**Procurement bill: Briefing for charities**

**January 2023**

This document provides an update for charities about the Procurement Bill. It has been developed by NCVO, Lloyds Bank Foundation for England & Wales, Social Enterprise UK, CAF and Locality and includes:

* Background information for charities about the Bill and how you can add your voice to calls to strengthen it so that it addresses more of the challenges that charities face with commissioning and procurement
* Annex I: a sample briefing that you are welcome to copy and share with your MP about the Bill and how it can be strengthened. You don’t have to include all the areas listed in the briefing when you send it to your MP – you can focus on those areas that are most important for you.
* Annex II: a template letter you can adapt to send to your MP about the Bill. Remember that the more you personalise the letter, the more impact it is likely to have.

**What is the Procurement Bill and how does it affect me?**

* The Procurement Bill is draft legislation that, when it becomes law, will determine the rules government (at all levels) follow to pay for services.
* The rules will impact upon the services and support that people access right across the country. If you have a contract (or have ambitions of securing one) to deliver services from the local authority, PCC or central government for example, these rules will affect you.
* The Bill includes procurement covering a whole range of goods and services – one piece of legislation will cover things from the purchasing of missiles and paying for large infrastructure projects to determining what support someone fleeing domestic abuse or facing homelessness can access in their local area.
* As the Bill covers so many different things, there is a danger that making commissioning and procurement effective for the delivery of person-centred services could be overlooked – and there is risk that a significant opportunity to address core commissioning challenges that charities have faced for many years could be missed.

**What is happening with the Bill?**

* The Bill is being debated in parliament. This is when changes can be made to the draft legislation before the final law is confirmed. You can track the Bill’s progress and read transcripts of debates about it [here](https://bills.parliament.uk/bills/3159).
* The Bill started in the House of Lords, where peers have had a chance to debate whether it achieves the government’s stated goals and to suggest and vote on amendments to the Bill.
* The Bill will be debated in the House of Commons in January 2023. This is when MPs will have the opportunity to talk about what they think is important in the Bill and where changes might be needed. MPs will then get to vote on what ends up in the legislation.

**How can I try and make sure the Bill doesn’t make it harder for charities to deliver services?**

* You can encourage your local MP to join the debates about the Bill and speak out and vote in support of elements that will improve how local person-centred services are commissioned.
* This briefing provides guidance about how you might go about doing this.

**Step 1: Building your case for support**

* When you hear the words ‘Procurement Bill’, it might sound very technical and dull – but it’s vitally important in determining what services will be available locally. As a charity delivering an important service locally, you are well placed to show your MP why engaging with the Procurement Bill matters.
* Before you get in touch with your MP, think about how you can help them to see how important the Bill is – and why it’s important for it to work for smaller charities in particular. Some questions that might help you to articulate this include:
	+ What service do you provide locally that is funded through a contract / that you are trying to get funded through a contract?
	+ What is the value of that contract (to give a sense of scale)?
	+ How many people does that contract enable you to support or provide your service to?
	+ What difference does the service make:
		- To the people who access the service?
		- To the local community?
		- To the local economy?
	+ What challenges do you face when it comes to commissioning and procurement?
		- Are tender processes disproportionate to the scale or nature of the contract? I.e. is the process overly complex?
		- Is there too little warning of when a service will be up for tender? Are the timescales too tight to respond?
		- Have you experienced ‘bid candy’ where you’ve been included in a local bid to demonstrate local knowledge and expertise but haven’t received referrals / funding when the contract has been awarded to the contract lead?
		- Are decisions based on lowest unit cost, rather than the total value / benefit your service delivers?
	+ You might find it helpful to write up the answers so you can share it directly with your MP or use these notes when you speak to them.
* It’s also worth remembering that making changes to the Bill to ensure it better suits the commissioning and procurement of person-centred services can also help government to achieve two of its two aims from the legislation:
	+ to improve value for money; and
	+ to open up the market to smaller providers, including charities.

