

DEMOCRATISING LOCAL PUBLIC SERVICES

A Plan For Twenty-First
Century Insourcing

A Labour Party Report

Community Wealth Building Unit

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Democratising Local Public Services

A Plan For Twenty-First Century Insourcing



Foreword, Andrew Gwynne MP

Shadow Secretary of State for Communities and Local Government

Outsourcing our vital public services to the private sector risks wasting public money, degrading our public services and putting people at risk.

Those seeking to open up our public services to private profit have long peddled the myth that outsourcing provides value for money to the taxpayer and drives up standards through innovation – but decades of outsourcing haven't produced a shred of evidence for either.

We know what happens when our local services are handed over to private companies. Our councils continue to have responsibility for these services, but they lose the ability to deliver them. With every contract that's outsourced our local institutions lose dedicated, qualified staff, and the staff that remain often see their pay and rights slashed. And when you try to report potholes or need to complain about street cleaning, it is to someone in a call centre far away who doesn't know your area and has never walked down your streets – that's if you're lucky enough to speak to someone at all.

After years of failure the public has lost confidence in the privatisation of public services and a growing number of Labour councils across the country are taking the lead in bringing services back inhouse. Not only is this saving money and opening up services to increased scrutiny and accountability, it is also creating good local jobs and opportunities for local businesses.

Insourcing is an element of Labour's radical plan – as a part of community wealth building -- to rebuild local economies, renew faith in local services and deliver a renaissance of local government in communities right across Britain.

But current laws are designed to hinder rather than help deliver this; they urgently need to be transformed. This report sets out a plan for doing exactly that, with three simple steps. First, it makes inhouse provision the default option, backed up by clear criteria for when it is okay to outsource. Second, it strengthens the standards built into outsourced contracts, making sure that service delivery, employment standards and costs do not suffer when services are outsourced, and that local economies benefit.

Finally, it sets out a package of measures to support councils in implementing these changes – both now, and under a future Labour Government.

Our plan will be the largest set of reforms to local government in generations, rebuilding local government capacity and giving power back to communities – because public services belong to local people, and people are more important than profit.

So whether you are visiting your local library, paying your council tax, or putting out the bins you can be certain that your neighbourhood services are of the highest standard and everyone providing these services is treated fairly and paid well. In short, this is a plan for public services run for the many, and not the private interests of the few.

Executive Summary

The outsourcing of key public services at a local government level was a pillar of Margaret Thatcher's ideological agenda. Outsourcing under Thatcher did not involve services being simply 'opened up' to the market, with private contractors coming forward freely to take up opportunities. Instead, outsourcing emerged out of a tightly controlled, coercively imposed legislative regime, which made public provision of local services very difficult. This resulted in the gradual growth of outsourcing, in particular in several defined areas of service provision. The harms of outsourcing have been well-canvassed and have been clear to many for the past 30 years. They include poor service delivery, a lack of accountability for – and ownership of – areas of essential neighbourhood services, a slashing of worker protections and the power of labour, and an artificially low costing of outsourced projects that has shunted costs to other government departments and the rest of society.

The current legislative and policy framework remains tilted in favour of outsourcing at a local government level. That framework must be reviewed in light of the known failures of outsourcing, the increasing evidence of the benefits of insourcing, and the democratic support for insourcing. There are seven reasons for the framework to be changed to better acknowledge the attractions of insourcing. Insourcing involves lower costs, a public service ethos, a longer time horizon, greater scope for coordination and integration of services, economies of scale, greater accountability and transparency, and better management of risk. But not every service can be provided by councils inhouse. Some criteria are needed for councils to decide on whether to bring services inhouse. Available criteria include the 'public function' test developed by courts to determine public law accountability, guiding questions proposed by the Institute for Government, and criteria developed by local authorities in Barcelona. It is possible to arrive at an amalgamated version of these three criteria. Where services cannot be provided inhouse, it is also important that strong standards are set for tendering, bid evaluation, and contracts. These standards should include a fair wages and workers' rights clause, compliance with the Freedom of Information Act 2000 and Human Rights Act 1998, requirements relating to use of local labour and local products, gender pay audits, maximum contractual periods, provision for monitoring of performance, community benefit contributions, and a prohibition on involvement of parties who have been engaged with illegality, improper tax practices, or corruption.

It is important to be practical and detailed in explaining how this framework would operate, and for that purpose draft legislation is set out. Further strategic decisions will need to be taken about whether the legislation singles out specified services for insourcing, or offers a general definition of insourcing. A general definition would appear to be the most defensible.

This is an insourcing framework that is capable of being implemented by a Labour Government. But there are also aspects of this framework that can be used by councils, and things that can be done now, without a change to the law. Labour's Community Wealth Building Unit is already supporting councils who want to insource with skill-sharing and advice, as part of a wider community wealth building programme. The criteria sketched out for the choice over insourcing or outsourcing can be used by councils in decision-making, helping them to go further. Councils can choose voluntarily to insist on the optimal standards for bidding, tender evaluation, and contracting that will be consistently applied when legislation is passed. Councils can push back on legal arguments commonly used to defend outsourcing, and can make use of all available

legal resources to encourage insourcing. Councils can probe claims about risk, ask strategic questions of proponents of outsourcing, and establish a rolling review of contract expiry dates. Councils can make better use of knowledge transfer and skills-sharing, and some suggestions are offered about what role other institutions can play in this process.

Multiple possible objections might arise from opponents of insourcing: that insourcing will place unsustainable cost burdens on councils, lead to skimping on performance, or contravene EU law. All of these objections can be answered. Ultimately this paper aims to make the case for insourcing for all local councils, and to set out in some detail how the Labour Party would roll back the Thatcherite outsourcing reforms in order to establish a framework for participatory, inclusive insourcing fit for the twenty-first century.

Part I: The History and Harms of Outsourcing

How Outsourcing Has Been Facilitated

Addressing current outsourcing practices without first understanding the history of outsourcing risks underestimating how deeply embedded outsourcing is in British policy and law. Recounting the history in brief also helps to make clear how the outsourcing regime can be unwound.

When Margaret Thatcher was elected in 1979, she and her government advanced rhetoric that combined an attack on government and trade unions with advocacy of freedom for business and the individual. This was part of a broader ideological shift, not confined to the United Kingdom and supported by international agencies (such as the International Monetary Fund) as well as those advocating for 'New Public Management'.¹ Increased private provision of services previously provided directly by councils, and the use of contracts to set out the nature of that private provision – what is now called outsourcing – fitted neatly into Thatcher's interlocking policy agenda. That private provision had also been directly lobbied for by organisations such as the Centre for Policy Studies, the Adam Smith Institute, and the Chartered Institute for Public Finance and Accountancy.²

Local government was a site of strong union density,³ and privatising the delivery of council services was a way to undercut union membership, since it encouraged private providers to compete by slashing wages and worker protections. Local government was not subject to the same scrutiny as central government, and the size of state could therefore be shrunk by stealth. And at the same time transferring the delivery of council services into private hands empowered businesses by providing a direct new source of revenue and profit.

The process adopted to engineer outsourcing also helped to embed values that were central to the Thatcher project. Introducing tendering and bidding allowed claims to be made about the importance of competition in delivering services. The language of 'outsourcing' itself – which applied a particular theory of the firm to government, and claimed that activities should be divided up into ever smaller tasks and sometimes undertaken by actors external to a core organisation (including within globalised markets) – suggested that specialisation and efficiency were central goals of government.

But outsourcing did not bloom and blossom organically as soon as opportunities were 'opened up' for private involvement in local government. A regime to encourage private involvement in provision of core council services was coercively imposed in a top-down way through successive legislation in the 1980s and 1990s, and even following that controlled imposition of outsourcing on councils, take-up of private services by councils was relatively slow.⁴

The Local Government Act 1972 had set out a series of functions for local government, including education, refuse collection, and social services. Then the Local Government, Planning and Land Act 1980 was passed, a year after Thatcher's election, disrupting the approach to local government activity. That Act ushered in competitive tendering for construction or maintenance work by councils. But it did not make competitive tendering optional, available for councils that viewed it as an attractive approach: it made it compulsory.

The Act prohibited a local authority from entering into a works contract above a specified value (to be prescribed by the Secretary of State) without going through a tender process.⁵ It also applied this retrospectively: where a works contract was already entered into without a tendering process, councils could continue that contract for twelve months and would then have to put that contract out for tender.⁶ Where a local authority or development body did undertake construction or maintenance work itself, the legislation required a specific positive rate of return on capital to be demonstrated, later set at 5%.

Some competitive tendering was encouraged by government in other areas following 1980, especially in refuse collection. But progress was sluggish on the local privatisation agenda: by 1985 only 41 out of 456 local authorities had brought in private contractors.⁷ This prompted the Conservative Government to pass even more demanding legislation after it won the 1987 election, the Local Government Act 1988.

That legislation set out eight 'defined activities': refuse collection, building cleaning, other cleaning, school and welfare catering, other catering, ground maintenance, and vehicle repair and maintenance.⁸

It then prohibited local government from carrying out "functional work falling within a defined activity" unless six conditions were fulfilled.⁹ The conditions were (simplifying slightly): councils would have to publish a notice inviting individuals to carry out the work; that relevant information about the work would be supplied; that if individuals expressed willingness to carry out the work the council would have to follow a process; that a written bid would have to be prepared by a person seeking to do the work; that the council in making a decision could not act in a way that would make it likely that competition would be restricted, distorted, or prevented; and that the work would have to be done in a way that matched the specification of it.¹⁰ Put simply: the bidding and tendering process became much more prescribed through this legislation.

The Secretary of State was also free to add to the definition of "defined activities", allowing the Government to expand the scope of this compulsory tendering regime.

Again, the legislation applied retrospectively: where a contract had been entered into before 1 April 1989 and infringed the legislation, "the parties to the contract shall cease to have the power to carry it out". Past contracts thus had to comply with the tendering regime, too.

The same legislation put other limits on local government. It prohibited local governments from considering "non-commercial matters" in relation to public supply or works contracts.¹¹ Non-commercial matters were said to include the terms and conditions of employment, "the conduct of contractors or workers in industrial disputes", "the location in any country or territory of the business activities or interests of ... contractors".¹² The Secretary of State was also free to add any "any other matter which appears to him [sic] to be irrelevant to the commercial purposes of public supply or works contracts". The Act made it clear that councils could be judicially reviewed if they did consider non-commercial matters in these contracts.¹³

In case there was any doubt that this legislation was coercively imposing conditions on local governments reflecting the Government of the time's ideological positions, it is worth noting that this was the same Act that required that a council would not "intentionally promote homosexuality or publish material with the intention of promoting homosexuality."¹⁴

In 1990, the Secretary of State added the management of sports and leisure services to the tendering, outsourcing regime governed by the 1988 legislation.¹⁵ A ratcheting up of grounds maintenance tendering was also introduced, such that local authorities were required to put 20% of grounds maintenance out for tender by 1 January 1990, and a further 20% each year until 1994.¹⁶

Then in April 1992, a new Government paper, *Competing for Quality: Competition in the Provision of Local Services*, sought to extend tendering and private involvement to a range of new services: computing, corporate and administrative services, engineering, finance, legal services, personnel, and property and architectural management.¹⁷ The Deregulation and Contracting Out Act 1994 gave further general powers to ministers to require contracting out by local authorities, albeit not after consulting local government.¹⁸

Overall, over the course of the 1980s and early 1990s, there was a gradual, coercive extension of an outsourcing framework. Legal barriers were created to insourcing and careful processes had to be followed for outsourcing.

What is striking, though, is the extent to which councils continued to provide services inhouse, despite such legal pressures. By 1993, 66.8% of contracts were won in-house.¹⁹ By that same year, just 8.4% of catering contracts in education and welfare had been won by the private sector, and just 19.9% of vehicle maintenance contracts. Nevertheless there was a clear shift – with building cleaning contracts won in 47% of instances by the private sector – as a result of the tilting of the law in favour of outsourcing.²⁰

The legal attack on inhouse local government provision was simply a supporting instrument in the broader ideological assault on government, trade unions, regulation, and public services. In 1997, with the election of Tony Blair, some new conditions were placed on outsourcing. But the Private Finance Initiative (PFI) locked in central governments to long-term government contracts, with surprisingly scant evidence of effectiveness.²¹

The Local Government Act 1999 introduced a 'best value' framework, which required local councils to achieve "continuous improvement" in functions.²² It allowed for the Secretary of State to make an order clarifying that a matter considered by local government should no longer be deemed a "non-commercial consideration", and it repealed aspects of the compulsory competitive tendering regime. But it also authorised ongoing contracting-out could by local authorities.²³

There were some positive developments for public provision of services at the local level at this time in the early 2000s. The Local Government Act 2000 allowed councils to promote economic, social, and environmental wellbeing. The Local Government Act 2003 allowed local authorities to borrow, but within particular limits. The 2003 Code of Practice on Workforce Matters in Local Authority Service Contracts, or Two Tier Code, applied TUPE (the Transfer of Undertakings (Protection of Employment) regulations)

to outsourcing in an effort to maintain worker protections. The aim of this Code was to ensure workers' conditions were no less favourable when outsourced than in public sector, though in several key areas – including pension provision – the Code was somewhat weak.

The Coalition Government entered into power in 2010 with a 'Big Society' agenda, realised through the Localism Act 2011. But that Act, following on from the *Open Public Services* White Paper, had implications for inhouse or outsourced service provision. It gave councils the "power to do anything that individuals generally may do", making it easier for councils to contract out: they would no longer have to secure statutory change, since contracting is something that "individuals generally may do."²⁴ It allowed the transfer of certain "local public functions" to "permitted authorities", which included an "economic prosperity board".²⁵ Through the 'Community Right to Challenge' regime, the Act also sought to discourage inhouse bids for services. Much of this legislative development, as demonstrated by the *Open Public Services* White Paper, was framed through the language of choice and personalised services.²⁶

The Public Services (Social Value) Act 2012 adjusted the Blair government's language of 'public value', and essentially altered the prohibition on local councils' taking into account non-commercial matters. It noted that local councils could take those matters into account as long as they considered it "necessary or expedient to do so" to comply with the Act.

