



## Community Right to Challenge



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# Community Right to Challenge

The Community Right to Challenge enables voluntary and community bodies, employees of the authority that wish to form a mutual organisation to deliver the service, and parish councils to express an interest in running a local authority service. The authority must consider expressions of interest and, where they accept them, run a procurement exercise for the service. The Right will hand the initiative to groups with good ideas about how services can be run differently or better, ensure their ideas get a fair hearing, and that they get the time they need to prepare effective bids for services.

**Part 1** of this document seeks to address some of the issues raised during consideration of the provisions at Lords Committee Stage of the Localism Bill.

A consultation document on the detail of how the Right will work was published earlier this year. **Part 2** sets out the way forward on the issues consulted on.

# Part 1

## Issues raised during Lords Committee stage

### Relevant bodies

Clause 69(5) defines a 'relevant body' which may express an interest in running a relevant authority service under the Right. These are listed as: a voluntary or community body; a body of persons or a trust which is established for charitable purposes only; a parish council; or, in relation to a relevant authority, two or more employees of that authority.

All of these bodies represent communities in different ways – whether they are made up of members of the community, work in – or for the benefit of – the community, or already deliver services for the community. Community in this instance can refer to either a community of interest or part or all of the population within the relevant authority area.

### Voluntary and community bodies

The Localism Bill defines 'voluntary body' and 'community body' as follows:

- **Voluntary body** means a body, other than a public or local authority, the activities of which are not carried on for profit. The fact that a body's activities generate a surplus does not prevent it from being a voluntary body so long as that surplus is used for the purposes of those activities or invested in the community;
- **Community body** means a body that carries on activities primarily for the benefit of the community.

The definitions of voluntary and community body have been designed to enable a range of civil society organisations to use the Right, supporting the Government's commitment to enable these groups to have greater involvement in running public services. This includes organisations such as industrial and provident societies (co-operatives and community benefit companies) and community interest companies, where not all profits may be re-invested in their activities or the community – provided their activities are for the benefit of the community. This requirement will ensure any profits are indirectly focussed on their activities. It will also ensure large multi-national companies and big conglomerates cannot use the Right.

The definitions reflect the characteristics of voluntary and community bodies rather than the legal form they may take, as some legal forms are also used by commercial companies. For example, many social enterprises are companies limited by guarantee. However, listing companies limited by guarantee as a relevant body would mean that many commercial companies could also use the Right. But we do not want to exclude social enterprises that take this form from using the Right.

There is no requirement for a relevant body to have a local connection as, for example, many national organisations do excellent work locally in their own right – particularly for communities of interest, which may not always be well supported by a local group.

The Government is proposing one amendment to the definition of a community body at Lords report stage of the Localism Bill to clarify that a public or local authority does not fall within this definition.

### **Relevant authority employees**

The Government is committed to giving public sector workers the right to bid to take over running the service they deliver, and the Community Right to Challenge implements this commitment for relevant authority employees. We are not proposing to specify the sort of organisation employees should form to use the Community Right to Challenge.

The powers to add, amend and repeal relevant bodies and amend the definitions of voluntary and community bodies in clauses 69(5)(e) and 69(9) will enable us to ensure these definitions continue to reflect the types of organisation representing communities.

In line with the recommendations of the Delegated Powers and Regulatory Reform Committee the Government is proposing an amendment at Lords Report stage of the Bill to make the power to add relevant bodies under clause 69(5)(e) exercisable by affirmative resolution.

## **Procurement exercises triggered by acceptance of expressions of interest**

Clause 71(2) requires a relevant authority to carry out a procurement exercise for a service where it accepts an expression of interest in it. But the provisions do not make any changes to procurement law. Clause 71(3) requires the procurement exercise carried out by the relevant authority following a successful challenge to be appropriate having regard to the value and nature of the contract that may be awarded as a result. So, where the service is of a nature or value to which the Public Contracts Regulations 2006 apply then the relevant authority will need to follow the procedures for advertising, tendering and awarding contracts set out in those Regulations. But where those regulations do not apply – for example, where the value of the service is below the threshold of £156,000 for local

authorities, or the service is otherwise exempt – authorities have the discretion to decide how to procure the service, just as they already do when contracting out services.

