

**Transformational Governance, Market Making,
and Employment Rights: Current
Developments in Britain's 'Public Services
Industry'**

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INVESTIGATE REFLECT REPORT UNDERSTAND

Overview

⌘ Transformational Governance in the Public Sector

⌘ Implications for Employee Representation and Employment

- ⌘ Public services: an island of joint regulation

⌘ Key question: How have unions sought to develop and enforce the regulation of procurement in a liberalising environment?

⌘ Case selection

⌘ Findings

- ⌘ Changing contracting dynamics > multidimensionality

- ⌘ Developing the legal framework > partnership

- ⌘ Employment protection: problems of *form and agency*

Transformational Governance in the Public Sector

- ⌘ Established theme of public service reform in the UK, built again since 2006
 - ⌘ ‘improving service delivery, minimising waste and harnessing technology’ (Cabinet Office 2009)
- ⌘ Generates pressure for organisational change
 - ⌘ Public bodies shift from *providing* public services
 - ⌘ Emphasis on *commissioning* and *facilitating*
 - ⌘ And on ‘whole area’ approaches to ‘wicked problems’ across organisational boundaries
- ⌘ Link to *liberalisation* agenda > market making
 - ⌘ Expanding private and third sector providers
- ⌘ And now to *austerity* agenda....

Transformational Governance in the Public Sector

❑ A 'public services industry'?

- ❑ 'Dr Julius's review has... looked at what has made the industry successful and made recommendations as to **what more the government can do, as a policy maker, regulator and procurer to ensure that its full potential can be realised for the benefit of the public.**' (Hutton in Julius 2008, *Foreword*)
- ❑ Found PSI employs 1.2m workers, 1 in 4 public service workers, and accounts for around one third of public spending.
- ❑ PPP's already more established than the rest of Europe combined (Hall et al 2008: 4)
- ❑ Outsourcing markets already the most developed in the world (OECD 2005: 83)