The Public Contracts Regulations 2015, bringing the EU Public Contracts Directive into UK law, placed some limits on government contracting, including at a local level (with an exemption for contracts for buses, water, energy, and other utilities). They required contracting authorities to apply principles of equality, non-discrimination, transparency, and proportionality, with a prohibition on acts that might "artificially [narrow] competition."²⁷ They also required a call for competition to be published for public contracts at the national level in the Official Journal of the European Union, if the contract is above a certain threshold. As at 2018, this was around £180,000 for supply, services, and design contracts; roughly £4.5 million for works contracts; and around £615,000 for social and other specific services.²⁸

Public authorities are generally required under the Directive and Act to exclude bidders who have been convicted of bribery, corruption, money laundering, tax offences, and other related offences, and may exclude bidders in a range of other situations, such as where there is "grave professional misconduct" or where there are "significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract."²⁹ Selection criteria are limited but phrased broadly: relating to "suitability to pursue a professional activity", "economic and financial standing", and "technical and professional ability".

Contracting authorities are also told they must "base the award of public contracts on the most economically advantageous tender assessed from the point of view of the contracting authority."³⁰ However, "qualitative, environmental and/or social aspects" can be considered if linked to the subject-matter of the contract. Public authorities can explicitly request information about subcontracting.³¹

A slightly different regime is set out for social and other specific services (listed as including “health, social and related services; “administrative social, educational, healthcare and cultural services”; “other community, social and personal services”; “provision of services to the community”), where greater freedom is given to contracting authorities. In particular, contracting authorities can take into account the need to ensure “accessibility, affordability, availability and comprehensiveness”, “the specific needs of different categories of users, including disadvantaged and vulnerable groups”, and “the involvement and empowerment of users”.³²

Other legislation relevant to insourcing and outsourcing has been passed in recent years, and under the Conservative Governments of 2015-2017 and since 2017. We will return below to the Procurement Reform (Scotland) Act 2014, which sets out a progressive framework for procurement in Scotland. More worryingly, piecemeal legislation has tied the hands of councils in efforts to bring particular services inhouse. For example, the Bus Services Act 2017 said that councils “may not, in exercise of any of [their] powers, form a company for the purpose of providing a local [bus] service.”³³

What should be clear from this necessarily brief (and law-centred) view of the legislative developments of the past 30-40 years is that the legislative backdrop for insourcing and outsourcing is not neutral. The law has been sculpted specifically to induce outsourcing, and to make it harder for councils to provide core public services inhouse. The result is outsourcing being viewed almost as a ‘new normal’, or orthodoxy, for councils. This review also makes clear the Conservative strategy over successive decades: to begin with stipulated services, and gradually to expand outwards the coverage of its outsourcing regime. The review (including the survey of relevant EU law) also provides context for any consideration of how the law might be changed.

How Outsourcing Has Gone Wrong

There are now multiple reports, academic papers, and publications on the harms of outsourcing.³⁴ But it remains useful to recap the harms of outsourcing in order to highlight the case for change to the legal and policy architecture, and to give an indication of the priorities that ought to be borne in mind as part of that change.

First, there is now widespread evidence of failures in service quality in services provided through outsourced contracts. The collapse of Carillion in 2018 highlighted starkly the risks of private provision, but diminished service quality and standards go beyond one-off instances or merely anecdotal instances of private providers not delivering on their promises.

Examples now abound of serious failings in contractual delivery, across a range of service areas and regions in the United Kingdom. Aberdeen’s grass-cutting services were outsourced in 2010, but were brought back in house in 2014 after an “unprecedented” number of complaints about the service. Sefton Council, which had awarded a 10 year contract to Capita Symonds in 2008 for technical services (including road maintenance and engineering), brought the contract back inhouse after disappointment with its services. South Derbyshire District Council contracted Northgate to take over its corporate services in 2010, but severed ties in 2011 after late filing of accounts. Worthing Council outsourced parking services to NCP, but after a series of complaints and controversies, took the services back inhouse in 2013. East Riding Council signed an eight-year contract with Arvato to run benefits and associated

training, with a promise that Arvato would create 1000 jobs. When just 176 jobs were created, all services were brought back inhouse.³⁵ In all these instances, councils and citizens have suffered through inadequate services, which not only harms quality of life for all affected but may have flow-on consequences for productivity. There has been a gradual deterioration of standards in many areas of service delivery, as well as a failure to meet targets, with service criteria sometimes downgraded in order to facilitate a gradual decline in employment, pay, and terms and conditions.

There are patterns in these incidents – cost overruns, failure to meet targets, disappointed expectations – in part because of the structure of private providers' motivations. Private providers have little incentive to exceed targets or to make generous provision in service delivery. Instead, their incentive is to fulfil pre-agreed contractual standards sufficiently – or to be perceived to fulfil pre-agreed contractual standards – so that they can receive their promised financial return. Private providers also have incentives to reduce costs in order to maximise return and profit margins, where they are for-profit providers. This can lead, and has led, to the cutting of corners in service provision.

Of course, it is true that private providers have an incentive for a contract not to be terminated prematurely, and perhaps to get a contract renewed. But this in practice often is an incentive to do just enough to satisfy the other contracting party, the council, leaving a small margin of error that can easily lapse into failings in performance.

Defenders of outsourcing might say that this is an argument simply to replace a contractor, rather than the system of outsourcing. But in some service areas there are very few competitors, meaning that the logic of competition presumed by advocates of outsourcing does not apply. Moreover, the same incentive structure – towards the cutting of costs, and 'just enough' satisfaction of performance targets that – operates on those other competitors, making similar failings likely.

These risks make the accountability of private providers all-important, but the second major harm from outsourcing has been a lack of accountability in different forms. The Information Commissioner has noted that just 23% of the public polled thought that the activities of private providers of public services were accessible.³⁶ Information about outsourcing companies can only be requested by the public if it is held by a public authority on behalf of that outsourcing company.

The National Audit Office has also commented in a 2013 report on the opacity of information about outsourcing companies' financial returns. "Few companies publish sufficient information in their accounts to separately identify the revenues and profits from their public sector work," the Office noted. Little is therefore known, by councils and citizens, about contractors' financial position, or their performance (past or existing) in other contracts.

The National Audit Office observed, too, that the amount of tax paid by contractors is difficult to discover. And, as with performance failures, there are structural reasons for this limited transparency, as pointed out by the Office: part of contractors' competitive advantage may be in keeping information from their competitors, making it highly unlikely that they will voluntarily release information in the public interest.³⁷

This lack of informational accountability is a harm in itself. But contractors undertaking local service provision are also not subject to full legal accountability.

Private contractors delivering services at a local level fall into a legal twilight zone in relation to human rights. Under the Human Rights Act 1998, bodies that “serve functions of a public nature” cannot act incompatibly with certain rights (including the right to life, the right to respect for private and family life, and the right to be free from discrimination – though the Human Rights Act does not extend to ‘social and economic rights’ such as the right to housing).³⁸ That means sometimes service providers delivering outsourced services will be subject to the Human Rights Act and sometimes they will not; but there is no consistent position.

In relation to human rights law, this grey zone of accountability makes it less likely that citizens will take claims, given the risk of costs. But it also means that contractors will not themselves have fully internalised the need to respect the Human Rights Act. It is not inconceivable that this has left citizens feeling more disempowered in their relationship to the services being provided by contractors.

Councils have also faced a weakened ability to hold contractors to account because contract law has proven to be an inadequate mechanism for accountability. Whilst much resourcing has gone into drafting contracts and contract management, it can remain difficult for parties (especially councils) to specify expectations and targets. As a result, contracts for local service provision often still contain open-ended terms, leaving room for disagreement about whether terms have been violated. In such circumstances, the party with more resources (including access to legal resources) is likely to be able to argue against a breach.

The mechanism of the contract has therefore loosened accountability on private providers, arguably providing wiggle-room for contractors to evade their obligations and limiting councils’ ability to insist on performance. This point was alluded to in a recent paper by the Institute for Government.³⁹ The view that there is insufficient ability for councils to hold contractors to account is also sometimes phrased in terms of a lack of flexibility in the outsourcing process.⁴⁰

A related harm of outsourcing is that it has incurred significant costs that have not been easy to anticipate or assess. In tendering processes, private providers have often set as their point of difference greater efficiency gains and lower costs. But these costs have been artificially deflated through reduced legal accountability and the phenomenon of ‘cost shunting’.⁴¹ This occurs where social and environmental costs are not recorded or absorbed by a market actor, and instead passed on to other government departments, communities, or citizens to deal with. Another way of putting the point is that cost-cutting by private contractors is often illusory: costs may seem lower in a tender, but are then simply passed on back to the taxpayer via higher social and governmental costs.⁴² In the case of outsourcing, these costs could include:

- (i) Reduced wages resulting in less money spent in local economies;
- (ii) Increased unemployment, leading to heightened care burdens, stress and health costs (incurred by the NHS), and costs of benefits, such as Universal Credit, Housing Benefit, and Pension Credit; and
- (iii) Lower tax take and national insurance contributions following reduced wages.⁴³

Because these costs have been shunted and are, in one sense, hidden, they are difficult to measure. A further cost that is difficult to specify is the de-skilling of local government, as capacity has been drained out of local government provision and transferred to contractors. As one South African analysis of outsourcing notes (confirming that some of these underlying trends are similar the world over), this loss of capacity is “self-reinforcing”.⁴⁴ The loss of skills within government makes it less and less likely that a government will be able to perform a service in future, and may undermine the contract management skills that have to be maintained by local councils for proper supervision of outsourced services. Another cost is the requirement for local councils, or governments, to regulate markets that they have created through outsourcing: a cost not often factored into discussions of the benefits of outsourcing.

Also difficult to measure is the loss of faith in government that can come from more limited council provision of core services, as well as the loss of faith that follows from a council being tainted by outsourced companies’ performance failures. A related harm that has an effect on people’s standing and quality of life, but is difficult to quantify, is the shift in how people relate to local government, from viewing themselves as “citizens ... with rights to public goods” to “consumers of services procured on their behalf”.⁴⁵

The diluted worker protections and lessened recognition of trade unions, which has been often a selling point of outsourced provision, has weakened the power of organised labour as well as workers’ sense of security in the workplace.

A report by the Institute of Employment Rights and UNISON has highlighted in particular the impact of women from increased outsourcing. It notes that compulsory competitive tendering targeted areas of local public services dominated by low-paid women workers, such as catering. Between 1989 and 1993, the first round of compulsory competitive tendering, part-time work (largely done by women) fell by 22% in the authorities studied.⁴⁶ Outsourcing increased temporary work, and also made it more difficult for women to make equal pay claims.

While there are separate considerations in the private sector, it is noteworthy that in recent years firms have begun to withdraw from outsourcing practices in increasing numbers, themselves acknowledging (as part of a revised theory of the firm) that the drive to hyper-specialisation in the name of efficiency has not always yielded efficiency, good performance, or sufficient accountability.⁴⁷

All in all, widespread performance failure, accountability gaps, and cost shunting on a significant scale (with particular effects on women) raise significant concerns about the operation of outsourcing in the United Kingdom. The outsourcing boom of the last 30 or 40 years has disfigured local government, disconnected local residents and workers from their councils, weakened service provision, wasted money, and created new social harm. A new approach is needed. The next part of this paper examines what a different framework for local government service provision might look like.

Part II: A New Framework Insourcing-First

Previous policy and legal frameworks have not sufficiently acknowledged the advantages of inhouse provision of local public services. Those advantages may have become clearer in the last 30 or 40 years, sometimes in their absence during the outsourcing boom.

There are at least seven reasons, or clusters of reasons, why inhouse provision of local public services has considerable merit. Inhouse provision is understood as provision of a service that is owned and managed by a council, delivered by people employed directly by the council. To list these reasons, all grounded in evidence or incentives structurally built into the nature of inhouse provision, is not simply to reduce inhouse provision to 'good', and outsourcing 'bad'. It is merely to redress an imbalance in understanding that has developed, in part because of an ideological and legal framework that has centred outsourced and privatised provision to such a great extent.

First, inhouse provision involves *lower costs*. If necessary, councils can borrow at cheaper rates than private providers. Councils can access the Public Works Loan Board, a statutory body within the Treasury. Interest rates are tied to the gilt-edged market and have been particularly low since the global financial crisis, with the Government reducing interest rates on loans from the Public Works Loan Board in 2012, and then again significantly in 2018. (As of 2016, local councils were reported to be able to access a 45-year loan at a fixed rate of 2.45%.⁴⁸ Indeed, the Treasury discourages public bodies from borrowing privately, because "the government can raise finance at a lower cost than the private sector", in the words of the National Audit Office.⁴⁹

There are also other fixed, structural reasons why costs tend to be lower. Where a council is providing one service amongst many, services can be strategically combined and merged over time. Inhouse provision – if it does not follow the success of an inhouse bid as part of a tender – does not have to absorb the cost of invitations to tender, tender evaluation, and contract management. Since lost public sector delivery capacity has not been replaced with public sector contract management capacity, often expensive external support is needed to manage these processes, including legal advice (especially on compliance with EU law). Once services are contracted out, monitoring is likely to be more costly. There is, as well, no need for councils to pay dividends to shareholders.

It is for these reasons that there are now numerous examples of costs savings being achieved through bringing contracts back inhouse, whether in relation to waste services in East Riding of Yorkshire Council; waste management and services in Three Rivers District Council; refuse collection in the Wear Valley District Council; housing options service in the Allerdale District Council; or leisure services in the Cheltenham Borough Council, to take just a few illustrative instances.⁵⁰

An APSE survey for UNISON in 2011, which received 140 responses from local authorities across the country, revealed that 57.1% of authorities insourcing a service anticipated no cost increases and 63.4% of respondents said they anticipated financial savings from insourcing. 12.7% reported up to £25,000 per annum of savings, 7.9% reported up to £250,000 per annum of savings, 6.3% anticipated savings up to £500,000, and 4.8% anticipated savings of up to £1 million; the remainder of respondents could not quantify savings specifically.⁵¹

Second, relatedly, inhouse provision involves a *public service ethos*. Service provision is motivated by a desire to serve the public good, and is not motivated by profit generation.

