

March 2021



CLINKS
RESPONSE

Response to the Cabinet Office Green Paper: Transforming public procurement

About Clinks

Clinks is the national infrastructure organisation supporting voluntary sector organisations working in the criminal justice system (CJS). Our aim is to ensure the sector and those with whom it works are informed and engaged in order to transform the lives of people in the CJS and their communities. We do this by providing specialist information and support, with a particular focus on smaller voluntary sector organisations, to inform them about changes in policy and commissioning, to help them build effective partnerships and provide innovative services that respond directly to the needs of their users.

We are a membership organisation with over 600 members, including the voluntary sector's largest providers as well as its smallest. Our wider national network reaches 4,000 voluntary sector contacts. Overall, through our weekly e-bulletin Light Lunch and our social media activity, we have a network of over 13,000 contacts. These include individuals and agencies with an interest in the CJS and the role of the voluntary sector in rehabilitation and resettlement. Clinks manages the National Criminal Justice Arts Alliance (NCJAA), a national network of over 800 artists, arts organisations and criminal justice practitioners using creative approaches to reduce reoffending.

About this response

We welcome the opportunity to respond to this inquiry. Our response focuses on the needs and experiences of the voluntary sector working in the criminal justice system and potential impact of the Green Paper's proposals on them. We have focused our response on a few questions that are the most relevant to our members as well as including key principles for procurement practices that we hope will act as a guide for the development of these proposals.

Our response is drawn from our regular and ongoing engagement with the voluntary sector, particularly the current commissioning process for the probation reform programme. As part of this we have held numerous market engagement events for the voluntary sector and worked with officials to understand and inform the commissioning processes under the new model.

We also held a roundtable with 10 senior leaders in the criminal justice voluntary sector with expertise in commissioning as well as a joint event with Children England, Locality, NAVCA, NCVO and Lloyds Bank Foundation for England & Wales to engage the wider voluntary sector which was attended by over 60 organisations. We have signed up to and fully endorse the consultation response submitted by NCVO.



Introduction

We welcome the intentions of the Green Paper's proposals to simplify current procurement processes and for there to be greater transparency and accountability in procurement practices. However, we believe more needs to be done to level the playing field and ensure procurement practices are proportionate and functional to ensure the criminal justice voluntary sector is able to engage as equal partners in these processes.

We are also concerned about the decision that the procurement changes in the Green Paper will not apply to health commissioning, as this may cause challenges for services that are co-commissioned with health and other partners such as local authorities or justice.

Voluntary organisations are often small, community based and driven by the needs of the people they work to support. They operate differently to other sectors and as our research shows, many rely on grant funding to ensure they can continue to be flexible and responsive to need. We have outlined key principles for ensuring future commissioning that is appropriate and accessible for criminal justice voluntary organisations. As follows:

Proportionality

The Green Paper proposes three main approaches to procurement that should be applicable in any circumstance. However, the approach is heavily weighted towards national procurement exercises with commercial sector providers. We are concerned about the lack of attention to proportionality in the Green Paper and therefore about how these processes will be applied in practice for the voluntary sector. Much of the voluntary sector is made up of small organisations that deliver services on a small scale to local communities. The 'one-size-fits-all' approach is likely to be disproportional to many of those organisations and the size of service they can deliver.

Grants

In recent years we have seen an increasing shift from grants towards competitively tendered contracts to deliver services. This creates significant barriers for small voluntary sector organisations who rely on grants and lack the resource to compete for, manage, and deliver contracts at scale. Reforming procurement should be an opportunity to reaffirm, prioritise and embed the commitments to 'Grants 2.0' set out in the civil society strategy¹ that have yet to be reflected in criminal justice commissioning practice.

Complexity

Government procurement is characterised by complex and confusing commissioning processes and procurement platforms that the voluntary sector has found challenging to engage with. It is important to identify procurement processes that fit with the necessary Cabinet Office requirements but are also not so complex that the processes present a barrier to providers from the voluntary sector.