Transformational Governance in the Public Sector

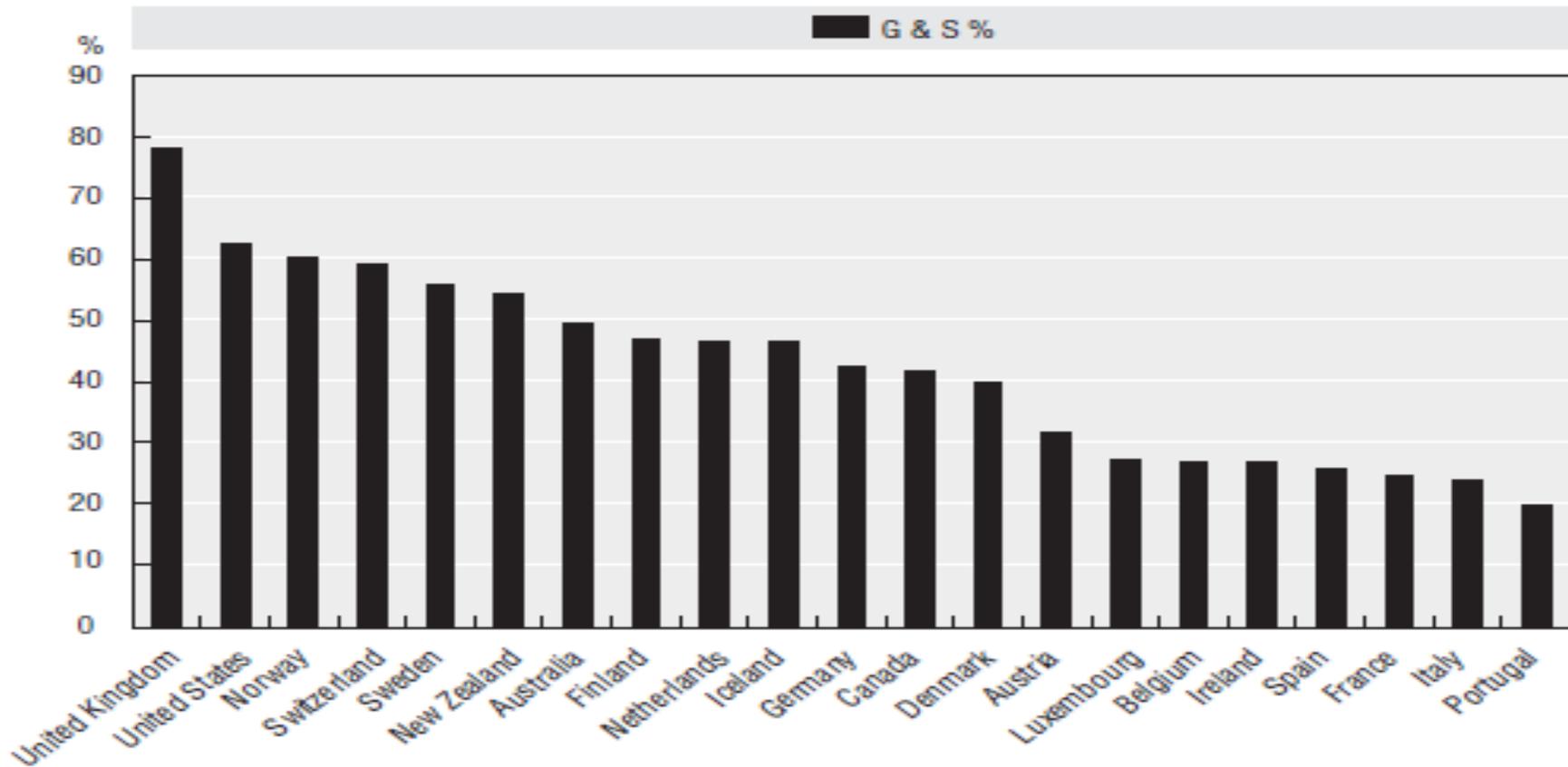
Table 5 PPP in Europe

Value of signed contracts, €m 2001-06					Total	Number signed deals 2001-07	Projects being procured Jan 2007	€m
	2001-04	2005	2006	2007				
Spain	1000	1154	1664	309	4127	38	2931	
Italy	890	2179	439	55	3563	20	29799	
Ireland	720	121	623	1489	2953	18	---	
France	0	1788	735	329	2852	26	3964	
Greece	0	798	1600	3885	2398	7	6270	
Germany	440	830	177	465	1912	34	9495	
Belgium	1300	480	---	300	1780	5	3635	
Netherlands	1302	---	431	---	1733	6	1211	
Poland	1520	---	---	---	1520	2	1317	
Austria	49	0	850	---	899	6	20	
Finland	0	700	---	---	700	1	---	
Bulgaria	0	366	288	366	654	6	2202	
Cyprus	0	500	---	---	500	1	---	
Portugal	278	---	32	140	450	6	1515	
Other countries	488	2	528	15	1018	17	5221	
Total (exc. UK)	7987	8918	7367	7353	31625	193	67580	
UK	21849	6237	14111	10698	42196	501		

Source: Public Private Finance, DLA Piper

Transformational Governance in the Public Sector

Figure 1. Outsourcing of government services
(purchase of goods and services vs. in-house provision)



Source: OECD Secretariat calculations based on GFS data.

Implications for Employee Representation and Employment

- ⌘ Critical issue: increased transfer of employment between and beyond public authorities
 - ⌘ Implications for bargaining and representation
 - ⌘ Public services the only remaining island in Britain of co-ordinated employee representation and industry-wide agreements
 - ⌘ Transfer to private services potentially affects coverage of agreements, union representation, and density
 - ⌘ Fragmentation of workforces potentially weakens existing representation structures
 - ⌘ Exposure of fragmented workforces to competitive pressures potentially erodes terms and conditions (market alignment)