It is this motivation that leads to situations such as that in Southwark, where street and estate cleaning was brought inhouse in 2003. That resulted in a great focus on reducing inequalities in liveability, according to APSE; new programmes such as night-sweeping; increased employment (from 447 staff in 2003 to 800 in 2009), including of local people; training opportunities for employees; and services above and beyond minimum requirements, like bulk clearance and roads being swept more than needed. This has been done with savings of between £200,000 and £250,000 a year.⁵²

Thanet had a similar experience with insourcing of refuse collection, recycling and street cleansing in 2006. New services have been introduced, including a wheely bin service and a charged green waste collection. Three years after insourcing, recycling had risen by about 10% and at least half a million pounds were saved in terms of cost.⁵³

Tied closely to the public service ethos of inhouse provision of services is the likelihood that more robust worker protections and wages will be available, since there is less of a need to cut labour costs in order to present an attractive offer of service provision. As well, evidence seems to suggest (perhaps relatedly) that inhouse provision may be associated with higher morale: 32.8% of 140 councils surveyed said that “improved staff morale” was a positive outcome of insourcing, and 25.4% reported improved staff terms and conditions when services were provided inhouse.⁵⁴

It's important neither to demonise private providers nor to romanticise public provision. Private provision can involve some element of public service ethos, too. But that motivation must always compete with the motivation to produce profit, and to achieve financial success for the company.⁵⁵ It is true, of course, that there are limits on a council's ability to make good on its public service ethos. Constrained budgets, workplace culture, hierarchies and individual egos, and limitations of time can all militate away from the ability for individuals to secure the public good. But the general trend and tendency within inhouse provision is towards generous, public-orientated delivery of services – and the improved service that can deliver is one general reason for inhouse provision to be supported.

Third, inhouse provision involves a *different time horizon*: an inclination towards a longer-term view in the maintenance and improvement of services, since inhouse provision generally is not confined to contractual periods. This has implications for capital stock and knowledge.

In relation to capital stock, while private providers may have some motivation to maintain assets to the extent that they are able to meet performance targets (and to win future contracts), again this motivation has to jostle with the imperative to make profit. Because contractual commitments are time-bound, there is little justification to improve the quality of stock, particularly towards the end of a contract.

Thanet is another example of this logic in action: there, as APSE has noted, refuse collection stock was “run into the ground” under private provision.⁵⁶ APSE observes in its 2009 review of outsourced and insourced services across the United Kingdom that “poor stock of assets” is a common feature across outsourced services. This is in part because private providers are stretched, with multiple contracts across the contract. APSE notes that ageing refuse trucks are particularly common when refuse has not been provided inhouse.⁵⁷ This deteriorating stock has implications for public safety as well as quality of performance. While council provision may also be limited by budgetary constraints, a longer time horizon (combined with public service motivation) encourages better maintenance of stock and assets.

The longer time horizon of councils also favours greater knowledge retention, which itself brings efficiencies. Lessons learned from service provision and good relationships can be built up over decades within local authorities, beyond individual electoral cycles. Such tacit knowledge or capacity is best harnessed if it is recorded and properly shared.

In contrast, private service providers generally only have knowledge built up over shorter, contract-bound time horizons. They may have experience in an area of service provision, if they have delivered other contracts. But they are less likely to have the close connection to communities that councils have, and less likely to have the wealth of knowledge (actual and tacit) acquired and developed over time by councils. New transaction costs and inefficiencies are introduced at the start of a contract when private providers have to build up that knowledge, sometimes from scratch, and at the end of contracts where knowledge can be lost where private providers have no incentive to retain or share it.

Fourth, councils can achieve *greater coordination* and integration of services. Again, this is not a point founded on speculation or ideological judgment. It is inherent in the structure of local government as a provider of multiple services. Information can be shared more easily across different services through local public provision of services (subject to usual protections of privacy), reducing costs and resulting in better services. Funds can also be pooled across services (so that, for example, centralised support can be provided for training leave, or maternity or paternity support).

There are numerous examples of this integration in practice. Tonbridge and Malling Borough Council brought its homelessness and housing register service back in-house in 2008. This allowed the Council to use the register to coordinate the achievement of targets in the Kent County Council Local Area Agreement and Tonbridge and Malling Corporate Performance Plan relating to adequate supply of affordable housing. There was improved linkage between planning, housing policy, and homelessness records. Additionally, the Tonbridge and Malling Housing Options team could – with the register brought back inhouse – at the same time as recording details of those in need offer advice on housing, in particular for young people.⁵⁸

Another example is Islington's insourcing of educational services to support schools in 2010. There had been a perception that difficulties with the outsourced service between 2000 and 2010 had harmed the wider relationship between the council and schools, and an inability for the council to join up educational services and other social services. When the service was brought inhouse, the council leader Richard Watts welcomed the "tearing down [of] the paper walls which existed between the schools and the council."⁵⁹

In contrast, private provision of services – where a provider has a narrow remit and is generally based physically offsite from a council – does not easily induce similar levels of coordination. Private providers, working to contract, generally have no responsibility for wider, related policy areas; are therefore unlikely to expend cost taking steps to support other policy goals; and will find it harder to liaise with other council services (because of more limited relationships and reduced proximity to those services). It is true that external agencies can sometimes coordinate community actors based on local relationships. But more commonly outsourcing is criticised for producing 'siloed' provision of services.⁶⁰ Enhanced coordination and integration is hence a relative advantage of insource provision that should not be overlooked.

Fifth, the capacity for *economies of scale* in inhouse provision must be borne in mind. Economies of scale are achieved when average production costs fall as output increases, and depend on a variety of variables.⁶¹ But local governments have several ways of harnessing the benefit of economies of scale for optimal efficiency.

Because local councils have longer time horizons (even when subject to electoral cycles) in the provision of services, they can guarantee large-scale purchase of inputs, bringing likely discounts.⁶² They are also able to see service provision in the round, combining services, or avoiding duplication – for example, in the development of IT and back-office services – in order to secure economies of scale.

Some private sector providers might be able to achieve economies of scale, including if they are large-scale providers. But this will not always be the case (some companies carrying out outsourcing are smaller than others), and shorter time horizons might result in relatively lower discounts in costs. It is also true that local government, operating within a defined region (especially if a smaller region), might not be able to achieve the same economies of scale, as central government. However, this does not mean some discounts from scale are not possible.

Sixthly, insourced provision is more democratically accountable. This is not a value judgment or a matter of impression; it is a matter of law.

Councils, as a matter of law, are subject to judicial review. Local governments, by virtue of being listed in Part II of Schedule 1 of the Freedom of Information Act 2000, are subject to freedom of information legislation, and the public has a general right of access to information held by local government. Local authorities are public authorities under s 6 of the Human Rights Act 1998, and so cannot act incompatibly with the human rights listed in that legislation. This means that citizens can challenge inhouse provision to provide justification for its actions, and can challenge local councils when they violate human rights, or act unlawfully or unreasonably or follow an improper process.

In addition, and perhaps more importantly, residents can hold councils to account through their local councillors, or through attendance at council meetings. In contrast, private providers (as well as not being subject to the Human Rights Act, and the FOIA, at least in most cases) may be far more secretive, untransparent, and opaque. Their primary responsibility is to the local authority with which they have signed a contract, not to the residents of an area.

In the context of discussions of democracy and accountability, it is also relevant to note that inhouse provision is highly popular. A survey conducted by Survation on behalf of the Association for Public Service Excellence (APSE) in 2016, which included booster samples across the country to ensure equal regional coverage, found that six times as many people trusted their local council (60%) to provide services in their local area over a private company.⁶³ 55% of people want to see more services run inhouse by councils; 61% of the public think that local and central government should try to run services in-house first, before outsourcing. And 64% of people distrust outsourcing companies, with only 21% of people trusting them.⁶⁴ Joe Guinan and Martin O'Neill explain the greater impulse towards public ownership of local services when they write:⁶⁵

The democratic argument for community wealth-building is therefore a direct and powerful one. It is about creating a shift in the balance of power in determining the fate of local communities: a shift from the impersonal logic of the market to the democratic power of political institutions.

Seventhly, there is scope for *better risk management* through inhouse provision. When services are outsourced, there is an information asymmetry between local councils and private providers: often complex companies have no incentive to disclose their capacity to deliver a project, and it might be difficult for councils to evaluate rigorously that capacity. Little effort has been made to boost skills in local government contract management and commissioning, as has already been noted. But the task is beset with challenges. This can result in the collapse of companies, as occurred prominently with Carillion and Interserve at a national level.

Inhouse provision involves no arm's-length relationship or mediation through the mechanism of contract. Councils are likely to be well-placed to assess their own exposure to risk and their ability to take on, and maintain, services. This is not to say that on occasion councils can also make mistakes in assessing risk in relation to their own provision of services. But this is less likely when they exert more control over the service.

There are undoubtedly attractions of private sector delivery of local government services. Private sector delivery is often loosely associated with innovation, dynamism, and efficiency. But purported cost savings have not always been materialised, and sometimes – as already discussed – have excluded certain important costs. Theoretical claims about efficiency gains are undercut by evidence that the market in private provision of local government services is at best imperfect, including in relation to competition between providers. A recent Public Administration and Constitutional Affairs Select Committee report underscored the lack of a satisfactory evidence base to justify the business case for outsourcing.⁶⁶

In light of the existing legal framework and the seven general advantages of inhouse provision, it is reasonable to conclude that the current policy and legal architecture does not capture sufficiently the benefits of inhouse provision of local government services. There is a case – based on lower cost, the public service ethos, a different time horizon, greater coordination, economies of scale, accountability, and better risk management – for a default position in favour of insourcing of services at the local government level.

Because the focus of this analysis has been on local government, no conclusions are reached about the position with respect to central government, or with respect to the provision of goods (as opposed to services). But a ‘new normal’ where insourcing is preferred, an ‘insourcing-first’ model, can be justified at the local level.

When to Insource, and When to Outsource?

We will return later in this paper to what an insourcing-first position might look like in legislation. It is clear, in part from conversations with councillors, that requiring all councils to insource all services immediately might place undue burdens on local government. Some kind of transition period, and phased insourcing, are needed. But it may be that some services can justifiably continue to be delivered by the private sector, even if a ‘thumb on the scales’ is placed in favour of insourcing. So how can principled decisions be made about what is and is not brought inhouse? (We prefer to talk here about ‘inhouse provision versus outsourced provision’, as opposed to the ‘make or buy’ decision, which is private sector language that may not be apt for the decision facing government, especially in the context of delivering services.) Many academics, report-writers, lawyers, and policy-makers have grappled with this question. We review below three prominent frameworks: a set of questions developed by the Institute for Government; an adapted version of the legal guide to what counts as a function of a public nature; and criteria inspired by local authority remunicipalisation in Barcelona. These do not exhaust all possibilities, but they represent three different approaches, and at least can help to prompt thinking about what the best criteria might be.

(i) *The Institute for Government framework*

In 2013, the Institute for Government set out in a paper six key questions to guide a decision on whether to use contractual mechanisms, for goods or services, at either a local or national level.⁶⁷ The questions are:

1. Is it difficult to measure the value added by the provider?
2. Are service outcomes highly dependent on the performance of other services?
3. Does delivering the service require investment in highly specific assets?
4. Is the service characterised by high demand uncertainty?
5. Is the service characterised by high policy uncertainty?
6. Is the service inherently governmental?

If the answer to any of these questions is 'yes', the Institute for Government notes that "particularly acute risks" could arise when using contractual mechanisms, but these might not be insurmountable: clear strategies for risk mitigation would have to be adopted.⁶⁸ The Institute for Government also observes that the costs and risks of transition should be considered carefully. If the answer to the first six questions is 'no', a further four questions should still be asked to test how easy the transition to contracting out might be:

7. Is there an existing supply of high-quality providers?
8. Is there an existing workforce (either in the public or private sectors) with adequate skills and capabilities to deliver high-quality services?
9. Does the government have the organisational capability to design and monitor the use of contractual mechanisms?
10. Does the government have enough information about cost and quality to measure provider performance?

A 'yes' to any of these questions would make transition more manageable, according to the Institute for Government. The Institute for Government goes on to elaborate on all of these questions, breaking them down into parts and suggesting how local and central governments might answer them.

The Institute for Government framework is nuanced and a useful guide for decision-makers. It is not tailored to the question of local government provision, nor is it tailored to the question of local government provision of services. As well, there is nothing in the framework that indicates the presumption in favour of insourcing that has been adopted in this paper.

The first core question is a useful reminder that if performance is not easily measured, it may be hard to hold private providers to account via contract. (But it is worth remembering that even complex social outcomes can often be converted into nuanced metrics.) If it is to be used, a better way of phrasing it may be in terms of whether a service is amenable to evaluation by contract in particular. In some ways the second question overlaps with the first: if performance is dependent on multiple actors, it will not be easy to measure or evaluate. When explaining the third question, the Institute for Government authors highlight that they are gesturing at whether a service might be akin to a natural monopoly, require significant initial investment. 'High asset specificity' may not be the most precise way of capturing the point, but the question seeks to investigate a relevant feature for the purposes of insourcing or outsourcing.

Unfortunately the fourth and fifth questions, referring to 'high demand uncertainty' and 'high policy uncertainty', lack some precision too. The Institute for Government is here asking government decision-makers to consider whether demand might vary over time, and whether policy priorities might change over time. If demand or policy is likely to change, it is true that contracts might be less suitable or attractive, but the Institute for Government does not justify why uncertainty should be such a significant consideration so as to determine a decision about insourcing.

The final core question, on whether a service is “inherently governmental”, is even more slippery. The Institute for Government says that this includes “key policy decisions”, such as waging war or imposing taxes; law and order activities; and activities relevant to the government’s duty to protect the public. But it does not articulate how it has determined what makes a policy decision ‘key’, and gives only illustrations of these. Moreover, no explanation is given for why ‘law and order’ is prioritised over economic decisions (which might have implications for people’s security and livelihoods), or for how broadly the government’s duty to protect the public is. These criteria might be overly malleable – they could be manipulated by decision-makers who have a pre-determined decision in mind – and insufficiently action-guiding.

The further questions relevant to the costs of transition are quite specific, relating as they do to: an existing supply of high-quality providers, an existing workforce with adequate skills, organisational capability to design and monitor contracts, and sufficiency of information about cost and quality of providers. But these final two questions – about contract management skills and information availability – seem to be fundamental threshold questions that should be answered favourably before any thought is given to contracting-out, rather than after-thoughts. Similarly, questions about workforce and supply of providers would appear to affect whether outsourcing is possible in principle, rather than just affecting the costs of transition.