Clauses 71(5) and (6) require a relevant authority to consider whether an expression of interest, and how any subsequent procurement exercise, can promote or improve the social, economic or environmental well being of its area. This will ensure that authorities take account of the benefits that relevant bodies and others can provide over and above delivery of the service. However, clause 71(7) requires authorities to undertake this consideration in a way that complies with procurement law. Failure to do so provides a number of grounds for legal challenge.

The provisions also do not make any changes to the way relevant authorities can specify and manage contracts. For example, they will retain the freedom to include requirements in contracts around performance and monitoring and to enter into contracts for whatever time period is relevant to the needs of their service users and the need to obtain value for money.

Relevant authorities will need to comply with their duties under the Equalities Act when delivering services directly; when considering expressions of interest, and contracting out following a successful challenge under the Right; and when procuring services outside of the Right. As is currently the case, when contracting out services, authorities will need to satisfy themselves that they have fulfilled their duties, for example by including appropriate requirements in contracts.

## Powers to provide advice and assistance

Clause 74(1) enables the Secretary of State to provide assistance to a relevant body in relation to exercising the Right. Clause 74(2) enables the Secretary of State to provide advice and assistance to a body or person other than a relevant body **about the operation of the Right**. This is intended to cover, for example, providing advice to local authorities about how the Right is intended to work, or to an organisation about whether or not they fall within the definition of a voluntary or community body.

We have taken this power to provide the necessary parliamentary approval for continued expenditure on the Right. Details of advice and assistance will not be included in regulations.

The Secretary of State is able to provide advice and assistance himself or to make arrangements for this to be provided on his behalf. Using an intermediary is a well established way of providing advice and assistance. For example, the Government already funds the Asset Transfer Unit to help community groups take on under-used land and buildings from the public sector; and Futurebuilders provided grants and loans to civil society organisations to help them win and deliver public service contracts.

The powers do not enable the Secretary of State to interfere in local decision making and procedures, or to direct local authorities to provide advice and assistance. Neither will clause 74 enable the Secretary of State to extend the Community Right to Challenge to bodies that are not currently relevant bodies, specifically commercial, profit-making companies.

Employees of an authority do not need to form an organisation to submit an expression of interest. Once they do form an organisation – which may be following acceptance of an expression of interest – they will technically no longer fall within the definition of a relevant body. Clause 74(4) ensures that advice and assistance can be provided to employees after the submission of an expression of interest, in the same way as it can be provided to other relevant bodies.

## Part 2

# The way forward on issues covered by the consultation document

A consultation document on proposals for using the powers taken under the Community Right to Challenge was published on 7 February. It sought views on the following issues:

- services that should be exempted from the Right;
- whether the right should be extended to other public bodies in future, and if so which;
- specifically whether the Right should be extended to all Fire and Rescue Authorities (some Fire and Rescue Authorities are the county council, and the Bill specifies county councils as relevant authorities, but others are not) whilst exempting core services including fire-fighting and responding to road traffic accidents;
- whether regulations should specify a minimum period for periods set by relevant authorities for the submission of expressions of interest, and if so, what this should be;
- the information that should be included in an expression of interest;
- whether regulations should specify a minimum and maximum period during which a relevant authority should reach a decision on an expression of interest, and if so, what this should be;
- the grounds on which an expression of interest may be rejected;
- whether regulations should specify a minimum and maximum period between an expression of interest being accepted and a procurement exercise starting;
- what support and guidance would be helpful.