Flexibility and transparency

There is an emphasis on flexibility and transparency in the Green Paper which is welcome. However, a risk-averse culture has led to commissioners following narrowly interpreted rules and has created a lack of confidence in using the current flexibilities. This culture needs to be addressed and commissioners encouraged and supported to be flexible and innovative in procurement. This is especially vital if we want to see innovative and proportional responses at the local level and encourage greater use of grants as well as collaborative local commissioning opportunities such as co-commissioning.

Relationships and collaboration

Past commissioning arrangements have eroded partnerships with the voluntary sector through intensive contract monitoring, narrow targets and perceived gatekeeping. The focus of the Green Paper is predominately on the contract award process which overlooks the importance of relationships and is a missed opportunity to create an environment of openness, engagement and collaboration between contracting authorities and providers which is vital for effective public services.

The role of the voluntary sector and social value

We are concerned that the Green Paper proposals create a 'one-size-fits-all' approach that does not sufficiently recognise this difference in purchasing 'products' and procuring services for people. We echo concerns raised by the Public Services Committee that because of treating these as the same, the new approach outlined in the Green Paper is largely relevant to reforming private sector procurement, commercialises 'social value', and in doing so risks neglecting the needs of charities and social enterprises providing services.²

Public services are not products to be bought and sold as short-term commercial transactions. Treating them as such creates obstacles both to sustainability and performance. In fields like criminal justice, this creates even greater difficulty to deliver services effectively where progress is incremental and long-term. Procurement decisions, including the appropriate funding mechanism, contract size and length, should always be based on prioritisation of social value over value for money.

In recent years, this has not been the case and as a result contracts for organisations working in criminal justice have been typically underfunded. This has seen voluntary sector organisations in criminal justice having to increasingly subsidise contracts using their reserves or other sources of funding. Relying on subsidy provided by voluntary sector organisations to deliver any public service must be avoided as it creates an unsustainable position, not just for the voluntary sector provider but also for beneficiaries and ultimately the taxpayer. It should be embedded as a fundamental standard for public commissioners to ensure full cost recovery as it is for the voluntary sector.

Therefore, in fields where services are being procured to meet the needs of vulnerable people, an alternative needs-led model could allocate funds based on identified need and quality of service rather than price per head. This would require greater collaboration and engagement pre-procurement with experts and potential providers to develop an understanding of need and commission services appropriately.

To achieve this, we feel the Green Paper should establish commitments for fostering a procurement culture and contracting cycle that embeds opportunities for collaboration, learning and service development rather than transactional contract management.

It would also require the government to review the Green Paper's approach to service user involvement and co-design. Service users are best placed to support with shaping the services they rely on but as the Public Services Committee recently highlighted, the approach adopted by the Green Paper precludes the involvement of service users in the design of services.³ We share concerns that opportunities for meaningful engagement of the people who use the voluntary sector services in co-designing services will be lost in an existing procurement culture and transactional approach to contracting.

We therefore recommend that is addressed and reiterate a recommendation we made in our *More than a provider* report in 2014 that service users are involved throughout the commissioning cycle, and commissioning and procurement teams are provided the opportunity to meet directly with service users.

Do you agree that suppliers should be excluded where the person / entity convicted is a beneficial owner, by amending regulation 57(2)?

Voluntary sector organisations are not constituted in the same way as private sector organisations and therefore it is not clear what is meant by having a 'beneficial owner' in this context. Voluntary organisations will be led and run by a Chief Executive Officer (or equivalent) and are overseen by a Board of Trustees who have overall responsibility for the organisation. The proposals in the Green Paper have not been developed with the voluntary sector in mind and we ask for clarity about what a 'beneficial owner' is in the context of these organisations.

To ensure the intentions of the Rehabilitation of Offenders Act 1974 are not contravened, it is important that after someone's conviction has been spent, they do not continue to be penalised under these proposals.