This list of questions does not consider whether the advantages of inhouse provision apply, and therefore seems to underestimate the value of public provision. There are no questions about whether there is a particular need for integration of services, for example, or whether a public service ethos, accountability, or low borrowing costs might be especially relevant. Overall, then, while this framework directs decision-makers to a number of relevant considerations, it does not appear to set up the right framework for comparison between public and private providers of services. It possibly under-weights some questions while over-weighting others. It can offer some pointers about the criteria for insourcing or outsourcing, but not a definitive framework.

(ii) *What counts as a ‘public function’ in public law*

British courts have long grappled with when a body or institution serves a ‘public function’, in particular for the purposes of human rights law. It is conceivable that the factors the courts have cited, with a view to determining what is properly considered ‘public’, could be helpful in developing a principled position about what should be insourced or outsourced. To be clear, the courts are not intending to direct whether a public service should be insourced when describing these factors. The point is that the factors might be usefully adapted to assist with determining when insourcing could be suitable.

A leading decision on this concerned whether a private care home in Birmingham, Southern Cross, was subject to the Human Rights Act. Some of the factors listed in that case are:

- How detailed a statutory scheme is in a particular subject-matter area;
- Whether a subject-matter area (such as the provision of care) is a “beneficial public service”;
- Whether vulnerable people are affected by a service;
- Whether a statutory duty exists to deliver a service;
- The degree of funding provided by a governmental body;⁶⁹ and
- Whether in providing a service coercive powers need to be exercised.⁷⁰

These considerations are certainly generally not irrelevant to a council’s insourcing decision. A statutory duty may favour direct council provision, and if a service requires coercive powers to be used – or affects ‘vulnerable’ people – caution might be needed in outsourcing that service.

But the yardstick of a “beneficial public service” has the same circularity as the Institute for Government’s direction for decision-makers to consider whether a service is “inherently governmental”. Whether a service is public, or governmental, should be the outcome of the inquiry, not the question asked at the outset. Without any further unpacking of what “public service” or “governmental” means, little guidance can be gained.

These factors also do not, as with the Institute for Government list, cover seemingly significant considerations about whether a local government is economically best-suited to providing a services (perhaps because of economies of scale or capacity for coordination). It is in some ways unsurprising since these legal criteria were developed for a slightly different purpose. Nevertheless they provide a useful reminder of some of the criteria that might be appropriate.

(iii) *The Barcelona criteria for remunicipalisation*

Activists and politicians in Barcelona have been seeking the remunicipalisation of key services, including water. The working criteria applied by Ajuntament de Barcelona (the Manager’s Office for Human Resources and Organisation), shared with supporters and academics in the United Kingdom, are the following questions:

- Is a service an essential core service, requiring stable, high quality public premises?
- Is there a strategic need for public capacity and expertise to control and improve the service?
- Is there evidence of greater cost efficiency if the service is provided inhouse?
- Does a service involve significant personal contact, considerable use of personal data, or infringement of people’s rights?
- Is a service a de facto monopoly?
- Does a service require exceptional investment, or make exceptional demands on workers?

Some of these questions cover similar ground to the public law framework and Institute for Government criteria discussed above. The focus on the effect on people's rights might be seen as a variant on the question of vulnerability raised by the public law framework, usefully extending that understanding of vulnerability. The second and third questions usefully remind decision-makers of the need to consider strategic and economic reasons for keeping a service inhouse. And the final criterion rightly acknowledges that a service that could make exceptional demands on workers (such as through significant use of overtime or work that imposes significant physical demands) might be better maintained inhouse to err on the side of protection of fundamental rights and interests.

The first question falls into the same trap as the notion of a service as "inherently governmental" or a "beneficial public service": it is under-determined and requires further unpacking of what an "essential core service" is, though the reference to "stable, high quality public premises" may be relevant. The fifth and sixth questions may also overlap – a de facto monopoly may require exceptional investment, and vice-versa – and could be usefully combined. All of these shortcomings provide useful starting points, however, for a revised framework.

(iv) Synthesising these criteria: revised criteria for insourcing and outsourcing

The best of these questions and criteria can be amalgamated, and the most imprecise or unhelpful ones omitted, to form a list of ten considerations. A council should satisfy itself:

- That a service is amenable to precise measurement and evaluation through contract;
- That it has robust contract management skills;
- That there is sufficient existing supply of high-quality providers;
- That there is a sufficient existing workforce (either in the public or private sectors) with adequate skills and capabilities to deliver high-quality services;
- That the service does not require stable, high quality public premises;
- That there is no strategic need for public capacity and expertise to control and improve the service;
- That there is no evidence of greater cost efficiency if the service is provided inhouse;
- That the service does not involve significant contact with at-risk groups, exercise of coercive powers, or risk of infringement of people's rights;
- That the service is not a de facto monopoly, or one that demands exceptional investment;
- That the service does not make exceptional demands on workers.

Only where a council satisfies itself of these ten considerations will it generally be permissible for a service to be outsourced. The considerations are variants or equivalents of criteria from the three other frameworks. The first four draw on the Institute for Government's questions. The fifth, sixth, and seventh are informed by the Barcelona criteria. The ninth and tenth are variations on the Barcelona criteria. The eighth merges considerations from the public law framework and a criterion used in Barcelona. This is a thorough checklist for councils, and can form the basis for a new legislative framework. It may be that councils will wish to add to these considerations (such as whether contracting brings financial risks in the event of the outsourcing company going into administration), but what is described above is a minimum set of considerations that councils ought to take into account.

In some cases – for example, services received by particular religious or ethnic groups – there may be a strong case for continuing outsourced provision (especially where outsourcing involves provision by a not-for-profit community group). It may be important that there is provision at arm's length from the state, or there may be considerable trust in a community provider.

We suggest, accordingly, that there is a 'good reason' carve-out. This would say that generally a service must not be outsourced unless those ten criteria are met, but that a service can be outsourced if a council has 'good reason' for that outsourcing provision. But it is important that such 'good reason' is defined in a disciplined way so that it is not used as an excuse to continue outsourcing. Good reason would include where:

- The risks involved with significant contact with at-risk people, exercise of coercive powers, or infringement of people's rights are best mitigated by retaining outsourced provision; or
- A council can demonstrate that it would face significant capacity barriers if it were to insource a service.

A council would have to demonstrate, with reference to evidence, that it would face significant capacity barriers only after considering all new supports being proposed in this paper, including the provision of a model contract (discussed further below); access to specialised legal advice from the Government Legal Department for assistance with contract management, modification, and review; and greater support for collaboration amongst councillors across the country. The first of these good reasons may be especially appropriate where there has been a long history of service provision in the community or voluntary sector, which demonstrates that risks are best mitigated by ongoing contracting-out.

Minimum Contractual Standards for Outsourcing

If the questions listed above are all answered 'no', a council may be warranted in continuing to outsource the provision of a service. But if some outsourcing continues, it is clear that the existing framework for outsourced contracts is not serving councils, communities, or individuals well. Urgent changes are needed to plug the accountability gap for outsourced local public services, to rebuild connections to local communities, and to address the economic failings of outsourced provision.

Some reforms to the architecture for outsourcing are considered below. All in all, there are two changes relevant to legal accountability; three pertaining to labour and workplace standards; and four further modifications to the operation of outsourced contracts. These are consistent with Labour's existing procurement policy.⁷¹ (Procurement generally refers to bulk government purchasing of goods, meaning that procurement policy and insourcing policy can overlap: bulk government purchasing may, but will not necessarily, form part of public *service* delivery.)

The next part of this paper analyses how such changes could be integrated into legislation, and whether the changes would apply at the tender stage, the bid evaluation stage, or the contractual drafting stage; there is also further discussion later in this paper about the consistency of such changes with existing European and domestic law.

It should be acknowledged that improving legal and contractual standards is not a castiron guarantee of improved employee practices, especially in a world of casualised work where formal contractual agreements may have little relevance to employment practice.⁷² Nevertheless it is suggested that the changes below can make a meaningful difference to outsourcing behaviour, and can improve the bargaining power of workers in outsourced workforces.

(i) Making outsourced activities subject to the Freedom of Information Act

The lack of democratic accountability for activities of private contractors carrying out outsourcing has already been noted. If a person seeks some important information about the actions of a private contractor, that information will not be as accessible as if it was sought from a council. This problem has been noted by the Information Commissioner in a recent report to Parliament.

The Information Commissioner points out that under s 5 of the Freedom of Information Act, a specific person who "exercise[s] functions of a public nature" or is "providing under a contract made with a public authority any service whose provision is a function of that authority" can be specified to be subject to the legislation. But this power relates to one-off instances, and it has never been used. Information can be sought on contractors if it is held by a council, but this is not always the case. The Information Commissioner has encouraged an amendment in the past to clarify that information held by a contractor can be thought to hold information on behalf of the council.

The Information Commissioner accepts that "one unintended consequence of outsourcing can be a significant reduction in the public's ability to access information about a public service."⁷³ It gives one example of where an attempt was made by a member of the public to find out the cost of refurbishments undertaken by a contractor for Stockton-on-Tees Borough Council. This information could not be divulged because of the Freedom of Information Act.

The Information Commissioner recommends, in closing, that more contractors should be designated by the Secretary of State under the legislation, where this would be in the public interest. The amount of public funding should be a guide. As well, the Information Commissioner says there should be a clarification of what it means for information to be held on behalf of a council, and that there should be regular reviews of the legislation. It says “it would not be feasible nor proportionate to designate all contractors delivering public services under the legislation.”⁷⁴ The Government, so far, has failed to respond to these recommendations.

The Information Commissioner is right that it would be impractical to designate, one-by-one, the contractors to which the Freedom of Information Act ought to apply. The Information Commissioner’s proposals are also sensible. But the spirit of the Information Commissioner’s arguments also favours a more robust reform: the stipulation in legislation that private contractors are generally subject to the Freedom of Information Act when carrying out activities under contract for a council.

This would have to be carefully circumscribed. Contractors would not be subject to freedom of information in all that they do. It would only be in circumstances where they are carrying out activities for a council – activities that involve, in the Information Commissioner’s own words, a public service. It might be that freedom of information obligations would apply only above a ‘*de minimis*’ threshold: for contracts above a certain value. That requirement would ensure that discrete, isolated contracts are not necessarily subject to the obligations of the legislation.

But activities of contractors performing contracts above a certain threshold should be subject to scrutiny. If a member of public wants to know the costs involved with an operation (say, in collecting rubbish bins), or the number of complaints that have been received (say, in the course of providing a housing repairs service), or the number of delays in providing a service (say, with an IT system), they should be able to receive that information if a contractor is in significant economic relationship with local government, delivering a service that affects a council’s residents. And the knowledge that such information can be requested and divulged may improve processes amongst contractors. This is preferable to designating contractors one-by-one under the Freedom of Information Act, which could be arbitrary and result in less consistency.

(ii) Subjecting private contractors to the Human Rights Act

Another legal loophole that needs to be closed involves making contractors carrying out contracts with councils subject to the Human Rights Act. It would surprise most members of the public to learn that large contractors doing outsourcing work are not subject to the Human Rights Act. As already discussed, contractors will only face the rigours of the Act if they are deemed by the courts to be serving “functions of a public nature”, and courts may decide contractors do not satisfy this test.

Again, this has been considered before by a parliamentary body, with recommendations falling on deaf ears. The Commons and Lords Joint Committee on Human Rights, in its 2004 report on *The Meaning of Public Authority under the Human Rights Act*, suggested there was a “gap in human rights protection”, where “an organisation ‘stands in the shoes of the State’ and yet does not have responsibilities under the Human Rights Act”.⁷⁵ It noted that this did not just matter to lawyers.

The gap created uncertainty for providers and recipients of public services. Ultimately, however, the Committee declined to recommend amending the Human Rights Act. It suggested that principles of interpretation could be developed by the courts.

One of the reasons the Committee was cautious was that it was “too early in the experience of the Act’s implementation”, six years after the Act was passed.⁷⁶ Fifteen years have now passed. The loophole remains and the arbitrary outcomes have only proliferated. The Law Society had been one of the submitters to the Committee that had recommended amending the Human Rights Act to include private contractors delivering public services within its remit.

The Law Society’s call should be heeded. The Human Rights Act could be tweaked to specify in s 6 that private sector contractors (again, perhaps, if involved with a contract above a particular threshold) delivering services via contract with a council are a public authority for the purpose of the legislation. These private bodies would remain independent of government. Their borrowing would not count as public sector borrowing. The courts could still find that their actions have been proportionate where claims are brought alleging a rights violation. But this would improve accountability, and could enhance the standing of councils and citizens in interactions with providers of outsourced services.⁷⁷

(iii) Workers’ rights

With the same aim of aligning minimum standards of behaviour expected of councils and private contractors, it is important that core protections are given to workers’ rights in outsourcing companies. In line with relevant international agreements (in particular, the International Labour Organisation’s Labour Clauses (Public Contracts) Convention 94), wages (including allowances), hours of work, and all other conditions of labour should be no less favourable in outsourcing work than if workers were employed by councils. This should extend to health and safety protections, and relevant trade union recognition. Such protections will work in tandem with the rolling out of sectoral bargaining, which is part of Labour’s announced policy.

One way of secure these worker protections would be require that all outsourced employment be consistent with the National Joint Council for Local Government Services’ National Agreement on Pay and Conditions of Service. This covers equalities; healthy, safety, and welfare; pay and grading; working time; leave; part- time and temporary employees; sickness; maternity; trade union facilities; and grievance and disciplinary procedures, amongst other areas. It would prevent private sector outsourcing bodies from attempting to undercut councils’ labour standards. They would be free to compete and innovate in labour conditions, but this would have to be done above the minimum standards set down by the National Agreement. This would guarantee workers fair and decent workplaces.

It would also be consistent with changes to the Human Rights Act and Freedom of Information Act: all three sets of changes would involve regarding workers employed by companies doing outsourced work as being part of local government, broadly construed. Introducing this change would advance the same purpose as (but go further than) the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), which provide for a transfer of employee rights when outsourcing occurs under some circumstances. The purpose would be usefully supported by legislative reference to ILO Conventions on 87 and 98, on freedom of association and collective bargaining.

