



A PUBLIC LAW PROJECT TOOLKIT

Commissioning: Understanding and using the law for smaller organisations

Joe Vester





About this toolkit

This toolkit is intended to help small organisations:

- Understand commissioning law better; and
- Give some ideas about how to avoid common commissioning problems

Before you start, there is an [introduction to this guide's approach](#), and some definitions.

Part One is a list of some of the problems that small organisations often encounter when tendering for work. It can point you to some of the different potential routes to avoiding those problems in the commissioning process.

It's worth noting that a lot of the suggestions in Part One are to avoid problems, not rectify them, and this is a theme of the guide. Getting good outcomes from tendering is often about being ahead of the game. So read it now, before you have a problem!

Part Two sets out some of the procedures and the main rules attached to them, plus their advantages and disadvantages.

Part Three deals with issues around challenging procurement decisions, if a process is unfair.

Part Four gives an overview of commissioning law and the legal duties and regulations that apply to different aspects of the process.



What is commissioning and procurement?

Commissioning and procurement is how government and public bodies (whether they be the NHS, a local council or a government department) make contracts with others to provide services. This could be a one-off contract to build a new road, or to provide long-term healthcare for a town, and anything in between. Commissioning has become more and more important in recent years as government bodies get others to provide services and do work on their behalf.

Commissioning law

Because large amounts of public money are spent through commissioning, and as part of efforts by the European Union to develop the common market, most of the law on commissioning comes from EU law (and Brexit won't change that immediately). A key aim of EU law is to ensure opportunities to perform government contracts are open to many different organisations and that the process is fair to everyone seeking a government contract. If you want to know more about the principles involved in commissioning law, look at [Part Four](#).

The importance of being aware of the law

This toolkit is intended to help organisations understand the law around commissioning. Being aware of the law is important because:

1. If something unfair happens during a tendering process, you usually need to act right away, so it's best to know what kind of unfairness you can take action about challenge. Waiting until the end of the process, seeing if you get the contract and then arguing about unfairness earlier on, will not work.
2. As well as meeting criteria, getting contracts depends on relationships, and you want those relationships to continue. Knowing the law in advance means you can head off problems as they arise, instead of facing the prospect of an expensive and difficult challenge to a decision-maker you want to work with in the future.

3. It enables you to present arguments to the commissioner about how they should conduct the process, and to know what options the commissioner has available. This should help avoid situations where you rely on information from the commissioner, but they later change their mind because what they originally said isn't legally possible for them.

Definitions used in this guide

Commissioning is the whole process of obtaining the service or product. It includes working out what an organisation wants to buy and how they are going to get it. Afterwards, it includes taking bids and making the contract.

The period of the commissioning process before formal procurement is **pre-procurement**. This can include consultations and formal or informal discussions.

Procurement starts once a commissioner announces a tender, or otherwise begins the formal process of selecting who will provide the contract, generally using one of the procedures set out in part two.

Many procurement processes start with a commissioner publishing an **invitation to tender**. This is a document or set of documents which describe what the commissioner wants from the service, and how decisions will be made on who provides the service

A **tender** (or a **bid**) is submitted by a provider who wants to provide the service, and sets out how they will meet the commissioner's specifications.



Part One: Common problems (and how to solve them)

Commissioning processes can raise a variety of challenges for smaller organisations. This section is designed to give some examples of how the law may assist in preventing a problem, how it may help you get what you want, and can help you challenge a decision.

Sized out of contracts

Smaller organisations may be viewed as too small to deliver a contract, even when they have delivered a predecessor service. This can include high financial specifications on turnover which don't reflect the needs of the actual service which will be provided. There may also be other barriers which mean that the contract is more likely to be awarded to a large provider.

Not all government contracts need to be commissioned through full-scale tender-and-bidding exercises. Most contracts under £181,000 do not need to go through formal processes, and that limit rises to £615,278 in most fields connected with health and social welfare. Over that limit, commissioners are subject to 'light-touch' regulation, so they have a lot more flexibility about the process (though it must still be fair) – [see more on the light touch regime](#).