It is important to note that many charitable organisations, including those delivering services to people in contact with the criminal justice system are led by people who are experts by experience and have convictions themselves. If someone wants to be a Trustee or Senior Manager for an organisation and has particular convictions, including one that relates to 'dishonesty or deception', that would exclude them from doing so under the Charities (Protection and Social Investment) Act 2016, they can apply to the Charity Commission for a waiver. If a waiver has been granted it is unclear as to whether the proposals in the Green Paper would be applied. We therefore ask the Cabinet Office to clarify this and ensure that people who have obtained a waiver are still able to act as a Trustee under the proposals set out in the Green Paper.

Dynamic Purchasing System (DPS+) and single registration process

Do you agree with the proposed changes to the procurement procedures?

Simplifying procurement processes is welcome. However, we are concerned about the proportionality of restricting procurement to three set processes with the expectation they can be applied in all circumstances and using a single registration process. As we have outlined, a 'one-size fits all' approach often disadvantages voluntary sector organisations, particularly smaller organisations.

The Green Paper does not sufficiently address issues of proportionality and by not doing so it runs the risks of the same approach being deployed to purchase national contracts, for example for facilities management as for a local organisation seeking to provide family support services. This could further disincentivise voluntary sector involvement with burdensome processes. Whilst intentions for a simpler and more flexible approach are welcome, experience from the voluntary sector highlights how the culture in procurement teams leads to process taking precedence over intent.



Do you agree that a central digital platform should be established for commercial data, including supplier registration information?

The Green Paper proposes establishing a single digital platform for supplier registration to ensure suppliers only have to submit their data once to qualify for any public sector procurement. Whilst the intention to simplify and reduce the resource that has to go into registering multiple times for different bids is welcome in principle, there is as huge diversity of organisations that may need to register on this platform and a vast range of services or products they may be looking to provide.

Steps need to be taken to ensure this digital platform works for small organisations and that they are not required to submit a level of information disproportionate to their organisation's size and the service they could potentially deliver.

The voluntary sector has experienced significant challenges registering for the prison education Dynamic Purchasing System (DPS), Probation Dynamic Framework and accessing the Ministry of Justice's e-sourcing portal. As follows:

Poor communication not tailored to the voluntary sector

We have found the requirements, guidance and provision has not been designed with the voluntary sector in mind and therefore is often not appropriate for voluntary organisations. This is exacerbated by poor communication, a lack of timely information and inconsistent information flow. In relation to the Probation Dynamic Framework, this has led to situations where organisations have been informed they were unsuccessful in qualifying only to discover this was untrue when the list of qualified organisations was published.

Commercial commissioning

The process and the Ministry of Justice's e-sourcing portal itself is extremely difficult to navigate. It is designed with commercial commissioning in mind and uses commercial language and terms that are not familiar to the voluntary sector. The use of such commissioning processes and portals has become a cross governmental feature that has significant implications for smaller voluntary organisations less equipped to engage in such processes. Even large providers, with significant existing footprints and experienced business development teams, have reported that the system is too complex.

Disproportionate and onerous requirements

There are a number of requirements that are particularly onerous and disproportionate for small organisations. For example, the use of credit reports designed for commercial organisations to demonstrate financial health is not necessarily appropriate for voluntary sector organisations. Such reports are an additional cost for small organisations who have no choice but to incur that cost at bidding stage and we have received several examples of organisations failing these checks.

It is essential that lessons are learnt from the voluntary sector's experiences and the Cabinet Office should engage with voluntary sector organisations further to understand the features of these systems that create challenges for them engaging with it. Any future central digital platform needs to be easily accessible, breakdown complex commissioning jargon and be proportionate.

| *Do you agree with the proposed new DPS+?*

There have been two sets of DPS introduced in recent years that voluntary organisations seeking to deliver services in prisons and the community needed to register on. These are:

Prison education DPS

In April 2019, the prison education DPS was introduced for prisons to directly commission education and learning provision for their institutions.