The consultation closed on 3 May. Over 200 responses were received. A summary of responses was published on 2 August and is available on the DCLG website at <http://www.communities.gov.uk/publications/localgovernment/righttochallengeresponses>. A copy has also been placed in the House library. This part of this document sets out how the Government is taking forward the issues consulted on.

## Information in an expression of interest

Clause 69(1)(b) requires an expression of interest to be in writing, and comply with such other requirements as the Secretary of State may specify in regulations. In specifying these requirements we are seeking to achieve a balance between ensuring a relevant authority has sufficient information to reach a decision – particularly as acceptance of an expression of interest leads to a procurement exercise – and avoiding a disproportionate burden on relevant bodies.

The consultation proposed that we specify certain information be included in an expression of interest, which should be proportionate and appropriate to the service being challenged. The majority of respondents broadly agreed with these proposals. We therefore intend that this information should form the basis of that specified for inclusion in an expression of interest in regulations. We are, however, proposing some changes following consideration of consultation responses.

We intend to provide that the following information proposed in the consultation be included in an expression of interest:

- *details of the relevant body* (this should include details of any members of a consortium or sub-contractors likely to deliver a significant proportion of any contract. Where the relevant body was two or more employees of the authority this should include details of how they propose to engage staff affected by the expression of interest in development of their proposal);
- *details of the relevant body's financial situation;*
- *details of the relevant service to which the expression of interest relates;*
- *the relevant body's case that it will be able to participate in any procurement exercise (or that it is taking steps to be able to participate in a procurement exercise); and*
- *the relevant body's case that it is capable of providing the service.*

We intend to provide that the following information proposed in the consultation be included, with some amendments:

- *details of the outcomes to be achieved, including how it meets service user needs and the social value offered by the proposal.*

We no longer intend to specify the following information proposed in the consultation:

- the relevant body's case for providing the service. Other information that we intend to specify will establish the details and benefits of the relevant body's proposal, and that it is capable of providing the service.

## Grounds for rejecting an expression of interest

Clause 71(8) provides that a relevant authority may only reject an expression of interest on one or more grounds specified by the Secretary of State in regulations.

The consultation proposed a number of grounds for rejecting an expression of interest. The majority of respondents broadly agreed with these proposals. We therefore intend that these grounds should form the basis of those specified for rejecting an expression of interest in regulations. We are, however, proposing some changes following consideration of consultation responses.

We intend to provide that the following are grounds for rejecting an expression of interest proposed in the consultation:

- *the relevant body is not suitable to provide the relevant service;*
- *the service is exempt from the Right and therefore not a relevant service;*
- *the service has been stopped or de-commissioned or a decision taken to do this;*
- *the expression of interest is submitted outside a period specified by the authority during which they can be submitted;*
- *the relevant service is already the subject of a procurement exercise or negotiations for a service agreement;*
- *the expression of interest is frivolous or vexatious;*

We intend to provide the following grounds proposed in the consultation with some amendments:

- the expression of interest does not include all the required information.  
We intend to amend this to "*the relevant body provides unsatisfactory, inadequate or incorrect information in the expression of interest*". This will ensure consistency with the Pre-Qualification Questionnaire template for procurement provided by the Office for Government Commerce.
- acceptance of the expression of interest would mean the authority could not comply with its best value duty.

We intend to amend this to "*the authority believes that acceptance of the expression of interest would lead to contravention of an enactment or a rule of law.*" Relevant authorities must comply with a wide range of legislation. This amendment will ensure authorities are not required to accept an expression of interest that would mean it would breach other legislation. As well as the Best Value duty this will include, for example, authorities' duties under the Equalities Act 2010.

We also intend to provide for the following additional ground:

- *where the relevant authority has not specified a period during which expressions of interest can be submitted for a relevant service and there is an existing contract or other service agreement in place – except when the authority is considering the future provision of the service.* This will cover situations where a service is already contracted out, but a window has not been set by the authority for submission of expressions of interest. It will ensure that authorities will not have to run procurement exercises for services which are already contracted out, which could have financial and legal implications for them. However, it will also ensure these services can be challenged when authorities are considering the future of the service – for example prior to expiry of the contract.