**Step 2: Get in touch with your MP**

* There are lots of ways you can get in touch with your local MP. You can find out who your local MP is and how to contact them at: <https://members.parliament.uk/FindYourMP>
	+ You could write to / email them sharing information about why you would like them to engage in the Procurement Bill and what you would like them to do
	+ You could invite them to visit your charity and talk to them about the Procurement Bill, why it matters and what you want them to do
	+ You could attend one of their constituency surgeries to ask them about their plans to engage in the Bill.
* Remember to be clear about your local connection – that you deliver vital services in their constituency. It can be helpful to tell them how many local people you support.

**Step 3: Ask your MP to support key elements of the Bill**

* Use your ‘case for support’ (see above) to help your MP to understand *why* it’s important for them to engage in the Bill – because it will impact on what services people in their constituency can access and what wider benefits can be devised from public service delivery.
* Share information on *what* you want them to do. You might find it helpful to use the briefing in Annex I to identify key parts of the Bill that you would like them to focus on. You don’t have to share the full briefing in Annex I if you don’t want to – just copy and paste what you want to use that resonate mostly strongly with your own experience.
* Some MPs will be members of a Committee that will debate the Bill. Even if your MP isn’t part of this Committee, they can still have an important role to play. In February, it’s expected that all MPs will have the chance to debate the Bill (the ‘Report Stage’). At this point, MPs can suggest amendments and vote on changes to the Bill. It will be important to speak to your MP before this happens so they can start planning what they will say.

**Further information**

If your MP is keen to engage in the Bill and would like further information about detailed amendments, you are welcome to direct them to the Policy Teams at NCVO or Lloyds Bank Foundation for England & Wales. We’ll be keeping track of which MPs are tabling amendments to the Bill and can provide further real-time information about where they might be best able to add their support.

* Lloyds Bank Foundation for England & Wales: policy@lloydsbankfoundation.org.uk
* NCVO: policy@ncvo.org.uk

**Annex I: Sample Briefing for MPs**

**Background**

* The Procurement Bill will impact upon the services and support that people access right across the country. It will not only inform how major infrastructure projects are delivered, but will shape the delivery of critical public services – from supporting someone fleeing domestic abuse to helping someone rebuild their life after experiencing homelessness.
* This briefing is focused on ensuring the Procurement Bill is appropriate for the commissioning and procurement of these types of person-centred services, highlighting where the Bill could be strengthened in relation to them.
* These person-centred services are delivered by a range of providers across sectors, including charities. Charities are often well placed to deliver these services because they are embedded in local communities, trusted by local people and able to reach those whom other services fail to engage.
* It is these types of services and service users that are too often overlooked in the development of policies and regulations. The consequence is that more collaborative ways of working that could deliver better services and value to local people are often designed out.
* Government spent £11.6bn on contracts with charities alone in 2019/20. Ensuring the Bill works for these types of organisations and services is therefore critical.

**How the Bill could make the most of opportunities to improve commissioning and procurement**

* Contracting authorities and service providers have long faced challenges when it comes to commissioning and procurement. The Bill is the biggest opportunity to address these challenges and improve how public funds are spent.
* While there are a number of positive elements of the Bill, too often it is too weak to make a real difference to local services. It *allows* for better practice rather than *encouraging* or *requiring* it.
* Government is planning a training programme to try and improve practice alongside the Bill. However, charities’ experience over many years has demonstrated that while sharing best practice can help to improve the practice of those who already want to do better, it does not address problems of poor commissioning.
* That is why we are keen for the Bill to go as far as possible in addressing the points highlighted in this briefing.
* In some cases, it is likely that some elements will only be picked up in secondary legislation and/or guidance – but getting verbal commitments for this from government in the House of Commons will help to ensure that regulations, guidance, and training are as strong as possible.

**Specific areas where the Bill could be strengthened**

* **Light touch contracts (clause 9)**

The current procurement rules include a ‘Light Touch Regime’ (LTR), which allows commissioners to design flexible processes for procuring services for people. The LTR creates an important distinction between procurement processes for person-centred services and, for example, large utilities or military defence materials.

The Procurement Bill keeps this principle of light touch flexibility, but opens it up so wide that it can be used to procure anything. Not only does this fail to acknowledge the difference between services for people and other goods and works, but it is also unlikely to drive culture change. The existing LTR has been underused by contracting authorities, in part due to a lack of confidence and risk aversion – but during the pandemic, we saw that government can build confidence in using these alternative approaches by being explicit about the nature of flexibilities that can be used and encouraging their take up.