(iv) Local supply chains

Labour's Community Wealth Building Unit is providing guidance on how local supply chains can be best harnessed through local government and anchor institutions. These new minimum standards will further facilitate and encourage this work by requiring that, where appropriate, outsourcing contracts encourage connections with local supply chains.

One of the key concerns arising out of the 30-40 year surge in outsourcing has been the depletion of local labour and businesses with the advent of private sector provision of services. A commitment to supporting local labour and products, which could include support for apprenticeships in a region and co-operatives and other democratic business forms, can help those service providers undertaking outsourcing to rebuild trust in the communities in which they operate. On this point, there is some overlap between how outsourcing is done, and general procurement policy.

John Tizard and Megan Mathias have described this as being part of a "place-based approach" to service provision.⁷⁸ They have suggested, drawing on community wealth-building principles, the need to tie local service provision to anchor institutions and economic democracy, amongst other things. A place-based commitment could take many forms. It could involve requirements that a proportion of local labour and local products are used by a private contractor. It could involve a more soft-edged rewarding of contractors who promote a place-based approach. It could involve encouragement, or a requirement, for sustainable supplies, fair trade practices, and carbon-friendly activities. A robust approach that guarantees benefits of outsourcing flow to the local community should be preferred, consistent with the Public Contracts Regulations 2015 (a point that is discussed further below).

(v) Gender pay audits, equal pay, and equality

As already noted, female workers have been hit harder by outsourcing. An Equal Opportunities Commission study showed 9 out of 10 female part-time workers experienced pay cuts after outsourcing to the private sector was implemented.⁷⁹ With the Freedom of Information Act not applying to private sector contractors at a local level, gender-based differences in pay cannot be easily investigated. Transparency will be improved with the extension of the Freedom of Information Act to contractors, discussed above.

But requiring that all contractors audit annually their gender pay gap, and report this to councils, will go one step further in allowing pressure to be placed on those parties who have significant gender-based differentials in pay. The Government recently announced that large firms with over 250 employees must publish gender pay audits. Labour's policy is to require that large firms to identify a plan of action to address the gender pay gap, and for those firms to be considered in government procurement.⁸⁰ This reform to outsourcing companies is in the spirit of that existing policy, acknowledging that firms performing a significant public function ought to account for any gender pay gap that exists in their operations.

As the Smith Institute has noted, there are also challenges to those taking equal pay claims when working in outsourcing companies. Equal pay claims against outsourcing companies under the Equal Pay Act 1970 have sometimes been rejected on the ground that, though councils are subject to the legislation, they are not the 'single source' of employment.⁸¹ As other changes are made to the insourcing framework, ongoing thought should go into whether the Equal Pay Act is fit for a twenty-first century in which outsourcing remains a part of the landscape. It must also continue to be emphasised that councils are subject to the Equality Act 2010, and so in contractual decisions must act in accordance with the public sector equality duty. This requires a council to "have due regard to the need" to "advance equality of opportunity between persons who share a relevant protected characteristic" (including members of BAME communities), in relation to decisions relating to outsourcing. Labour policy will also extend the public sector equality duty to the private sector, including outsourcing companies.

(vi) Addressing anti-democratic contractual periods

A problem that has been raised with Private Finance Initiative (PFI) contracts is their length.⁸² These long contracts lock local authorities into rigid multi-decade commitments. The same limitation attaches to local government outsourcing contracts. They can be signed by one council, largely tying future councils' hands, even if these councils hold a different view about the optimal form of public service provision. Renegotiation or termination, both likely to incur significant costs, can be councils' only options in the face of these long-term contractual periods. That outsourcing creates such rigidity is particularly egregious, given that (as already discussed earlier) more 'open public services' were framed as providing greater choice.

One response to this is to impose maximum contractual periods: say, of three or four or five years. This would prevent councils from binding future elected representatives, and would be a goad against complacency in contractual performance. It is true that in some instances long-term capital investment is required that may exceed this period.

An alternative is to require reviews of contracts, but to allow contracts to be for longer periods. This would enable longer-term capital investment, though it would not address some councillors' and citizens' democratic concerns. Another possibility is that a maximum contractual period could be allowed, but with an exception for contracts that councils deem to be particularly necessary. A challenge with this latter option is to define the 'exception' in a way that does not allow it always to be used by councils seeking to outsource.

Further consultation might be necessary to clarify the particular way in which anti-democratic contractual periods are prevented: another way of achieving a similar outcome would be through mandatory break clauses at particular intervals. Our provisional preference is for a four-year maximum contractual period, which would allow some leeway for the write-off contractual investment and which would reflect the period over which local governments' mandates are refreshed (including in councils with partial elections at more regular intervals). Renewals of contracts with the same provider after four years would, of course, be possible. And it is likely that at the local government level – the level at which this framework is to apply – there are fewer services requiring longer-term capital investment. Where longer-term capital investment is required (such as in investment for waste treatment), there may be a case for more financial support from central government, and this term period qualification can provide a prompt for that consultation.

(vii) Community benefit

A key feature of the Scottish procurement legislation, introduced in 2014, is the introduction of 'community benefit requirements'.⁸³ This allows a contracting authority to impose a contractual requirement "relating to ... training and recruitment" or "the availability of sub-contracting opportunities" or other measures "intended to improve the economic, social or environmental wellbeing of the authority's area in a way additional to the main purpose of the contract." It then sets out that, where a contract is equal to or greater than £4,000,000, the contracting authority must give notice of the community benefit requirements it intends to include in the contract (or reasons if these are not included). It must also explain the benefits it considers it will derive from community benefit requirements. Additional guidance may be published on consultation on appropriate community benefit requirements.

While community benefit requirements are limited, they are an opportunity for the social contract between outsourcers and their local community to be discharged. Consultation by councils on the content of community benefits can be an opportunity to democratise economic decision-making, and might also provide the chance to align the local economy with the United Kingdom's general industrial strategy. Lessons can be learned from the Scottish experience, to ensure compliance with EU law and that benefits are harnessed from such community benefits. Initial Scottish experience has been positive; a limited Scottish government study analysing 24 contracts showed that 1000 individuals from 'priority groups' were employed through community benefit clauses in contracts and 200 apprentices from priority groups recruited. This is an average of 42 people employed per contract, and 8 apprentices per contract.⁸⁴

Community benefit provision should be consistent with, and go beyond, Labour's existing procurement policy, which requires that firms winning procurement contracts will achieve best practice on tax compliance, workers' rights, environmental protection, training and apprenticeships, paying suppliers on time, and boardroom excess (such that firms move to a 20:1 limit on the gap between lowest and highest paid).

(viii) Monitoring of performance

There is widespread evidence, internationally as well as within the UK, that councils – especially with the rise of outsourcing – have found it difficult to monitor performance, and that contracting providers have on occasion failed to maintain regular communication regarding contractual performance.⁸⁵ Part of the reason for

this is the already discussed depletion of contract management skills within councils, and additional costs associated with contract monitoring, as fewer services have been provided inhouse.

A contractual provision requiring that a private contractor identify an employee with responsibility to monitor performance (including of sub-contractors), and to liaise regularly with council, would help to address this shortcoming in outsourcing practice. Liaison or representative appointments are already referred to in many contracts. Identifying an employee with this responsibility, or at most creating a position with such a responsibility, would not be onerous for an outsourcing provider. Increased contact could facilitate communication between a council and an outsourcing provider, allowing risks (perceived either by council or the contracting provider) to be highlighted at an early stage and contingency planning to be done.

Away from the content of the contract between the council and private contractor, it would also be possible for councils to form 'outsourcing audit committees' within their existing structures. Councils have limited resources and time, a point discussed further below. But such committees could save councils resources and time through maintaining relationships and careful oversight of outsourcing work.

(ix) Excluding certain parties from the contracting process

Finally, in the context of discussions of the nature of the contracting process where outsourcing remains, it is worth noting that councils should be entitled to make greater use of powers to exclude parties from competing for contracts. Under the Public Contracts Regulations 2015, consistent with the EU Directive on Public Procurement, councils must exclude individuals and firms who have been convicted of certain offences, including corruption, bribery, and various tax offences. But the Regulations also allow exclusion where there is evidence of a breach of tax obligations, evidence of "grave professional misconduct", "where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract", and where the party has negligently provided misleading information that may have had a material influence on contracting.⁸⁶

The full range of these mandatory and discretionary powers should be used by councils, to ensure probity and integrity in contractors with which councils have a relationship. Councils could develop their own guidelines for what constitutes "grave professional misconduct" justifying exclusion, which might include human rights abuses or improper tax behaviour falling short of a violation of tax offences. There is more discussion later in this paper about how councils might record evidence that a firm or individual "has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract".

The Government's 2019 Reforms of Outsourcing

Responding to a series of high-profile outsourcing failures, including Carillion, the Government released a set of documents in February 2019, designed to improve outsourcing processes. This included an 'Outsourcing Playbook', a 'Supplier Code of Conduct', and 'Central Government Guidance on Corporate Financial Distress'. Some of these proposals are beyond the scope of this policy document because the focus was on central government, and not only local government, outsourcing.

Others merit comment. The Government in its 'Outsourcing Playbook' notes that the 'Make or Buy' decision should be made on the basis of optimal service delivery and value for money. It points out that a detailed cost-benefit analysis should be undertaken. It also observes that services that have experienced difficulties in the past or are "core" to departmental purposes, complex, novel, poorly understood, difficult to bring in-house in future will be more challenging to outsource.⁸⁷ But very little guidance is given on applying these criteria. It is merely said: "The Make or Buy decision should be taken after appropriate consideration."⁸⁸

The 'Outsourcing Playbook' also recommends 'Should Cost Models' (modelling with a public service comparator). However, there is no direction as to the assumptions that need to be used in this model (for example, whether models should have to model the same labour costs as the relevant collective agreement). The Playbook also recommends piloting of new outsourcing, recognising the risks involved. It recommends that clear specifications be drawn up in relation to the bidding process, and that resolution planning should be a standard part of draft contracts. The Government notes that it has drafted a Model Services Contract, and that departments should seek assistance from the Government Legal Department when changing contract terms.

The Playbook calls for due diligence in evaluation, underscoring the risk of "low cost bias".⁸⁹ The Playbook also seems to accept the point made earlier in this document, that there can be incentives militating against high-standard performance and maintenance toward the end of contracts. It suggests that "there should be sufficient means within the contract to incentivise the incumbent supplier to both maintain resources and performance up to the end of the contract."⁹⁰ On the final page of the Playbook, under the heading 'Bringing delivery back in-house', there is just one sentence: "The Make or Buy guidance in chapter 3 should be followed when considering insourcing services."⁹¹ These are the last words in the body of the text.

The Supplier Code of Conduct was released at the same time. It is a slim six pages after some introductory words. It refers to the Equality Act 2010, meeting the needs of service users, the need for care with vulnerable users, and the need to "comply with all applicable human rights ... laws".⁹² It notes the importance of continuous improvement of services, refers in passing to sustainable procurement, and underscores the importance of ethical behaviour.

The Central Government Guidance on Financial Distress has a little more substance. It aims to highlight what early indicators of financial distress are for those monitoring contracts on behalf of government, and sets out what possible responses might be available to government representatives to carry out restructuring or contingency planning. But it points out it "is not intended to be a detailed technical manual."⁹³ The document also begins with a laudatory description of the value of outsourcing. "The private and voluntary sectors bring a range of specialist skills, world-class expertise and deeper knowledge to bear on what can be complex issues," the Guidance notes. It adds that "[o]pen and fair competition within free markets encourages creativity and innovation."⁹⁴

These comments reflect the shortcomings of all three documents. They do not address the risks of outsourcing in any depth, or attempt to traverse in detail the potential value of inhouse provision. They are focused disproportionately on what government can do differently, rather than commenting on private sector practice. All three documents

largely restate existing legal obligations (including under the Equality Act 2010), or make bland assertions of best practice (say, about due diligence). The documents are of no legal effect, and offer only suggestions to departments and private contractors. It should not be thought that they offer nothing of value. Some of what is said is useful, including on the value of resolution planning. But the documents are profoundly inadequate relative to the scale of the problems revealed in the last three or four decades with outsourcing, in the spheres of efficiency and accountability. They do not meaningfully reform the practices of outsourcing.

Labour's Proposed Framework: An Overview

1. A Pro-Insourcing Position:

- Whenever service contracts between councils and contractors expire or are terminated, there is a presumption that they will be insourced.

2. A Structured Framework for Deciding on Inhouse/ Outsourced Provision

- To rebut the presumption of inhouse provision, a council must be able to satisfy itself of ten conditions
- The ten questions relate to (i) precise service measurement; (ii) lack of contract management skills; (iii) insufficient high-quality providers; (iv) insufficient workforce; (v) need for stable premises; (vi) need for public capacity; (vii) evidence of inhouse efficiency; (viii) impact on at-risk groups/rights; (ix) de facto monopolies; and (x) exceptional demands on workers
- However, where a council has 'good reason' (including if it is convinced it does not have sufficient capacity) it may continue with outsourced provision in some circumstances where these conditions are not met

3. A More Robust Contracting Process Where Outsourcing Persists

- If a council can justify outsourcing, certain conditions must then be met
- Nine new standards will exist, relating to: (i) the Freedom of Information Act; (ii) the Human Rights Act; (iii) fair wages and employment standards; (iv) gender; (v) contract timeframes; (vi) local supply chains; (vii) community benefit; (viii) monitoring; (ix) past behaviour of contractors

Part III: A Local Public Services Bill

This Part of the paper addresses how the framework would be translated into law, evaluating some possible key legal phrases, and considering how the framework fits into existing law. No comprehensive, exhaustive statute is provided here. Further expert drafting and consultation would be necessary to finalise the form of a Local Public Services Bill. But the aim of this Part is to underscore that the proposals sketched in Part II are practical and capable of being realised today. The deepseated problems of insourcing will not be solved through law. However, as discussed in Part I, the legal framework has long been tilted towards outsourcing. A change to the legal framework will support citizens' and councils' efforts to build a movement for insourcing.

