

# Oxford POGO Club

## Response to Green Paper on Transforming Public Procurement

### EXECUTIVE SUMMARY

This response to the Green Paper on Transforming Public Procurement addresses four broad themes: **Culture, Outcomes, Transparency, and Learning**. As the Oxford Procurement of Government Outcomes (POGO) Club, we are a diverse group of academics and practitioners interested in better public procurement for better social outcomes. We recognise that this consultation is about law reform of national rules in legislation, rather than practice guidance, but the point that many of us seek to emphasise is that *new flexible rules will not automatically result in new flexible practices*.

We have debated the extent to which our comments on practice and social outcomes can be incorporated into rules in legislation intended for public procurement more generally. Many of us believe it is entirely possible to have special rules for social services – in fact, a distinction between social and other types of goods and services *already exists in current procurement legislation* and we think the distinction could continue to exist.

Current rules allow “light touch” flexibilities for certain social procurements. The Green Paper aims to introduce more flexibility by making all procurement rules as flexible as the current “light touch” rules. In other words, the Green Paper is shifting the general rules to be similar to the flexibilities for social procurement. Many of us would like to see the distinction between social and other procurements maintained and social procurement to shift towards even more flexible rules.

Importantly, some of us believe that the current “light touch” flexibilities are underused and that overly risk-adverse and process-driven practices persist in social procurements in many contracting authorities at the local level. Some of us emphasise that successful implementation of the Green Paper’s shift towards flexibility – and our suggestions here for even greater flexibility for social procurements – requires more than rules about process. Therefore, many of our comments here relate to expanding upon the principles and otherwise reducing risk aversion.

Significantly, many of the social challenges that concern us are the responsibility of subnational or local government authorities. Thus, many of our comments focus on implementing national rules at a local level.

Our comments in this submission are offered as short direct responses to selected questions presented in the Green Paper. For the purposes of this executive summary, we group our comments in four broad themes as follows:

- **Culture.** Many of our comments raise issues of culture – especially in response to the Green Paper’s “principles” and the “oversight” function. Many of us believe that success in the procurement of social services and the achievement of better social outcomes requires more of a culture of collaboration and relational working with service providers, including voluntary, community and social enterprise (VCSE) organisations. We highlight that this way of working requires less risk aversion on the part of government. We also highlight that government (and governance) arrangements at regional and local levels are diverse. We suggest this way of working and diversity should be better reflected in the principles, where we describe potential principles of collaboration and discretion. We

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also suggest that the capabilities of the oversight body should reflect the culture and diversity within the system. Perhaps the oversight could be reframed as “Shared accountability and learning.” Many of us believe the Green Paper takes a very top-down approach and is focused on relatively simple commercial transactions. (*These issues are raised in response to Questions 1 and 2.*)

- **Outcomes.** A second area of our focus is around outcomes, which we raise in response to the Green Paper’s principles and reform of procurement procedures. We suggest the new rules should allow for more flexibility and longer-term contracts for social outcomes. These suggestions include a Social Outcomes Framework or Dynamic Purchasing System (like an umbrella contract set up at a central level) that would allow local authorities to more easily make call-off orders (second stage awards under the umbrella contract) for procurements based on social outcomes. These outcomes-based contracts and orders would be for longer periods because outcomes take more time to happen and verify. Our comments are based on the insights of some of us who study social impact bonds and other results-based mechanisms. (*These issues are raised in response to Questions 1 and 8.*)
- **Transparency.** A third area is around transparency, which is a significant feature of the Green Paper and a salient topic for the public at the time of writing. Our comments are very supportive of the transparency reforms and emphasise that greater flexibility should be accompanied by greater transparency. However, we also recognise the burden the transparency reforms may place on local authorities. We provide some explanation of this issue and make some suggestions aimed at easing this burden including technical support from central government, a programme of fellows embedded in local authorities, and a period of adjustment, co-design, and flexibility. (*These issues are raised in response to Questions 27 and 28.*)
- **Learning.** Our fourth area of comments relates to improved learning about and throughout the procurement system, strengthening the capacity and voice of procurement professionals within their organisations and across the system. We raise this issue in response to the Green Paper’s principles, the proposed oversight function, and the new dispute mechanism. As noted above, we suggest the “oversight function” proposed in the Green Paper should be a “shared accountability and learning” function. A learning function could include assessment of the procurement system, surveying the actors in the procurement system, monitoring and reporting on the use of procedures and dispute mechanisms, and supporting interpretation of results. (*These issues are raised in response to Questions 1 and 2.*)