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| **Problem with current approach**  | **What is needed**  |
| * Light touch contracts are so widely applicable as to be meaningless, and wide-open rules are unlikely to encourage take-up
 | * Specificity about the nature of services that can and should adopt more flexible approaches, including a set of principles for determining these services
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* **Proportionality (clause 12)**

The Procurement Bill covers such a wide range of goods, works and services and a range of scales (from tens of thousands of pounds to hundreds of millions) that it can only be implemented effectively if proportionality is applied throughout the process. That is, the process followed must be proportionate both to the scale of the contract and the type of service / good that is being procured. For example, a £500,000 contract for delivering holistic support to survivors of domestic abuse is wholly different to a multi-million pound defence contract, and different considerations and processes will be necessary for each.

Proportionality is crucial to the effective procurement of person-centred public services. It ensures that resources are not wasted on overly complex processes and that the most appropriate provider to run the service can be procured rather than being excluded. Providers often find themselves excluded because of, for example, their small size or their lack of experience delivering huge contracts where this is not relevant to the scale or nature of the contract in question.

Proportionality is relevant across the entire procurement cycle, yet it is only referenced in specific areas within the proposed legislation. It is critical for proportionality to be included within the Bill’s overarching procurement objectives.

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| **Problem with current approach**  | **What is needed**  |
| * The Bill covers a wide range of goods, works and services at vastly different values / scales
* Proportionality is currently only referenced in specific areas of the Bill, not as an overarching principle
 | * Proportionality should be included within the Bill’s overarching procurement objectives
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* **Social value (clause 13)**

Increasing the role of social value was a key tenant of the Procurement Green Paper, but it was removed from the first draft of the Bill – despite social value being a key way of ensuring wide-reaching and long-term value for money. Amendments made by the House of Lords mean there is now a requirement to consider social value in the Bill, but there is a danger that these important additions could be lost when the Bill goes through the House of Commons.

It's vital that social value is explicitly mentioned in the Bill to safeguard its central importance to procurement decision-making and processes. Doing so would more effectively drive much-needed culture change amongst contracting authorities.

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| **Problem with current approach**  | **What is needed**  |
| * There is a risk that amendments made in the House of Lords could be removed when the Bill goes through the Commons.
* If social value is not referenced on the face of the Bill it will diminish its role and will not help to drive the culture change that is needed to maximise social value
 | * Ensure that references to social value within the Bill are retained
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* **Most Advantageous Tender (MAT) (clause 19)**

The Bill’s ambition to ensure that procurement is based on the ‘most advantageous tender’ rather than ‘most economically advantageous tender’ is welcome. This change in focus could help to create more diverse and sustainable markets which deliver high-quality public services.

The focus on the ‘most economically advantageous tender’ set out in previous regulations did allow contracting authorities to base procurement decisions on a broad range of considerations, including quality and social and environmental aspects. However, in practice, it meant that contracting authorities made (and continue to make) many procurement decisions primarily based on the lowest unit costs. This extremely narrow focus can lead to poor practice and low-quality services. It can also price out smaller charities and local providers, where larger organisations are able to take advantage of economies of scale across multiple contracts, or recoup lost income of underfunded contracts from other areas of their business, even though the smaller provider may be better placed to deliver the service.

While the change to basing decisions on ‘most advantageous tender’ is positive, there is limited definition in the Bill of what this should mean and how it should be applied. It would be helpful for the government to provide more clarity, whether through guidance, or on the face of the Bill, and there should be provision for this change to be reviewed in the future to ensure it has been effective in shifting procurement culture towards broader considerations than cost, including quality and social value.

