

BASW

The professional association for
social work and social workers

Untested Models: The Role of Private and Independent Providers in Social Work





Introduction

Social work is traditionally seen as delivered by public sector organisations – usually local authorities or the NHS.

Over the last couple of decades independent organisations (many of which are privately owned, for-profit companies) have taken on an increased role in delivering social work services, for example, privately owned fostering agencies. Private organisations have always been involved in providing some social work services – an example might be some children’s homes. However, what is new is the scale of such organisations that can be multi-national corporations with a turnover of billions of pounds a year. Such organisations have also taken on a range of services that social workers rely upon in undertaking their work: homecare is perhaps the classic example, but other examples include Human Resource (HR) services and IT services and software. This shift is particularly obvious in England. A number of local authorities have also placed the provision of Children’s Services (including safeguarding services) into so-called ‘Children’s Trusts’ – legally independent organisations that operate at arms-length from the local authority and direct democratic accountability. Here we describe these as ‘untested models’.

Is this an issue of concern for social work and social workers or should social workers simply focus on the ‘bread and butter’ issues of day-to-day practice?

This is an area that is highly contested. For proponents, the introduction of private companies and independent agencies such as Children’s Trusts allow innovation where the state provision of services has failed. For others, only social work delivered by the public sector is the answer. Often the debate is polarised and entrenched. For perhaps a proportion of social workers, the debate is of no concern, or if it is of concern, it is an issue over which they have no control.

As this paper will show, the issues are complex. However, this is not an issue that social work or social workers can ignore.

This work grew out of a motion passed at the BASW AGM on 26th April, 2017. At the time of writing BASW is consulting on how to respond to this accelerating shift to independent providers: both by the adoption of principles and an action plan. This paper gives the context and relevant information under five headings:

- The background
- The legal situation in relation to local authorities
- Different models of service delivery used by local authorities
- Understanding independent providers
- Conclusions

Based on these points the document then proposes a series of practical questions for social workers to ask.

Background

Since the Local Government Act 1972 local authorities (LAs) have had powers to trade in services with other LAs¹, however, until the 1980’s most of them directly delivered social services. In practice, this meant that LA’s directly employed domiciliary care workers and social workers; and they also owned residential homes used by services users who needed them. However, from 1979, the Conservative Government introduced a ‘market economy’ in local authority services underpinned by competition between providers. While this policy was criticised for being ideological, proponents argued that it would lead to reduced costs and increased quality.

Reflecting this shift, the Local Government Act 1988 introduced ‘competitive tendering’, which required

¹ www.legislation.gov.uk/ukpga/1972/70/section/113

LAs to allow private companies to bid for their services.² Since then governments have accelerated the pace of introducing alternative models of service delivery. The preferred model is 'contracting out' of services to private providers and it is estimated that 'contracting out accounts for around half of the £187 billion that the public sector spends on goods and services each year.'³ Despite this, *'[t]here are no comprehensive lists showing which authorities have outsourced which services, or which companies are contracted by which authorities'*⁴, and there are no readily available guiding principles for local authorities to follow when they tender out services. Guiding principles are required because of longstanding concerns about the role of the public sector in delivering of social services. These include: anti-competitive behaviour by tenderers, little evidence of cost reductions by the private sector⁵ thus undermining the rationale for contracting out; and emerging evidence that to increase profits bid winners sometimes reduce employees' working conditions.⁶

The legal situation in relation to Local Authorities

Different legislation grants local authorities powers and discretion to enter into different partnership arrangements for the provision of services. Examples include:

- Local Authorities (Goods and Services) Act 1970. This empowered local authorities to provide goods and services to each other. These might include 'administrative, professional or technical' services.⁷
- Section 113 of Local Government Act 1972. This grants powers for LA employees to offer services to other LAs.⁸
- Local Government Act 1988 – Creates a legal duty of local authorities to ensure Compulsory Competitive Tendering (CCT) of services.
- Local Authority Act 1999. Introduced 'Best Value' to supersede CCT with additional emphasis on annual increase in quality and reduction in costs.
- The Open Public Services White Paper⁹. This expanded citizens' choice over services but more importantly, it (re)stated the principle of multiple providers of services (local authorities, private companies, mutuals and charities), and competitive tendering. It also expanded the power of 'elected representatives' to commission more (and different) service providers.
- The Localism Act 2011. There is a provision in this Act that if local authorities wanted to engage in commercial activities, then these had to be done through company structures.
- The ongoing devolution settlement in England will lead to further changes in LA delivery models for health and social care. For instance, in the case of Manchester, it is expected that devolution will lead to further integrated health and social care services through different legal structures and organisational models.

Different models of service delivery by local authorities

These laws and policies led to a proliferation of models of delivery including LA-owned companies, 'shared services' with other local authorities, those entirely contracted out to private companies, and/or contracted out services which are subsequently integrated with other LA provisions. The table below illustrates this further.

² www.legislation.gov.uk/ukpga/1972/70/section/113

³ National Audit Office. 2013. 'The role of major contractors in the delivery of public services'. London: The Stationery Office

⁴ Sandford, Mark. 2016. 'Local government: alternative models of service delivery'. House of Commons Library

⁵ Sandford, 2016.

⁶ The Smith Institute. 2014. 'Outsourcing the cuts: pay and employment effects of contracting out.' London. The Smith Institute

⁷ www.legislation.gov.uk/ukpga/1970/39/section/1

⁸ www.legislation.gov.uk/ukpga/1972/70/section/113

⁹ www.gov.uk/government/uploads/system/uploads/attachment_data/file/255288/OpenPublicServices-WhitePaper.pdf

Model	Explanation
Shared Services	Under this model two or more LAs jointly provide services, either directly or by outsourcing them to private companies. An example is the old tri-borough model between Chelsea, Kensington, and Hammersmith and Fulham.
Outsourcing services	Since the Local Authorities Act 1972 (Section 135) LAs have had power to outsource their services to private, voluntary or third sector organisations. ¹⁰ There are different models of outsourcing including: Strategic Service Partnerships – where one private company provides multiple services to LA(s). Joint-venture companies – here LA(s) may form jointly-owned companies with a private company to deliver services. These contractual and commercial relationships change. For instance, an LA may choose to return a contracted service ‘in house’ or the private company may end the contractual arrangement.
Local authority trading companies	Under the Local Government Act 2003, English and Welsh LAs have powers to form profit-making companies to provide services. ¹¹ Furthermore under the General Powers of Competence in England, LAs can engage in activities that companies or individuals are permitted to do unless it is prohibited by other legislation. ¹² Applying also in Scotland and Northern Ireland this power enables LAs to act like private companies. However, it is illegal for them to establish companies to provide and charge for services which fall within their statutory duties.
Mutuals	A public service mutual is an organisation which has left the public sector ‘parent body’ (also known as ‘spinning out’) but continues to deliver public services. Mutuals are organisations in which employee control plays a significant role in their operation. ¹³ There are a number of models, from profit-making to not-for-profit, however the underpinning principle is that of significant employee involvement.

Understanding Independent Providers

To understand ‘untested models’ it makes sense to understand how independent providers work.

Independent providers are very different both in legal structure, governance and management and these factors will have an impact on the delivery of social work. This is not a complete or definitive statement of the legal, financial and structural arrangements of a wide variety of organisations but aims to highlight the key issues.

Profit and surplus

It is useful to make distinction between ‘for profit’ organisations and ‘not-for-profit’ organisations (although this terminology is not found in the legal definitions of organisations). Confusingly, ‘not for profit’ organisations can and do make a financial profit, however, it is described as a ‘surplus’, and ‘for profits’ can show a financial loss. The difference is that in ‘not-for-profits’ any surplus is held in reserve

¹⁰ Sandford, 2016.

