

# The Mutation of Privatisation

A critical assessment of new community and individual rights

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(Continuing the work of the Centre for Public Services)

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## Abbreviations

AQP	Any Qualified Provider
CSR	Corporate Social Responsibility
DCLG	Department for Communities & Local Government
FOI	Freedom of Information
GP	General Practitioner
LATC	Local Authority Trading Company
NCIA	National Coalition for Independent Action
NCVO	National Council of Voluntary Organisations
NAVCA	National Association for Voluntary and Community Action
NHS	National Health Service
PbR	Payment by Results
PCT	Primary Care Trust
PFI	Private Finance Initiative
PPP	Public Private Partnership
TMO	Tenant Management Organisation
TUPE	Transfer of Undertakings (Protection of Employment) Regulations 1981

## Definitions

**Community/voluntary/non-profit organisations** – is used to recognise three different types of organisations. Community organisations are membership based and represent particular interests and campaign on public policy issues; voluntary organisations are usually local bodies often working with, and providing services to, particular groups of users; non-profit organisations cover a range of bodies such as housing associations, leisure trusts, national charities and other bodies that usually employ staff on a much bigger scale than community and voluntary organisations.

**Social enterprises** – this is a generic term to describe mutuals, cooperatives, employee-owned and similar collectively-owned non-profit companies.

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## Chapter 1

# A TYPOLOGY OF RIGHTS

New community rights to bid, buy, build, challenge and provide are enshrined in legislation and Coalition policy. The government is also extending existing individual rights to buy and to personal budgets. Considerable sums of public money are required to implement these policies and provide technical and legal support to voluntary and community organisations to exercise these rights.

This paper examines the objectives and scope of the new community rights and proposes a typology of public sector reform rights. It highlights the fundamental conflicts between 'rights', 'choice' and 'contract' cultures and localism. It assesses the conflicts and contradictions between community and commissioning, participation and empowerment, and the impact on democratic accountability, public finance, employment, equalities, the changing role of the state and community, voluntary and non-profit organisations.

The new community rights and the widening scope of existing rights are classified in a five-part typology:

**Provision of services:** Right to Request and to Provide, Community Right to Challenge, Right to Manage.

**Ownership:** Community Right to Bid, Right to Buy (including Preserved Right to Buy and Right to Acquire), Right to Transfer.

**Development:** Community Right to Build, Right to Reclaim Derelict Land

**User choice:** Right to Choice, Right to Personal Budgets, Right to Control.

**Taxation:** Right to Limit Council Tax Increases.

The surge in community and personal rights follows several earlier initiatives such as the Land Reform (Scotland) Act 2003, which enables rural communities to apply to register an interest in land and property with the right to buy. In 2007 the Quirk Review recommended the transfer of assets to community organisations and the Big Lottery Fund's Community Assets Programme allocated £30m to renovate local authority buildings for community use and ownership.

The Coalition's 'free school' programme has many of the same objectives as new community rights. Parents, charities, universities, businesses, educational groups or teachers can set up new all-ability, state funded schools. They are free of local authority control, set their own pay and conditions for staff, do not have to employ teachers with Qualified Teacher Status or follow the national curriculum. The rapid growth in free schools and academies is part of government strategy to take primary and secondary education out of local authority control and accountability and lay the basis of a centralised 'independent' education sector. The first wave of free schools were in mainly middle class areas with 57% of better-off, educated and professional households compared with the English average of 42.8% (The Guardian, 2011).

The new rights should be assessed in the broader context of citizen rights. They comprise individual rights: *civil rights* (freedom from abuse and interference from the state, companies and other third parties; freedom of speech, the freedom to own property and intellectual property rights and the right to work); *social rights* (the right to education, health care, welfare and the freedom to participate in society); and *political rights* (the right to vote, to hold office, to organize, to join a trade union, and to participate in collective and public activity) (Whitfield, 2012a).

A Commission on a Bill of Rights is considering whether to recommend a UK Bill of Rights and, if so, its form and content. Additional rights could include socio-economic rights such as

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the right to have access to health care services, sufficient food and water and social security. Environmental rights could include the right to an environment that is not harmful to health and well-being together with environmental protection to prevent pollution and ecological degradation, promote conservation and sustainable development. However, these rights are likely to be qualified by statements such as “...the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights” (Commission on a Bill of Rights, 2012). The Commission recognises the problems of imposing duties on public authorities when more public services are being outsourced.

### **Limitations of the new rights**

User choice rights, together with the right to buy social housing, are exercised individually, whereas other rights require collective action by community or voluntary organisations. With the exception of the right to bid, build and to challenge, few of the rights can be used in combination because they provide specific access to services or acquisition of public assets. But they have a dual role. They are designed to provide additional leverage for community/voluntary/non-profit organisations to have more influence over local services, facilities and development. However, they are also designed to destabilise and fracture public provision of public services and pave the way for further marketisation and privatisation. None of the rights are directed at improving in-house public provision.

The new rights represent a new class of community rights, but there are major questions about who will be the primary beneficiaries. The exercise of community rights requires a relatively high level of capability and organisation with resources/education to conclude the process. Clearly, they should enable some community organisations to improve local facilities and services and to have a more influential role in determining the future development of their area. The community/voluntary/non-profit sector may also act as an incubator or nursery of ideas and innovation that are then incorporated within the public sector. But the belief that the sector must create social entrepreneurs dedicated only to expanding social businesses is misconceived. Social change language is used to give the impression of alignment and shared objectives and to mask the real intent.

The programme of rights is selectively targeted at increasing social rights to challenge or take over facilities. This is reflected in the language of ‘to challenge’, ‘to bid’, ‘to buy’ ‘to control’, which implies a power that may not be reflected in the ability to successfully exercise these rights. The rights entitle a community organisation or individual to intervene or to start a process, which may or may not conclude in fulfilling the original objective. They do not have the legislative power to take action; this remains the responsibility of a local authority, government department or public body.

The ‘anyone can be a contractor’ attitude runs the risk of grossly under-estimating the complexity and cost of delivering quality public services and the scope of employer responsibilities. The ‘perfect contract’ and the ‘perfect service at low cost’ are illusory. Running a post office or community centre has their own demands, but providing operational public services requires different capabilities with greater risks and financial liabilities.

Key rights are excluded. The Coalition government has already withdrawn guidance to reduce the emergence of two-tier workforces and weakened equality impact assessments. The right to health and education, right to a job, a living wage, a pension and to strike have all been reduced or made more difficult to achieve. No new rights planned when outsourced services are ‘contractually non-compliant’. There is no right to dissolve PPPs. The Community Right to Bid, Build and to Challenge are only applicable in England. Separate right to buy schemes for tenants operate in Scotland, Wales and Northern Ireland.

### **Neoliberal reform of public services**

Community rights are a key part of the Coalition’s Open Public Services reform programme (Cabinet Office 2010a, 2011 and 2012a). The financialisation and personalisation of public services are designed to extend the marketisation and privatisation of public owned assets,

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governance and democracy and the public domain (Whitfield, 2012a). The main trends in the transformation of public services include:

- The mutation of privatisation with new pathways to outsource, transfer, marketise and privatise services and functions.
- The mainstreaming of commissioning in the public sector and emergence of the Commissioning Council model.
- Creation of a mixed market of public, private and non-profit/voluntary sector service providers to compete for contracts.
- Increased use of larger multi-service, long-term contracts or strategic partnerships.
- Wider use of payment-by-results and outcomes in service delivery contracts.
- Growth of a social investment market and social impact bonds to finance service delivery.

The UK has led the neoliberal development of new approaches to private investment in public infrastructure and services via Public Private Partnerships (PPPs). New public private partnership models are likely to emerge involving privately managed services companies, social finance investment companies and social enterprises and an increase in subcontracting to social enterprises and third sector organisations.

New community and personal rights must be considered alongside further development of the PPP model and the growth of a social investment market and social impact bonds in the US, Canada, Australia and the UK. The 'rights' approach also has implications for the EU drive to 'complete' the internal market and regulatory frameworks, including procurement and services of general and economic interest.

### **The mutation of privatisation**

Although the sale of public assets initially took centre stage, privatisation was never intended to be solely about selling assets to increase government revenue in order to minimise taxation, or to improve economic efficiency.

Privatisation developed, by political and economic necessity, into a multi-dimensional process. Political opposition meant that most of the core functions and services of the state could not be privatised by a stock market flotation or trade sale. Market mechanisms were not in place and required more complex arrangements with a longer timescale. Political values and social attitudes had to be changed, not least the belief in 'public services' had to be eroded and embedded trade union and professional interests challenged.