We offer these comments in a time of emergency and upheaval at international, national, and subnational and local levels. The last twelve months have been dominated by the COVID-19 pandemic and associated lockdowns. Also, during the last year, the UK left the European Union. At all levels of government, public spending through procurement is a highly salient issue. Beyond the issue of vaccines (not our focus here), the global pandemic has caused serious fundamental disruption to the delivery of social services and significant changes in peoples’ needs. Many people are looking to public spending through procurement to help our recovery from the pandemic (Folliot Lalliot & Yukins 2020, Harbour, 2020). In this challenging and momentous context, we encourage the government to be thoughtful about procurement of social services and social outcomes. Members of the Oxford POGO Club are available for further consultation on any of the comments in this submission.

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## INTRODUCTION

This response to the Green Paper on Transforming Public Procurement (UK Government / Cabinet Office, 2020) is submitted by the Oxford Procurement of Government Outcomes (POGO) Club, which is a peer learning initiative of the Government Outcomes Lab (GO Lab) in the University of Oxford's Blavatnik School of Government. The Oxford POGO Club is open to anyone interested in capacity-building in public procurement and in collaboration to improve social outcomes. Participants come from many different disciplines, sectors, and countries. Our chair is Anne Davies, Professor of Law and Public Policy, Faculty of Law, University of Oxford.

The aims of our group are:

- To help public sector leaders understand how public procurement may be used to improve social outcomes through collaboration with the private and community / voluntary sectors.
- To encourage better alignment of procurement plans with the mission, strategy, and budget of a programme, agency or government.
- To develop the capacity of procurement practitioners to collaborate and procure social outcomes as part of the professionalisation of public procurement.

This consultation response addresses a selection of the questions based on the group's focus on social outcomes. The Oxford POGO Club participants who have contributed to or are supportive of this consultation response are listed at the end of the document.

### **The Government's approach in the Green Paper**

We consider that there is an important distinction to be made between procurement at the more commercial or transactional end of the spectrum (which may also serve social objectives as a secondary matter) and 'social procurement', where what is being procured is itself a public service of some kind (health, education, employability, social care and so on) with social goals fully integrated into the whole of the procurement process. (Some Oxford POGO Club participants view on these issues are given expression in Villeneuve-Smith & Blake, 2016.)

Our concern about the Green Paper as a whole is that it is unduly focused on competition and transactional procurement as the paradigm. It does not sufficiently take into account the needs of authorities engaged in the commissioning of public services and projects aimed at achieving better social outcomes.

In the context of social procurement, what is required is a culture of relational or 'partnership working' that focuses on:

- Situating procurement in the context of the authority's wider policy goals.
- Engaging with local actors in a process of market creation and development, not just running a competition.
- Developing truly collaborative, relational contracts in which the public authority and the contractor see themselves as partners pursuing shared goals.

We note the statement at Para 49 that there is no plan to include the healthcare sector, the Public Services (Social Value) Act 2012 or relevant local government legislation in the reforms because they are 'freestanding' laws. However, there is a risk that this decision in itself

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downgrades social value considerations and collaborative approaches by failing to integrate them into the new procurement regime.

Current rules allow “light touch” flexibilities for certain social procurements. (The light touch regime for social health, education and other services is part of the current Public Contracts Regulations 2015 and is the subject of the Green Paper consultation Question 12). The Green Paper aims to introduce more flexibility by making all procurement rules as flexible as the current “light touch” rules. In other words, the Green Paper is shifting the general rules to be similar to the flexibilities for social procurement. Many of us would like to see the distinction between social and other procurements maintained and also for social procurement to shift towards even more flexible rules.