The Definition of Insourcing in Legislation

It is first necessary, if legislation is to create an insourcing-first framework, to be clear about what insourcing and is not. Insourcing relates to service contracts that have previously been delivered by for-profit or community providers. (Procurement is a term that refers to the purchase of goods and services at scale by public bodies; some insourcing might include elements of procurement, but need not involve procurement.) Insourcing involves direct delivery of services by councils, rather than non-public providers. It need not, but can, involve the repurchasing of assets or capital used by private providers. It need not, but can, involve the termination or revocation of contracts. It can involve the decision for a council to deliver services directly at the moment that a contract with a private provider expires. Bringing a service 'inhouse' is shorthand for deciding that a service will be henceforth delivered by a council.

A further question, which is political as well as definitional, is whether insourcing-first legislation should specify particular services to be brought inhouse. As noted in Part I, successive Conservative governments' approach in the 1980s and early 1990s was to specify services to be outsourced: building and maintenance, refuse collection, cleaning, catering, ground maintenance, and vehicle repair initially. Later added to this list were leisure services, computing, administrative services, engineering, finance, law, personnel, architecture, and property management.

This list-based approach was effective in gradually concentrating energy on particular services. It is conceivable that some of these very same services could be specified in insourcing-first legislation, in particular refuse collection, ground maintenance, administrative services, cleaning, and administrative services. (All of these services have been brought inhouse by councils in recent years.)

On the other hand, specifying services might be overly rigid, limiting the momentum behind services not listed in legislation. As well, hybrid services are increasingly common, and might not be well captured by a list. Different contractual end-dates for these services might also make a coherent approach to insourcing across these services difficult. Allowing greater flexibility is consistent with Labour's commitment to the relationship between central and local government being a partnership.

Overall, then, a general definition might be preferable. It could define 'insource' (for the purposes of an obligation to insource contracts when they expire or are terminated) as 'to revert from contractual delivery of a service to direct delivery of a service by a local authority', where local authority is defined in the usual way. A 'service' involves ongoing activities or functions.⁹⁵ This definition could take the following legislative form:

Local Public Services Bill

PART I

INHOUSE PUBLIC SERVICES

Preliminary

1. (1) For the purposes of this Act, 'insourced' means to revert from contractual delivery of a service to direct delivery of a service by a local authority.

Presumption in Favour of Insourcing

The next question is how to capture the policy commitment to requiring local authorities to review contracts upon expiry or termination, and to adopt a presumption in favour of insourcing. More detail will be needed on the meaning of a contract's expiring or terminating. But one option is for legislation to say that 'When the term of a relevant contract expires or a relevant contract is terminated, a contract must be insourced, unless ...' What would then follow is a requirement for the council to ask itself the ten questions discussed in Part II. A fuller definition could then be given of 'relevant contract'. Contracts can be bracketed out of this definition, including contracts for social care (which are the subject of separate policy development). For example, contracts underneath a threshold – £40,000 was a figure suggested in consultation – might not trigger the presumption in favour of insourcing, since these are discrete, isolated, time-limited services that the council does not want to deliver permanently. (Safeguards will be needed to ensure there is not gaming to frame contracts as falling underneath this threshold.) Contracts between local authorities and other public authorities might be bracketed out. The 'good reason' carve-out would also have to be included. Further terms would need detailed definition: for example, some of the terms in the ten key questions, such as 'sufficient contract management skills' or 'de facto monopoly'. The legislation could take the following form:

Presumption of Insourcing upon the Expiry or Termination of Service Contracts

2. (1) When the term of a relevant contract expires or a relevant contract is terminated, a contract must be insourced, unless:
 - (a) The sum paid by the local authority for the delivery of the contract is less than a sum to be specified in the Local Public Services Regulations; or
 - (b) A new contract is signed with another local authority or public authority; or
 - (c) The local authority satisfies itself that:
 - (i) The service is amenable to precise measurement and evaluation by contract.
 - (ii) The local authority has sufficient contract management skills.
 - (iii) There is a sufficient existing supply of high-quality service providers.

... [CONT.]

- (iv) There is a sufficient existing workforce, in the public or private sector, with adequate skills and capabilities to deliver high-quality services.
 - (v) The service does not require stable, high-quality public premises.
 - (vi) There is no strategic need for public capacity and expertise to control and improve the service.
 - (vii) There is no evidence of greater cost efficiency if the service is provided inhouse.
 - (viii) The service does not involve significant contact with at-risk groups, exercise of coercive powers, or risk of infringement of people's rights.
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- (ix) The service is not a de facto monopoly, or one that demands exceptional investment.
 - (x) The service does not make exceptional demands on workers.
- (2) Where a local authority retains outsourced provision, it has a duty to consult all relevant affected groups before making a decision.
- (3) Where a local authority has good reason not to insource, it may choose to outsource a service.
- (4) 'Good reason' in s 2(3) means:
- (i) The risks involved with significant contact with at-risk people, exercise of coercive powers, or infringement of people's rights are best mitigated by retaining outsourced provision.
 - (ii) The council can demonstrate with reference to evidence that it would face significant capacity barriers if it were to insource a service.

It could be noted that if a local authority wants to move in the opposite direction, from direct delivery of a service inhouse to outsourced delivery, it must satisfy itself of the conditions in s 2(1)(c)(i)-(x).

Minimum Standards in the Outsourced Contract

The next stage of the framework is the most difficult to draft. It involves changes to some other pieces of legislation (including the Freedom of Information Act 2000 and the Human Rights Act 1998) along with additions to a Local Public Services Bill. These other amendments aside, there is also the question of compliance with European Union law (in particular, the Public Contracts Directive) and the Public Contracts Regulations 2015. Of course, it would be open to a Labour Government to amend the Public Contracts Regulations 2015. However, this paper assumes that those Regulations could only be amended in a way that remains consistent with European Union law, and seeks to sketch a framework that would not be inconsistent with European Union law.

The main requirements of the Public Contracts Regulations 2015, and the Public Contracts Directive from which they derive, are the following:

- Contracting authorities must treat economic operators in ways that satisfy principles of equality, non-discrimination, transparency, and proportionality (reg 18);
- Procurement must not have the effect of “artificially narrowing competition”, which would happen if some economic operators are unduly favoured or disadvantaged (reg 18);
- Contract notices must be produced where a tender is called for (in which open or restricted procedures are possible);
- The technical specifications should be set out in procurement documents;
- Selection criteria can relate to “suitability to pursue a professional activity”, “economic and financial standing”, and “technical and professional ability” (reg 58);
- Only certain limited considerations can be “requirements for participation”: and contracting authorities must “limit any requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded”;
- The award of a contract, where there is a tender, must be based on “the most economically advantageous tender assessed from the point of view of the contracting authority” (reg 67), but “qualitative, environmental and/or social aspects” can be relevant as long as they are “linked to the subject-matter of the public contract in question”;
- It is possible to assess a tender using “life-cycle costing”, which might include consideration of energy use and environmental externalities (reg 68);⁹⁶
- “Special conditions relating to the performance of a contract” can be specified if they are “linked to the subject-matter of the contract” and “indicated in the call for competition or in the procurement documents”, and these conditions may include “economic, innovation-related, environmental, social or employment-related considerations” (reg 70);
- ‘Social and other specific services’ (which are defined) are subject to less restrictive procurement rules.

To be clear, these Rules do not kick in unless a decision is made to put a contract out for tender. In other words: none of these Rules applies if a contract is brought in-house. If a contract is only brought partly in house, some aspects of the Public Contracts Regulations 2015 might be relevant. However, contracts can be brought inhouse (in the way described in the preceding pages) without falling afoul of these regulations.⁹⁷

For the other contractual standards, it is our provisional suggestion (having consulted legally qualified individuals on this point) that these will be consistent with the Public Contracts Regulations 2015 if several conditions are met. First, information about these standards should be made clear in the call for tenders. Second, these standards must be defined in the contract and it must be transparent that they affect the scope of the work. Third, the standards must be applied in a way that respects principles of equality, non-discrimination, transparency, and proportionality. Fourth, the standards must be applied in a way that is linked to the subject-matter of the contract. Fifth, there should be reference made to the criteria in the Public Contracts Regulations 2015. Accordingly, guiding legislation might look like the following:

Outsourced Contracts

3. (1) Calls for tenders must be consistent with the Public Contracts Regulations 2015.
- (2) As part of any work required by an outsourcing contract:
 - (a) Wages (including allowances), hours of work, and all other conditions of labour (including pensions) will be no less favourable in an outsourcing contract than if workers were employed by councils, and the trade union(s) relevant to the workforce will be recognised;
 - (b) Provision will be made for use of local labour and local supply chains;
 - (c) A contracting authority will provide a local authority with an annual gender pay audit;
 - (d) A contracting authority's work will not exceed a four year period; [...]
 - (e) A contracting authority will make provision for community benefit;
 - (f) A contracting authority will identify one member of staff responsible for regular monitoring of contractual performance, and for regular communication with the local authority about that performance.
- (3) A local authority may exclude tenders on the grounds set out in regulations 57 of the Public Contracts Regulations.
- (4) The 'scope of work' conditions relating to the performance of the contract, set out in s 3(2)(a)-(f), must be communicated as part of the specifications of the contract at the time of a call for tenders.
- (5) The 'scope of work' conditions set out in s 3(2)(a)-(f) can be adjusted to fit the nature of the subject-matter of the contract.
- (6) In evaluating bids for work, that include provision for the work in s 3(2)(a)-(f), contracting authors will treat economic operators consistently with principles of equality, non-discrimination, transparency, and proportionality.
- (7) In evaluating bids, and at every stage of the contractual process, local authorities will not act in any way that artificially narrows competition.
- (8) In awarding a contract, a local authority will make its decision on the basis of suitability to pursue a professional activity, economic and financial standing, and technical and professional ability.
- (9) In awarding a contracting, a local authority will base its decision on "the most economically advantageous tender assessed from the point of view" of the local authority.
- (10) A local authority can take into account qualitative, environmental, and/or social considerations (including life-cycle costings) that inform what tender is "the most economically advantageous" from the point of view of the local authority.

Some of these terms will need to be defined further, including 'local labour', 'local supply chains', and 'community benefit' (on which guidance can be gained from the Scottish legislation, already discussed). But in essence this legislation would require that all local government contracts would comply with these standards; it would be possible for these contracts to be terminated if outsourcing companies breached any of the standards.

In an indication that this new framework would not be inconsistent with EU procurement law, Directive 2014/24/EU notes that: “Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.” A Local Public Services Act would constitute a set of “applicable obligations in the fields of environmental, social and labour law” to which economic operators ought to comply. It is also relevant that Article 70 of that same Directive says that authorities “may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract ... and indicated in the call for competition or in the procurement documents.” It adds that the conditions “may include economic, innovation-related, environmental, social or employment-related considerations.”⁹⁸

The Public Contracts Regulations may also have been applied in a blinkered way up to this point, and there is scope to reinterpret them to support a transformed approach to insourcing and outsourcing. In particular, it may be that the prohibition on “artificially narrowing competition” could be used as a guide to ensure that outsourcing contracts are not awarded to large oligopolistic providers whose activities might narrow competition in markets.

To ensure consistency with other EU law, including Article 56 of the Treaty on the Functioning of the European Union (which protects the freedom to provide services within the European Union), a Labour Government could usefully adduce evidence of how these changes would satisfy a proportionality test. Further consultation may be necessary on consistency with trade agreements in force at the time that the legislative framework is introduced. All these changes would need to be introduced alongside the other legislative tweaks already discussed, including amendments to the Freedom of Information Act 2000 and Human Rights Act 1998.

Alongside this new legislation, the Government Legal Department could be charged with converting these standards into a model contract to be used for councils, which would reduce the burden on councils. A model contract is already available, and this contract could be updated in light of the standards described above.⁹⁹

It might be that other accompanying legal changes could be added to what has been mentioned above to improve outsourcing practices. One reform proposal, which is not explicitly mandated above but has some merit, is the development of the ‘joint employer’ doctrine. That doctrine, which would require both councils and outsourced providers to be considered employers, is at the time of writing being tested in litigation supported by the Independent Workers’ Union of Great Britain.¹⁰⁰

Challenging Faulty Outsourcing Decisions

It will be open for citizens, as is orthodox, to challenge councils under judicial review if citizens or other bodies are unhappy with a decision to outsource. As well, citizens can make full use of the Freedom of Information Act under the new regime. In addition, however, allowing citizens and community groups to request evidence of an outsourcing decision can prevent untransparent outsourcing and enhance accountability.

This provides backstop recourse for citizens and community groups to ensure that outsourcing does not happen by a sidewind, and encourages outsourcing councils to maintain evidence of their decision-making – and to go through a process of reasoned decision-making where it does decide to continue to outsource a service. Safeguards would need to be in place to ensure that this channel is not used vexatiously or by market competitors. However, if designed and implemented in the right way, this mechanism could be a useful way for community objection to be mobilised. It encourages democratic participation and highlights the need for councils to justify their decisions to the people they represent. It might be converted into legislation in the following way:

Accountability for Outsourcing Decisions

4. (1) After a local authority satisfies itself that the conditions in s 2(1)(c)(i)-(x) have been met and makes a decision to contract for a service, and if s 2(4) does not apply, at any time before the expiry period of that contract, a person residing in the area of that local authority or a community group may request evidence of the council's decision-making.
- (2) A council must, within 30 days, respond to that request for evidence, furnishing the information showing that it considered all conditions in s 2(1)(c)(i)-(x) and showing how it reached its conclusions.

Another possible route for challenges suggested in consultation is the creation of a Public Contracts Tribunal, which might allow for speedy, low-cost resolution of disputes between local authorities and outsourced providers.¹⁰¹ That proposal warrants further consideration. But it would involve some cost, whereas other proposals made thus far in this policy document would incur no or minimal cost for central government and local authorities, since they require only change to legislation. Under existing Labour policy, a Public Value Contracts Commissioner will also be set up, to ensure tenders are awarded on the basis of public value. This office, with proper resourcing, provides a further channel of accountability.¹⁰²

Part IV: What Councils Can Do Now

This new framework could have a transformative effect on local government. It could bring services back into public hands, enhance labour conditions, improve accountability, reduce inefficiencies, and ensure greater consistency. (Some consideration is given in the final part of the paper to how councils can be facilitated in their insourcing work.) These reforms would be more far-reaching and thoroughgoing than the Government's meek, under-developed modifications to outsourcing practice.