We are also considering providing for an additional ground that allows for assessment of whether an expression of interest will improve the quality of the service and better meet service users' needs

We no longer intend to specify the following grounds proposed in the consultation:

- the relevant body is not capable of providing the service. The amended ground set out above on inadequate, incorrect or unsatisfactory information will enable expressions to be rejected where the relevant body is not capable of providing the service.
- another expression of interest has been accepted. Respondents to the consultation were concerned that this may influence authorities not to invite those whose expressions of interest had been rejected to tender in any subsequent procurement exercise.

In line with the recommendations of the Delegated Powers and Regulatory Reform Committee the Government is proposing an amendment at Lords Report stage of the Localism Bill to make the power to specify the grounds on which an expression of interest may be rejected exercisable by affirmative resolution.

## Exempting services

Clause 69(4) enables the Secretary of State to specify in regulations services that may be excluded from the Right. The consultation sought views on which services should be excluded, and whether there were any general principles that we should apply in considering services for exemption.

Respondents to the consultation suggested a range of services that they felt should be excluded from the Right, and principles on which a decision could be taken, but there was no clear consensus behind these suggestions.

## Extending the Right to other public bodies

Clause 69(2)(d) enables the Secretary of State to extend the Right to other public bodies in regulations. The consultation sought views on which public bodies the right should be extended to in future.

In particular, we sought views on extending the Right to all Fire and Rescue Authorities (some Fire and Rescue Authorities are the county council, and the Bill specifies county councils as relevant authorities, but others are not) whilst exempting core services including fire-fighting and responding to road traffic accidents. Of those that responded to this question, just over half agreed we should do this. We are discussing the concerns raised with representatives of the fire and rescue sector in order to reach a conclusion on this issue.

Respondents suggested a wide range of other public bodies that they felt the Right should be extended to – with many suggesting that it be extended to **all** public bodies. We are discussing suggestions for extension with key interested parties, in order to form a view on which public bodies the Right may be extended to in future.

In accordance with the recommendations of the Delegated Powers and Regulatory Reform Committee the Government is proposing an amendment at Lords Report stage of the Bill to make the power to add relevant authorities exercisable by affirmative resolution.

## Timescales

The Bill enables the Secretary of State to specify in regulations a number of timescales associated with the process for the Right. The consultation sought views on whether these timescales should be set in regulations, and if so, what they should be. Different views were expressed on whether the various timescales should be set in regulations, and suggestions for how long they should be ranged from a week to several years. Many authorities raised concerns about the difficulty of setting timescales nationally that could take account of the wide variations in services and circumstances and did not interfere with timescales for existing commissioning cycles. We have considered these responses carefully and agree that these powers should be removed and replaced with a requirement for relevant authorities to set and publish these timescales, having regard to factors which will be set out in guidance to which they will be required to have regard under clause 73(2). The Government is proposing amendments at Lords Report stage of the Bill to give effect to these changes.

### **Minimum period for submitting expressions of interest**

Clause 70(2) already enables relevant authorities to set periods during which expressions of interest in respect of particular services may be submitted, to enable them to synchronise this with commissioning cycles for services, and clause 70(3) requires them to publish

details of these periods. Clause 70(5) currently enables the Secretary of State to specify minimum periods that may be set by authorities.

As set out above, the Government is proposing an amendment that would remove the power in clause 70(5). Where relevant authorities choose to set a period for receiving expressions of interest, they will be required under clause 73(2) to have regard to factors set out by the Secretary of State in guidance.

Based on responses to the consultation we propose that these factors should be:

- the need to provide relevant bodies with sufficient time to prepare and submit expressions of interest;
- the nature, scale and complexity of the service for which a period is being specified;
- the timescale for any existing commissioning cycle relevant to the service for which a period is being specified, or any other relevant authority processes (eg Council Cabinet decision making or budget setting).