Importantly, some of us believe that the current “light touch” flexibilities are underused and that overly risk-averse and process-driven practices persist in social procurements in many contracting authorities at the local level. Some of us emphasise that successful implementation of the Green Paper’s shift towards flexibility – and our suggestions here for even greater flexibility for social procurements – requires more than rules about process.

We recognise that the Green Paper proposes reforms to procurement *law* rather than to procurement more generally (Arrowsmith, 2020) and that procurement law is only one aspect of success or failure in this context. However, the government’s stated ambition to ‘transform’ public procurement cannot be achieved by focusing narrowly on legal reform. Much more effort needs to go into sharing best practice, training procurement officials, and raising the profile of procurement and commissioning in all its forms among senior leaders in public sector organisations. The point that many of us seek to emphasise is that *enacting new flexible rules will not automatically result in new flexible practices*.

We encourage the Government to **think more carefully about procurement broadly defined**, to include long-term strategic supply chain considerations, supplier engagement, procedures leading to the award of a contract, and contract implementation, transparency, disputes and remedies, etc. We find that procurement is too often informally perceived to be mostly about tendering in narrow procedural terms. We suggest that most of the public value in a procurement (or perhaps more helpfully, a commissioning process) is realised long before and long after tendering and contract award. This may be especially true in procurements with a social purpose. The persistently narrow informal definition of procurement makes it more difficult for procurement to be understood as a strategic rather than procedural function.

We also encourage the Government to **think more broadly about learning and continuous improvement of the procurement system** rather than limiting the focus to individual transactions or contracting authorities. Some of us perceive the latter narrow view in the principles and oversight function. In our answers below, we suggest expanding the principles and reframing the oversight function as a “shared accountability and learning” function.

A final general point is to encourage the Government to **improve processes for standardising contract terms across the UK, including results-based contracts and contracts for social outcomes**. The scope of the Green Paper seems unduly constrained by the scope of the EU’s 2014 Procurement Directive, which focused on reducing barriers to competition in the *award of* contracts across the EU. The EU’s 2014 Procurement Directive had a

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very limited focus on the terms of the awarded contracts or their implementation. It is encouraging to see some focus on contract management in the Green Paper, but we would go further and legislate a process for defining standard public contract clauses and implementation procedures.

### RESPONSES TO SELECTED QUESTIONS

We have answered a selection of the consultation questions where we considered that we had the most to contribute based on the group's expertise in social outcomes.

#### *Q1. Do you agree with the proposed legal principles of public procurement?*

Our comments here suggest adding principles of collaboration, procurement discretion and reasonableness, and learning and continuous improvement of the procurement system.

The 'public good' objective as currently formulated focuses on commercial procurements in which social objectives are secondary. This formulation fails to acknowledge the possibility that some procurements are principally about social objectives.

The 'integrity' and 'fair treatment' objectives are, of course, unobjectionable in principle but there is a risk that the 'control' and 'impartiality' elements of these objectives may be interpreted and applied in ways that discourage collaboration and partnership working. For example, authorities may be discouraged from building close relationships with contracting partners to support the delivery of social goals for fear that they may be accused of being partial.

The "value-for-money" principle may be helpful for some individual investment decisions but does not seem well-suited to a focus on outcomes-based contracts or collaboration and learning during contract implementation.

Many of us feel that none of the principles adequately address the overall purpose of the procurement system or learning and continuous improvement of the overall system. The Government describes the role of a National Procurement Policy Statement (Paras, 29, 37 - 41) and states that contracting authorities should ensure they have the right organisational capacity (Para 40.) Many of us agree that the latter is important, but some note that this does not address issues of effectiveness or capacity, including the professionalisation of public procurement across the system.

We encourage the Government to add a principle about **collaboration**. Alternatively, language about collaboration could be included under the proposed principle of public good. Many of us believe that procurement of social services and the achievement of better social outcomes requires more of a culture of collaboration and relational working with service providers, including voluntary, community and social enterprise (VCSE) organisations. Many of us hope that a focus on collaboration will influence training and capacity development of staff in a wide range of public authorities. (See Brown et al.'s work on complex contracting (2018) which resonates with many of us in the Oxford POGO Club).