If you are an organisation owned or managed by its employees (for instance, an employee-owned mutual enterprise) with a 'social purpose,' you might be able to have a reserved contract, where you would only be competing against other organisations with a social purpose – [see reserved contracts](#).

Contracts which have very large minimum turnover requirements may be falling foul of EU law on equal treatment of different enterprises for bidding – [see more on the legal framework](#).

Many contracts are split up into smaller 'lots,' which generally makes it more accessible for smaller organisations to apply. Commissioners may limit the number of lots which will be awarded to one bidder. Commissioners who do not divide into lots must justify why they haven't done so.

The role of larger organisations in a commissioning process can be very disruptive and hard to manage. They can have lower overheads, and undercut local or small providers to such an extent that it is effectively impossible for smaller organisations to bid successfully. Being aware of the different commissioning frameworks and informed early engagement can help smaller organisations engage on a more level playing field. It is vital in this case to engage with the commissioner before the formal procurement starts.

In addition, if any provider submits an 'abnormally' low bid, then the commissioner is obliged to investigate that bid. If you have suspicions about the level of the bid, you could check whether this has been done.

Commissioners don't understand the issues

Providers often feel that commissioners don't understand the service users and situations they are commissioning for. Commissioners must avoid conflicts of interest, and one-on-one engagement during or just before a procurement process may raise concerns that they will favour one party. That could mean that the whole process is seen as unfair. You might want to think about how you can engage with your commissioner outside of such processes and without creating even the appearance of conflict of interest.

If you can persuade a commissioner to engage in a negotiation-based procurement procedure, then it may give more opportunities to engage and explain your model and how it fits with the needs of users – see more about procedures with negotiation.

Innovation Partnerships are a recent development, which allow for an innovative service or product be developed. They are subject to different requirements in terms of competition from others. If you have an innovative concept for your service which isn't available elsewhere on the market, you could approach an authority to work in partnership with you – see more on innovation partnerships.

Sometimes even a commissioner who has engaged and consulted will come up with a way of delivering a service which cannot give your users what they need. Services that don't meet the needs of groups with a protected characteristic may be unlawful under equality law.

Contracts procured on the basis of 'payment by results' can lead to huge problems for voluntary sector organisations who cannot manage the cash flow issues created. Depending on the circumstances, such systems may distort competition in favour of larger organisations with bigger reserves, and therefore be a violation of commissioners' duty not to discriminate between different competitors.

Short timescales

Short timescales to tender, especially if additional information is required or if there is anything unclear in procurement documents, can place a huge burden on small organisations with few staff members, all of whom have other responsibilities.

All timescales set for procurement need to be reasonable and proportionate. While there are some minimum limits set by law for many processes, a very tight timescale to develop a bid for a complex service (especially if collaborations or a consortium would be involved) may be unlawful if it is disproportionate. In this context, disproportionate means that it is more stringent than needed to achieve the commissioner's aims (generally, to get a contract in place to provide the service by a particular date) - see more on the general principle of proportionality.

Changing specifications

During pre-procurement engagement, a commissioner can sometimes indicate that they will prioritise certain criteria, but when the formal invitation to tender is published, the actual criteria may be different. This can be after a provider has put in a lot of work based on what they were initially told. Knowing the law, or taking some early legal advice, can help you anticipate these sorts of changes and know what you can or can't rely on.

In some procedures (such as under the 'light touch' regime) there is scope for commissioners to change the contract after the formal procurement process has started. But in most procedures, this is likely to require starting the process again. If a commissioner changes what they are looking for, or how the contract is awarded, this may be a breach of the law which you can

challenge if it unfairly affects you.

After contracts have been awarded, there is limited scope for changes to be made. There are limited detailed exceptions to this which are outside the scope of this guide. If a commissioner wants to change a contract, they will need to jump through one of these hoops, or begin a new competition to provide the contract. If a provider makes unauthorised changes to a contract, there may be a legal remedy against the commissioner.



