1. Privatisation and procurement: overview and legal frameworks

Definitions:

- **Privatisation** — the sale or transfer of state-owned assets into private hands, including healthcare, social care services, housing, prison facilities and water or other utilities. Privatisation is increasingly used globally as a tool to reduce cost and enhance the efficiency of public service provision.

- **Public procurement** — also called public tendering - the procurement of goods and services on behalf of a public authority. It accounts for a substantial part of national economies (up to 15% in developed countries and up to 20% in developing countries).

Legal framework:

- Privatisation and public procurement involve both trade law and human rights law. There can be a tension between trade law and human rights law, as market forces and trade law may push both the State and private providers towards ignoring human rights. The trade regime must be interpreted and applied in a manner consistent with the human rights obligations of States.
- Some of the human rights involved are the ESC rights to an adequate standard of living, safe and healthy living conditions, housing, health and food, as well as CCP rights to life, privacy and family life, freedom of movement, physical integrity, and rights to a remedy.

| International human rights standards | • Economic, social and cultural rights: ICESCR Articles 9 (social security), 11 (adequate standard of living), 12 (health).  
| • Civil and political rights: ICCPR Articles 3 (non-discrimination), 6 (life) 9 (liberty and security of person), 14 (rights to a remedy).  
| • Convention on the Rights of Persons with Disabilities, Article 9 |  
| Regional human rights standards | • African Charter Articles 3-7, 9.  
| • American Convention (ACHR) Articles 3-5, 7-8, 11, 22, 25-26.  
| • Protocol of San Salvador Articles 3, 9-12.  
| • European Convention (ECHR) Articles 2, 5-8, 10.  
| • European Social Charter (ESC) Articles 11-14, 20-21, 31. |  
| Trade law standards | • GATT Article I (most favoured nations principle), III (non-discrimination).  
| • GATT Article XX (a) GPA (Government Procurement Agreement) Article XXIII: exceptions for measures based in public morals.  
| • Other WTO agreements, including the TRIPS Agreement, DOHA Declaration (re the procurement of drugs). |  
| Anti-corruption standards | • UN Convention on Corruption, Article 9. |  
| ILO | • ILO Convention No 94 (Labour clauses (public contracts) Convention) |
2. Privatisation and procurement: impacts and responsibilities of business

Privatisation — While states maintain the ultimate responsibility for human rights, service providers have the duty to refrain from interfering in the enjoyment of human rights, and an obligation to ensure that they do not jeopardize the accessibility, acceptability or quality of services when they assume control.

<table>
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<tr>
<th>Privatised public services: some questions</th>
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<tr>
<td>Private water providers: do they guarantee the safety and quality of water services and geographic accessibility of water services?</td>
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<td>Private health insurance: do they accept all customers or patients, select patients on the basis of their health or financial status? Are patients' privacy rights respected?</td>
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<tr>
<td>Private hospitals: do they comply with national quality standards, and offer adequate training to their staff? Are all patients' religious and cultural origins respected in hospital procedures?</td>
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<tr>
<td>Private prison facilities: are prisoners' health, welfare, freedom of movement and access to information and rights to family life properly respected?</td>
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Public procurement — private providers of goods may be required to comply with human rights standards if they engage in a contract with a public authority. For example, suppliers may be required to meet certain standards concerning diversity of their workforce before they are qualified to compete for public contracts. In addition, private companies as suppliers to public bodies must not engage in bribery or other corrupt practices, which may indirectly negatively affect citizens' enjoyment of rights affected by delivery of the services in question (e.g. health care, education).
3. Privatisation and procurement: The role of states

Privatisation - Human rights law does not address explicitly the issue of privatization. Nevertheless, it can have negative or positive human rights consequences. As privatisation implies a move away from direct government control, there is a shift from governments ‘fulfilling’ human rights (to health, housing, etc.), to governments ‘protecting’ human rights, i.e. overseeing the now private providers of public services.