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Collaboration is a feature of the government's recent policy proposals around the healthcare system and some of us feel those proposals also belong in this procurement reform. The Government's policy paper describes a "new duty to promote collaboration across the healthcare, public health and social care system," and argues, "When collaboration works well it leads to better outcomes for people, for example a successful early intervention can lead to people living independently and in their own homes for longer" (UK Government / Secretary of State for Health and Social Care, 2021). This argument resonates with many of us who also find it pertinent to this reform.

Second, we encourage the Government to add a principle around **procurement discretion and reasonableness**. Alternatively, language about discretion and reasonableness could be included under the proposed principle of integrity and/or value-for-money. Commissioners and procurement staff should explicitly be given wide discretion. This principle would emphasise that procurement involves trade-offs and making real-time decisions by individuals with imperfect information. There may be multiple lawful ways that decisions can be made and reasonable people may disagree. There may be no one "right supplier" from an objective point of view -- even if an objective point of view is achievable. Without such a principle, Government decision-makers may be more risk averse and unwilling to take advantage of the flexibilities proposed in the Green Paper – especially in the circumstances of increased transparency proposed in the Green Paper.

Third, we encourage the Government to add a principle of **learning and continuous improvement of the procurement system**. Alternatively, language about learning and the procurement system could be included under expanded principles of public good, integrity, or perhaps even value-for-money (though the latter would need to be greatly expanded). A system-wide focus would be broader than focusing on value-for-money in individual investment decisions or the capacity of an individual contracting authority. When thinking of the procurement system, many of us find helpful a framework developed by the Organisation for Economic Co-operation and Development (OECD), which defines four pillars within a methodology for assessing procurement systems (MAPS) (OCED, 2018). Perhaps system-wide issues might be the focus of a National Procurement Strategy, but some of us suggest operationalising this principle through revisions to the 'oversight' function proposed in the Green Paper. This suggestion is expanded upon below. (See answer to Question 2 below.)

### ***Q2. 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?***

We think that there are considerable gains to be made by designing the procurement regime so that it is constantly identifying best practice, learning and improving. This is the best safeguard against poor outcomes and poor value-for-money. However, it is important that the oversight body has the right mix of skills and experience and the right focus.

The question refers only to 'commercial capability'. There is no reference to improving contracting authorities' ability to use procurement to improve social outcomes

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and, again, we fear that this type of procurement is being overlooked. One option would be to frame ‘capability’ more broadly, to include social value and social outcomes, and to ensure that the expertise of the unit is not confined to transactional procurement. For example, representatives of VCSEs and SMEs could provide highly valuable input alongside commercial procurement experts.

We also note that the Government has not explained how authorities in Scotland, Wales, or Northern Ireland will be represented on this central unit that is overseeing spending.

Therefore, some of us suggest that **‘oversight’ should be reframed as ‘shared accountability and learning’** and the focus expanded to include the procurement system at large.

The shared accountability functions could be achieved with a diverse membership of the body, including experts from different regional and local government organisations, persons experienced in working with VCSEs and SMEs, and those working to address social challenges.

The learning function of this body could include advancing the professionalisation of procurement and clarifying the role procurement as a strategic management function rather than a procedural or administrative function. The learning function of this body might also include longitudinal assessments of the procurement system, surveying the actors in the procurement system, monitoring and reporting on the use of procedures and dispute mechanisms, and supporting interpretation of results.

Notably, this procurement reform is happening at the same time as law reforms in the delivery of health services and in policy developments related to social value. While these reforms may have separate teams in central government, it is likely to be the same small number of people implementing all these various reforms in more local organisations. Many of us suggest that that a focus on learning and continuous improvement of the procurement system would include consideration of all such reform efforts and their impact for practice.