Once the scale of privatisation reached a threshold, where further sales were complex or politically untenable, the emphasis moved to different forms of ownership and control. New forms of privatisation or pathways emerged (see Figure 1, page 14) as the focus moved to the marketisation of services by outsourcing, joint ventures, public private partnerships, and transfers to arms length companies. A new 'gene' of personalisation gave service users individual budgets and direct payments/vouchers. This widened and deepened the role of the private sector in the design and delivery of public services (Whitfield, 2012a).

These new pathways have three components:

1. Contracts with external service providers such as companies, non-profit and voluntary organisations and includes subcontractors and supply chains of goods and equipment.
2. Advisers, technical and management consultants, auditors, lawyers, financial advisers and funding agencies.
3. Trade organisations to represent new types of contractors and consultants that lobby to protect and expand contracting opportunities.

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## Chapter 2

# THE NEW COMMUNITY RIGHTS

### Definition of 'rights'

Council tenants have the right to buy their home and access substantial discounts if they meet residency requirements (a tenant for a minimum of five years) and on condition that the property is not subject to planning restrictions (for example, demolition in a regeneration area).

The Right to Request and the Right to Provide are currently not legislative rights but are implemented through management directives in government departments and the NHS. Similarly, the Community Right to Challenge does not convey a right to remove a service provider, only the right to have the matter considered by submitting an 'expression of interest'.

### Provision of services

The government's objective is to give communities the right to challenge *"...to run local services where they believe they could do this differently and better."* The aim is *"...to encourage greater diversity of service provision, and improved innovation and responsiveness - alongside building fair access and ability for voluntary and community sector bodies when competing to run services; reduce the costs of service provision for local public bodies; and empower communities and citizens (DCLG, 2012a).*

The Localism Act 2011 gives community/voluntary/non-profit bodies (including cooperatives, community interest companies, companies limited by guarantee and other non-profit incorporated bodies), charitable group or trust, parish council or two or more employees of the local authority responsible for service delivery, the **Community Right to Challenge** (Sections 81-86) the provision of services. It fulfills a Coalition Programme for Government commitment to *"...give communities the right to bid to take over local state-run services"* (Cabinet Office, 2010b).

The Act applies to the whole or part of a service *"...provided by or on behalf of a relevant authority"*, currently local authorities and fire and rescue authorities, although the Secretary of State has power to extend it to other public sector bodies (DCLG, 2012a).

Only 'relevant' bodies can submit an expression of interest, but they have the option of forming a partnership with other relevant or non-relevant bodies. An unincorporated community or voluntary organization could submit an expression of interest, but would be expected to become an incorporated body with limited liability if it intended to submit a tender.

Certain services are exempt from the Community Right to Challenge. Health services jointly commissioned with an NHS body are exempt until April 2014. Services commissioned using direct payments and those provided to a person with complex individual health or social care needs are permanently exempt.

An expression of interest must identify the service being challenged and its geographic area, provide financial information about the organisation, how it will meet users needs, promote or improve economic, social and environmental well-being and the outcomes to be achieved. If local authority employees are involved in the expression of interest, they must provide details about how they will engage with other staff that are affected by the challenge. The 'right to challenge' applies only to the provision of services, not to the delegation of functions. For example, the processing of planning applications is a service, but the decision to grant or refuse planning permission must be taken by the local planning authority. The responsible authority must consider and respond to the challenge.

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A local authority can reject the expression of interest on the grounds that it:

- is based on inadequate or inaccurate information;
- the expression of interest does not comply with the Localism Act 2011 or regulations made under the Act.
- considers the applicant, consortium members or subcontractors do not have the financial resources to deliver the service or that it is able to participate in a procurement process;
- considers the continued integration of services is critical to service users, for example, services to older people and those with mental health, dementia, learning and physical disabilities;
- has decided to stop providing the service;
- the service is already the subject of a procurement process;
- the authority and a third party have begun negotiations to provide the service;
- is already actively exploring provision by a staff-led mutual;
- considers that acceptance of the expression of interest is likely to lead to a failure to meet the authority's legal duties.
- considers the expression of interest is considered frivolous or vexatious. (DCLG, 2012a).

The expression of interest must be a considered case, not just an objection to the current provider. A community or voluntary organisation can withdraw an expression of interest or may refuse to amend it, but the authority can still proceed to carry out a procurement process without a bid from a community or voluntary organisation if it decides this is appropriate.

The Localism Act 2011 and subsequent regulations set out in detail which organisations are permitted to challenge, the content of an expression of interest and the reasons why an authority may reject it, but no attempt is made to determine the conditions or rationale that might justify the use of the Community of the Right to Challenge. It is also significant that the Community Right to Challenge is not limited to the provision of services where community/voluntary/non-profit organisations already deliver much needed services, but applies to virtually all local authority and fire and rescue authority services. Similarly, there is no definition of a 'local' community or voluntary organisation. The definition of relevant body is "...intended to cover a wide range of civil society organisations" (DCLG, 2012a).

If the authority accepts the challenge, it must undertake a procurement process, either under the Public Contracts Regulations 2006 if the value of the service is above the current the threshold (currently £173,934). If the value of the contract is below the threshold, or is not an exempt service, the authority does not have to follow the EU procedures for advertising, specifying and awarding contracts. Procurement will be open to other bidders including private companies. The local authority must consider economic, social and environmental well-being (Public Services (Social Value) Act 2012), and is legally obliged to achieve best value and value for money.

Procurement regulations classify health, education, recreation, cultural and sporting services as Part B (Residual) Services and are exempt, although a local authority may decide to tender on grounds of demonstrating value for money. If a social enterprise provides services primarily to a public body and the public body exercises control similar to that which it has over internal departments, the 'Teckal' exemption may apply and EU procurement rules would not apply (see below for procurement regulations for social enterprise spin outs).

There is no restriction on in-house bids if the local authority accepts an expression of interest and commences a procurement process. The draft statutory guidance claimed in-house bids would be very difficult, but this was withdrawn following representations by local authorities.

Although private contractors cannot directly use the Right to Challenge, they can partner with community/voluntary/non-profit organisations or social enterprises to bid to run services. This could lead to the private sector offering inducements to launch challenges and/or to enter

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partnerships. A contract culture (see Appendix 1) inevitably increases the potential for collusion, corruption and greed.

A **Right to Request** scheme was launched by the Department of Health in 2008 to enable frontline Primary Care Trusts (PCTs) to establish social enterprises to take over the provision of clinical and support services, following New Labour's policy to require PCTs to separate commissioning and provision by April 2011. A successor programme, the **Right to Provide**, was launched a year earlier.

Forty-seven social enterprises were established between 2010 and June 2012 involving over 20,000 staff. All but three were in health and social care. A further 37 projects were in development including projects in children and youth services (4), education (3), housing (2), and one each in community safety, culture and libraries, fire and rescue and adult and community learning (Cabinet Office, 2012b).

The first and only spin-out from central government, My Civil Service Pension (MyCSP) Ltd, was launched in April 2010, but later that year the government unilaterally decided that it would become a 'mutual joint venture with external partners'. There was no consultation with staff or trade union and a clear majority voted to take industrial action in protest (Public and Commercial Services Union, 2011).

MyCSP is a joint venture, 25% owned by 475 staff, 35% by the government and 40% by the Equiniti Group, a pension and human resource outsourcing contractor. The Chairperson of Equiniti is Kevin Beeston, previously chair of Serco plc from 2002-2010 with Sir Rod Aldridge, founder and chair of Capita Group 1984-2006, as a non-executive director. So the outsourcers have the biggest stake in the first so-called mutual!

Staff in acute, mental health and community NHS Trusts can develop mutual/social enterprise proposals, which the Trust is obliged to consider. If approved, draft and final business plans are required. The NHS Standard Contract or primary medical care contracts cover a wide range of clinical and support services. However, Foundation Trusts boards are not obliged to support proposals for staff-led social enterprises because they are classified as independent organisations.

The government and local authorities are piloting Social Work Practices for adult social care and for looked-after children and care leavers. Branded as 'bringing social workers into the Big Society', they are social worker-led small private organisations and thus will be vulnerable to take-over by bigger companies. They will have no additional resources, will fragment service delivery and will be a high-risk venture that could shoulder disproportionate blame in a care crisis. Consequently, many social workers are opposed to social work practices and most local authorities are planning in-house practices, if only to retain control of costs.

Social enterprise spin-outs do not have to tender, under certain conditions, unlike the Community Right to Challenge. NHS mutuals have negotiated fixed-term contracts and avoided a procurement process on the grounds that there is no market for the service. A competitive tender is not legally required if public bodies can define a market, demonstrate there is a need for the market and demonstrate there are no other competitors who would be interested and capable of bidding and delivering the service. An initial three-year contract awarded under the Right to Provide may avoid competition but subsequent or additional contracts will be. Longer agreements may be offered, *"...but will be coupled with the requirement to market test specific services through a formal tender process"* (Department of Health, 2011).