But councillors, council officers, and others might reasonably wonder what can be done in relation to insourcing and outsourcing prior to this legislative change. This part of the paper makes four suggestions: making use of the principles underpinning the proposed framework; making full use of existing legal and policy arguments in favour of insourcing and against outsourcing; the sharing of knowledge (an activity that is already being supported by the Labour Party through its Community Wealth Building Unit); and insourcing-sensitive timetabling. It makes clear that radical positive change can be achieved by councillors, without any need to wait for a new legal framework. Indeed, the strong message of this section is: councillors should not wait for that new legal framework to begin to move towards an insourcing-first approach.

Using the Principles in the Framework Set Out Here

Even without a legislative framework, individual councils could decide to adopt the core of the policy framework put forward here. They could decide as a body that all contracts that reach the end of their expiry date, or which are terminated, should generally result in insourcing.

The ten questions to determine insourcing or outsourcing could also be asked as councils make these decisions. Phrased slightly differently, they are the following:

1. Can the council be satisfied that the service is amenable to precise measurement and evaluation by contract?
2. Can the council be satisfied it has sufficient contract management skills?
3. Can the council be satisfied there is a sufficient existing supply of high- quality service providers?
4. Can the council be satisfied there is a sufficient existing workforce, in the public or private sector, with adequate skills and capabilities to deliver high- quality services?
5. Can the council be satisfied that the service does not require stable, high- quality public premises?
6. Can the council be satisfied there is no strategic need for public capacity and expertise to control and improve the service?
7. Can the council be satisfied there is no evidence of greater cost efficiency if the service is provided inhouse?
8. Can the council be satisfied that the service does not involve significant contact with at-risk groups, exercise of coercive powers, or risk of infringement of people's rights?
9. Can the council be satisfied that the service is not a de facto monopoly, or one that demands exceptional investment?
10. Can the council be satisfied that the service does not make exceptional demands on workers?

These questions are difficult to answer in the abstract, and need to be given local answers for local services. Refuse collection – one area that has involved significant insourcing activity – may be a service where targets are not easily measured (though there are ways to break down refuse collection activities), and where there is some evidence of cost efficiencies from being brought inhouse around the country. Benefit services (another area where there has been some insourcing) involve contact with at-risk groups and risks of infringing on people's rights, as well as a strategic need for public provision; questions 6 and 8 might, at least sometimes, be answered in the negative. Waste management is another area with a strategic link to broader policy goals (including sustainability and community cohesion), where quite significant demands might be made on workers. There seems to be a strong case, which needs to be tested in context, to reject ongoing outsourcing of street cleaning, benefit services, and waste management, barring exceptional local circumstances.

To a certain extent councils can also begin to contribute to upgraded contracts and improved behaviour by outsourcing companies. The Freedom of Information Act and Human Rights Act cannot be amended without parliamentary support. Councils can continue to lobby for these outcomes. But it would be possible for councils to adopt a general approach in outsourced contracts to fair wage clauses, gender pay audits, local supply chain support, community benefit provision, and monitoring. What is important here is for councils to act consistently with the Public Contracts Regulations and relevant EU legislation. However, as noted, as long as these elements of the contract are flagged in specifications, and councils continue to base their decision on the criteria set out in the Public Contracts Regulations, these broader considerations can be taken into account. They can also ensure they use the exclusion provisions of the Public Contracts Regulations to prohibit certain tenderers from participating.

Adopting this framework, even without the structure that new legislation would bring, could still improve standards, result in more transparent decision-making, and encourage outsourcing companies to lift their conduct where outsourcing is still appropriate.

Dealing with Legal and Policy Arguments Against Insourcing – and Making the Most of the Law

It is difficult to provide general legal guidance about how councils ought to approach contracts, and legal advice cannot be offered here. But in consultation it was repeatedly said that depleted contract management skills mean that councils are unable to hold contractors fully to their contractual undertakings. Councils should make use of existing inhouse legal advice, and consult with other councils, in order to ensure that:

- Warranties and representations made at the outset of a contract remain true; if they are no longer accurate, this can be the basis for termination;
- Contractors are continually held to the obligations that they signed up to in the contract;
- They understand the circumstances under which they can lawfully terminate the contract (including when there is a default), and the processes that should be followed in these circumstances (including notices that must be issued);
- They understand any break clauses that exist;
- They are aware when a contract can be terminated because of a 'force majeure' event.

It does not require legally trained or legally qualified people to make use of these tools (though legal advice should be sought if a contract is ultimately renegotiated). Councillors can review warranties and representations at the start of a contract, and evaluate whether these remain true. Councillors can make lists of the obligations imposed on outsourcing companies, and discuss whether these obligations have been fulfilled. Councillors can also highlight break clauses, and consult on whether 'force majeure' events – or other activities justifying termination – have occurred. Sometimes step-in clauses can be invoked, as well as councils' 'best value duties', to justify early termination where contractors are at risk of financial collapse (causing harm to public finances as well as local residents and service users).

Sometimes contracts claim that the law governing the relationship between a council and a contractor is governed entirely by the words of the contract; this is known in law as an 'entire agreement clause'. These do not always have absolute effect. Local authorities should also be aware of when they might be able to invoke frustration (a doctrine that says, to simplify a little, that certain unforeseen events can release parties from their obligations under a contract). In some circumstances, illegal conduct can also 'taint' a contract, and release one side of their obligations, though this will not apply in every case. The courts will consider the nature and centrality of the illegality, and the intentions of the parties.¹⁰³ This legal doctrine may nevertheless provide one means for the termination of a contract.

Common arguments raised by proponents of outsourcing and opponents of insourcing relate to risk and capacity. These claims should be probed with care. It can be said that bringing services inhouse will incur risk. But whether the risk is undesirable must always be a *relative* question: would outsourcing to a contractor incur more risk, given contractual management capacity, any threats to the solvency of the contractor, and inadequate accountability? Would continuation of a contract present undue risks to service delivery, residents, and council finances? Councils should be slow to accept that risk is necessarily less of a problem when a service is outsourced. Councils should also bear in mind the point already raised: that despite outsourcing often being framed in terms of choice, it can reduce the freedom of councils to control services. Insourcing can provide that freedom and control, by giving councils the opportunity to consider how services interrelate and how they can be best delivered.

In relation to capacity, more is said below about the implications of austerity for outsourcing. But it is worth noting that capacity is like a muscle that can grow through exercise. It can be built up over time, through experience with contracts and services. Moreover, the significant loss of capacity from outsourcing cannot be underestimated. Skills, tacit knowledge, and relationships might all disappear when a contract normalises a state of affairs where a service that it delivers is provided by an external provider. Arguments about capacity hence should sometimes favour insourcing, and councillors should be aware of this when capacity is raised.

Knowledge-Sharing

Both the voluntary application of the framework in this paper, and the harnessing of legal and policy arguments in favour of insourcing, will be made easier by pro-insourcing councillors working together. Collaboration within councils, and across councils, can strengthen the bargaining power of councils, and lift levels of knowledge and nous. Councillors can share lessons learned from past insourcing and outsourcing

experiences; tactics from negotiations and contract drafting; and understandings of various markets and providers.

The Labour Party's Community Wealth-Building Unit will play this role in coordinating councillors, including through providing a structured space for councillors to discuss strategy and techniques, and to build relationships. The Unit is currently organising regional-level forums for knowledge-sharing and peer-to-peer support.

Three different groups can benefit from knowledge transfer. Council leaders can feel empowered to lead campaigns to insource. Council officers can feel better equipped with evidence and tools to manage contracts and rethink service delivery. And external actors – such as unions, service users, and citizens – can support the accountability of outsourced providers, and contribute ideas about how insourcing can be improved.¹⁰⁴

One piece of work that councillors could collaborate on is a database with a record of particular contractors' performance. It might appear to be unfair on contractors to construct a register of poor performance. But this is relevant background information for local authorities. Moreover, a register of this kind could support the purposes of the Public Contracts Regulations 2015, and associated EU law. Regulation 57(8)(g) allows a council to exclude a contractor where the contractor "has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity ... which led to early termination of that prior contract, damages or other comparable sanctions." There is currently no database that would allow a council easily to discover information of this kind.¹⁰⁵ An Insourcing Forum, or looser network of relationships between councillors, might facilitate the development of this database.

Rolling Calendar Review

One very practical proposal, mooted in research by Mo Baines of APSE, is for councils to have a rolling calendar review of upcoming contract end-dates, review dates, or break clause dates.¹⁰⁶ This will draw on some council capacity but simply involves an officer having responsibility for oversight of all contracts and key dates in those contracts. It does represent good practice for all dates relevant to a contract to be logged in one accessible file.

This will then allow councils to prepare themselves for a presumption in favour of bringing a service back inhouse. It will allow information to be gathered, especially in advance of a contract coming to the end of its expiry date, so that councils can ask questions about whether the same service ought to be insourced. Some councils may already have some version of this 'rolling calendar review' in place, and of course, it is for councils to decide what is most helpful to meet their needs. But such a system could support overall oversight and accountability – and good preparation for insourcing or outsourcing ultimately enables councils to have capacity to make good decisions.

Part V: Objections and Next Steps

Three concerns have been raised during the development of the thinking in this paper. It is worth outlining these concerns, answering them (to the extent possible), and setting out next steps.

First, councils have been drained of resourcing and capacity over the last nine years of Conservative austerity. According to the Local Government Association, councils in England face a £7.8 billion funding gap by 2025.¹⁰⁷ In the face of such a lack of resources, is it realistic and viable for councils to insource? Is it unduly burdensome for councils to presume that they should insource contracts as they expire?

This line of reasoning, while it represents a valid concern, implicitly associates outsourcing with cheap provision and insourcing with cost. But the analysis in this paper, in particular in Part I and II, suggests that this implicit association is not firmly founded in evidence, and may be more of a result of the residue of the Thatcherite thinking described in Part I.

Outsourcing has tended to offer cuts to wages and labour costs, but cost overruns, expensive performance failures, and social cost shunting have become common consequences of contracting-out. Indeed, we may still not yet be capable of measuring the total cost of outsourcing. Insourcing involves lower borrowing costs, and other reasons for lower costs in the long-run, especially when those costs include not just narrow labour costs but a wider accounting for social and environmental costs. There are many instances when efficiencies have been gained through inhouse provision, as discussed in Part II.

So it is not unduly burdensome to encourage councils to consider inhouse provision. Moreover, if councils do believe there to be a strong case for ongoing outsourced provision, the legislative framework (including the 'good reason' carve out, which specifically mentions insufficient capacity) allows for outsourcing to continue. Discrete, low-cost projects will not be subject to the presumption in favour of insourcing. And the presumption in favour of insourcing can be rebutted, through councils carefully working through the questions gestured at in the foregoing analysis. The contractual standards should not increase costs for councils. A guide to them has been presented here; in some cases they require legislative reform by central government, and where they demand more from companies undertaking outsourcing, they should result in lower social costs over the long-run. Where this does not materialise, they can be reviewed, and a new model contract can be established in their place. Capacity concerns can also be addressed through greater use of the Government Legal Department, which could be directed under a Labour Government to develop greater capacity to deal with issues of insourcing and outsourcing.

Second, it has been worried that these standards – along with the broader framework set out – are so demanding that they will lead to councils when they insource, and private providers when outsourcing continues, to skimp on performance. The logic of this point is that with costs diverted to better labour standards, outsourcing companies may have tighter margins, resulting to a greater number of performance failures; and with councils already strained and in the process of rebuilding capacity, performance in the public sector might be sub-optimal initially.

But this objection relies on a narrow understanding of ‘performance’ that might be skimmed. The performance of a private provider, or a council, does not just relate to targets or outcomes. It also relates to treatment of workers, contribution to community, and the relationship built with residents. It seems hard to maintain that performance, under the revised set of contractual standards or under an inhouse model, will be worse under the new framework set out above, once this broader understanding of performance is adopted. Indeed, as discussed above, the available evidence suggests substantial improvements in performance through insourcing.

Moreover, private contractors whose margins will be affected in the way described when asked to comply with more stringent labour and community standards are perhaps not contractors that should be delivering key public functions. Councils should certainly be supported as the transition is made to an insourcing-first framework (with there being the possibility of more direct legal support, for example, from the Government Legal Department) but it seems blinkered to presume that performance will be worse under local government provision, especially given the countervailing reasons outlined in Part II.

Third, consistency with European Union law might be reasonably raised as a concern. Procurement is an area of law where the European Union has laid down some quite detailed requirements. It is important that a new insourcing framework does not fall afoul of these requirements, even notwithstanding uncertainty about the United Kingdom’s future relationship with the European Union. (It is likely that European Union law will no longer apply in the same way, following a transitional period after Brexit, but this paper has assumed the need for consistency with European Union law, partly because this paper’s framework may operate during a transitional period where European Union law continues to apply.)

But care has been taken in this paper to recount key requirements and to sculpt a framework that is consistent with those requirements. Further legal consultation is necessary, and a full Local Public Services Bill has not been presented here: only excerpts. However, the EU Procurement Directive expressly protects in Article 1 the ability of public authorities to decide whether, how and to what extent they wish to perform their public functions. It does not require outsourcing. This paper has suggested that a pro-insourcing framework can be adopted, along with new minimum contractual conditions for outsourcing, while retaining consistency with the Public Contracts Regulations and associated EU directives. Minor adjustments can be made to the draft legislation here if inconsistencies arise in application.

There is, of course, more work to be done. At the edge of the focus of this paper is a bigger-picture analysis of the services that ought to be delivered by local government, as opposed to central government, or the scope and extent of local government borrowing.

But what has been attempted is a review of the history of outsourcing, an overview of its harms, an analysis of why insourcing-first is justified, and the development of a new policy and legal framework to help realise that position.

Local government is a key site in the struggle to unwind neoliberal reforms and democratise the economy. Councils are, and have always been, an essential part of a programme for practical socialism, which delivers people’s daily needs and improves people’s everyday lives. With greater inhouse delivery, the seeds can be sowed for local public service delivery that is fit for the twenty-first century, at the same time that new approaches to public ownership are being pioneered through Labour Party policy at the national level. And through insourcing there is an opportunity to reassert at the local level the value of the collective ownership that is the hallmark of a socialist society.

Endnotes

* Particular thanks to David Hall and Mo Baines for their contributions to this policy paper.

¹ The supposed benefits of New Public Management included greater efficiency and dynamism in the public sector, allegedly to mirror practices in the private sector.