### ***Q6. Do you agree with the proposed changes to the procurement procedures?***

Yes, but the proposed changes alone are unlikely to increase flexibility or reduce risk aversion. As the Government notes (Paras 63 and 93), many of the proposed flexibilities exist already for social, health, education and other services. This flexibility has existed since at least 2015. However, flexibility in the law does not necessarily result in flexibility in practice.

A strong theme in many of our discussions on procurement has been that many of the inefficiencies and rigidities in procurement processes (which make participation difficult for SMEs and VCSEs in particular) arise not because of the procurement procedures themselves, but because officials are afraid of getting things wrong and being sued. This leads to use of well-known procedures instead of potentially more suitable but unfamiliar procedures (‘we can’t do this because we haven’t done it before’) and an overly rigid application of the rules. This may explain the limited use of procedures such as innovation partnerships, even though we know that when these procedures are used

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they can be highly effective. Thus, we have no objection to the proposed changes to the procurement procedures as such, but we note that changing the procedures will not, in itself, solve the problem of risk aversion.

One way to address this problem may be through carefully-drafted guidance emphasising in a positive, facilitative way the range of possibilities open to procurement officials, not just the constraints they face, and a comprehensive programme of training and sharing of best practice to foster confidence and creativity. It is vital that collaborative approaches to procurement are represented in this guidance and training as well as more transactional models at the commercial end of the spectrum. (This problem is the reason we propose a principle related to procurement discretion and reasonableness in response to Question 1 above.)

More generally, while we think that the proposed changes to procurement procedures can accommodate public services procurement, particularly if they are accompanied by appropriate guidance, there may be a case for retaining some special procedures for public services procurement to highlight the distinctiveness of this form of procurement. We address this more fully in our responses to Questions 8 and 12.

### ***Q8. Are there areas where our proposed reforms could go further to foster more effective innovation in procurement?***

Yes – assuming the Government is asking here about procedural innovations and novel approaches to social challenges and not only innovations in the natural sciences.

We encourage the Government to clarify and clearly state that innovation may include innovation in procedures in and/or delivery in social, health, education, and other services. Much of the language in the Green Paper focuses on scientific and technical innovation (Paras 83, 84, 85). In this context – a focus on science – it is not clear that “novel procedures” such as the outcome-based specifications described (Paras 87 and 88) may refer to social services and be considered innovations per se.

As suggested by the Government in the Green Paper, performance or outcomes-based specifications can shift the focus away from prescription of inputs or activity to outcomes allowing suppliers to innovate (Para 88). Some Oxford POGO Club participants have expertise in Social Impact Bonds (SIBs), which are a type of outcomes contract in which finance is provided by a third party. Some of us have observed challenges in the procurement of SIBs because the focus on outcomes clashes with standard terms used in local authority contracts, leading to protracted negotiations and an increase in transaction costs associated with a relatively small number of service users. Additionally, the Government’s SIB programmes (for example, the Life Chances Fund) mandate the involvement of a third-party investor, making it unclear whether the contracting authority should be contracting for a supplier (social services provider) or financial services or both. (It is not clear to some of us that such mandating third-party investors in an outcomes contract is helpful – especially if the social services provider is willing to otherwise fund the contract and carry the associated performance risks.) (For discussion of issues in SIBs see Macdonald, 2019 and FitzGerald et al., 2020. The GO



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Lab team is currently working on a paper that addresses, among other things, issues of public procurement of SIBS in the Life Chances Fund.)

Some of us make three suggestions designed to reduce the transaction costs and increase economies of scale in social outcomes-based contracts. (The Government should note that there is significant disagreement among Oxford POGO Club participants about various opportunities and threats associated with the second and third suggestions.)

The first suggestion is provision in the law for **Social Outcomes Framework(s) or Dynamic Purchasing System(s)**, allowing longer periods of time for service delivery and outcomes achievement. (Outcomes take longer to achieve and measure or verify than services.) A **Social Outcomes Framework** or **Dynamic Purchasing System** could operate like an umbrella contract set up at a central level and allow local authorities to more easily make call-off orders (second stage awards under the umbrella contract) for procurements based on social outcomes. Umbrella contracts (the framework or dynamic purchasing system) could provide standard processes for awarding call-offs, amending call-offs, verifying outcomes achievement, and if necessary, provision of financing. Such umbrella contracts could be set up by central government departments who may provide some top-up funding, outcome validation, and/or performance management or evaluation services at greater economies of scale.