Part Two: Procurement processes and what they mean for you

This part of the guide gives an overview of some of the different rules and processes for procurement. It isn't intended to be comprehensive but to help you understand what a commissioner could do, or explain why they are adopting a certain approach.

Ultimately, decisions about how a procurement process will run are made by commissioners, not providers. Once a decision is taken, it is often difficult to change it (but for when you can, see [Part Three](#) on challenges), so the best way to get what you want is act early. Engage with pre-procurement, put forward ideas about how a commissioner might procure the service, and be on the front foot.

Market engagement

The period before a formal procurement process is vital to good commissioning. By the time an invitation to tender is published, most of the work has already been done. During pre-procurement, the commissioner will be developing its criteria, the design of the contract and considering its priorities. It is, therefore, the time when providers have an opportunity to shape the process to increase their chances of success:

- You could influence a commissioner on the design of the service and the contract, and the procurement procedure they will use;
- You could have a frank discussion about what the commissioner wants and why they are making their choices;
- You can start planning, for instance to develop consortia arrangements.

Most importantly, once a procurement process has started there are inevitable restrictions on additional contact between the commissioners and the bidders, which is essential to give bidders a level playing field. So pre-procurement is often the only time that providers get a chance to talk openly with commissioners, and when they learn most about what the commissioners really want.

It's important to understand, though, that pre-procurement engagement is also affected by the law. There are two points to mention in particular:

- First, unfair collaboration between a provider and a commissioner before procurement formally starts may mean the whole process is unfair, and that a losing bidder could challenge the result.
- Second, whatever is said before procurement starts cannot be relied on – the contract will be awarded only on the basis of the formal procurement process. So if a commissioner says during pre-procurement they are really keen on awarding to local organisations, but that's not mentioned in the invitation to tender, the commissioner cannot and will not give you extra points for being local.

Ways to engage with commissioners

The following are just some suggestions about ways you might be able to engage with commissioners who are relevant to your services. There are many others which may be appropriate to you:

- Writing an annual letter to the head of commissioning in a relevant department or authority, setting out your current services, strategy and capabilities;
- Holding open days to which you invite commissioners;
- Setting up demonstration projects which can show commissioners what you can do.

'Traditional' approaches

The Open Procedure

This is commissioning as most organisations know it. Tenders are put out for contracts, often after limited engagement with possible bidders. The tender is published in its final form and does not change. Any interested service provider can bid; all bids once submitted are final; and a decision is made without further engagement.

The Restricted Procedure

In a modification to the open procedure, service providers initially submit only limited information to the commissioning body, for instance to show that they meet certain minimum requirements to deliver the services. On the basis of that information, a number of providers are invited to submit a full tender, and the winning bidder is scored and selected from that limited group.

While traditional approaches are often sensible ways of procuring (and may be the quickest and cheapest way of getting a service commissioned) they can sometimes have disadvantages for smaller organisations:

- Open procedures can have very significant up-front costs, where providers do a lot of work (often adjusting their procedures or policies to suit a tender) before even knowing if they are in the running.
- Restricted procedures may have high minimum standards before an organisation is invited to tender, which could knock smaller ones out of the competition unless they are appropriately considered.

The ‘light touch’ regime

Since 2015, many contracts for social, educational, health and cultural services are governed by a ‘light touch’ regime (see [the Annex](#) for a full list). This is to give commissioners greater flexibility in how they procure services in these areas.

First, it allows higher-value contracts in these areas to be awarded without going through formal commissioning processes. For most contracts, advertising through the OJEU is required if the contract is worth more than £118,133 (for central government) or £181,302 (for local government and other public bodies). If a contract is one of the ‘light-touch’ categories, then it only needs to be advertised in the OJEU if it is worth more than £615,278.