Probation Dynamic Framework

The Dynamic Framework is the commissioning mechanism that is currently being implemented to procure rehabilitation and resettlement services for the new probation system due to go live in June 2021. Qualification for the Dynamic Framework opened in 2020 and the competitions to deliver services for day one of the new probation system have taken place.

For both, the process for qualifying to register on the systems and then engage in competitions has been challenging and caused significant confusion amongst the voluntary sector, requiring a great amount of resource for organisations to navigate the systems.

Since the launch of the **prison education DPS**, the voluntary sector has highlighted several challenges and barriers to engaging with it:

Unpredictability and challenging communication

Voluntary sector organisations often had strong relationships built with prison governors that enabled two-way dialogue about available budget, intentions to commission activity and where the needs for services were. Since the arrival of the DPS, it has been unclear what engagement the sector can have with governors outside of the DPS process. This has created barriers to partnership working and prisons drawing on the voluntary sector's expertise. As a consequence, there is little visibility of the potential pipeline of contracts that will become available, making it challenging for voluntary sector organisations to plan.

Contract lengths

The length of contracts available through the DPS was initially for a maximum of one year with the intention to drive innovation. This required organisations to spend a significant amount of time bidding for short-term speculative contracts. In response to this feedback, the minimum contract length was extended to two years from 1st February 2020. However, this is still a relatively short period of time given the complexity of the bidding process and lengthy mobilisation periods. **Whilst we recognise that flexibility needs to be embedded into the system, we recommend the contract length on any DPS should be at minimum of three years.**

The way the **Dynamic Framework for the probation system** has been designed and implemented and the structure of the competitions has also not supported voluntary sector involvement. Challenges include:

Multiple competitions run simultaneously

The structure of the call-offs has been daunting, with multiple competitions running simultaneously, stretching the resources of those wishing to bid for multiple contracts. Guidance should ensure government departments launching commissioning processes allow an absolute minimum of four weeks for organisations to respond to any competition, and longer where competitions are complex and require partnership or consortia formation.

Preventing collaboration and sub-contracting opportunities

Larger voluntary sector providers have reported that the onerous nature of the Dynamic Framework has meant small organisations are not in a position to collaborate and explore sub-contracting opportunities as material sub-contractors. This weakens the bids of large providers and creates further barriers for small and specialist organisations to deliver services under the model. Others have fed back that small organisations are so daunted by the process they have taken the decision to only play a small part in supply chains so they don't need to register independently.

The sector's negative experience of DPS has made them wary of and in some cases reluctant to engage with current and future DPS. Indeed, one of our members told us: "I hear the phrase DPS and turn off – the effort is never worth the reward".

This gives us serious cause for concern about the proposals outlined in the Green Paper for the future development of further DPS. **It is essential that before the wider roll out of DPS and implementation of a single digital platform, these issues need to be addressed to ensure an equal playing field for the voluntary sector and that smaller providers are not alienated.**

In future commissioning, there needs to be sufficient flexibility to enable government departments to work with the Cabinet Office to identify procurement processes that fit with its requirements but are also not so complex that the processes present a barrier to the voluntary sector. To support this, there should be consultation with organisations that have the expertise to bid to deliver the service needed and who could represent potential bidders.

The importance of grants

Are there areas where our proposed reforms could go further to foster more effective innovation in procurement?

Both the prison education DPS and the Probation Dynamic Framework have prioritised contract over grant funding. Indeed, all the funding available through the prison education DPS was in the form of contracts yet for the probation Dynamic Framework, commissioners should be able to commission services using both grants and contracts. However in reality, throughout the design of the model the focus of the Ministry of Justice and Her Majesty's Prison and Probation Service has been on contracting. There appears to be continued confusion amongst commissioners about what constitutes a grant and where the use of grant funding is more appropriate. We continue to have concerns that the model gives preference to contracts over grants.