The second suggestion builds on and goes further than the first. We propose considering a new **Social Innovation Procedure** for social, health, education, and other services, to include increased flexibility for direct awards and contract amendments. This **Social Innovation Procedure** could be available if (a) the contractor is a UK-registered Charity or Community Interest Company (CIC), and (b) some payments are based on results and/or social outcomes, and (c) there is an additional transparency report with more details such as outcome targets, pricing, and outcomes achievement during contract implementation. However, this idea is controversial within the Oxford POGO Club. Many of us are concerned about potential negative effects of creating a set-aside mechanism and would call for more evidence and analysis and/or testing of this proposal.

Our third suggestion is really a combination of the previous suggestions. **Social Outcomes Framework(s)** and **Social Innovation Procedures** could be combined to allow the direct award of call-off orders to UK-registered registered Charities or Community Interest Companies. However, this suggestion suffers from the same controversy as the second suggestion.

If the Government is interested in exploring these suggestions further, the Oxford POGO Club would be delighted to convene a discussion or provide additional information – in proposition and opposition.

***Q10. How can government more effectively utilise and share data (where appropriate) to foster more effective innovation in procurement?***

Where the innovation is more procedural or more related to social value and less about a scientific innovation, we encourage the Government to **acquire relevant data from the provider and then publish those data under an Open Government Licence.**

For example, where the innovation is a results-based or outcomes-based contract, data about the specified results/outcomes and their achievement during implementation should be obtained by the government for sharing more widely. (Some Oxford POGO Club participants have heard from some SIB parties comments like, “we want to share data, but we don’t know if we can – no one knows who owns what data.”)

Another example relates to social value (referenced in Para 89). Where social value commitments are used to evaluate a tender and those commitments become part of a contract, we encourage the government to acquire and share data on these commitments. Members of the Oxford POGO Club are aware of many individual stories or short case studies about social value. More structured open data about these commitments are required. Sharing more structured data on social value commitments may help central, local governments, and academics learn more about how social value is being implemented. This sharing may also make it easier for a wide variety of local organisations, including local VCSE organisations, to participate in local social value initiatives.

***Q11. 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?***

Please see our response to Question 8 above.

***Q12. In light of the new competitive flexible procedure, do you agree that the Light Touch Regime for social, health, education and other services should be removed?***

We accept the logic of this decision in the light of the proposal to create the competitive flexible procedure with many similarities to the Light Touch Regime (LTR).

The Green Paper aims to introduce more flexibility and seeks to do so by making all procurement rules as flexible as the current “light touch” rules. In other words, the Green Paper is shifting the general rules to be similar to the flexibilities for social procurement. Many of us would like to see the distinction between social and other procurements maintained and social procurement to also shift towards even more flexible rules. (See ideas suggested in response to Question 8 above.)

Many of us see the Green Paper as a missed opportunity to highlight the distinctiveness of public services and social outcome procurement, for example, by offering greater flexibilities to contracting authorities in this context. This will be a particular problem if guidance relating to the competitive flexible procedure focuses primarily on simpler procurements of goods at the more transactional end of the spectrum.

***Q26. Do you agree with the proposals for the Open and Closed Frameworks?***

Please see our suggestion about frameworks in response to Question 8 above.

***Q27. Do you agree that transparency should be embedded throughout the commercial lifecycle from planning through procurement, contract award, performance and completion?***

We agree that transparency should be embedded throughout the lifecycle. We encourage the Government to require that some minimum transparency-related deliverables be specified in the procurement documents' requirements and in the contract. The Government could outline transparency reports to be prepared by suppliers for sharing by the contracting authority under the Government Open Licence. (In fact, the Government has already defined such a process in the Model Services Contract (UK Government / Government Legal Department 2020). Such a process would help avoid confusion among parties as to who owns or can share what data.