- Before introducing privatisation into their system, states should perform a ‘human rights impact assessment’ of the potential human rights consequences of the planned privatisation. They must ensure that the following principles be guaranteed after the privatisation: availability, accessibility, acceptability, and quality of the services.
- In order to regulate and manage the services, the state must establish a clear and transparent regulatory framework and must provide for facilities to seek redress when individuals have been denied services by privatised service providers.

Public procurement – public procurement contracts must comply with human rights standards and must contain relevant human rights provisions. Governments should ensure that
- Public money is spent toward effectively realizing ESC rights.
- Contracts are awarded for legitimate reasons.
- Contracts contain relevant human rights standards.
- All businesses are provided with a fair opportunity to make their care for the contract in question, with due attention being paid to the position of vulnerable populations, including women.

4. Privatisation and procurement: good practice case studies

National Human Rights Institutions can play an important role by identifying risks that privatisation and public procurement pose in terms of human rights. Here are some facts and initiatives that NHRIs could recommend to their Governments:

Privatisation:
- The UK Government has issued guidelines concerning ‘Good practice for managing the people consequences of outsourcing and privatisation’.
- The Dutch health insurance branch has been privatized, yet is subjected to heavy regulation by the Dutch Government, including a prohibition to refuse customers, for which permission has been sought at the EU.

Public procurement:
- The Canadian government has introduced a preferential award of federal contracts to Aboriginal peoples.
- The South African Government currently uses a system of ‘targeted’ procurement as part of its policy of social integration.
- The US State of Massachusetts procurement laws require that suppliers have no dealings with Myanmar (Burma), given Myanmar’s labour rights record (which has led to a dispute with the EU).
- Several European countries have various different types of policies for achieving women’s equality attached as requirements in the award of public procurement contracts.

(Public procurement: Rights & democracy website)
### 5. Privatisation, procurement and human rights: enhancing the role of NHRIs

<table>
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<tr>
<th>PARIS PRINCIPLES</th>
<th>STATE</th>
<th>BUSINESS</th>
<th>CIVIL SOCIETY</th>
<th>VICTIMS</th>
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<tr>
<td><strong>Monitoring</strong></td>
<td>Examine current privatisation and procurement trends and advise on best practices</td>
<td>Monitor and document corporate best practice in relation to the provision of public services; conduct research on high risk sectors</td>
<td>Identify best state practice / capacity building re privatisation and public procurement</td>
<td>Monitor and research privatised public services for breaches of human rights in vulnerable groups</td>
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<td><strong>Advocacy</strong></td>
<td>Toward the carrying out of human rights impact assessments prior to the introduction of privatisation</td>
<td>Toward the compliance with human rights standards when responsible for the provision of public services or goods</td>
<td>Awareness-raising on the consequences of privatisation / the need to embed human rights law in public procurement</td>
<td>Awareness-raising on potential human rights breaches within privatised public services</td>
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<td><strong>Education</strong></td>
<td>Provide information / education on the need to assess privatisation and public procurement in light of human rights and to ensure human rights compliance in service agreements</td>
<td>Work with companies and business education providers to build understanding of human rights issues in privatised services</td>
<td>Joint action with NGOs focussed on high risk groups (e.g. persons in elderly care, prisoners, mental health users)</td>
<td>Educational materials regarding applicability of human rights within scope of privatised services</td>
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<td><strong>Complaint handling</strong></td>
<td>Advocacy to government to ensure victims of breaches in privatised sectors have access to remedy and reparation</td>
<td>Awareness-raising of role of businesses in monitoring and receiving complaints</td>
<td>Awareness-raising of role of civil society in monitoring and receiving complaints</td>
<td>Raising awareness about possibilities for lodging complaints</td>
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### 6. Further sources of information
- Mackintosh and Koivusalo, Commercialisation of health care, UNRISD 2005
- Coyle, Campbell and Neufeld, Capitalist Punishment: prison Privatisation and Human Rights, 2003
- http://definitions.uslegal.com/g/government-procurement/
- Rights & democracy website, at http://www.dd-rd.ca/site/publications