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| **Problem with current approach**  | **What is needed**  |
| * Existing regulations already allowed for wider considerations to be made but it did not shift practice - decisions are still dominated by lowest price
* Lowest price is often not best value and can lead to poor quality services and/or ‘failure demand’ (where people’s needs are not met so they must seek support from other/more services)
* There is limited information in the Bill about what ‘most advantageous tender’ means and how it can be applied
 | * Greater clarity on the face of the Bill / in the guidance about what ‘most advantageous tender’ should mean and how it should be applied - including case studies
* Reviews of how ‘most advantageous tender’ is being applied to understand if it is impacting how decisions are made
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* **Value for money (clauses 12 and 19)**

The Bill does not define value for money, nor does it set out what can or should be considered when assessing for the ‘most advantageous tender’. While provisions under existing legislation already allow for wider considerations of value, too often the dominating factor remains ‘lowest unit cost’. This is problematic because it can lead to services being procured which do not effectively meet needs and can drive higher costs long term - particularly where it leads to a revolving door of support needs, where people do not get the support they need and their need for support escalates as a result. They are forced to keep going to services that cannot give them the help they need, or cannot address the root cause of their issue.

While the Cabinet Office is planning training to be rolled out alongside the legislation to encourage culture change, it is important that the legislation goes as far as possible in encouraging better practice. Further defining value for money is an example of how this could be done.

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| **Problem with current approach**  | **What is needed**  |
| * No definition of what value for money means
* Lack of clarity is likely to mean that decisions continue to be dominated by lowest unit price
 | * Define value for money
* Definition should include:
	+ Considerations of social value (including the social value that is inherent in how many charities deliver services)
	+ The quality of the service provided and ability to meet the needs of those supported
	+ Long term value, including whether the service properly supports people to address issues, reducing future support needs
* Considerations of savings that could be made across other service areas e.g. GP referrals or A&E admissions
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* **Supporting the inclusion of smaller providers such as charities within procurement processes (clauses 15, 16, 17, 54, and 91)**

Smaller providers such as charities often struggle to compete in competitive tendering processes. While they have the expertise to deliver quality services, they rarely have the requisite time or resources necessary for complex bidding processes, such as bid-writing teams and legal expertise. Proposals are often prepared by service managers or CEOs on top of already full-time and front-line jobs. Often tenders are launched with no warning and with tight timescales. Charities have identified that greater lead-in times and awareness of when tenders will be published would better help them to prepare and subsequently compete for contracts.

While the Bill as it is currently drafted does allow for better practice by confirming that contracting authorities are able to publish planned procurement notices, we know from the current state of practice that being able to do something does not mean that it occurs. As such, a greater onus should be placed on contracting authorities to publish planned procurement notices. The requirement to publish pipeline notices where spend is expected to be £100m or more in the coming year should also be strengthened by lowering the threshold. Smaller providers would be aided by having greater warning of impending opportunities and when tender specifications are expected to be published, so they can seek to organise resources accordingly.

Additionally, the Bill specifies no minimum participation period or minimum tendering period for light touch contracts. This will disadvantage VCSEs by leaving them inadequate time to develop an offer (especially through collaboration with other providers and co-production with service users) and/or craft a high-quality bid, particularly if contracting authorities use the light touch rules to procure person-centred services.

Similarly, contracting authorities should be further encouraged to consider preliminary market engagement. The commissioning process ahead of any procurement is arguably the most important element – it allows contracting authorities to truly understand needs in their communities, what services are required, and which types of service provider might be best placed to deliver. It is only through engaging with people who would access the service and specialist providers who already provide support that contracting authorities can gain a deep understanding of the nature of the service required, which should form the basis of any tender that is subsequently published.

While such engagement is already permitted under existing rules, it is common to find that contracting authorities are reluctant to engage with people and providers for fear that it will contravene competition laws. The Procurement Bill does nothing to change this: engagement is also permitted, but it is not sufficiently encouraged. Vague language about not conferring ‘undue advantage’ through preliminary market engagement is also likely to make contracting authorities and providers think twice before engaging in pre-procurement commissioning processes. To shift behaviour, the legislation needs to be more explicit about encouraging contracting authorities to take this approach, and clearer about the circumstances in which ‘undue advantage’ must preclude a supplier from bidding.