On the other hand, we also highlight that *transparency is not free* and many contracting authorities, especially local authorities, will need capacity development and support for the upfront costs of implementation. One can imagine a good local commissioner with a limited budget and many people needing services saying, "Why should I pay for more transparency right now?"

Many of the benefits of transparency are external to a contracting authority and are realised on a timeline beyond the immediate, individual transaction or project. Immediate transparency benefits to a contract may be small in any specific procurement because the timeframes are short. For example, a reasonable commissioner may be focused more on the immediate quality of service provision than in creating a larger competition to drive down price. In contrast, external or future benefits in transparency may be large. These include more accountability (managed by external actors), increased competition in future transactions, reduced transaction costs because local authorities can learn from each other in future, and improved understanding of the procurement system through academic and other insights.

Therefore, many of us feel the (central) Government should provide support for local government implementation of additional transparency reforms, including the Open Contracting Data Standard (OCDS) and use of a single supplier registration portal. (Additional comments are made about OCDS in response to Question 28.)

Potential solutions to reduce the burden on local contracting authorities include the following suggestions:

- Technical support from central government, such as provision of workshops, a helpdesk, and / or technical support for implementation.
- A national programme involving procurement fellows (or procurement data stewards) who have practical skills in transparency and data issues and who can be trained in public procurement. These fellows could be supported by a university or consortia of universities and embedded in local government for an extended period. Alternatively (or subsequently) they could be in the public sector through a fast-track scheme.

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- A period of adjustment, co-design, and flexibility, in which local-government implementation experience informs calibration of central government policies and procedures.

### ***Q28. Do you agree that contracting authorities should be required to implement the Open Contracting Data Standard?***

Yes, we agree with the Government's requirement to implement the Open Contracting Data Standard (OCDS). We suspect different contracting authorities should be given a reasonable timeframe for implementation and resources by the central Government.

OCDS appears to be the most practical and efficient way to make the transparency principle and reforms become a reality. Without requiring implementation of OCDS there is a serious risk that the transparency reforms will be meaningless or impracticable.

Many Oxford POGO Club participants have experienced challenges consistent with the Government's comments in Para 160 and 161. Some of us perceive a myth that "procurement documents are already transparent." One problem we experience is that, even when procurement transparency notices are lawfully published, the full invitation to tender and other procurement documents are often only available for a short period of time and require registration on a third-party site with restrictive terms of use. Many people, in academia, the public sector, and the private sector need information about what has happened in the past to help interpret or understand what may happen now or in the future. The current practice in UK public procurement simply does not support this analysis and learning.

[Questions 31 and 32 are answered together.]

***Q31. Do you believe that a process of independent contracting authority review would be a useful addition to the review system?***

***Q32. Do you believe that we should investigate the possibility of using an existing tribunal to deal with low value claims and issues relating to ongoing competitions?***

Yes. We think that some quicker and easier mechanisms for challenging and correcting errors during the procurement process would help with the problem of risk aversion among procurement officials (see Q6) by reducing the need for – and thus fear of – costly litigation. Some of our practitioner members have experience of vexatious, or at least speculative, challenges by bidders brought with a view to gaining a strategic advantage, and it is important that these challenges can be resolved with minimal disruption to the procurement exercise. It would also be helpful if public authorities could easily correct their own minor errors whilst keeping a particular procurement process on track.

If a case does reach the courts (or a tribunal), a greater emphasis on reviewing the reasonableness of officials' decisions and actions, and intervening only where those decisions and actions were manifestly unreasonable, would be helpful. As we explained in our response to Q1, there are many situations in which officials face complex choices

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and it is important that the review process does not encourage defensive or risk-averse decision-making.

That said, we think that it is important that interested parties are able to seek judicial review of authorities' decisions where a serious public law wrong has occurred, in the interests of upholding the Rule of Law.

[Questions 40 and 41 are answered together.]