As our state of the sector research demonstrates, this trend is consistent with government procurement processes over the last few years, with an increasing shift from grants towards competitively tendered contracts to deliver services. However, bidding for and managing contracts is complex and resource-intensive and disadvantages small voluntary sector organisations who rely on grant funding to enable them to deliver their services.

We are concerned that the expectation that all services will be contracted through a DPS further stifles the flexibility to use other forms of funding to pilot innovation, creative use of grants or even to simply use authority funding to contribute to larger co-commissioned service developments. Indeed, there is no mention of grant funding at all in the Green Paper. We are particularly concerned that delivering grants through a system designed for contracts can lead to unnecessary bureaucracy and complexity and ultimately will lead to grants being underused or used badly. If grant making is to be undertaken through a DPS, it is vital

that the qualification agreement and any clauses and terms and conditions within grant agreements are light touch enough to ensure that they do not in fact form a contract.

Commissioning of the voluntary sector should be underpinned by the following principles:

- **Grants should be the default funding option for voluntary sector organisations to ensure a more diverse range of education and learning services and the involvement of small, specialist organisations**
- **Grants should be for three years to provide sustainable funding for the sector**
- **Guidance should be developed on what circumstances a commissioner would choose a contract over a grant to support decision-making.**

If contracts are awarded to voluntary sector organisations it is important that their terms are flexible enough to enable variation within contract life to enable organisations to better respond to changing needs of their services users. This was largely achieved and welcomed during 2020 responses to the Covid-19 pandemic, yet we are concerned that the proposals within the Green Paper will prevent this practice from taking place.

Further to this, it is important that co-production of services with voluntary sector organisations and people with lived experience of the criminal justice system is embedded meaningfully into every stage of the commissioning process.

Market stewardship and capacity

Do you agree that the award of a contract should be based on the “most advantageous tender” rather than “most economically advantageous tender”?

What further measures relating to pre-procurement processes should the government consider to enable public procurement to be used as a tool to drive innovation in the UK?

In principle we support the awarding of contracts to be based on the ‘most advantageous tender’ rather than the ‘most economically advantageous tender’ especially as this will enable social value to be taken into account when procuring services. To ensure this aspiration is translated into practice, we recommend this is explicitly outlined in the Green Paper with detail about how this will be scored within procurement processes.

Further, there is no information outlined in the Green Paper about the financial assessment of providers or how this will be applied in a way that considers the unique nature of voluntary sector providers. This further embeds our concern that specialist voluntary sector organisations could be prevented from engaging with procurement processes. This needs to be redressed to ensure proportionality and fairness in future procurement processes.

If procurement processes are to drive innovative practice they need to be designed and implemented flexibly to enable all providers, including voluntary sector organisations, to engage in these processes. As we have outlined, small and specialist organisations deliver essential services to people in contact with the criminal justice system but often do not have the resource to engage in complex commissioning processes. It is important that the expertise of these organisations is not lost if they are not immediately able to engage in commissioning



March 2021

processes. There is an opportunity to embed capacity building support for these organisations in the pre-procurement process, to ensure there is a diverse market from which to procure services.

Clinks was pleased to have secured funding from the Ministry of Justice and Her Majesty's Prison and Probation Service to offer consultancy support to organisations led by and specifically for racially minoritised people working or interested in working with people in contact with the criminal justice system and their families. Eligible organisations were able to access up to five days of consultation support tailored to their needs. One aim of the funding was to help organisations identify and overcome any potential barriers to engaging with the new probation arrangements, although the intention was for support to extend beyond this to more generally build the capacity of specialist organisations led by and focused on supporting the needs of racially minoritised people in the criminal justice system.

We recommend that future procurement processes enable and embed capacity building support tailored to small, specialist voluntary sector organisations, particularly those working to support racially minoritised people.