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| **Problem with current approach**  | **What is needed**  |
| * Bill *allows for* things that could help smaller providers to bid (e.g., publishing planned procurement notices) but doesn’t require / encourage them
* Bill allows for preliminary market engagement, but cautions against conferring ‘undue advantage’ to providers without defining what that means - this will have a chilling effect and will not change risk-averse approach that currently exists
* There are no minimum time periods for light touch contracts
* Bill does not require pipeline notices to be published where a contracting authority expects to spend less than £100m in the next financial year
 | * Increased expectations that contracting authorities:
	+ Publish planned procurement notices
	+ Consider and undertake pre-market engagement
* More clearly define ‘undue advantage’ with regards to preliminary market engagement - this could be in guidance - with case studies of how to use such engagement to deliver better services
* Increased expectations that light touch contracts are designed to encourage and enable VCSE participation
* Lower threshold for requiring publication of pipeline notices
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* **Reserving contracts for supported employment providers (clause 32)**

Current procurement rules reserve supported employment contracts for those where 30% of staff are Disabled or ‘disadvantaged’, but the original EU procurement rules had a higher threshold of 50% and did not include the word disadvantaged, which has no legal definition. The Procurement Bill maintains the lower threshold and wider definition, which risks those organisations whose staff are majority Deaf and Disabled people being shut out of contract delivery. It’s vital that the original definitions are re-instated so that reserved contracts for supported employment providers meet the objective of these contracts.

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| **Problem with current approach**  | **What is needed**  |
| * Bill maintains a lower threshold and wider definition for what counts as a ‘supported employment provider’ (proportion of Disabled staff is down from 50% to 30% and now also includes staff who are ‘disadvantaged’ without defining what that means)
* Risk that those organisations employing Deaf and Disabled people (including Deaf and Disabled People Led Organisations) will be shut out of contract delivery
 | * Revert to previous definition of a supported employment provider - 50% of staff who are Disabled
* Include further detail, including case studies, in the guidance
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* **Opening up the market (clauses 71 and 72)**

In many instances, the only means for smaller providers to participate in public service delivery is to act as a subcontractor to deliver part of a larger contract. There are countless examples of smaller providers, particularly smaller charities, being named as subcontractors to strengthen bids due to the provider’s expertise, track record and local connections, yet in reality they either have no knowledge of being in the bid, or referrals and/or subsequent payments fail to follow. This problem, known as ‘bid candy’, results in services that do not deliver the quality of service needed or expected, and can result in contracts being cancelled and procurement processes being re-run, at significant expense.

‘Bid candy’ is a significant challenge for smaller providers, and under existing rules there is nothing to stop large providers from adopting this practice. If the Procurement Bill is going to successfully open up public service delivery to a greater diversity of providers, particularly smaller providers, it is important to tackle this problem.

Simple checks and balances would go some way to discouraging and addressing the practice. Ensuring those named in bids are aware of their inclusion would be easy for contracting authorities to confirm at the point of assessment. Similarly, through effective contract management, contracting authorities could ensure that referrals take place as anticipated, with checks to ensure money follows these referrals in a timely manner. Driving out ‘bid candy’ would benefit contracting authorities by ensuring that the quality of the service delivered matches that set out in the initial bid.

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| **Problem with current approach**  | **What is needed**  |
| * Nothing in the Bill will actively address bid candy
 | * Contracting authorities should have to check those named in bids are aware of their inclusion
* Checks through contract management of successful providers to ensure referrals and money is flowing as intended
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* **User choice and direct awards (schedule 5)**

Schedule 5 allows for the direct award of contracts in order to provide services where user choice is mandated by other legislation. However, it is currently unclear whether direct awards refer only to personal budgets, or whether provision is intended to support strategic co-production and commissioning of person-centred services for a group of people with similar needs. If the latter, then this should be clarified, and encouraged where appropriate.

A specific, but still flexible, set of principles for identifying and commissioning such services through direct award should be based upon the following characteristics:

* Services that are **delivered to people facing difficult and/or multiple challenges**
* Services that **depend on trust** being built between the service provider and the person accessing the service
* Services that provide **personalised, holistic and in-depth support**, typically over the medium to longer term

Providing services outside of a procurement system can still allow for quality control and securing the best use of public funds. Principles to guide this process should include:

* **Focusing on co-production**: working with people who access services and those that provide them to fully understand what support is needed, designing services to meet these needs and involving people who access services in decision making.
* **Ensuring accountability and transparency**: accountability should be to those accessing services. Where services are not meeting these needs, people should have access to relevant data and information and the ability to challenge commissioners.
* **Measuring success**: it is important to understand what matters to the people using the service and how they determine the efficacy of support. This should be complemented by available evidence and research. Monitoring information should be accessible to all, with a focus on services and commissioners using this information to continuously improve.
* **Payments reflect costs**: payments for services should accurately reflect the cost of delivering that service.
* **Providing long-term funding** (with review points): value for money is supported where providers can plan, adapt, and improve. Longer term funding allows for better continuity of service and enables providers to build the trusting relationships that are needed to support people facing complex challenges. Review points can ensure that providers are continuing to use learning from their monitoring to deliver the most effective services.