Implications for Employee Representation and Employment

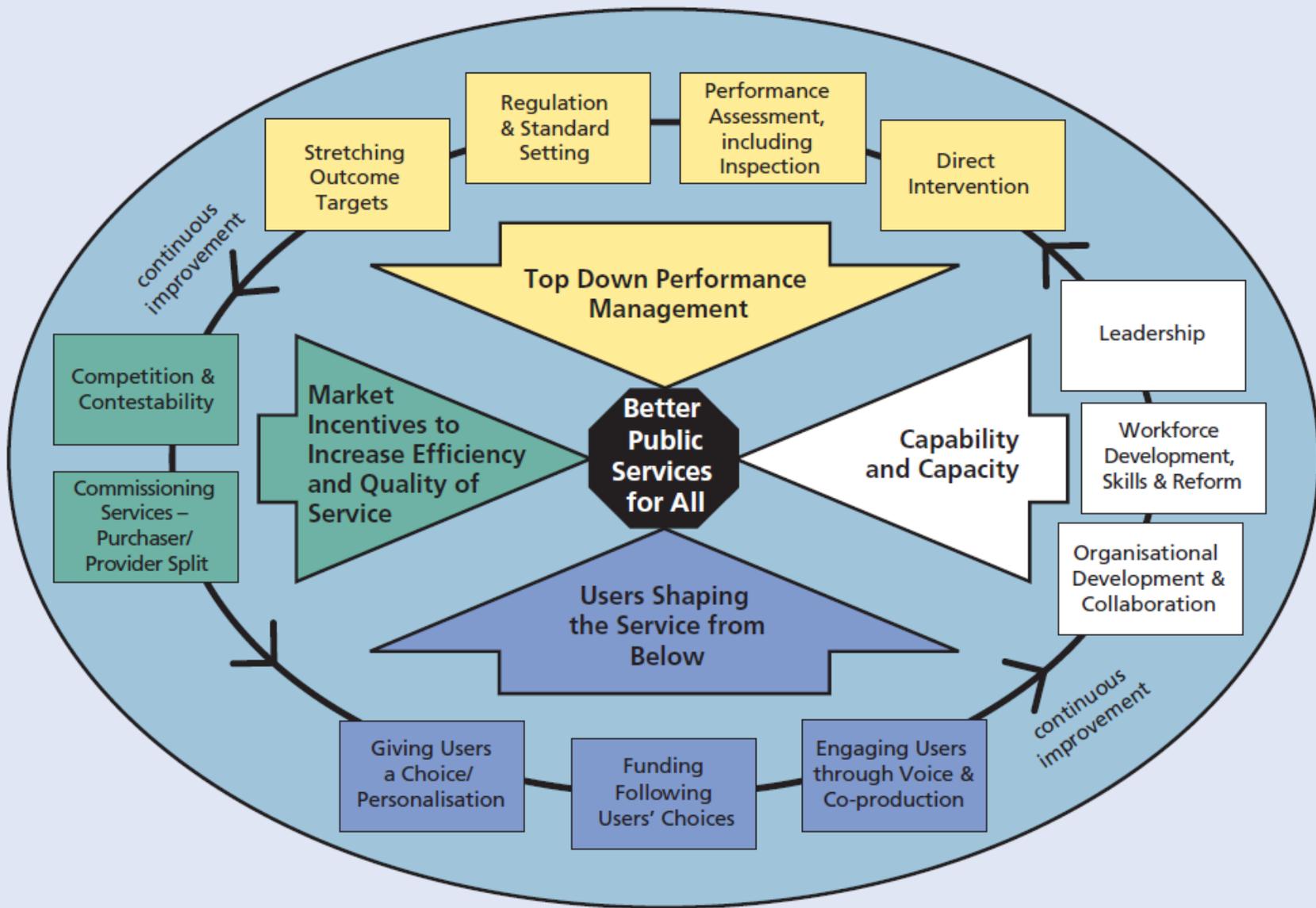
	Public Sector	Business Services
Union density	64	13
Union recognition	90	11
Bargaining		
Workplaces	83	10
Employees	82	12
Consultation (JCC)	74	26