Transparency

Do you agree there should be a new unit to oversee public procurement with new powers to review and if necessary, intervene to improve the commercial capability of contracting authorities?

Where do you think members of the proposed panel be drawn from and what sanctions do you think they should have access to and ensure the panel is effective?

Do you agree that transparency should be embedded throughout the commercial lifecycle from planning, through procurement, contract award, performance and completion?

We see some positives in the Green Paper proposals for a new unit to oversee public procurement and lend support to the whole commissioning cycle being a transparent process. However, it is important that this doesn't lead to over centralisation and prevent the flexibility and proportionality needed for the voluntary sector to engage with procurement processes. We hope this, alongside the development of a simpler set of guidelines and clearer standards will help drive up standards. The panel needs to have diverse membership and we recommend voluntary sector representatives are able to sit as members of the panel. It is also important that the panel is able to engage with and be informed by people with lived experience who will be the recipients of the services.

It is regrettable that the Green Paper proposals and powers do not apply to health. This leaves the door open for ongoing confusion around procurement processes particularly where many contracts have historically been co-commissioned. Further, the intended approach outlined in the Green Paper is at odds with NHS commissioning intentions that are weighted to encourage collaboration rather than competition.

This could create an acute problem where services are being co-commissioned at a local level and further complicated about how and when service users can be involved in co-design of services.



Clinks supports, represents and advocates for the voluntary sector in criminal justice, enabling it to provide the best possible opportunities for individuals and their families.

Published by Clinks
© 2021
All rights reserved

Clinks is a registered charity no. 1074546 and a company limited by guarantee, registered in England and Wales no. 3562176.

Block C, 5th Floor
Tavistock House
Tavistock Square
London WC1H 9JJ
020 7383 0966
info@clinks.org
@Clinks_Tweets
www.clinks.org

Are there specific issues you have faced when interacting with contracting authorities that have not been raised here and which inhibit the potential for innovative solutions or ideas?

There are some additional issues we wish to outline that could inhibit the potential for innovative solutions or ideas. One of these is a failure to appropriately distinguish between and accommodate the different legal status of the bidding organisation. Most contracting authority exercises assume the bidding entity is a private sector organisation or one working to generate profit with a complex ownership structure. One example is financial assessments which assume a profit margin (but which exclude it from management overhead), or which require a Parent Company. All of these assumptions work against and do not recognise the nature of voluntary sector organisations.

There are many assumptions built into many contracting exercises that explicitly favour the large commercial organisations, some examples include assumptions around retained profits, parent company guarantees, multi-lot discounts and best and final offer stages. Again, these do not reflect the unique nature of voluntary organisations and indicate that commissioning processes are often developed without the necessary flexibility and proportionality needed for the voluntary sector to engage with them.

Conclusion

We welcome many of the proposals made in the Green Paper, particularly those relating to creating increased transparency throughout the commissioning cycle. However, the proposed approach does not make due consideration of the needs of the voluntary sector that provides essential services to people in contact with the criminal justice system. We are concerned that unless there are moves to make the proposed processes more flexible and proportionate, including through using grant funding, many voluntary sector organisations will be ruled out from engaging in future public sector procurement processes.

End notes

1. Department for Digital, Culture, Media and Sport and the Office for Civil Society (2018). *Civil Society Strategy: building a future that works for everyone*. Available at: <https://www.gov.uk/government/publications/civil-society-strategy-building-a-future-that-works-for-everyone> [accessed 24 June 2020].
2. Public Services Committee (2021). Letter to Rt Hon Michael Gove MP, Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office: *Procurement and public services*. Available at: <https://committees.parliament.uk/publications/4692/documents/47132/default/> [accessed 23 February 2021].
3. Public Services Committee (2021). Letter to Rt Hon Michael Gove MP, Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office: *Procurement and public services*. Available at: <https://committees.parliament.uk/publications/4692/documents/47132/default/> [accessed 23 February 2021].