be empowered to access relevant complaints processes, and we have made recommendations which seek to improve the mechanisms by which they (and their representatives) can hold the delivery of services accountable.
- 8.6 This report has also made reference to a number of independent bodies which have played an important role over the years in holding both the state and providers accountable. We have made recommendations to include such bodies pro-actively throughout the process, to learn from their expertise and ensure that issues can be identified at the earliest possible stage.
- 8.7 We accept that all this will require a change in culture and attitude. The Procurement Act 2023 is a welcome and potentially important step in this change. For example, its broader concept of “value” and promised increased transparency provides an important opportunity, but one which must be fully seized. This change will require some refocusing of expenditure to ensure that public authorities have the resources and capability to ensure that contracts are drafted and implemented with a focus on the rights of individuals.
- 8.8 However, we consider that is not only beneficial but required: a public authority’s legal obligations, under public law, human rights law and equalities law, continue to apply even when services have been outsourced. It is up to the relevant public authority to ensure that these rights are maintained. The proposed Public Procurement Note on Protecting Individual Rights and Individual Rights Focused Model Contract Guidance should greatly assist with this. In our view, the potential benefits will certainly make the required changes worthwhile over time. A re-focusing on the rights of individuals is in the interests of all responsible parties.
- 8.9 We have been anxious to ensure that our recommendations, designed to improve the contracting out of government services generally, are practical and evidence-based. In this, we have been assisted by the composition of the Working Party which has been a productive and collaborative project between those with procurement law and public law expertise as well as those with a commercial perspective and who represent individual service users. This collaboration has resulted in a set of recommendations which we hope are both based on principle and founded in the reality of public sector contracting.

8.10 We look forward to engaging on these recommendations with all who are interested in pursuing a rights-based and responsible approach to government contracting.

Recommendations

National Procurement Policy Statement

1. The UK Government's National Procurement Policy Statement, and the Welsh Government's Procurement Policy Statement, should emphasise the importance of the rights of individual service users (ideally through the principles of good administration set out above), including the need for compliance with public law principles and statutory equality and human rights obligations, and the importance of such rights when assessing the quality of the proposed service. **(para 1.26)**

The Preparatory Phase

2. Early engagement with service users and representative groups who act on their behalf, should be explicitly required by any regulations on preliminary market engagement, relevant Cabinet Office or devolved guidance and policies including the Sourcing Playbook and Procurement Policy Notes (including the new proposed PPN on Protecting Individual Rights). This should be done as part of the new proposed Rights Impact Assessment set out below. **(para 3.26)**
3. Relevant policies, guidance and/or regulations should stress the importance of (and, in appropriate cases, require) early engagement with independent oversight bodies such as ombudsman and inspectorates. This should also be done as part of the proposed Rights Impact Assessment. **(para 3.29)**
4. When a contracted out service is being actively considered by the public authority and before a formal procurement process, there should be an early Rights Impact Assessment which assesses the potential impact on the individual rights of service users. This should incorporate an Equality Impact Assessment, but also cover the potential impact on other fundamental rights such as those arising under the HRA and wider public law rights. This must include engagement with individual service users and relevant oversight bodies. This should be set out in the Sourcing Playbook and the Procurement Policy Note on Protecting Individual Rights. We recommend that local and devolved governments also adopt this policy. **(para 3.36)**
5. When a public authority intends to re-tender a service that has been previously contracted out, then the Rights Impact Assessment should consider evidence of how rights were actually affected during the delivery of the service. As well as speaking to individuals directly affected and independent oversight bodies, this should involve an analysis of complaints received, and particularly:
 - (a) relevant legal claims, including judicial review claims, coroner reports, public inquiries and data on relevant appeals; and
 - (b) independent reports; including those from statutory oversight bodies, national human rights institutions and ombudsman complaints. **(para 3.38)**
6. The Rights Impact Assessment should set out whether there is likely to be a low, medium or high-risk of impact on the rights of individual service users. Where there is a medium or high-risk, then the impact assessment should make clear what the issues are, any previous examples of good or bad practice in similar services, how the public authority intends to meet the state's legal obligation, including ensuring that any impact on an individual is necessary, reasonable and proportionate, and that any identified risks are appropriately mitigated. **(para 3.41)**
7. However, if the impact assessment identifies serious concerns about the public authority's ability to comply with its legal obligations if the service is contracted out, and the public authority is not confident that these concerns could be addressed by practical steps such as improved contractual provisions or oversight mechanism, then the proposed service should not be contracted out. **(para 3.43)**