Source: Kersley et al 2006: various tables

Changing Contracting Dynamics > Multi-dimensionality

- ⌘ Experience previously of 'Big Battalion' approaches to market
 - ⌘ Best Value and Market Testing: Services
 - ⌘ Private Finance Initiative: Capital and Services
- ⌘ Concurrent developments now in...
 - ⌘ Devolved governance, e.g., Academy Schools
 - ⌘ Multi-agency governance, e.g., Local Strategic Partnerships, Shared Services and Total Place
 - ⌘ And Customer Pressures, e.g., Direct Payments
- ⌘ All requiring cost savings, all leading potentially to outsourcing

Chart A: The UK Government's Model of Public Service Reform – A Self-Improving System



Developing the Legal Framework: Partnership

- ⌘ Organisational challenge almost overwhelming
- ⌘ Need for a comprehensive, clear and usable framework of employment protections
- ⌘ Unions and the ‘partnership’ agenda
- ⌘ Hierarchy of union aims clear in TUC documentation:
 - ⌘ ‘a Fair Wages Resolution,
 - ⌘ a new regime for contract compliance
 - ⌘ and the straightforward application of revised TUPE regulations which also protect pension rights.’
- ⌘ Faced ‘implacable opposition’ on the first from industry that fed directly into government ambivalence

Developing the Legal Framework: Partnership

- ❑ Complex patchwork of protection

- ❑ Hard law

- ❑ Protection of contracts of employment and rights to representation

- ❑ Transfer of Undertakings [Protection of Employment] Regulations 2006

- ❑ Limited regimes of contract compliance

- ❑ Equality Duties (Race 2000; Disability 2005; Gender 2006; Combined 2010)

Developing the Legal Framework: Partnership

☐☐☐ Soft Law

- ☐☐☐ General application of TUPE to public sector restructuring
 - ☐☐☐ Cabinet Office Statement of Practice on Staff Transfers in the Public Sector 2000
- ☐☐☐ Prohibition of 'two tier workforce'
 - ☐☐☐ Best Value Code (2003) Two Tier Code (2005)
- ☐☐☐ Extension of employment contracts/collective agreements, in health
 - ☐☐☐ Retention of Employment (2001)
 - ☐☐☐ Joint Statement on Agenda for Change (2005)

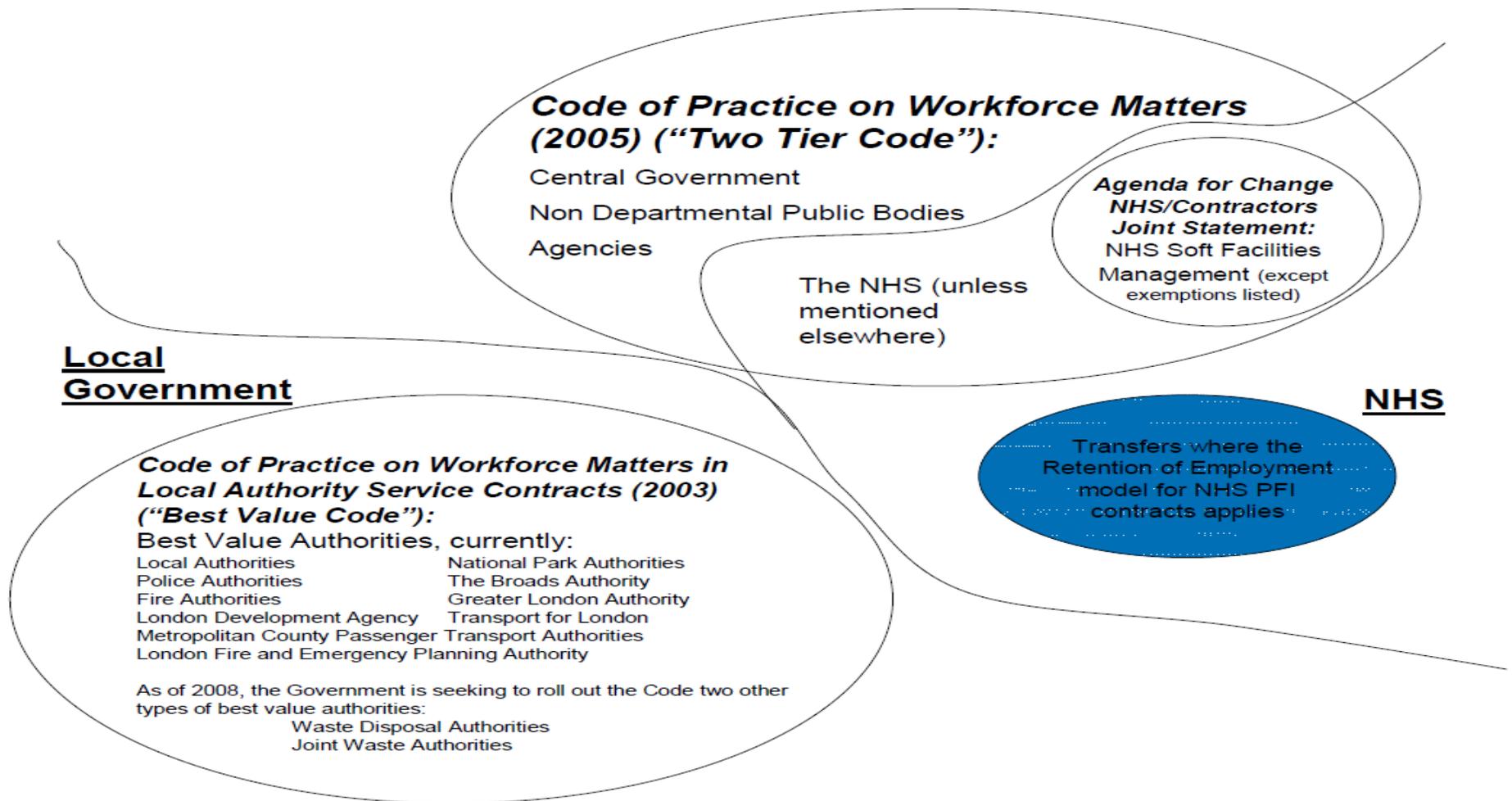
Employment Protections: Problems of Form