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| **Problem with current approach**  | **What is needed**  |
| * It is unclear whether schedule 5 can be used to strategically commission services for people
 | * Clarification – including in secondary legislation and guidance – of how schedule 5 is intended to be used. If it is meant to encourage strategic commissioning of person-centred services, this should be explicitly stated and encouraged where appropriate.
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* **Mandatory exclusions**

The Bill requires that suppliers be added to the debarment list where a beneficial owner is a person and/or entity that has previously been convicted. This approach undermines the government’s aims regarding rehabilitation. Government must take the lead in respecting the Rehabilitation of Offenders Act 1974 and only bar people for as long as their convictions are unspent as a maximum.

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| **Problem with current approach**  | **What is needed**  |
| * The requirement to exclude suppliers where a beneficial owner has previously been convicted undermines the Rehabilitation of Offenders Act 1974
 | * Beneficial owners with spent convictions should not be required to be placed on the debarment list.
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**Appendix II: Template letter for your MP**

*The more you personalise your communication to your MP, the greater the impact but if you’re short on time, you are welcome to adapt the template letter below. Remember to add your organisation’s logo into the header if you can. The sections where you need to add your own information are highlighted in yellow.*

<Insert name and address of your MP>

(find your MP at: <https://members.parliament.uk/FindYourMP>)

<Insert date>

Dear <insert first name of your MP>,

I am writing to you on behalf of <insert charity name> about the Procurement Bill. Supporting amendments to this Bill will be critical to ensuring that people in <insert constituency name> can access the public services they need locally, and that government spending achieves maximum benefit for society.

At <insert charity name> we support people in <insert where you deliver services, particularly highlighting your work in the MP’s constituency> who <insert who your charity supports in terms of the challenges they face e.g. who face homelessness or who are fleeing domestic abuse>. We do this by <insert short description of the types of activities and services your charity offers>.

Local charities like <insert charity name> deliver a whole range of vital services to people in <insert constituency name>, but our ability to do so is often thwarted by commissioning and procurement processes that discourage smaller organisations and charities from fully participating. As a result, too often local people are unable to access services they trust or that provide the holistic support that they need. Not only does this negatively impact on individual people’s lives, but it also wastes public funds that are already over-stretched. Furthermore, money often leaves the local area when contracts are awarded to national organisations, and people end up being directed to service providers with no local connection. This funding could instead be invested locally, which brings additional benefits of creating local jobs, keeping resources within local supply chains, and being able to meet local priorities such as <insert example of a local priority here, e.g., creating green jobs, improving social infrastructure, strengthening civil society, etc.>.

<insert specific example of how poor procurement has impacted what services are available in your local area and how that impacts people accessing services. If you have experienced any of the challenges that are summarised in the briefing above, use this space to bring that to life for your MP.>

The Procurement Bill is an opportunity to help address many of the challenges surrounding public procurement – but, as it stands, there is a danger that the new legislation won’t make the most of this opportunity. There is a risk that small and local providers and contracting authorities alike will still face overly complex processes when it comes to deciding who should deliver local public services, and that the wider benefits of a service to the local community, economy, and environment won’t be realised.

We are keen to meet with you to discuss the challenges arising from procurement practices and how you can help ensure that new procurement rules better facilitate the delivery of services that local people need. I would also be happy to put you in touch with NCVO and Lloyds Bank Foundation who are supporting us in this work and can provide further details about how the Bill has the potential to improve local services, particularly for people facing multiple disadvantages. . Please do let me know how we can support you to take this issue forward in parliament

Yours sincerely,

<insert name>

<insert job title>

<insert charity name>

Email: <insert contact email address>

Phone: <insert contact phone number>