Procurement

8. Guidance or regulations which define the Most Advantageous Tender, should place a much greater emphasis on a concept of value which focusses on the rights of the individual service users. In particular, it should emphasise the following:
 - (a) The importance of award criteria addressing how the provider intends to uphold the rights of individuals when assessing the value of a service;
 - (b) The risk and cost of legal challenges and inquiries if the service does not deliver to the required standards for individual rights;
 - (c) A focus on long-term value; which should include the potential wider cost to the public authority of the failure of the service, including the time and cost of the service having to be brought back 'in house'. **(para 4.26)**
9. The Cabinet Office, and devolved administrations, should produce a new Procurement Policy Note on 'Protecting Individual Rights'. This PPN should stress the following (for medium and high-risk contracts in particular):
 - (a) Set out clearly the importance of the state's legal obligations with respect to individual rights;
 - (b) Recommend that a separate team assess the quality of a bid, ideally blind to the cost. The quality assessment should explicitly include the ability of the provider to uphold individual rights;
 - (c) Make recommendations for how the rights of individuals can be incorporated throughout the procurement process, including in setting award criteria and during the assessment of bids;
 - (d) Require the resolution of any identified risks of breaches of individual rights within a specified timeframe; and
 - (e) Require the reporting and resolution of breaches of individual rights during the term of the contract. **(para 4.32)**
10. The proposed PPN⁵⁰⁵ on Protecting Individual Rights stresses the importance of both the public authority and provider ensuring that good quality training is provided on key rights issues. At the tender stage, if the provider is to deliver or be responsible for training, the public authority must require bidders to set out information about the means of training, who will deliver it, quality of proposed training materials, how such training will be updated during the contract and how it will be assessed as part of the award criteria. In addition, the public authority should make clear how it will oversee the quality of training to ensure that it meets the contractual requirements. **(para 4.49)**
11. The Sourcing Playbook, and other relevant policy (including those of devolved administrations), should be amended to clearly state that if, after a tender process, the public authority is not confident that any bidder can meet the basic legal standards for individual rights required, then the public authority should not award the contract to any bidder. The public authority should then consider either retaining the service 'in house' (i.e. not contract out the service) or addressing the issues which led to no compliant bids. **(para 4.53)**
12. There should be subsequent regulations and/or policy on the discretionary exclusion grounds for poor performance which makes clear this includes serious breaches of individual rights. In particular, contracting authorities should consider using discretionary exclusion grounds for poor performance in the following circumstances:
 - (a) There has been a finding by an independent court or inquiry of a systemic breach of individual rights or a serious breach in an individual's case;

⁵⁰⁵ Or Scottish Public Procurement Note in Scotland.

- (b) The repeated failure of a provider to implement recommendations of independent oversight bodies such as ombudsman; and
- (c) The repeated failure to follow relevant government guidance and policies on the rights of individuals when delivering the public service. **(para 4.68)**

Contracting

13. When contracting out a service where individual rights are likely to be affected, it is essential that the public authority has a specific written contract which sets out the key requirements of the service. It should not sign up to a provider's standard terms and conditions, unless fully satisfied that its key requirements have been met. **(para 5.16)**
14. The Cabinet Office should, following detailed consultation, publish "Individual Rights Focused" Model Contract Guidance and relevant model contract clauses. The model contract clauses and guidance should address:
 - (a) How to ensure that medical assessments (such as health and disability assessments or homelessness vulnerability assessments) are conducted in a lawful manner;
 - (b) How to ensure that the public authority is making its own decision and not fettering its discretion unlawfully to a third-party;
 - (c) How to ensure that individual rights are protected in the delivery of services, including the use of Key Performance Indicators;
 - (d) The importance of training and how the public authority can ensure that training is of a high-standard and regularly reviewed;
 - (e) Specific monitoring and oversight provisions, including how to improve data collection, ensure transparency and reduce the reliance on self-audits;
 - (f) Requirements to provide clear information about complaints procedures, the role of independent ombudsman and how individuals can seek legal advice to challenge decisions;
 - (g) How the public authority will hold the individual service provider accountable for individual rights breaches; and
 - (h) provide appropriate whistle-blower protection.

Consultation by the Cabinet Office should include independent oversight bodies such as the various Ombudsman, statutory inspectorates and expert groups like the Local Government Association. Specialist charities may also be worth considering. Devolved governments should consider adopting the above guidance or developing their own document. **(para 5.23)**

15. In the Playbook and relevant guidance (such as the Individual Rights Focused Model Contract Guidance set out above) it should state that there must always be clear, contractual penalties in contracts for breaching the rights of individual service users with appropriate and proportionate penalties for doing so. This is especially important in contracts for medium and high-risk services. **(para 5.27)**
16. Outsourced assessment contracts should include clear and specific protections for individuals when determining complex issues such as vulnerability or the impact of a long-term medical condition. The contract must contain:
 - (a) A requirement that a provider must speak to the individual they are assessing (unless they explicitly consent to a paper-based assessment or refuse to take part) and, where possible, give them a choice about the format (i.e. telephone, video or face-to-face);
 - (b) Clear and specific standards for the assessment itself and the final report, ideally through Key Performance Indicators. This should include the requirement to follow relevant legal criteria, ensure

reasonable adjustments are available, comply with government guidance and to allow the individual to submit evidence prior to the report which should be properly considered.