Second, if it is worth more than £615,278, the requirements on the commissioner are much lighter and there is more scope for flexibility in the process:

1. The only formal requirement is publication in the OJEU;
2. The commissioner must abide by the principles of transparency and equal treatment of tenderers;
3. Time limits, procedures and documentation can be decided by the commissioner (as long as they are 'reasonable and proportionate');
4. Once a commissioner has announced the time limits, the conditions for participating in the process, and the procedure for awarding the contract, it must usually stick to these;
5. But it can change the procurement arrangements, as long as it does so without breaching principles of transparency and equal treatment, and as long as it informs everyone involved in the tender and keeps suitable records.

Grants

In some circumstances, grants remain an appropriate and legal means of procuring services. Grants may remain a competitive process, but may be subject to more limitations on who can bid (for instance, only local organisations). This could be beneficial for smaller organisations, but it is only likely to be relevant when dealing with smaller quantities of money.

Reservation for public service organisations

Authorities can also reserve certain contracts to particular types of 'public service' organisations. This has upsides and downsides, but can be an important opportunity.

To qualify, the contract must be for certain types of services. These are mostly training and educational, administrative services, and health or community health provision. Some cultural and sporting activities are also covered.

The organisation must also:

1. Have as its objective the pursuit of a public service mission linked to the delivery of services
2. Reinvest its profits in order to achieve its objectives
3. Be based on co-ownership or participation by employees (or plan to be when it performs the contract)

The biggest difficulty with reserved contracts is that they have time limits attached to them. A contract awarded under this reserved procedure can only last for up to three years. After that, it cannot again be awarded as 'reserved' to the same organisation. The commissioner will either have to award it as reserved to a different qualifying organisation, or can award it through a competitive procedure – to the same organisation or a new one.

So a reserved contracting arrangement could suit your organisation if:

- You want to get a service up and running but aren't necessarily interested in providing it long-term (or the purpose of the contract could be to answer a specific need which is time limited, so that it won't carry on in future).
- You want to run a service for a period, and think that after three years (or less in some cases) you will be in a position to bid successfully against others.

Reservation for sheltered employment

Commissioners may also reserve contracts for organisations which work with disabled and disadvantaged people. The organisations must satisfy pretty specific criteria, however:

1. Their aim must be the social and professional integration of disabled and disadvantaged people;
2. They must perform the contract in the context of sheltered employment programmes; and
3. At least 30% of the employees must be disabled or disadvantaged workers.

This will only apply to certain types of organisations, but for those organisations it will be important. The meaning of “disadvantaged” workers is not defined, and could potentially be quite wide, so if you are involved with sheltered employment, this may well be relevant to you.

Innovation partnerships

Innovation partnerships are intended to help develop and purchase new products and services which aren’t already available. Their use is relatively rare, but might be appropriate in some contexts.

This is a relatively flexible procedure (with some complex requirements beyond this guide), which can be used a number of ways. The basic requirement is that the commissioner identifies the need for an innovative product, service, or works that cannot be met by purchasing any products, services or works already available on the market. The intention will generally be that the commissioner can, at the end of the partnership, acquire the product to use themselves.

Although this might seem like a system for developing new technology that could be relevant to your organisation, it could also apply to developing new and innovative services. For instance:

- An app or technology-enabled service for vulnerable or isolated individuals, which would be better done by an organisation with in-depth understanding of the affected group
- A service without any technological aspect but which has an innovative element beyond what else is currently on the market – maybe providing traditional services within a new environment, or connected to a previously separate service.

Competitive procedure with negotiation (CPN)

In CPN, the commissioning body issues a call for competition, including details of minimum requirements, and a specification as to how the contract will be awarded. The information must be detailed enough to allow providers to decide whether they wish to bid. Generally, at least three bidders will be invited to submit tenders and negotiate. These negotiations can be extensive and involve discussions over the form of the service, the costs and incentives, and the quality of the service offered. The commissioner can also select one bid without negotiation, or can have multiple rounds of tenders and negotiation before announcing a winning bid.

CPN is designed for commissioning complex services, involves more time for the process to be completed, and more work for the commissioner. But it gives a chance for commissioners and providers to discuss how the services can be provided. This could help providers demonstrate to commissioners why their proposed model of delivering the service is the best one. It can also give a chance for providers to adjust their proposals on the basis of feedback from the commissioner. But it is important to remember that the contract will still be awarded on the basis of the criteria announced at the start of the procedure, and these will not be subject to negotiation. So providers need to be realistic about how much they can adapt their bid to score highly against those criteria.