☐☐☐ Scope

- ☐☐☐ No general extension of agreed collective terms
 - ☐☐☐ Most enforceable protections apply only where there is a transfer of employment
- ☐☐☐ Two tier code expressly incorporates exceptions
 - ☐☐☐ Including, ‘public corporations and trading funds, Independent Sector treatment Centres, NHS PFI contracts using Retention of Employment model, Academy Schools and HE and FE institutions.’
- ☐☐☐ RoE applies to Soft FM staff in NHS PFI deals
- ☐☐☐ Scope not always clear, e.g., schools required to comply with the code, ‘so far as it is relevant’.

Regulating organisational change and employment practice

PUBLIC SECTOR TWO TIER CODE COVERAGE SCHEMATIC



Employment Protections: Problems of Agency

⌘ Durability

- ⌘ Acceptance of TUPE at least is now broad, *at the point of transfer*

 - ⌘ Barrier to entry

 - ⌘ ‘takes the fear out of reform’

 - ⌘ Flexibility can be assured at other points

 - ⌘ New TUPE 2006 expressly goes beyond ARD to permit variations where ETO defences are available

Employment Protections: Problems of Agency

⌘ Enforcement

- ⌘ TUPE provides rights to consultation but notoriously difficult to enforce in advance when dealing with three-way employment relations, *affected employees*?
- ⌘ Two tier protections especially difficult
- ⌘ Principal responsibility falls to contracting authority
 - ⌘ More than one third of authorities overall fail to include references in service contracts
 - ⌘ Monitoring in nearly half of all authorities is dependent on supplier self-reporting, with a further 14% failing to monitor at all
- ⌘ Alternative Dispute Resolution: cumbersome
 - ⌘ One case completed to date

Transformational Governance: Critical Issues

- ⌘ Current agenda expands procurement into organisations unfamiliar with processes and pushes it to lower levels, in terms of *commissioners and contractors*
- ⌘ Four critical issues for employee representation
 - ⌘ Current framework provides only narrow protections for industry-wide norms
 - ⌘ Established evidence of weak procurement expertise at lower levels
 - ⌘ Onus for unions on organisation and information flows
 - ⌘ Legal or organising strategies in the age of austerity?