- (c) Provision for independent audits of the quality of assessments and assessment reports;
- (d) Clear standards on the relevant medical qualifications of assessors; and
- (e) Requirements for when a public authority should return an inadequate assessment, focused on the rights of the individual to have their evidence properly considered and evaluated. **(para 5.58)**

17. It is therefore important that, following a contracted out assessment of the medical evidence, the decision-maker makes their own decision, based on their assessment of all the evidence and their own reasoning. As JUSTICE recommended in relation to benefits assessments, decision-makers should address contradictions between reports and other evidence, and not merely repeat and adopt extracts or summaries of the assessment report. Incomplete or inadequate assessment reports should be returned to the provider. **(para 5.63)**

Contract Oversight

18. The importance of good data in respect of contract performance cannot be overestimated. Whilst we accept that self-auditing has an important part to play, we consider that self-audits are not objectively reliable and should be avoided as the only or the predominant oversight mechanism. The PPN (see above) on Protecting Individual Rights should emphasise that it is best practice that individuals affected by contracts (or representative bodies) and specialist independent oversight bodies (e.g. HM Chief Inspector of Prisons or ombudsman) should have regular input into how contracts are being delivered.

Independent audits of data are recommended and should be required for medium or high-risk contracts identified by the risk assessment. This should be addressed in the new Individual Rights Focused model contract guidance.

Oversight by the public authority should include analysis of relevant independent reports, legal decisions and complaints procedures for recurring issues that should be addressed. **(para 6.19)**

19. Central government should properly oversee the contracting powers it gives to local authorities.

For example, the Department of Housing, Communities & Local Government should carry out an independent review into outsourced homelessness assessments based on the information we have received. **(para 6.31)**.

Transparency and Accountability

20. We recommend that public authorities, including local authorities, should publish in a clear and accessible location the list of services which have been contracted out, the supplier and the legal authority for that procurement. **(para 7.11)**

21. The Working Party supports the Procurement Act's replacement of the Find a Tender Service and Contracts Finder websites with a single online platform. However, the Cabinet Office must robustly monitor this new platform to ensure that key contracts and documents are fully uploaded, that redactions are limited and proportionate and that the service is user friendly and accessible. The investigatory powers in the Procurement Act should be used to this effect. **(para 7.21)**

22. The Working Party welcomes the requirement in Section 52 Procurement Act requiring the publication of all key performance indicators for any contract worth over £5 million and, critically, for yearly reports to be published about whether those KPIs have been met. **(para 7.26)**

23. Cabinet Office guidance should make clear that for medium and high-risk contracts, irrespective of the value of the contract, public authorities should publish the KPIs and produce and publish yearly reports about how those KPIs have been met. **(para 7.28)**

24. The Working Party supports the full adoption of the Open Contracting Data Standard, across central, local and devolved government, with the need for clear targets to be set to achieve this. **(para 7.34)**
25. There should be a comprehensive review of all proactive disclosure provisions regarding contracting, and which affect the public sector. This would include a review of the publication scheme provisions in FOIA, and how they complement other procurement laws and government requirements. This should consider how such provisions are monitored and enforced, and what resources are available. **(para 7.40)**
26. Following consultation, the Government should consider amending section 3 of FOIA (held on behalf of provisions) to give a clearer legislative steer about when information regarding a public sector contract is held for the purposes of legislation and introduce a legal requirement to report regularly on the coverage of the legislation. **(para 7.40)**
27. The Government should use existing powers under section 5 FOIA to designate contractors as public authorities in respect of the public functions they undertake where this would be in the public interest (due to the scale, duration or public importance of the contracts). They should designate a greater number of organisations exercising functions of a public nature, and do so more frequently and efficiently. The public would then be able to make requests directly to these organisations and require them to proactively disclose information in line with a publication scheme. **(para 7.40)**
28. The Individual Rights Focused Contract Guidance should stress that independent bodies should be identified for each for outsourced service in the contract which can both investigate poor service provision (e.g. independent inspectorates) and make recommendations following complaints in individual cases (e.g. ombudsman) **(para 7.49)**
29. Providers and public authorities should be required under the contract to provide clear information about how individuals can make complaints, access independent oversight bodies and seek legal advice or advocacy support to challenge decisions made about their rights. **(para 7.59)**
30. Where there are doubts amongst individual service users and providers in particular sectors about the human rights obligations of private providers, we recommend that the Government should consider legislating on a case-by-case basis to address the issue (as was done with section 73 Care Act 2014). **(para 7.80)**
31. The Working Party is clear that there should be explicit contractual terms in central, local and devolved government contracts setting out the proposed liability under the HRA (using the Individual Rights Focused Model Contract Guidance set out above). **(para 7.83)**

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