Part Three: Challenges to commissioning decisions

When to challenge

If you want to challenge a commissioning decision, you almost always have to start court proceedings within 30 days of becoming aware of the problem (or when you should, reasonably, have been aware of the problem; for instance, when something was published on the commissioner's website). That is a really challenging timescale because there is a lot of work to do before proceedings can start.

The decisions you might want to challenge are not just the final outcome of a process. If something happens earlier which is unfair or unlawful (e.g. not enough information being provided in an invitation to tender), you need to challenge it within 30 days of your concerns arising. If you leave it until the end, you will almost certainly be told that it is too late and you should have acted sooner.

What to challenge

There is no way of describing exactly what is going to give you a case to challenge a decision you don't like. It will always depend on what has happened in that specific situation.

You don't need to know there is a good legal case before turning to a lawyer. The summary of the law in part four gives some ideas – if one or more of those principles seems to you to have been broken, then you might want to take legal advice. Commissioning is a complex area of law and you will always want to get legal advice before taking any action.

The practicalities of challenges

Legal challenges to procurement decisions are expensive. As with most legal proceedings, if you win, the opponent will pay most of your costs. If you lose, you must pay the opponents', so it is effectively 'double or nothing' and that may mean hundreds of thousands of pounds of costs.

You also risk losing some important relationships, and it can be a big drain on an organisation's time as well as money.

In commissioning cases, the court will generally consider whether damages (ie money paid to the challenger) are enough to resolve the problem. The court will only suspend the award of the contract while the legal challenge takes place if damages are not enough of a solution.

With that in mind, commissioning challenges do sometimes work and can benefit an organisation and its users. Some examples include:

- Bristol Missing Link (BML) provided a domestic violence support service to the local authority. The contract was re-commissioned and was awarded to another organisation. BML raised concerns about how the scoring was conducted and asked for documents showing how the other organisation's bid had won. The local authority refused, and BML started court proceedings. First, the court stated that the council had been unfair in not giving BML the documents, but then by using them to argue BML was wrong. Second, the court ruled that a payment of money by the local authority to BML would not be an appropriate remedy to the problem if BML won the case: usually the sum of money paid would be the amount of expected profit and BML, as a charity, had not expected to make a profit.

- Southall Black Sisters provided a specialist domestic violence support service to Asian and Afro-Caribbean women in Ealing. Ealing Council decided to commission a new service which would cover the whole borough and provide services regardless of gender, race and other protected characteristics. In doing so, it failed to make any equality impact statement regarding race, and then, once forced to reconsider, failed to take into account the issues raised by consultees over the need for specialist provision for some racial groups. Two of Southall Black Sisters' users challenged the decision. Once the matter reached trial, the council agreed its decision could not be defended and changed its position.



Part Four: Overview of the legal framework

EU treaty principles

EU law lays down several principles in relation to procurement. These principles are about how the procurement is conducted, not the final outcome. The ones most likely to arise in this context are:

Non-discrimination and equal treatment

This means that all bidders must, unless there is justification to do otherwise, be treated equally. It includes equality between different types of organisations (such as consortia or private enterprise, or even a group of organisations without a formal association), but in some circumstances could include an obligation to give priority to smaller organisations who might usually be disadvantaged.

Proportionality

This is a far-reaching principle, and it can be summarised as:

- Steps taken must be appropriate to the end result which the commissioner is seeking; and
- Those steps must not go beyond what is needed to achieve the result.

For instance, the time limit set by a commissioner for bids can be short, in order for the contract to be decided by the end of a set period, but cannot be shorter than is necessary to award the contract by that time.

This principle applies throughout the procurement process and could include everything from the criteria set for the winning bid to the overall procedure used.