¹¹ Unison. Undated. ‘Branch guide to local authority trading companies.’ www.unison.org.uk/content/uploads/2013/06/On-line-Catalogue212753.pdf

¹² Unison. Undated. ‘Branch guide to local authority trading companies.’ www.unison.org.uk/content/uploads/2013/06/On-line-Catalogue212753.pdf

¹³ Mutuals Taskforce. Undated. Our Mutual Friends. www.gov.uk/government/uploads/system/uploads/attachment_data/file/61778/Our-Mutual-Friends.pdf

or re-invested in the activities of the company. BASW is one example, while the vast majority of universities in the UK and vast majority of housing associations are other examples. In a 'for profit' company profits can be reinvested, or crucially, distributed to shareholders or taken out by the Directors.

Charities, Companies and Trusts

Charities, companies and trusts have different legal structures.

Registered *charities* need to meet certain criteria, be registered with the Charity Commissioner and are, of course, 'not-for-profit'. The legal responsibility for a charity is ultimately the trustees. Crucially, with a few exceptions, trustees of a charity cannot be paid. For large and complex charitable organisations (and small charities too) this presents challenges since they have to recruit sufficient people of sufficient calibre to undertake this work. Trustees will have considerable demands made on their time, their skills and can be liable for mistakes made – but are not paid. (Charity chief executives, and other staff, are paid – but they cannot be trustees of the charity that employs them). Many existing and long-established charities have historically delivered services to service users, in many cases funded by local authorities and many social workers are employed by them. Crucially though, charities have to re-invest any surplus in their organisation. These factors probably explain why 'untested models' have not, so far, involved setting up *new* charities to deliver services.

The responsibility for a registered *company* is ultimately with the director or directors. Companies can be seen as a mechanism for handling risk. A company structure (legally constituted and registered at Companies House) provides a 'firewall' between the organisation and the directors protecting their personal assets. It is thus an enterprise – it allows investment with the aim of returning a profit. If a company goes bankrupt liability is limited to the assets of the company.

Setting up and maintaining a company structure takes time and money. For this reason, many individuals who sell their skills and expertise directly for a living (including independent social workers) practice as 'sole traders'. This model offers less legal protection since if things go wrong the sole traders personal assets may be at risk. As a result, many individuals (including independent social workers) have established and maintain a company.

The use of the term 'Director' in local authority social work services is, in terms of company law, is therefore somewhat misleading. A Director of Children's Services or a Director of Adult Services does not 'own' any part of the service and is not entitled to any share of the surplus, should there be one.

Companies can also be structured as 'not-for-profits' (in law described as 'companies limited by guarantee'), which means that these directors are also insulated from risk, there are no shareholders and a surplus cannot be distributed to directors or shareholders. BASW is a good example. Many charities are also 'companies limited by guarantee' as an additional way of managing risk.

The Community Interest Company (CIC) is essentially a hybrid between a private company and a charity. A CIC has to have social objectives and there is regulation in place to secure this. It is 'not-for-profit' - but crucially the directors can be paid.

The word 'Trust' has been used to describe a number of legal structures. Thus, Doncaster Children's Trust is in fact a company limited by guarantee, other organisations described as 'Trusts' are, in fact, CICs and in yet others the legal status is not publicly available.

Company ownership, financing & board composition.

A company can have one or more directors. The company may allocate ownership of the company through shares ('shares of the company'). There may be one Director who is the sole shareholder or there may be a number of Directors who are also shareholders. Companies may also offer shares to the public as a way of raising money which can then be traded on a secondary market. If the company

makes a profit, the profit can be retained for investment, taken out by the Directors or paid as a dividend to the shareholders.

In this model the social worker who is sole director of their own company is, in legal terms, in no different situation to a director of a larger company. If the company makes a profit the director is entitled to take out the profits.

Theoretically, it is possible to access the accounts (including profit and loss) of all companies for a small fee (companies are required to file accounts every year), however, generally speaking, the larger the company the easier it is to mask the figures and even who ultimately owns the company.

The Board of a company comprises those with legal responsibility for the company ('the directors') plus others. The size of a Board tends to grow as a company grows though size is eventually limited to make decision making possible. The 'others' usually include the chief executive and often the chief financial officer and the chief operations officer (assuming these individuals are not actually directors as well).