The Nuttall Review of employee ownership in the private sector recommended a Right to Request employee ownership, based on the existing statutory 'right to request' models in employment law. This *"...would broadly involve a group of employees developing a proposal for employee ownership, discussing it with their employer, and employees having an expectation that the employer should reasonably consider the proposal and respond to it. However, there would be no 'right to have' and therefore there must be an equivalent expectation that the employer can turn down the proposal"* (Nuttall Review, 2012).

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The Department of Health allocated £119m to support social enterprises (and many received additional support, cash or in-kind support from their host PCT), but there is no comparable funding for local government. The cost of setting up a social enterprise for a 100 staff, inclusive of initial appraisal, business plan, initial contract negotiations, set-up and start-up is estimated to be £220,000 - £530,000 plus working capital of £0.5m - £0.7m (Social Finance, 2012).

The choice of provider for elective care introduced in 2007 will be extended to the majority of NHS-funded services by 2013-2014 under the Any Qualified Provider (AQP). Patients will be able to choose any provider that meets NHS standards and prices. *“There will be no volume or payment guarantees for providers – their income will be wholly dependent on patients choosing to use their services..... With the introduction of Any Qualified Provider the need for competitive tendering should diminish considerably”* and will only be used for ‘whole system service transformation’ (Department of Health, 2011). Once a provider market is established, market forces will dictate which providers survive. But the Department of Health claims this is not privatisation, because services remain free at the point of use, based on clinical need! (ibid).

## Ownership

The Community Right to Bid *“...is intended to level the playing field by strengthening the opportunities for local groups who want to have a greater say about what happens to public or private assets of importance to their local community which may come up for sale. It will give them a legal right to nominate as an Asset of Community Value...and “...allow communities the time to prepare a business case and seek funding to compete on the open market to buy and manage that local asset. This will help to keep vital local facilities open, transforming their use, generating income and increasing the self-sufficiency of the neighbourhood for the long-term benefit of their community”* (DCLG, 2012e).

The new **Community Right to Bid** (Sections 87-108, Localism Act 2011) is intended to identify public and private assets as ‘assets of community value’ that ‘further the social well being or social interests of the local community’ in England. Public or private assets could include leisure facility, community centre, children’s centre, library, museum, park, shop and pub. Local authorities are required to maintain a list of land and buildings classified as ‘assets of community value’ nominated by the local community. When the owner of a listed asset wants to sell, a six-month moratorium allows community organisations time to prepare a bid. At the end of the moratorium the owner can sell the asset to whomever they want. Locality, a merger of British Association of Settlements and Social Action Centres and the Development Trusts Association, has a £13.2m government contract to help community organisations prepare bids.

The **Right to Buy** (Housing Act 1980, Housing Act 2004) scheme was introduced in 1980 giving council tenants with five years residency, the right to buy their home at a discount. The government has retained the same discount rates of the property value (35% for houses, 50% for flats, plus 1% (houses) or 2% (flats) for each year beyond the qualifying period. However, it has increased the cap on the total discount available nationally by £25,000 to £75,000 from April 2012, a move designed to accelerate sales and reduce the public housing stock (DCLG, 2012b).

The average discount fell from 50% to about 25% and sales plummeted from nearly 70,000 in 2003-04 to just over 3,000 in 2010-11 in England (DCLG, 2011c). Nearly two million council homes have been sold in England since 1980.

Sales under the **Preserved Right to Buy** (for tenants who have transferred from local authorities to housing associations under the Large Scale Voluntary Transfer scheme) and the **Right to Acquire** (Housing Act 2004) gives housing association tenants the right to buy. Right to Acquire sales declined from a combined total of 15,000 to 1,160 between 2003-04 and 2010-11.

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The government have amended the process by which local authority tenants exercise the statutory **Right to Transfer** (Housing and Regeneration Act 2008) and **the Right to Manage** (Housing Act 1985). About 200 Tenant Management Organisations (TMOs) currently manage about 70,000 dwellings. Local authorities no longer have to prepare a feasibility study of the prospective TMO's financial, management, control and governance proposals, which must be incorporated into the TMO business plan. Local authorities do not have to notify the Secretary of State of ballot results or provide a copy of the TMO management agreement.

## Development

The government's objective is to provide an opportunity for "...some small scale development that meets local need to be brought forward by community groups without a traditional planning application." In addition, "...greater involvement of the community could lead to more certainty for developers; development that is more in line with local needs and provides greater public amenity; and increased civic engagement and a move towards the 'Big Society'" (DCLG, 2011b).

The **Community Right to Build** (Sections 116-121 and Schedule 11, Localism Act 2011) is designed for small-scale developments, for example 5-10 homes that do not exceed 10% of existing development over a ten-year period. Projects can include housing for rent or sale, shops, businesses, community facilities, playgrounds and the conversion of disused buildings into affordable housing, and could be undertaken in partnership with property developers and/or housing associations. The Community Right to Build can be used in combination with the Community Right to Bid or the Community Right to Challenge.

The Localism Act 2011 requires a local organisation using the Community Right to Build to establish a legally constituted organisation (such as company limited guarantee with charitable status or community interest company) with the express purpose of furthering the social, economic and environmental well-being of a community. All benefits arising from the project, such as a capital receipt or rental income, must remain within the community. Start-up, project development and referendum costs of a Community Right to Build scheme are estimated to be £40,000, but may be reduced with government seed-corn funding.

A Community Right to Build is limited to a defined neighbourhood area. The Localism Act 2011 introduced a new right to prepare a neighbourhood development plan, which will be part of the local statutory development plan (the Local Development Framework and the National Planning Policy Framework). Parish Councils and neighbourhood forums are empowered to set planning policies and to give planning permission via Neighbourhood Development Orders or Community Right to Build Orders.

Neighbourhood plans must conform with the strategic policies in the Local Plan and can promote more (but not less) development in a neighbourhood than is set out in the Local Plan. If a neighbourhood area has not been defined, community and voluntary organisations wishing to initiate the Community Right to Build must agree a neighbourhood area with the local planning authority.

A community organisation must consult widely before submitting a draft Community Right to Build Order to the local authority. The Council will appoint an independent examiner acceptable to the community organisation, to assess compliance with national and local strategic policies and legislation. The independent examiner will publish the assessment and can refuse, ask for modifications or accept the Order. If the examiner recommends approval the local authority will organise a referendum and must grant planning permission if the local referendum results show over 50% support, otherwise the authority must refuse the Order.

The **Community Right to Reclaim Land** is designed to ensure under-used land and property is put to productive use. The government is making public details of surplus publicly owned land and property together with details of the timescale for disposal (data.gov.uk). A Public Request to Order Disposal (PROD) must be sent to the Secretary of State identifying the local and central government owned land and property for which there are no suitable plans, or likely to be in a reasonable time period. After considering the evidence, the Secretary of State

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may issue a Disposal Notice (Schedule 16, Local Government Planning and Land Act 1980) to public bodies defined in the Act to dispose of the land at open market value. A Non-Statutory Request, applicable mainly to government departments, can only recommend disposal. Community groups could use the Community Right to Bid scheme if the land is designated an 'asset of community value'.

**A Community Asset Transfer** enables land buildings owned by statutory bodies to be transferred to community organisations at 'less than best consideration' i.e. less than full market value.

### User choice

The government's Open Public Services reform programme has five principles – to increase choice wherever possible, decentralise to the lowest appropriate level, be open to a range of providers, ensure fair access to public services and to be accountable to users and taxpayers (Cabinet Office, 2010b and 2011).

Choice Frameworks are planned to extend the **Right of Choice** in health, adult social care, childcare, schools and further education following the Open Public Services White Paper (Cabinet Office, 2011). Choice Frameworks will set out what choices should be available, responsibilities, quality standards, inspection regimes, information sources and complaints procedures.

The NHS constitution gives patients the right to choose a General Practice (GP) surgery and to be accepted by that practice unless there are reasonable grounds to refuse. Patients have the right to express a preference to see a particular doctor in the GP surgery and for the surgery to comply.

Patients in England have the legal right to choose from any hospital provider in England offering a suitable treatment that meets NHS standards and costs. Patients can also choose private sector providers who have a contract with the NHS. Emergency and urgent services, cancer, maternity and mental health services are excluded. Patients have the right to information to help them choose a provider, to be involved in discussions and decisions about their healthcare and to accept or refuse treatment.

