

## Report for Resolution

**Report to** Cabinet  
14 March 2012  
**Report of** Head of strategy and programme management  
**Subject** Localism Act 2011

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Item

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### Purpose

To consider the Council's approach to the implementation of a key part of the Localism Act 2011 (specifically Part 5 Chapter 2 – Community Right to Challenge). These changes to legislation are likely to come in to force between now and the local elections although final guidance had not been issued at the time of writing

### Recommendations

To approve the decision and notification timetables required under sections 82 to 84 of the Localism Act 2011 as relating to Community Right to Challenge:-

- (1) To accept expressions of interest under the Community Right to Challenge duties annually only between 1<sup>st</sup> March and 30<sup>th</sup> April, commencing 2013
- (2) Determination of those expressions will under normal circumstances take no more than seven months and be reported to Cabinet each September for ratification and follow generally the process outlined in Appendix 2
- (3) The procurement process resulting following the acceptance of any expression will start no sooner than three months and no later than six months following acceptance

### Financial Consequences

The financial consequences of this report will be met primarily from within existing staff resources. However it is likely that there will be as yet unknown costs associated with legal advice, potential procurement exercises and possible mobilisation costs should a challenge be successful

### Risk Assessment

There are likely to be unknown demands placed upon reduced resources, some of which may impact the delivery of existing services and may affect the delivery of services

### Strategic Priority and Outcome/Service Priorities

The report helps to meet the strategic priority "Aiming for excellence – ensuring the Council is efficient in its use of resources, is effective in delivering its plans, is a good employer and communicates effectively with its customers, staff and partners" and the service plan priority to implement the Localism Act

**Cabinet Member:** Cllr Arthur, Leader of the Council

**Ward:** All wards

**Contact Officers**

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**Background Documents**

## Report

### Background

2. The Localism Act became law in November 2011 and the implementation of its various parts is being phased over the coming few months
3. This report considers the steps needed to prepare for part 5 chapter 2 “Community Right to Challenge” (CRtC)
4. At the time of writing no firm implementation date had been given. However previous indications for the Department of Communities and Local Government (DCLG) had suggested April 2012 as a target date. Detailed guidance was still awaited at the time of writing and was expected in the last week of February or first week of March
5. Given the possible timing of implementation and the coincidence with the local election cycle some early policy and implementation decisions are required to shape implementation. As further guidance and details are released further decisions or amendments may be required by cabinet
6. Some other parts of the Act have or are being dealt with through other methods (for example “Pay Accountability” will be discussed at council on 20<sup>th</sup> March and the implementation of the new standards and code of conduct regime was discussed at standards committee on 3<sup>rd</sup> February)

### Community Right to Challenge

7. This enables voluntary and community bodies (whether local or national) as well as employees to express an interest (EoI) in the running of services the council currently provides. The November 2011 DCLG “Plain English guide to the Localism Act” says:

*The Localism Act gives these groups, parish councils and local authority employees the right to express an interest in taking over the running of a local authority service. The local authority must consider and respond to this challenge; and where it accepts it, run a procurement exercise for the service in which the challenging organisation can bid*

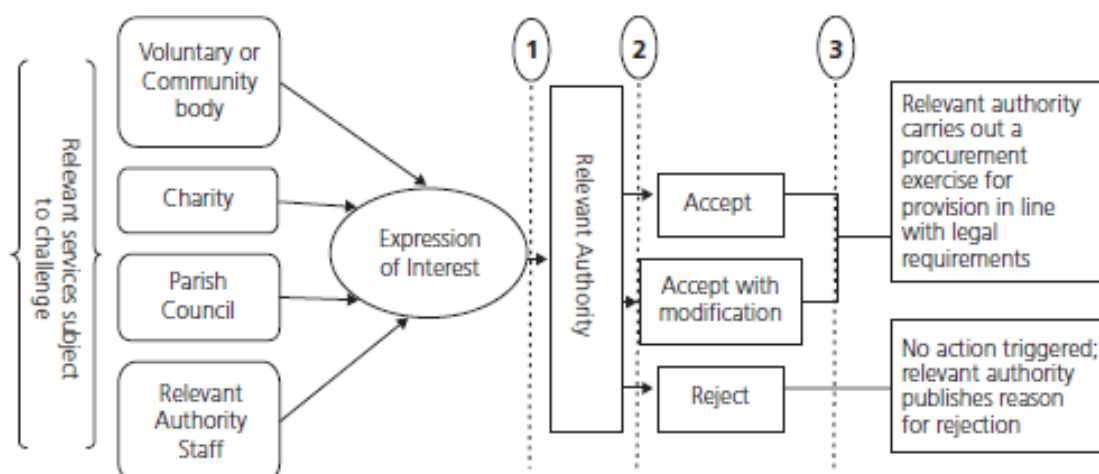
8. These may be services delivered currently and not intended to be commissioned. There will be specific reasons for refusal and **functions** involving decision making are generally excluded. An example of a function given by DCLG is the determination of planning applications. However the processing of planning applications for example would probably **not** be excluded. **Appendix 1** is a summary of the key parts of the Act
9. Where services are already subject to existing contracts an EoI need not be considered unless the process of reprocurement or retendering is due. This prevents, for example, expressions being submitted one year in to a five year contract