***Q40. Do you agree with the proposed changes to amending contracts?***

***Q41. Do you agree that contract amendment notices (other than certain exemptions) must be published?***

These questions continue the strong emphasis on transactional procurement and do not take account of the need to develop relational approaches in the context of outcomes-based contracting for public service delivery. Here, the contracting authority needs to work closely with its contracting partner to ensure the best possible results for service users and needs flexibility to adjust the contract as circumstances change or as new evidence emerges about best practices. While we understand the value of transparency and the need to avoid the unfairness to other potential bidders that could arise if there are no restrictions on amending contracts, the language of 'amendment' is far removed from the relational context and a lighter touch regime would be appropriate here.

More generally, we note that contract management is an important discipline in its own right and is central to the delivery of social outcomes in government contracting broadly defined. It is often assumed, wrongly, that simply getting the procurement process right and picking the best value bid will result in good outcomes in and of itself, when active contract management is required. We hope that, as part of its wider agenda to 'transform' procurement, the Government will consider improving guidance and training in this area and raising the profile of contract management as a specific and essential skill for officials.

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### **SIGNATORIES**

*The following Oxford POGO Club participants endorse this submission in their individual capacities (though not necessarily every suggestion and comment herein):*

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## Oxford POGO Club Response to Green Paper on Transforming Public Procurement

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### **REFERENCES**

- Arrowsmith, S. (2020). *Transforming public procurement law after Brexit: early reflections on the Government's Green Paper*, December 2020, Working Paper, Available at SSRN: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3749359](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3749359)
- Brown, T., Potoski, M., & Van Slyke, D. (2018). *Complex Contracting: Management Challenges and Solutions*. *Public Administration Review*, 78(5), 739–747. <https://doi.org/10.1111/puar.12959>.
- Folliot Lalliot, L. & Yukins, C. R. (2020). *COVID-19: Lessons Learned in Public Procurement. Time for a New Normal?* 1 Concurrences No. 3 3-2020 1 pp. 46-58 (Sept. 2020), GWU Legal Studies Research Paper No. 2020-53, GWU Law School Public Law Research Paper No. 2020-53, Available at SSRN: <https://ssrn.com/abstract=3685860>.
- FitzGerald, C., Fraser A. & Kimmitt, J. (2020) *Tackling the Big Questions in Social Impact Bond Research through Comparative Approaches*, *Journal of Comparative Policy Analysis: Research and Practice*, 22:2, 85-99, DOI: [10.1080/13876988.2020.1726177](https://doi.org/10.1080/13876988.2020.1726177).
- Harbour, M. (2020). *How responses to Covid-19 can energise innovative procurement*. Blogpost. Medium.(May 7, 2020). Available online: <https://medium.com/challenging-procurement/how-responses-to-covid-19-can-energise-innovative-procurement-6be3fad43cf>
- Macdonald, J.R. (2019) *Awarding Outcomes-Based Contracts*. (Guide on the website of the Government Outcomes Lab, Blavatnik School of Government, University of Oxford). Available online: <https://golab.bsg.ox.ac.uk/toolkit/technical-guidance/awarding-outcomes-based-contracts/>
- OECD (2018), *Methodology for Assessing Procurement Systems (MAPS)*, Available online: <http://www.mapsinitiative.org/methodology/MAPS-Methodology-for-Assessing-Procurement-Systems.pdf>.
- UK Government / Cabinet Office (2020). *Transforming public procurement*. (Green Paper), Available on the UK Government website at, <https://www.gov.uk/government/consultations/green-paper-transforming-public-procurement>.
- UK Government / Secretary of State for Health and Social Care (2021) *Integration and Innovation: working together to improve health and social care for all*. (White Paper setting out legislative proposals for a Health and Care Bill.) Available on the UK Government website at <https://www.gov.uk/government/publications/working-together-to-improve-health-and-social-care-for-all>.
- UK Government / Government Legal Department (2020) *Model Services Contract V.1.09* (England and Wales). Available online: <https://www.gov.uk/government/publications/model-services-contract>.
- Villeneuve-Smith F. & Blake J. (2016). *The Art of the Possible in Public Procurement*. E3M. <https://e3m.org.uk/the-art-of-the-possible-in-public-procurement/>.