² See Policy Studies Institute, <http://www.psi.org.uk/publications/archivepdfs/Recent/CENLOC7.pdf>. Of course, privatisation and outsourcing were both key planks of Thatcher's policy agenda. The focus of this paper is outsourcing.

³ The National Association of Local Government Officers was the fourth biggest trade union in 1979: TUC History Online, http://www.unionhistory.info/timeline/1960_2000.php

⁴ This process is best explained in: A Patterson and P.L. Pinch, "Hollowing out" the local state: compulsory competitive tendering and the restructuring of British public sector services" (1995) 27 *Environment and Planning A: Economy and Space* 1437–1461.

⁵ See s 7.

⁶ See s 6 of the Act.

⁷ See Patterson and Pinch, above n 4, at 1443.

⁸ See s 2.

⁹ See s 6.

¹⁰ See s 7.

¹¹ See s 17.

¹² See s 17(5).

¹³ See s 19(7). A council was also prohibited from asking any question of any contractor relating to a non-commercial matter: s 19(10).

¹⁴ See s 28.

¹⁵ See Patterson and Pinch, above n 4, at 1443.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ See ss 69–70.

¹⁹ Ibid, at 1444–1445.

²⁰ Ibid, at 1447.

²¹ This was observed recently in the Committee of Public Accounts' 74th report on *Whole of Government Accounts*, published on 25 January 2019, which reiterated that "the Treasury still had no data to show that PFI provides value for money": at p. 16.

²² See s 3 of the Act.

²³ See ss 18–19 of the Act.

²⁴ See s 1 of the Act.

²⁵ See ss 15–20.

²⁶ See HM Government, *Open Public Services*, June 2011, at p. 8 ("wherever possible we will increase choice") and p. 16.

²⁷ See s 18.

²⁸ See <https://blog.tendersdirect.co.uk/2018/01/04/new-public-procurement-thresholds-2018-2019/>.

²⁹ See s 57.

³⁰ See s 67.

³¹ See s 71.

³² See s 76.

³³ See s 22.

³⁴ See, for example, House of Commons Public Administration and Constitutional Affairs Committee, *After Carillion: Public sector outsourcing and contracting*, 9 July 2018; David

Walker and John Tizard, *Out of Contract: Time to move on from the 'love in' with outsourcing and PFI*, 2018; Satoko Kishimoto and Oliver Petitjean (eds), *Reclaiming Public Services: How cities and citizens are turning back privatisation*, 2017.

- ³⁵ All examples taken from UNISON's Outsourcing Database; public news stories are available about each case.
- ³⁶ Information Commissioner's Office, *Outsourcing Oversight? The case for reforming access to information law*, 2019, at p. 6.
- ³⁷ National Audit Office, *The Role of Major Contractors in the Delivery of Public Services*, 2013, at p. 15.
- ³⁸ Section 6 of the Act.
- ³⁹ Institute for Government, *Accountability in modern government: what are the issues?*, 2018, especially at pp. 24-26, available online at <https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG%20accountability%20discussion%20paper%20april%202018.pdf>.
- ⁴⁰ See APSE, *Insourcing: A guide to bringing local authority services back in-house*, 2009, at p. 10.
- ⁴¹ John Tizard and David Walker, *A Domesday Book for public service contracts – better data, better value for money*, 2018, at p. 8.
- ⁴² A version of this point is made by Albert Sanchez-Graells here: <http://www.howtocrackanut.com/blog/2016/5/10/regiopost-and-its-implications-full-extended-discussion-at-bristol-conference>.
- ⁴³ Thanks to Sampson Low for developing an account of these impacts in correspondence.
- ⁴⁴ See Public Affairs Research Institute, *The Contract State: Outsourcing and Decentralisation in Contemporary South Africa*, 2014, at p. 27.
- ⁴⁵ CLES, *Restoring Public Values in Public Services: A route map for national, municipal and citizen action*, 2018, at p. 3.
- ⁴⁶ Margie Jaffe, Bronwyn McKenna, and Liane Venner, *Equal Pay, Privatisation and Procurement*, 2008, at pp. 6–7.
- ⁴⁷ See, for example, WBMS, 'Insourcing is on the rise: is the outsourcing boom over?' 16 May 2017, online at <https://wbmsglobal.com/insourcing-rise-outsourcing-boom/>; Telecom TV, 'BT brings it all back home by insourcing the outsourcing', 10 August 2018, online at <https://www.telecomtv.com/content/tracker/bt-consumer-creates-more-than-1-000-permanent-jobs-to-help-provide-uks-best-customer-service-31975/>.
- ⁴⁸ See *Financial Times*, 'UK public finance: councils build a credit bubble', 25 April 2017, online at <https://www.ft.com/content/84892c56-1a17-11e7-bcac-6d03d067f81f>; see also UK Debt Management Office, Public Works Loan Board, online at <https://pwl.gov.uk/responsibilities/local-authority-lending-pwlb/concessionary-rates/>.
- ⁴⁹ Comptroller and Auditor General / National Audit Office, *PFI and PF2*, 2018, at p. 8.
- ⁵⁰ APSE, above n 40, at pp. 21–22.
- ⁵¹ UNISON/APSE, *Insourcing update: The value of returning local authority services in-house in an era of budget constraints*, 2011, online at <https://www.unison.org.uk/content/uploads/2013/06/On-line-Catalogue201223.pdf>.
- ⁵² APSE, above n 40, at pp. 28–29.
- ⁵³ *Ibid*, at p. 51.
- ⁵⁴ UNISON/APSE, *Insourcing update*, above n 51, at p. 12.
- ⁵⁵ This is undergirded by the legal duty on directors to promote the success of a company under UK law: see 172 of the Companies Act 2006.
- ⁵⁶ APSE, above n 40, at p. 50.
- ⁵⁷ *Ibid*, at p. 16.
- ⁵⁸ *Ibid*, at p. 32.

- ⁵⁹ See forthcoming work by Mo Baines for APSE, 2019.
- ⁶⁰ See Walker and Tizard, *Out of Contract*, above n 34, at p. 14.
- ⁶¹ See discussion in Germa Bel, 'Local Government Size and Efficiency in Capital Intensive Services: What Evidence is There of Economies of Scale, Density and Scope', International Center for Public Policy, Working Paper 12-15, 2012.
- ⁶² See discussion in Elvira Uyarra, 'Opportunities for innovation through local government procurement: A case study of Greater Manchester', NESTA, 2010, at p. 16.
- ⁶³ APSE, *Neighbourhood Services Poll*, 2016, available online at [http://www.apse.org.uk/apse/assets/File/Neighbourhood%20Services%20Poll%20Report\(1\).pdf](http://www.apse.org.uk/apse/assets/File/Neighbourhood%20Services%20Poll%20Report(1).pdf).
- ⁶⁴ See statistics collected by We Own It (originally from Survation polling from 2017, 2015, and 2014): We Own It, 'Public Ownership is Popular', available online at <https://weownit.org.uk/public-solutions/support-public-ownership>.
- ⁶⁵ Joe Guinan and Martin O'Neill, 'From community wealth-building to system change' (2019) 25(4) *IPPR Progressive Review* 382 at 387.
- ⁶⁶ House of Commons Public Administration and Constitutional Affairs Committee, After Carillion: Public sector outsourcing and contracting, 9 July 2018, at p. 15.
- ⁶⁷ Tom Gash and Nehal Panchamia, When to contract: *Which service features affect the ease of government contracting?*, 2013, available online at https://www.instituteforgovernment.org.uk/sites/default/files/publications/When_to_contract.p df.
- ⁶⁸ *Ibid*, at p. 2.
- ⁶⁹ These come from Lord Neuberger's judgment at [154], since he is most schematic about listing factors; his (f) and (g) are omitted since they apply more squarely to consideration of the application of the Human Rights Act 1998. See *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95.
- ⁷⁰ This further factor is from Baroness Hale's judgment, at *ibid*, [63]; Baroness Hale was President of the UK Supreme Court at the time of this paper's publication.
- ⁷¹ See <https://labour.org.uk/press/labour-will-use-200-billion-government-purchasing/>.
- ⁷² Thanks to Jason Moyer-Lee for this point.
- ⁷³ Information Commissioner's Office, *Outsourcing Oversight? The Case for Reforming Access to Information Law*, Report of the Information Commissioner to Parliament, 2019, at p. 26.
- ⁷⁴ *Ibid*, at p. 51.
- ⁷⁵ House of Lords / House of Commons Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act*, 2004, at p. 16, online at <https://publications.parliament.uk/pa/jt200304/jtselect/jtrights/39/39.pdf>.
- ⁷⁶ *Ibid*, at p. 50.
- ⁷⁷ We make no recommendations here about making private sector contractors delivering outsourced services subject to judicial review, but this is also a site of possible reform. Thatcher's Government made clear in its Local Government Act 1988 that councils could be subject to judicial review for taking into account non-commercial considerations. Law reforming outsourcing could make clear that contractors delivering outsourced services are subject to judicial review – meaning they would have to act lawfully and not unreasonably, and follow proper process, amongst other considerations. There could be real value for citizens, councils and others in developing the law in this direction. It is true that judicial review traditionally applies to the executive government (with some exceptions) and is generally an area of law developed by judges. These could be factors revisited if there is an opportunity to consider further reform.
- ⁷⁸ John Tizard and Megan Mathias, *Beyond contracting: public service stewardship to maximise public value*, February 2019, at p. 18, available online at https://www.wcpp.org.uk/wp-content/uploads/2019/02/Public-Services- Stewardship_Final_Eng.pdf.

- ⁷⁹ Smith Institute, *Outsourcing the Cuts: Pay and Employment Effects of Contracting Out*, 2014, at p.16, online at <http://www.smith-institute.org.uk/wp-content/uploads/2015/09/Outsourcing-the-cuts.pdf>.
- ⁸⁰ Dawn Butler, 'Labour will force employers to take action to close their gender pay gaps', Thursday 8 March 2018, online at <https://labour.org.uk/press/labour-will-force-employers- take-action-close-gender-pay-gaps-dawn-butler/>.
- ⁸¹ See, for example, *Personnel Today*, 'Equal pay: local authority and limited liability partnership were "associated employers"', 19 May 2014, online at <https://www.personneltoday.com/hr/equal-pay-local-authority-limited-liability-partnership-associated-employers/>.
- ⁸² See House of Commons Treasury Committee, 'Private Finance Initiative: Written Evidence', 2011, online at <https://publications.parliament.uk/pa/cm201012/cmselect/cmtreasy/writev/pfi/pfi.pdf>.
- ⁸³ See ss 24–26 of Procurement Reform (Scotland) Act 2014.
- ⁸⁴ Scottish Government, 'Analysis of the impact and value of community benefit clauses in procurement', 26 June 2015, online at <https://www.gov.scot/publications/analysis-impact- value-community-benefit-clauses-procurement/>.
- ⁸⁵ For discussion of this challenge internationally, see Mary K. Marvel and Howard P. Marvel, 'Outsourcing Oversight: A Comparison of Monitoring for In-House and Contracted Services', *Essays on Service Delivery and Privatization*, online at <https://sites.duke.edu/niou/files/2011/05/Marvel-and-Marvel-Outsourcing-Oversight.pdf>.
- ⁸⁶ See reg 57.
- ⁸⁷ Government Commercial Function, *The Outsourcing Playbook: Central Government Guidance on Outsourcing Decisions and Contracting*, February 2019, at pp. 19–20.
- ⁸⁸ *Ibid*, at p. 20.
- ⁸⁹ *Ibid*, at p. 44.
- ⁹⁰ *Ibid*, at p. 52.
- ⁹¹ *Ibid*.
- ⁹² Government Commercial Function, *Supplier Code of Conduct: Delivering better public services together*, February 2019, at p. 6.
- ⁹³ Government Commercial Function, *Central Government Guidance on Corporate Financial Distress*, February 2019, at p. 5.
- ⁹⁴ *Ibid*, at p. 6.
- ⁹⁵ A service might be contrasted with a one-off project. But it must be borne in mind that over the past 20-30 years, activities that were once services have been broken down into one-off and shorter, time-bound projects. The line between what a 'service' is and what a 'project' is may not always be clear-cut. A council may, in some instances, have to consider this – and to think about rebuilding services across several discrete contracts – as it brings service contracts back inhouse.
- ⁹⁶ Life-cycle costing has to be carried out through an appropriate method, guidelines for which are outlined in the Directive.
- ⁹⁷ Many thanks to David Kilduff for his guidance on this point.
- ⁹⁸ As discussed in: Albert Sanchez-Graells, 'Regulatory Substitution Between Labour and Public Procurement Law: The EU's Shifting Approach to Enforcing Labour Standards in Public Contracts' (2018) 2 *European Public Law* 229–254.
- ⁹⁹ See 'Guidance: Model services contract', online at <https://www.gov.uk/government/publications/model-services-contract>.
- ¹⁰⁰ See Ben Chapman, 'Government to face IWGB union in landmark court case for workers' rights', *The Independent*, 7 August 2018, online at <https://www.independent.co.uk/news/business/news/government-face-iwgb-union-landmark- court-case-outsourced-workers-rights-a8480461.html>.
- ¹⁰¹ Thanks to David Kilduff for this suggestion.

- ¹⁰² Andrew Gwynne MP, 'Gwynne announces radical Local Government proposals at Labour Conference', 25 September 2017, online at <https://andrewgwynne.co.uk/gwynne-announces-radical-local-government-proposals-at-labour-conference/>.
- ¹⁰³ See discussion at Inhouse Lawyer, 'Illegality in Contracts', 26 February 2013, online at <http://www.inhouselawyer.co.uk/legal-briefing/illegality-in-contracts/>.
- ¹⁰⁴ Thanks to Matt Dykes for his contribution of these three levels of analysis.
- ¹⁰⁵ There have been some proposals for better archiving of existing and past government contracts; see in particular: John Tizard and David Walker, 'A Domesday Book for public service contracts – better data, better value for money', TUC, January 2019.
- ¹⁰⁶ See Mo Baines, 'Rebuilding Capacity: The Case for Insourcing Public Contracts', University of Liverpool Dissertation (awaiting publication).
- ¹⁰⁷ 'Local Government Association Briefing', 5 July 2018, online at <https://www.local.gov.uk/sites/default/files/documents/NHS%2070th%20anniversary.pdf>.