The **Right to Direct Payments** (Community Care (Direct Payments) Act 1996) and **Personal Budgets** (Health Act 2009) are being extended to mental health patients and patients with long-term conditions in 2012. By April 2011, 35% of eligible users and carers in England (340,000 people) were using personal budgets. A third of users had taken a direct payment, the council managed the personal budget for the remainder. Take-up in Wales and Scotland was significantly lower.

Legal restrictions on local authority trading mean that in-house services cannot be purchased with a Direct Payment, only with a Personal Budget. A service user can decide to have all or part of the Budget used for in-house services and the rest of it paid out as a Direct Payment. Some authorities have established arms length Local Authority Trading Companies (LATC) to avoid this problem. The Government is pressing for wide use of Direct Payments, thus sacrificing choice to create the conditions for public provision to wither on the vine and mask direct privatisation.

Three key issues are often conflated. Firstly, the concept of citizens who require high levels of care and support having more control over who and how they are cared for, is fundamentally important. Secondly, the ability of service users to purchase services from the local authority, NHS or other public body in addition to private or voluntary providers. Thirdly, the extension of personal budgets to more categories of service users as a permanent feature of service delivery. Ultimately, they could eventually transform into vouchers for schools, hospitals and other services. To use ex-Prime Minister John Major's famous phrase, "we are personalising, not privatising" services (John Major, 1997).

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New Labour's Vision for Adult Social Care concluded "*The time is now right to make personal budgets the norm for everyone who receives on-going care and support – ideally as a direct cash payment, to give maximum flexibility and choice*" by April 2013 (Department of Health, 2010).

Individual budgets, direct payments and vouchers/credits transfer the risk and responsibility to individual users, by forcing them to select their own service provider. They atomise collective provision because individuals are encouraged to make decisions based solely on their own circumstances. The potential abuse of personal budgets is highlighted by research of the pilot projects (Department of Health, 2012). Most patients used their budgets to pay for carers/personal assistants, physical exercise and alternative or complementary therapies. However, other uses included the purchase of laptops, satellite navigation device, social trips with friends, a theatre trip and domestic appliances. Variations in the approval or rejection of requests by personal health budget leads or PCT panel between pilots caused confusion. It raises difficulties in a broader definition of health needs, responsibility for funding those needs, equality of provision, the use of NHS budgets and the potential abuse of personal budgets.

The ***Right to Control*** (Welfare Reform Act 2009) extends personal budgets by giving disabled people a new legal right to control the resources for their social care, employment support, housing support and equipment and adaptations. Seven local authority areas are currently testing the Right to Control. Disabled people will be able to continue receiving the same support, ask a public body to arrange new support, receive a direct payment and buy their own support or have a mix of these arrangements.

## **Taxation**

The **Right to Limit Council Tax Increases** (Schedules 5 and 6, Localism Act 2011) applies if a local authority wishes to increase council tax above the limit set by the Secretary of State and approved by the House of Commons. A referendum must be held with the local electorate asked to approve or veto the increase. Local authorities also have to vote and publish a statement on pay policy including salaries of senior officials and lowest paid employees.

## NEW PATHWAYS TO PRIVATISATION

### Political objectives

New community and individual rights have been introduced in a period of austerity and at the same time as the government has embarked on a new phase in neoliberal transformation of public services and the welfare state (Cabinet Office, 2011). This chapter examines the potential impact of these rights.

Firstly, new rights will subject more services to commissioning and outsourcing leading to the expansion of service markets. No controls have been imposed on the scope of right to provide or the right to challenge, so they are likely to lead to the procurement of services that currently have a low level of outsourcing. The effect will be to transfer operational responsibility from local government to private contractors and community/voluntary/non-profit organisations. The government wants to blur the boundaries between public, private and voluntary sectors by creating a mixed market of providers and 'partnerships'.

The Coalition government claims to value 'community' and 'local', but it is creating national markets in health, education and other services. Hospitals and schools are required to operate in regulatory regimes that have virtually no connection to, or respect for, community or locality. For example, NHS Foundation Trusts have a mutual governance structure, but they are constrained by NHS regulatory and financial rules and operate within national markets created by the 'choose and book' and Any Qualified Provider systems that marginalises the importance of 'locality' and collective responsibility.

Secondly, a big take-up of the community right to challenge could increase insecurity and reduce the morale of in-house staff, particularly the loss of skills and knowledge if services are outsourced. This may lead to an increase in the number of staff willing to consider the right to provide option.

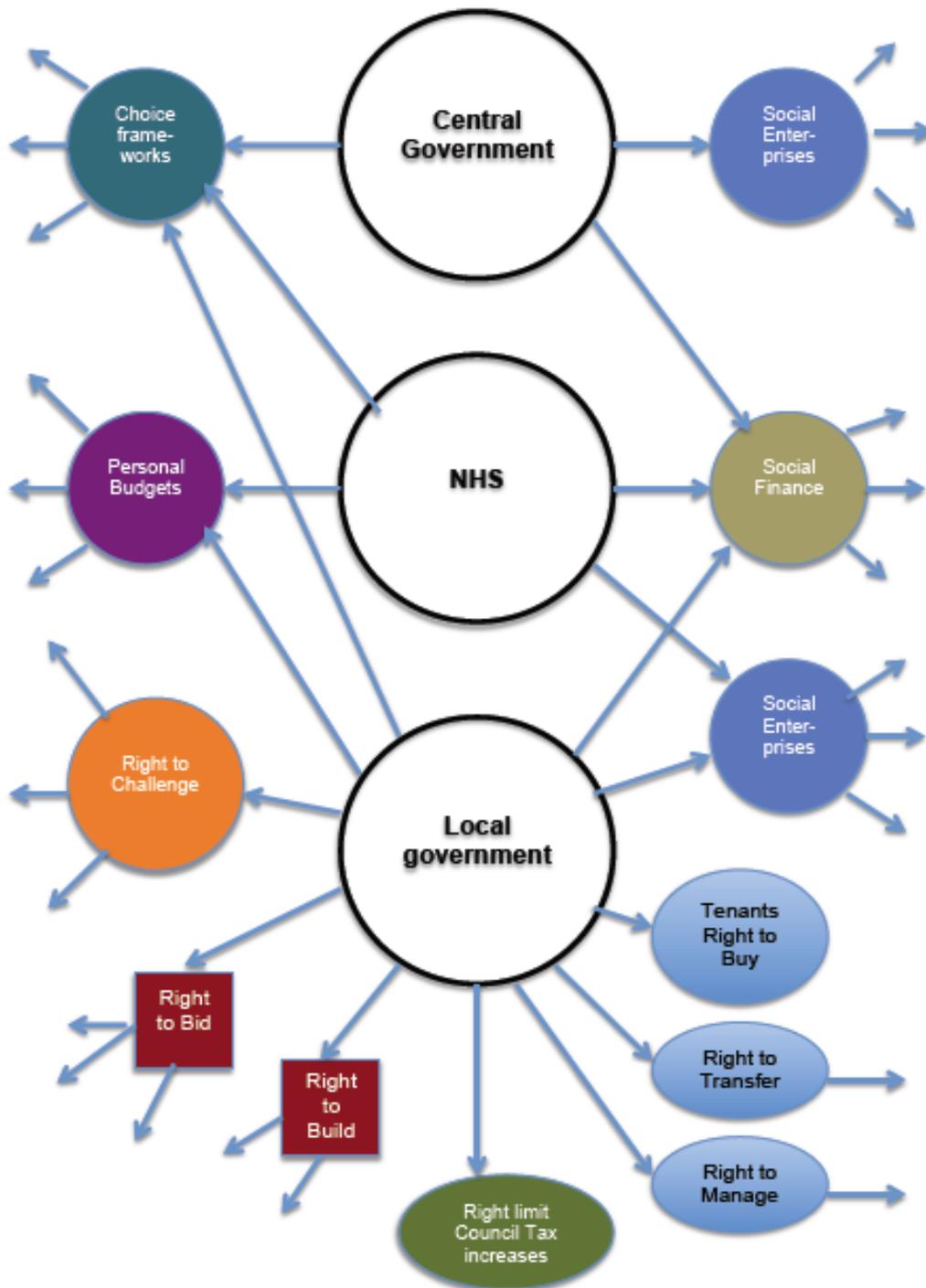
Thirdly, most of the community rights are designed to deliver services, operate facilities, obtain ownership of homes and facilities or secure personal/individual choices about service providers. They require limited organising and campaigning for implementation. Yet the promotion of new rights gives the misleading impression that they will 'empower the community', although social rights do not necessarily lead to an increase in political power. The rights nurture business rather than political empowerment.