Transparency

This is also a far-reaching principle. By being transparent, commissioners should avoid being discriminatory or disproportionate. It includes appropriate

advertising of the opportunity, publication of the weightings and criteria and the tender documents, clarity of the specifications and not (generally) changing contracts after they have been awarded.

The question to ask is: “Can I honestly say to myself that what the commissioner is doing in this case is transparent, proportionate and non-discriminatory?” If the answer is no, then the commissioner may be falling foul of EU law. Depending on the stage in the case, you could bring this up to ask the commissioner to change their practice or proposal; or it could form the basis of a legal challenge, if that was appropriate.

State aid

The principle intention of EU law is to create a level playing field for competing bidders, including across borders. As such, there are restrictions on government bodies giving help to organisations. If one of your competitors in a bid receives support from a public body (for instance, a grant which would cover some of their overheads for delivering a contract) then it is possible that would unfairly enable them to submit a better or cheaper bid. It is an issue you should raise with the commissioner, or it could be grounds for a challenge.

Public Contract Regulations 2015

EU law on commissioning is made through directives. This means that EU member states have to make their own laws which reflect what the EU has laid down. In the UK, the law is contained in the Public Contract Regulations 2015. These set out the minimum time limits, and certain rules and procedures which must be followed. But because these regulations were made to give effect to EU law, everything done under them needs to comply with EU law principles as well.

Rules under the Public Contract Regulations 2015 which may be of interest include:

- The requirement for commissioning authorities to take steps to prevent, identify and remedy conflicts of interest in relation to commissioning

(regulation 24)

- The requirement to take steps to prevent distortion of competition by the involvement of one or more bidders in design of the procurement process (regulation 41)
- The requirement for time limits to be based on the complexity of the contract and the time required for drawing up tenders (regulation 47)
- The requirement for commissioners to ask questions about the price proposed in any 'abnormally low' tenders (regulation 69)

Although you can't be expected to know all the regulations off by heart, you can know that there are some rules about how commissioners must conduct themselves, so you can know to seek help if you think something has gone wrong.

Brexit

It isn't yet known how Brexit will affect procurement law. But the Public Contract Regulations 2015 were drafted with very considerable input from the UK government and the general view is that they are unlikely to be changed immediately on Britain leaving the EU in March 2019. There are bigger questions about how EU caselaw and principles should apply following Brexit, but the current proposal is that a 'snapshot' of EU law will remain in force during any transition period.

Public law

The UK has its own requirements on public authorities to act fairly and lawfully. These duties overlap with the EU principles and requirements of the Public Contract Regulations. Two particularly relevant factors include:

- Procedural fairness: public authorities must not act unfairly. This is potentially very broad, but in this context, it means knowing the criteria against which a bid is judged, being given suitable opportunities to understand an issue and a decision being free from bias or partiality.
- The purpose of the decision: The decision (or the criteria to make the

decision) should not be set for an improper or inappropriate purpose, and only relevant factors should be taken into account (eg a requirement for bidders to have a blue logo to fit with local authority branding would likely be invalid).

Equality law

Public Sector Equality Duty (‘PSED’)

PSED requires public bodies to consider, with an open mind, how its actions will affect those with protected characteristics. That includes considering how to improve the position for those people. The consideration must be an integral part of the decision-making process and not engineered to fit the commissioner’s desired outcomes.

If a proposed public service appears to pose problems for your users who have a protected characteristic (such as sex, race, disability or sexual orientation), then it is worth considering whether the commissioner has asked the right questions. Examples might include:

- If a commissioner wants to provide a single service for all groups (e.g. a single domestic violence service for men and women), has it considered the impact on such a service on each group and how to mitigate any negative effect on either (or both) groups?
- If a commissioner has decided to fund separate services for different groups, but allocate different resources to each (possibly because one group is much larger), have they considered adequately what disadvantages have been caused, and how to mitigate the effects of that decision?

The best time to alert a commissioner to your concerns is early. Commissioners may consult affected groups, and must consider relevant information if it is presented to them. If they don’t have the information they need to make a decision then they should obtain it. If they go ahead without fulfilling their obligations, there may be a challenge.