Company takeovers and monopolies.

'For profit' companies regularly take over other companies. In 'for profit' companies the systems of directorship and share ownership make this a relatively easy process where the predominant, or sole issue, is the price (This explains why private companies frequently merge or are subject to take over but this is rarer in the not-for-profit sector). With the cost of borrowing at all time historic lows companies can secure the funding to buy out another company relatively easily. In this way, companies can grow to a point that are in the memorable phrase are 'too big to fail' and eventually a *de facto* monopoly is created.

Direct services and service organisations.

It is also useful to make a distinction between those organisations who provide regular, on-going services direct to the users of social work services ('direct services') and organisations who provide services to those organisations - what might be described as 'service organisations'. This might include, for example, IT, HR, and buildings ('estate') management. While some public-sector organisations organise and deliver these services themselves, others have 'outsourced' them to private companies.

Influential service organisations are management consultancy firms. Consultancies have won a number of major contracts involved in the planning and delivery of social work. Consultancies usually have yet another legal structure - that of partnership (or more precisely Limited Liability Partnership or LLP) a model also favoured by accountants and lawyers, but key here is that the financial results of a partnership (including the profits accruing to individual partners) are not publicly available.

Conclusions

First, local authorities are democratically accountable. This works at two levels. First, the electorate gets a regular say in who is ultimately responsible for the delivery of local services. Second, social work practice deals with fundamental human rights e.g. whether a child should be removed from a family, or whether an adult mental health patient should be deprived of their liberty. With democratic accountability comes a mechanism for transcending mere technocratic or financial issues, however important these are in delivering a good service. It might be argued that that independent providers are simply at 'arms-length' to local authorities, thus the democratic safeguard continues to prevail. However, this may have been the case when independent organisations were small, but many providers now dominate local authorities in size, budget and consequently power. Crucially, local authorities are not for profit, any financial surplus is retained by the local authority as reserves or for the provision of services.

Second, where is the evidence that 'untested models' will work better? Do they provide better services

for users? Are they more effective in managing resources? Do they provide a better organisational context for practice? If not, or there is no visible difference, then why are they being promoted?

Third, this paper suggests the worst case scenario of 'untested models' is a company that creates, or aims to create a monopoly, or near monopoly, whose finances and ownership are complex to the point of opacity, a company that is beholden to distant share-holders rather than services users or professionals, who use these techniques to maximise profit and in the absence of any direct democratic accountability are effectively too big and too strong for local public-sector commissioners to manage. It has become too big to fail. Several companies at, or near the border of the provision of social work now fall into this category.

Fourth, it is suggested that 'service organisations' are not peripheral to the task and delivery of social work. Software systems are a good example. For example, it is currently inconceivable for local authority Children's Services to function without dedicated software. However, monopoly control of a key service such as this might well become an 'entry' for the delivery of direct social work services.

Fifth, where an area has adopted, for whatever reason, a 'trust' whether through a CIC or company limited by guarantee, it is suggested that it is not the legal model *per se* that will guarantee, or fail to guarantee, quality social work services but the composition of the Board.

Key questions to ask

This then helps formulate a series of questions for social work practitioners and managers where their employer might be considered moving to an 'untested model'.

1. Why is social work being moved into this new model and what is the impact of this models on social work practice?
2. What is the evidence that this new model will make any difference?
3. Is the proposed model 'for profit' or 'not for profit' and how will this affect social work – for instance in terms of practice, training for social workers and availability of services?
4. What is the legal structure of the organisation and what are the safeguards to ensure democratic accountability?
5. What will happen to any profit/surplus?
6. Who will make up the board and what is the transparency of the appointment process? Who is involved in the selection of the board?
7. Will the board membership include social workers? Does it include service users?
8. Will the Directors of the company be paid?
9. Will the Chief Executive be a qualified and registered social worker?
10. For staff who are transferred will they retain the same terms and conditions of service?

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