Fourthly, the right to buy/acquire social housing is community dispossession, because it reduces the stock of social housing available to rent. The government plans a 'one for one' replacement (only for England as a whole and not by locality) so that every additional home sold under the right to buy will be replaced by a new home for affordable rent, but details of how this will work have yet to be published. Replacement at a national scale ignores both local and regional needs, and the likelihood that the rate of sales will outstrip the replacement rate because homes are sold more rapidly than new ones are constructed and new construction costs outstrip sales receipts (average net sale receipt in England is forecast to be £55,500 in 2012/13 after housing debt is taken into account, DCLG, 2012d).

Finally, the government hopes that new community rights will be a foil to the mainstreaming of commissioning in the public sector, in which national and transnational companies are certain to win the largest share of contracts by number and value.

The rights to provide and to challenge are intended to further privatise public services and are dictated by ideological motives. They bypass the scope for in-house improvement and mechanisms to address problems in the design and delivery of services by directly challenging the in-house provider. It does not address poor performance of private and community/voluntary/non-profit sector contracts caused by public spending cuts, flawed specifications and/or poor management.

Figure 1: New community and individual rights create new pathways to privatisation



**New community and individual rights create new pathways to privatisation**

The exercise of new community and individual rights create new pathways for the delivery of public services. For example, NHS spin-outs create a cluster of social enterprises, which have a collective vested interest in 'growing the market' and to compete against private companies. Each pathway attracts financial advisers, brokers and consultants. Commissioning (procurement) is mainstreamed, outsourcing increased and as the contract market grows, business and financial interests exert power to maintain the corporate welfare system of contracts, tax breaks, subsidies and shared ideology. Market forces increasingly shape the design and delivery of public services.

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Its sole purpose is to outsource more public services and develop contractor markets. The fact that community and voluntary organisations received ‘only’ £9.1bn in contract payments from statutory bodies in 2007-08, ‘just’ 2% of total public expenditure, is crudely used to demonstrate the ‘potential’ for more contracts (DCLG, 2012f). Exactly the same argument will be used by non-profit organisations, such as housing associations and national charities and agencies, to use the ‘right to challenge’ to diversify and build market share.

Whether the Community Right to Challenge turns out to be a ‘trojan horse’ for outsourcing or not, it is a charter for national and regional non-profit organisations. The search for economies of scale is likely to be a constant feature. Housing associations will argue that it will be more cost effective if they delivered all public services to estates and neighbourhoods. Leisure trusts are likely to try to justify why they should take over the provision of all sports, arts and cultural services and facilities.

The rights are presented as a means of empowerment and making the public sector more responsive to local needs, but this ignores the economics of contracting with small savings, high transaction costs, increased client costs and contract variations plus a contractor’s profit further reducing spending on service delivery (Whitfield, 2012a).

### **Viability of a ‘third sector’**

More fundamentally, these issues must be considered in the context of the concept of a so-called ‘third sector’ to supplement the public and private sectors. Community/voluntary/non-profit organisations have an important role in the economy, but the concept of a parallel third sector must be challenged on several grounds. There are profound political and economic questions whether a third sector could and should be the objective (this debate is not within the capacity of this paper and will be discussed at a later date). The sector is divided on this issue, as is the response to the privatisation of public services.

The transfer of assets and services from the public sector has played a key role in the growth of the community/voluntary/non-profit sector in the last thirty years. Further expansion will rely heavily on the continued transfer of assets and increased outsourcing of public services rather than organic growth, leading to little additionality or economic growth. Competition is primarily between community/voluntary/non-profit organisations and the public sector, not the private sector, which dominates procurement for larger contracts and outsourcing markets.

In practice, the sector’s growth is dependent on supporting the key components of neoliberal transformation, namely commissioning, outsourcing, completion, markets and market forces. The political economy of the Coalition is not challenged, because to do so would jeopardise the flow of contracts! There appears to be a fundamental failure to understand the dynamics and impact of neoliberal transformation on the economy, the state and peoples lives as well as on the community/voluntary/non-profit sector.

### **Conflict between rights, choice and contract cultures, and localism**

The exercise of the right to challenge will increase the rate of procurement, but this will be dependent on take-up and acceptance of expressions of interest by local authorities. However, outsourcing is no guarantee that services will improve and runs the risk that there might be little or no improvement or a decline in quality.

The conflicts and contradictions between the rights, choice and contract cultures and with localism are four-fold.

Firstly, the rights and choice mechanisms are intended to increase the market of service providers and ensure that a larger proportion of services are subjected to a procurement process with service delivery dictated by contract. But increasing reliance on competition and market forces in service provision and delivery will reduce the opportunities for community/voluntary/non-profit bodies to deliver services, because large companies will inevitably win most contracts.

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Secondly, the government assumes that state ‘managed competition’ will be able to manage, monitor and regulate markets to ensure performance standards are met with rights entitlement. However, the exercise of choice relies on the existence of surplus capacity, yet most public services suffer from under-capacity to meet public demand and severe financial constraints. Furthermore, the recent failure of financial regulatory regimes and the systemic failure of public bodies to properly monitor contractor performance indicates that more competition and contracting will have negative consequences for rights and choice.

Thirdly, the rights, choice and contract cultures impose significant additional costs. The government has already committed to spending £100m per annum on the new community rights alone (see Table 1). The cost of creating surplus capacity at a time of continuing public spending cuts hardly qualifies as ‘more for less’. High transaction costs incurred in procurement and in the sale of public assets are further additional costs.

Finally, the collective impact of individuals exercising their rights, for example, choose to book, will impact on local hospitals if patients select treatment at hospitals elsewhere. Inherent in the right of choice is the right to impose consequences on others. It will reinforce individualism and personal budgets in the design and delivery of services. The idea that the right to choice would reinforce local endeavor to ensure good performance of local providers is myopic.

Furthermore, a high degree of mobility will be required by service users to switch schools, hospitals and other service providers. Staff would also be required to move between contracts and their place of work. This assumes both service users and staff have the financial resources to meet additional transport costs. The widening of competition and a contract culture is almost certain to have a negative effect on staff terms and conditions.

A degree of choice in health, education and other services is important although not the main concern of service users who want to have access to a good quality health centre, hospital and school and be treated with respect. They want to choose how they are engaged in the design and delivery of services and policy-making. They also recognise that choice in some services such as refuse collection, street scene and highways comes at a high price and is not practical. Choice, with collective empowerment exercised with other users, would be more powerful and meaningful than individual market-based choice.

Choice in the payment of council tax, rents and other charges and how service users contact the council and public bodies is important too. But many local authorities are reducing choice by trying to channel people into communicating via email and websites, because they are cheaper, less accountable and effective than personal contact.

### **Democratic accountability and transparency**

Democratic accountability is being systematically eroded by excluding elected member representation on governance bodies in organisations that are dependent of public money, such as academies, free schools and NHS Clinical Commissioning Boards. Representation on other public bodies, such as new Health and Well-Being Boards is minimal. In addition, representation on arms length companies and trusts, such housing management and leisure, is limited and constrained by company law that requires them to prioritise the interests of the company over the wider public interest.

The introduction of community rights, in parallel with the mainstreaming of commissioning, will expose structural democratic deficiencies or gaps that cannot readily be remedied. Most important, the separation of client and contractor functions creates a knowledge/skills gap and internal structures with different vested interests as more services are outsourced.

Democratic accountability gaps are created by the increasing complexity of large multi-service, long-term contracts. Procurement via competitive dialogue or negotiated processes is resource intensive and managed by officers leaving Councillors with a minimal direct role and a lack of understanding of key issues. Backbench Councillors are frequently marginalised and service users and the public have no formal role in the selection of a service contractor and subsequent management and monitoring of the contract.

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A three-tier governance or partnership structure is usually established consisting of a strategic board (Council leader, chief executive, responsible cabinet member and company director), and management and operational boards (council officers and contractor managers). Although branded as 'strategic partnerships', they are contracts between a public body and a private contractor. Further gaps are often evident when client-contractor disputes and/or different methods of participation or consultation hamper Councillors and service users seeking remedies to problems in service delivery.

An information gap is created by the blanket application of 'commercial confidentiality' (the refusal to disclose information, evidence or rationale for policy decisions and contracts that are commercially sensitive). This further restricts service user, community organisation, staff and trade union participation.

The new rights and neoliberal transformation of public services increases the complexity and potential conflicts of interest in governance arrangements, yet these are not recognised, because of the absence of long-term thinking. For example, governance arrangements could be strained when contracts are confronted with changing demands, competition or mergers, further spending cuts and/or poor service delivery performance. This raises questions about how the public interest will be protected in these situations.

The growth of trade organisations to represent new types of contractors and consultants and the widening reach of corporate welfare to protect and expand contracting opportunities and minimise regulatory controls also poses new threats to democratic accountability. The fracturing of joined-up government by separating client and contractor under the commissioning model, the growth of a contract culture and the continued interchange of public and private advisers between sectors using the revolving-door mechanism, have barely been recognised, let alone considered.