### **Timescale for making a decision on an expression of interest**

Clause 72(3) currently requires relevant authorities to make a decision on an expression of interest within such time as may be specified by the Secretary of State in regulations. We now consider this requirement to be unnecessary if there is a requirement for authorities to set a timescale within which they will notify a relevant body of their decision on an expression of interest (see below). The Government is therefore proposing an amendment that would remove clause 72(3).

### **Timescale for notifying relevant body of a decision on an expression of interest**

Clause 72(4)(a) currently requires relevant authorities to notify the relevant body of their decision on the expression of interest within such time as may be specified by the Secretary of State in regulations.

As set out above, the Government is proposing an amendment that would remove the power in clause 72(4)(a) and instead require relevant authorities to set and publish a maximum timescale for notifying a relevant body of their decision on an expression of interest. Different periods may be specified for different cases. Authorities will be required under clause 73(2) to have regard to factors set out by the Secretary of State in guidance.

In order to prevent delays to the process, the amendment will also require relevant authorities to notify relevant bodies of the timescale for a decision within 30 days. The countdown for both the 30 days and the timescale for a decision would begin either when an expression of interest was received, or if the authority had specified a period for expressions of interest to be submitted for a particular service, the end of that period.

Based on responses to the consultation we propose that the factors to which relevant authorities will be required to have regard will be:

- the need to notify relevant bodies of a decision within a reasonable period;
- the nature, scale and complexity of the service to which expressions of interest relate (eg is the service shared with one or more other relevant authorities, or jointly commissioned with one or more other public bodies);
- the complexity of the expressions of interest received (eg do they propose radical change to the way a service is delivered?);
- the likely need to agree modifications to expressions of interest in order to accept them (clause 72(2)(b) requires any modifications to be agreed with the relevant body);
- the timescales for any existing commissioning cycle relevant to the service which an expression of interest relates to, or any other relevant authority processes (eg Council Cabinet decision making or budget setting).

Where the relevant authority has specified a period for submitting expressions of interest in a particular service, we suggest that the number of expressions of interest received should also be a factor.

### **Minimum and maximum period between an expression of interest being accepted and a procurement exercise starting.**

Clause 71(4) currently enables the Secretary of State to specify in regulations the minimum and maximum period that may elapse between an expression of interest being accepted and a procurement exercise starting.

As set out above, the Government is proposing an amendment that would remove the power in clause 71(4) and instead require relevant authorities to specify and publish these periods. Different periods may be specified for different cases. Authorities will be required under clause 73(2) to have regard to factors set out by the Secretary of State in guidance.

Based on responses to the consultation we propose that the factors to which relevant authorities will be required to have regard will be:

- the need to provide employees of the relevant authority, and other relevant bodies, with a fair and reasonable and realisable opportunity to bid in the procurement exercise for the service;
- the nature, scale and complexity of the service being procured;
- the timescales for any existing commissioning cycle relevant to the service being procured, or any other relevant authority processes (eg Council Cabinet decision making or budget setting).

## Guidance

Clause 73(2) requires a relevant authority to have regard to any guidance issued by the Secretary of State on the Right. Our consultation sought views on whether there were any issues on which we should provide guidance. Respondents suggested a range of issues that guidance could cover, which we are considering carefully. The guidance will include the factors relevant authorities will need to have regard to when specifying timescales, and further information in relation to the information to be included in an expression of interest and the grounds for rejecting an expression of interest.

## Support

Clause 74 enables advice and assistance to be provided to relevant bodies to help them exercise the Right. Our consultation sought views on what support would be most helpful. Respondents made a range of suggestions about what support should be provided, which we are considering carefully. We are developing proposals in consultation with key interested parties. We expect advice and assistance to be focussed on those that need it most. This is likely to mean smaller and newer voluntary and community bodies benefiting from support.