But PSED is only an obligation to have regard to the issues. Ultimately, it is up to the commissioner how they decide to proceed after the consideration.

The duty doesn't oblige them to take any option in particular, not even the most advantageous option for a highly-affected group. However, it remains a powerful and persuasive tool, especially if the commissioner has overlooked a serious issue in developing their service.

You should note that if you think a service design does not adequately reflect PSED, because it hasn't taken relevant issues into account, then you will need act quickly and not wait until the end of the procurement to raise the issue (see *When to Challenge*).

Discrimination

If a commissioner proposes or creates a service or system which does not cater to the needs of your users, then you may want to consider whether it is discriminatory.

When a measure is discriminatory (and whether that discrimination is justified) is not straightforward. But there are some general principles:

- A measure which disadvantages people with a protected characteristic needs to be justified. Disadvantages could include that a system is harder for people from a protected group to access, or that they get a poorer result from it.
- Discrimination can happen whether the measure is actually based on the characteristic (for instance, a rule against girls wearing trousers) or whether it just happens to affect them more (e.g. a rule against long hair which affects girls more than boys, but isn't intended to affect one sex more than the other).
- Provision of separate services for different groups can be justified (as discussed in relation to PSED, it can be the right thing to provide for specialist needs), but 'separate but equal' treatment on the basis of race and sex needs to be treated with caution.
- Cost is relevant in whether a measure which causes disadvantage is justified, but often cost alone will not be enough.

Human Rights Act

The Human Rights Act 1998 imposes obligations on all public bodies to adhere to minimum human rights standards. However, challenges on the basis of such rights are relatively rare in the context of commissioning. The Human Rights Act also includes prohibitions on discriminatory treatment, which complement those in the Equality Act.

Social Value Act

The Public Services (Social Value) Act 2012 obliges most public authorities to consider how their proposed services can be procured so as to “improve the economic, social and environmental well-being” of the area. Most of its provisions do not apply in Wales.

This means that commissioners can, and must, consider wider social benefits when conducting procurement exercises. Those benefits must be relevant to the contract being procured. For example, a contract for drug and alcohol services would have to have benefits relevant to that group or that issue – it couldn’t have a side benefit of improving local transport facilities.

The Social Value Act, like PSED, only imposes a duty on commissioners to consider the issue. That means that the best way to have an effect is to put this issue forward at the beginning of the commissioning process, and show the commissioner what additional social value could be achieved and ask them to build that into their process.

Special duties on NHS bodies and local authorities

Some duties apply to NHS Bodies, including a duty on Clinical Commissioning Groups (CCGs) to have regard to reducing health inequalities. This is comparable to PSED discussed above, and also includes an obligation to report annually on how the duty will be carried out.

CCGs also have obligations in terms of public consultation and transparency of operation, which give important opportunities for input and understanding of upcoming developments. Individuals receiving care should also have involvement in decisions affecting them.

CCGs should also consult local authorities on major decisions, and if there is a disagreement, the Secretary of State for Health may be asked to resolve the dispute. Local authorities are themselves under duties under the Care Act in relation to promoting diversity and quality of services.

Both the duties on CCGs and local authorities may require them to consult on proposed measures, and to conduct consultations in an accessible manner, especially where those affected might have particular difficulties with engaging.



Annex

The following services are subject to the 'light-touch' regime. These are summaries only, and some of the very minor categories are not included here. If the service you are thinking about falls into one of these categories, it may be subject to less formal regulation:

- Provision of services to the community (a very broad category).
- Supply of nursing, medical and staff to work in a domestic context including home helpers.
- Educational and training services.
- Prison-related services
- Community and personal services provided by membership organisations such as youth associations.
- Services relating to benefits, including sickness, maternity, disability, family and unemployment benefits.
- Public security and rescue services (though many of these are excluded from procurement regulations), and investigation or surveillance services.
- Seminar, festival, and other event organisation services.
- Religious services.
- Legal services (though most legal services are not subject to the procurement regulations at all).



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