The control of public assets and services by community/voluntary/non-profit bodies, charities and trusts does not automatically lead to improved democratic accountability. In fact, many organisations have a poor accountability and employer track record. For example, housing associations have a varied governance and tenant involvement performance record. Many are no longer local organisations following mergers and the rapid consolidation of the sector, which is now dominated by national and regional associations, many of which have diversified into other services.

Most community and voluntary organisations represent specific interests such as tenants, residents, patients or provide a wide range of care, support and fund-raising activities and are unlikely to bid for contracts. Irrespective of their capability to bid, they are confronted by a political and economic decision whether to focus on organising, advocating and campaigning for better services or whether to become a service provider, or how to balance both. Many US community organisations faced the same dilemma, became service providers and lost their remit and ability to organise and campaign.

Bids are more likely to come from social enterprises, housing associations, foundation hospitals, leisure trusts and regional or national organisations eager to increase market share.

The extent to which local authorities will monitor governance arrangements alongside contract performance is a key question. Reliance on 'self-monitoring' will be ineffective. The financial sustainability of community projects is often problematic and may lead to changes in the scope of projects, governance and management. These may be positive, but if they raise key questions of public interest, then the local authority, as client, has a responsibility to raise questions and/or require formal scrutiny.

The government has taken no action to extend Freedom of Information despite more and more public services, functions and the public infrastructure being delivered by private contractors in long-term contracts. More extensive use of private consultants, many of which are 'partnerships' with minimal corporate disclosure requirements, are not covered by FOI. Increased use of tax havens for PFI/PPP assets is another issue. The disclosure of invoices

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over £500 paid by public sector bodies has minimal effect on transparency or procurement and does not deter the unscrupulous.

The answer primarily lies in reform of democratic governance and public services by making them more accountable, participative and responsive to community needs. It remains highly questionable whether the 'rights' approach will achieve this objective.

### **Economics of commissioning**

The Community Right to Challenge Impact Assessment estimated local authority procurement costs to be 4.6% of a contract value of £200,000 (DCLG, 2011a). The government assumed a 20% saving on outsourcing reducing the cost of service delivery to £152,720. Private sector profits of 6%-10% would further reduce expenditure on service delivery. So a service that has already suffered spending cuts since 2010 will be delivered with an additional 30% budget cut. And what happens in subsequent years when further spending cuts require additional savings?

The Community Right to Challenge Impact Assessment claimed that New Labour's Julius Review 'found' outsourcing savings of 20%. But this was a selective literature review that ignored government funded UK research over the last twenty years that has consistently found average savings of 6%-8% (Department of the Environment 1993 and 1997, Equal Opportunities Commission 1995, Cabinet Office 1996, Audit Commission, 2008 - see full discussion in Whitfield, 2012a). The Impact Assessment referenced only the 1993 study!

Outsourcing studies rarely examine client costs, implying that competition and market mechanisms are cost-free. NHS administration costs soared from about 5% of total expenditure in the early 1980s to 13.5% in 2005 in parallel with the growth of commissioning and marketisation (House of Commons Health Committee, 2010). Personalisation has created more bureaucracy according to 73% of respondents (up seven percentage points from previous year) in a national survey (Community Care, 2011).

Economic sustainability is not fully taken into account, a significant omission when social enterprise spin-outs must encounter a procurement process within a few years of set-up. 'More for less' is frequently cited in management rhetoric, particularly by the big four management consultancies, but they have a poor record in practising what they preach.

The need for joined-up or integrated service delivery remains a key objective. Enabling community/voluntary/bodies to issue an expression of interest about a particular service has contradictions. If the service has a relatively small budget then this increases the possibility of a community or voluntary sector bid being viable and successful. But few services are stand-alone and the separation into small contracts may undermine integration. A larger contract may address integration issues more successfully, but there is considerably less likelihood of a community or voluntary organisation bid being successful if it is competing against private sector bid capacity.

### **Public cost of community rights**

The take-up of the Community Right to Challenge is estimated to be 331 services per annum based on levels of dissatisfaction expressed in a DCLG Place Survey in 2008, with 60% leading to a procurement process (DCLG, 2011a). The demand for the Community Right to Bid is estimated to be between 94 – 136 per annum and an average purchase value of £0.3m (DCLG, 2012e). The Community Right to Build impact assessment assumes that 5% of neighbourhoods will take up the preparation of a neighbourhood plan per annum, or 380 plans (DCLG, 2011b).

The estimated local and central government implementation costs, coupled with the centrally funded technical advice to community/voluntary/non-profit organisations, are nearly £100m per annum plus £1.5m transition costs - see Table 1.

Table 1: **Public cost of community rights**

<b>Expenditure to finance community rights</b>	<b>Annual public cost (£m)</b>
<b>Estimated local and central government implementation costs</b>	
Community Right to Challenge to 2014-15 (1)	6.9
Neighbourhood Plans and Community Right to Build – includes capital grants (cost to community groups of preparing right to build scheme £40,000) (2)	15.0
Community Right to Bid - £17.5m cost to local authorities plus £1.6m central government (plus £1.4m transitional costs) (3)	19.1
Tenants Right to Transfer (10 estates of 750 units, set-up costs £412 per unit and debt write-off £812 per unit) (4)	9.2
Tenants Right to Manage (7 estates of 500 units, average £200,000 including tenant support costs) (5)	1.4
Sub total	51.6
<b>Support and advice to implement the 'rights'</b>	
Mutual Support Programme, Cabinet Office, £10m (6)	3.3
Strategic Partners, Office for Civil Society £8.2m over 3 years (7)	2.7
Department of Health - promotion of social enterprises (2008-2012 - £119m) (8)	23.8
Department of Education – support for pilot Social Work Practices (9)	1.3
Community Right to Challenge (up to 2014-15 - £11.5m) (10)	3.8
Community Right to Build (£17.5m, three years up to 2014-15) (11)	5.8
Community Right to Build additional kick-start grants (12)	0.3
Community Right to Bid (up to 2014-15 - £13.2m) (13)	4.4
Tenants Right to Transfer (10 estates @ £75,000) (14)	0.7
Sub total	46.1
<b>Total</b>	<b>97.7</b>

Sources: (1) DCLG, 2011a (2) DCLG, 2011b (3) DCLG, 2012e (4) Social Housing, June, 2011 (5) DCLG, 2012b (6) Cabinet Office, 2012 (7) Office for Civil Society, 2011 (8) Social Investment Business, 2012 (9) Department for Education, 2011 (10) Third Sector, 2012 (11) DCLG, 2012g (12) DCLG, 2012h (13) DCLG 2012e (14) DCLG, 2012b.

The average annual benefits of the Right to Build are estimated to be £67m of which a staggering £60m is credited to developers no longer having to submit a planning application or appealing planning permissions! (DCLG, 2011b). The local authority savings were linked to processing fewer planning appeals. The Community Right to Challenge annual savings of between £11.9m and £12.7m per annum is not credible because of the assumed level of savings (DCLG, 2011a). Community Right to Bid benefits are primarily linked to valuing annual volunteering benefits at between £28.0m and £40.5m! (DCLG, 2012e).

Social and economic benefits from Right to Buy sales and the replacement scheme were estimated at £1.8bn over the next three years, but there are major questions about the sale and construction forecasts and the lack of detail in the impact methodology (DCLG, 2012d). This figure does not take account of the value of discounts, which could reach £1bn if the 33,500 sales forecast in the three-year period to 2014/15 are achieved. Nor does it take account of £50m right to buy administrative costs (£2,850 per dwelling in London, £1,300 elsewhere).

The potential for legal challenges and disputes between community organisations, local authorities, private contractors, developers and land owners has not been taken into account and could increase costs considerably. Nor has the cost of terminating community or voluntary organisation contracts and the cost of transfer or another procurement process, been taken into account.

Personal budgets are likely to require top-up funding by patients and service users and/or restrictions imposed on what they can be used to purchase. They are not designed solely to exercise choice and have the potential to transfer costs to the individual. The value of personal budgets can be changed quite easily and/or personal payments and value added charges to 'personalise' the extra costs of exercising 'rights'.

Community/voluntary/non-profit bodies face significant economic and financial constraints in delivering public services and will test their capability to deliver public services equal to or

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better than in-house provision. They will have to manoeuvre through the *ramping up* of private and voluntary sector ability to deliver virtually any public service or provide public goods; the *dumbing down* of the complexity of public provision, democratic accountability, operating in the public interest; and the *constant criticism* of government and in-house provision irrespective of performance.

The new mantra of outcomes and payment-by-results could further disadvantage community organisations leading to delayed payment and costly disputes (Whitfield, 2012b). Identifying the cause and effect of outcomes is rarely straightforward and the quality of inputs, processes and outputs are equally important for most local public services.

The right to limit Council tax rises has little to do with protecting people from higher costs, because there are no controls on the level of charges imposed by choice and personalised services.

### **Determining value for money**

The need for comprehensive and rigorous determination of value for money will be more important than ever. However, identifying the costs and benefits of the Community Right to Challenge and other rights, adds an additional dimension to a process that is often partial and less than comprehensive. It is essential that projects and outsourcing are subject to a full economic, social, environmental, equality and health impact assessment; an audit of the direct and indirect costs, including transaction costs, contract management and monitoring; and an employment audit to identify the effect on jobs, terms and conditions.

### **Political or business empowerment**

Community resource centres and community work resources have been systematically cut over many years. Most trade union resource centres closed more than a decade ago.

The empowerment debate demonstrates a lack of understanding of power relations and the conditions and processes required, in which different types and degrees of empowerment may take place. Empowerment doesn't just happen, because politicians or policy advisers decree it. It is not given, but won through organising and action.

Despite the 'empowerment' rhetoric, the new community rights are likely to disempower many community organisations as contracting reduces advocacy, community initiative is directed into financing and managing facilities and volunteers replace paid labour.

The community-right-to-challenge, and right-to-buy local facilities could be a poisoned chalice for many community/voluntary/non-profit organisations, requiring them to redirect their effort and resources to managing facilities. It will convert many community activists into community centre and volunteer managers. Most community organisations do not have the level of active membership and resources to successfully combine management, organising and campaigning responsibilities.

The provision of technical resources for community/voluntary/non-profit organisations illustrates how the state will selectively finance technical support to implement selective policies. The sums involved are large and could become the preserve of middle class organisations, aided by advisers, brokers and lawyers and consultants.

Governments have financed technical support to tenants organisations involved in local authority large-scale stock transfers in the hope that this would ensure tenant support in a ballot. The government is extending tenants rights and continuing to fund technical support, but now the target is local authorities that are opposed to stock transfer.

The new rights and Open Public Services choice frameworks create further opportunities for voluntary sector contractors, empowerment brokers, social enterprise agents and carpetbaggers. A number of national voluntary organisations, for example, the National Council for Voluntary Organisations (NCVO) and social enterprises, such as, The Social Investment Business constitute a new element of corporate welfare with their engagement in the implementation of government policies. They have been eager to bid for contracts and to

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manage privatisation funds, such as the Department of Health's Social Enterprise Fund and the £10m Investment and Contract Readiness Fund (to build the capacity of social ventures to be able to receive investment and bid for public service contracts). The quality, accountability and performance of the multi-million pound advisory services must be rigorously monitored and reviewed.

The government has appointed nine 'strategic partners' to the Office for Civil Society to support policy objectives and will receive £8.2m over the next three years (Office for Civil Society, 2011). It includes rabid supporters such as the Association of Chief Executives of Voluntary Organisations (ACEVO) (it called on the government to go "full throttle" on public sector reform, extension of the right to challenge to the NHS and Probation, and a right to redress for third sector organisations who consider they have been treated "unfairly" by commissioners, ACEVO, 2011); National Council for Voluntary Organisations (NCVO), and Locality (now a Community Rights contractor).

There is clearly potential for community/voluntary/non-profit bodies to be directly or indirectly used as a stalking horse by private companies and third sector organisations, such as housing associations.

### **Changing the role of the state**

One of the government's key objectives is to change the role of the state from provider to commissioner. The state will finance, plan and procure services, which will be delivered by a market of public, private and voluntary sector providers. For example the London Borough of Barnet, plans to become a Commissioning Council in which most services will be delivered by private contractors and arms length companies. The Council has not permitted in-house bids and contractors are free to locate service delivery anywhere (European Services Strategy Unit, 2012).

The separation of client and contractor and mass outsourcing could leave a local authority employing a few hundred staff in a 'commissioning group'. However, contract monitoring has been a constant weakness in public management. Some Councils have a poor track record in managing and monitoring relatively small contracts, let alone large multi-service contracts. There is little recognition that the growth of a contractor market will impose additional regulatory and contract management responsibilities on local and central government and the NHS.

The new community rights introduce new risks for local and central government. Firstly, the risk that the new rights will be exercised with serious purpose and not frivolously or with vexatious intent. Secondly, the risk that only sustainable proposals are subject to detailed analysis and any attempt to 'prove' the success of the Localism Act is avoided. Thirdly, business cases and bids must include comprehensive employment policies.

The blurring of boundaries between providers, the widening use of personal budgets and increased marketisation of services will make commissioning more difficult and complex. Decision-making will require more detailed investigation of the financial and operational sustainability of providers, particularly if 'spin-outs' continue and community/voluntary/non-profit bodies bid for contracts.

The legal right to privatise public assets raises fundamental questions about public ownership, democratic accountability, and the way in which assets will be controlled and managed are matters of public interest. The question also needs to be raised about why it is assumed that a social enterprise spin-out is not subject to a rigorous options appraisal and procurement with an in-house bid? The principle and process of establishing management buyouts have previously been criticised and opposed, so are social enterprises so radically different. Why should civil servants, NHS and local authority staff have the 'right' to transfer a service from the public sector?

The outsourcing market will be dominated, certain sectors are already, by transnational and national companies. The take-over of private and social enterprise contractors will be part of

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their 'growth' and market share strategies. The 'bus wars' waged against employee-owned bus companies by the big five bus companies until they were eliminated demonstrates the risks and ruthless corporate practices (Whitfield, 2012a).

### **Social finance market**

A social finance market is growing to finance social enterprises, the acquisition of community facilities and new ways of funding public services via social impact bonds (Whitfield, 2012b). Social finance companies have a vested interest in supporting, if not encouraging, the right to bid, to build, to provide and to challenge because financing these projects will help to consolidate, legitimise and expand this market. It also opens up new opportunities for 'social entrepreneurs' to establish consultancies and agencies to provide advice and finance.

The sector will become part of the wider corporate welfare system relying on the same contracting system, same or similar tax and financial breaks, and the same system of lobbying. Furthermore, it presents an opportunity for large companies to promote corporate social responsibility, new philanthropy and the social benefits of business and finance capital. What better way to help the financial sector recuperate from the banking scandals!

The rhetoric surrounding the potential for a new 'John Lewis' style social market economy of co-operatives, social enterprises and mutual, fails to take account of the political economy of public services and the welfare state. It only serves to undervalue the economic and social importance of social enterprises. More importantly, social enterprises become agents of neoliberal transformation of public services, instead of contributing to reconstruction of the state, economy and public services.

### **Quality of jobs and illusion of jobs growth**

Community/voluntary/non-profit organisations that aspire to becoming public service contractors must recognise their employer responsibilities for the health and welfare of staff, support trade union membership and representation, and to negotiate with trade unions.

Government guidance on community rights makes no reference to employment responsibilities and good practice. The government's assumption of 'savings' could, in practice, only be obtained by redundancies at the TUPE (Transfer of Undertakings (Protection of Employment) Regulations 1981) staff transfer stage, coupled with changes in terms and conditions for existing and new staff, and in some cases, wider use of volunteers. Pensions will be under severe pressure. Two- or multi-tier workforces are likely to emerge as new staff are employed on reduced terms and conditions.

Job increases in the private, community/voluntary/non-profit sectors will lead to job losses in the public sector. If social enterprises expand by obtaining more public sector contracts this would represent growth for the organisation, but there would be no gain for the national or local economy. Genuine growth would occur if the organisation grew organically by extending or introducing new services or projects. There is a real danger that changes in employment between public and private sectors or local or subregional spatial changes may be interpreted as 'growth', but this will be smoke and mirrors.

The construction of new housing units under the Right to Build is forecast to create 2,300 net direct and indirect additional jobs per annum based on the construction of an average 2,900 dwellings per annum (DCLG, 2011b). Only 62-90 new jobs are forecast under the Right to Bid as some volunteers move into employment (DCLG, 2012e). One-for-one replacement of Right to Buy sales are forecast to create 12 jobs for every £1m of housing investment in additional units (DCLG, 2012d). The Community Right to Challenge impact assessment did not examine the effect on jobs (DCLG, 2011a). The overall impact on jobs is unclear, mainly because of the lack of a full jobs audit and benefits based on over-optimistic forecasts.

### **Reducing inequality and poverty?**

The new rights are unlikely to directly reduce poverty and inequality. Better targeted services, increased community use of local facilities and more choice of service delivery will have a

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marginal effect in reducing poverty. The right to limit council tax increases would have a limited financial benefit for the unemployed and low income families, because most would be entitled to council tax benefit. The loss of, or further cuts in, services is likely to outweigh any financial gain.

Advocates of the right to bid, build, buy and provide often promote the expansion of share ownership and vouchers to “...*help to liberate people from social inequality, economic dependency and entrenched poverty*” (Wylar and Blond, 2010). They propose to ‘capitalize the poor’ by incentivising them to purchase stakes in local community assets and community vouchers. The planned privatisation of Royal Mail and the recently nationalised banks will generate further fervor.

The equalities and social justice dimensions of the rights agenda will depend heavily on the scope and rigor of equality impact assessments, the practices of organisations providing technical advice and contractual equality and diversity obligations in procurement. There is also the concern that community/voluntary/non-profit organisation service delivery proposals may represent narrow local interests and have the objective of maintaining a status quo at the expense of wider equality and public interest.

The Coalition government is reviewing the operation of the public sector equality duty and repealing the socio-economic duty to consider the impact of policies on social class. They are also replacing the Equalities and Human Rights Commission Board, repealing certain powers and duties, reviewing its budget and outsourcing the provision of equality information, advice and support (Home Office, 2012).

### **Impact on public management**

The cumulative effect of new community and individual rights on public management is likely to be negative. Public sector staff will witness financial support being made available for the formation of social enterprises and technical support to community/voluntary/non-profit organisations, whilst they are required to impose severe cuts in frontline service delivery. The government’s overall message is that reform and innovation is best achieved by opting out of the public sector.

There appears to be little concern that the opting out process is time consuming and raises the question of private work in public work time that could have a knock-on effect on services. In addition, if the take-up rate of the Community Right to Challenge is significantly greater than forecast and/or the average service budget is much larger than £200,000, expressions of interest and the procurement process will require a much larger share of resources. This could divert resources and slow down in-house improvement and innovation. Increased efficiency and productivity, service improvement and innovation can be achieved by in-house services with the involvement of the workforce, trade unions and service users. Reduced sickness rates are not the prerogative of social enterprises.

### **Impact on the voluntary sector**

Some voluntary organisations will want to use the Community Right to Bid and Community Right to Build to secure community facilities and local development. They may also want to use the Community Right to Challenge or become a subcontractor to a social enterprise under the Right to Provide.

Contracting could have profound implications for voluntary organisations because tendering imposes commercial relationships and values and requires them to compete in a market against other organisations and companies. It is difficult to be both a public sector contractor, community action organiser and advocate on behalf of the community, which could threaten their independence.

Voluntary organisations are being pushed into the ‘outcomes only’ agenda despite the fact that the quality of inputs and the method or process of service delivery are equally important. The extension of service delivery tariffs to mental health and community services, important areas of voluntary sector activity, will impose further constraints. Contracting imposes high

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transaction costs, which will have to be incorporated into bids or be subsidised from other activities.

The increasing use of payment-by-results and outcomes requires community/voluntary/non-profit organisations to have sufficient financial resources to defer payment and accept a higher proportion of contract payments which will be dependent on the quality of outcomes (over which they may have only partial control or influence). This leads to bigger financial and operational risks.

### **Monitoring and review**

The Department for Communities and Local Government “...intends to take a light-touch approach to monitoring and reviewing implementation of” the Community Right to Challenge and will leave individual local authorities to monitor the operation of the policy (DCLG, 2012f). Presumably they will take the same approach to the implementation of less contentious community rights.

In addition to monitoring the implementation of community rights, the government also needs to be prepared to intervene to stop aggressive use of the Community Right to Challenge by non-profit organisations and collusive tactics by private contractors.

The public sector does not have a very good record of rigorous monitoring and reporting of the performance of outsourced services. It is not inconceivable that some authorities may adopt a ‘hands-off’ approach to community/voluntary/non-profit contracts won through the Community Right to Challenge in case this was interpreted as being too onerous. Some community and voluntary organisations are unlikely to include the full cost of monitoring their performance and/or may be unprepared to be rigorously monitored by the client.

National organisations such as NCVO, ACEVO and others who have strongly supported the legislation, together with those involved in providing technical support to community/voluntary/non-profit organisations, can be expected to provide a continuing commentary of the implementation of the new rights.

Assessing the cumulative effect of the community rights on public services, staff and service users is another important aspect of monitoring that is likely to be forgotten in an era of challenges and potential contracts. Given that the government and its supporters are not interested in the impact of community and individual rights on public services, this firmly places the responsibility on trade unions and progressive community and voluntary organisations.

### **What can be done to oppose these policies?**

New ‘rights’ and ‘mutual’ or ‘social enterprise’ organisations are usually perceived as being positive and beneficial, hence there is often a reluctance to oppose or criticise them. But are all ‘rights’ inherently ‘good’ and are all social enterprises acceptable even when they privatise public services? Clearly, a distinction must be made on the grounds of public interest. This is not opposition in principle, but against their application in specific sectors of the economy, which must be taken into account in strategies.

Trade union and community strategies should aim to increase understanding of the consequences of taking up community and individual rights: make the case for in-house improvement and innovation plus in-house options and bids; demand comprehensive equalities, economic, social and environmental impact assessments; rigorous monitoring of government financed agencies and consultants advising community/voluntary/non-profit organisations; all contracts to include secondment and TUPE Plus employment models; campaign to boycott the take-up of the Community to Challenge, transfer, and to buy.

Inevitably a case will be made to widen the scope of the new rights, either by clarification or reinterpretation of statutory guidance. However, this paper has demonstrated that these rights are fundamentally flawed and are designed to destabilise rather than improve public services. Hence seeking amendments is likely to have no positive impact.

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Resources should be concentrated on building political support for a broader set of rights that could include the right to:

- participate in the design, planning and delivery of public services and at each stage of the transformation of local services, for example, to be engaged in options appraisals, setting standards and specifications;
- participate at key stages of the procurement process;
- access to contractor monitoring and performance reports and participate and give evidence in scrutiny review of contracts;
- extend Freedom of Information to private and voluntary contractors engaged in the provision of public services and management and technical consultant;
- a local referendum on progressive taxation policy support investment and growth.

Progressive rights should be part of a programme for the reconstruction of the economy, state and public services.

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## Appendix 1: The essence of a contract culture

<b>The essence of a contract culture</b>	
1.	<b>Commissioning separates client and contractor</b> and fractures the organisation of government. Client officers lose skills and knowledge of frontline service delivery. The outsourcing of commissioning could be the next step.
2.	<b>Public sector resources are diverted into 'making markets'</b> by shaping contracts to suit business interests and designing business-friendly regulatory frameworks.
3.	<b>Public sector capacity is reduced</b> by wider use of management consultants, legal and technical advisers with larger and more complex contracts.
4.	The growth of arms length companies, trusts and Joint Venture Companies results in <b>corporatisation and fragmentation of democratic accountability and transparency.</b>
5.	The <b>extraction of profit from the delivery of public services</b> thus reducing spending on frontline service delivery.
6.	<b>High transaction costs</b> – management consultants, technical advisers, lawyers and cost of undertaking procurement – divert resources from frontline service delivery.
7.	Staff <b>regularly transferred between employers</b> with consequences for the continuity of terms and conditions, pensions, training and career development.
8.	<b>Increases reliance on contract management, monitoring and review</b> , which has rarely been rigorous and comprehensive.
9.	Public service terms are replaced by the <b>ideology and language of the marketplace</b> , which are intended to change attitudes, priorities and imbed marketisation in the public sector.
10.	<b>Erosion of public service principles and values</b> as business practice and commercial values dominate the design and delivery of services.
11.	<b>Services users increasingly treated as individual 'customers'</b> and have to negotiate client-contractor-subcontractor disputes, delays
12.	Change of industrial negotiating machinery to contract-by-contract basis which <b>reduces the organising capacity of trade unions.</b>
13.	<b>Growth of trade organisations</b> to represent new types of contractors and consultants and the widening reach of corporate welfare to protect and expand contracting opportunities.

Source: European Services Strategy Unit

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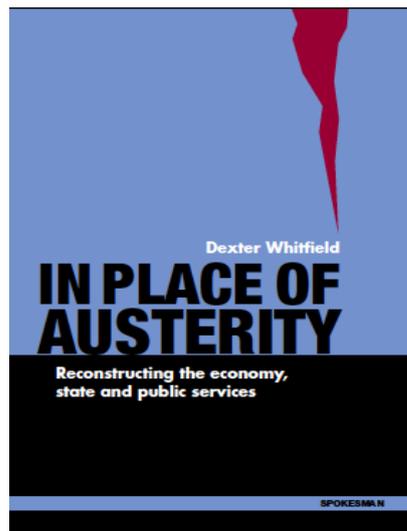
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