10. There is nothing in the legislation which forces an Eol to be based upon the provision of the whole service. It could, for example, be based on parts of the city or parts of a service or groups of users. When assessing an Eol the council must *"consider whether acceptance...would promote or improve the social, economic or environmental well-being of the authority's area"* (s.83(8))
11. There will be specified grounds for refusal within the final guidance. Based upon a DCLG policy statement in September 2011 some of these are likely to include procedural grounds, the suitability of a body to deliver a service and requirements to ensure compliance with, for example, equalities and best value duties.
12. Under the best value duty for example the council may need to consider the implications of an Eol which splits out the easier to deliver parts of a service upon the best value for all service users and tax payers. Such an expression may in fact increase the unit cost of providing the remaining parts of the service
13. Where an Eol is accepted a procurement exercise must be undertaken *"such as is appropriate having regard to the value and nature of the contract that may be awarded"* (s.83(3)). Existing standing orders and legislation provide for the number and nature of quotes required as well as the threshold for European tender regulations. The body expressing the interest is not guaranteed to take over the service and whilst only "not for profit" bodies can be the lead body to submit an Eol any subsequent procurement process could be open to anyone, particularly if full open tender is legally required
14. An Eol can be submitted at any time unless we specify "windows" when these can be submitted. We must under various parts of the legislation set out certain deadlines by which we will respond to expressions and initiate any procurement exercises. The suggested timetable is designed to protect and ration resources to deal with unknown numbers of expressions of interest
15. It is recommended that the following various timetables are adopted:
  - (1) Submissions of expressions of interest (s.82(2)) – annually 1<sup>st</sup> March to 30<sup>th</sup> April (starting March 2013)
  - (2) Determination of an expression of interest i.e. how quickly we respond (s.84(3)) – maximum 7 months– this reflects the fact that an Eol could come in at the very start of the submission period and would then need to await September Cabinet decision (see **Appendix 2** for a suggested annual timetable)
  - (3) Procurement (s.83(4)) – we need a minimum and maximum period between acceptance of an Eol and the start of a procurement exercise. It is anticipated that any challenged services would likely be run on a minimum of a three year contract and therefore likely to fall within European (OJEU) scale (approximately £170,000). Therefore the minimum of all cases should be 3 months and the maximum for all cases should be 6 months

16. Once the statutory guidance has been issued further work will be undertaken to consider the practicalities of meeting these duties. This will require establishing suitable governance and decision making processes
17. As suggested in Appendix 2 it is recommended that each September Cabinet considers the expressions received in the previous March / April window alongside officer recommendations.
18. If in the future DCLG guidance or subsequent case law impacts these decisions further reports will be brought back to Cabinet for consideration

## Appendix 1 – Community Right to Challenge

The process is summarised by DCLG as follows:



This introduces three timelines illustrated above:

1. Commissioning cycles – EoI only acceptable at certain points
2. Response – time between submission and notification of decision
3. Procurement – minimum and maximum times between acceptance and initiation of a procurement process

It is these timetables and deadlines referred to within the body of the report

There are some **areas where meanings are defined**. Some of this is within the Act itself whilst other parts may come from subsequent guidance and, potentially, case law:

- Relevant Authority – as a district council we are automatically included and therefore subject to potential challenge
- Relevant Services – under s.81(5) of the Act there may be some specific exclusions from challenge, although as yet none have been identified. However the DCLG says it is clear that “**functions**” rather than services are excluded. Previous consultation documents suggested that “a function is a duty or power that requires decision-making by the responsible person or body, whereas a service does not”. By way of example it suggests determination of planning applications is a function whilst waste collection is not. Therefore some activities we undertake requiring decisions may fall outside the scope of this legislation (perhaps parts of planning and homelessness). Definitions of decisions and functions may become tested in the courts over time
- Relevant Body – these are bodies enabled to submit a CRtC. It excludes public bodies and councils but does include staff. It also states that the making of a surplus does not in itself preclude a body. Bodies do not need to have a local connection and could be national charities for example, with or without local branches. If joint bids are made with, for example, a private firm providing back office support, that bid is still to be considered as the “relevant body” is still leading it

Details about what **should be included in an EoI** may to an extent be within the remit of local authorities. However information within the September 2011 DCLG policy statement as well as general government direction around Open Public Services (and a presumption toward plurality of provision) suggest that guidance will aim to prevent being overly prescriptive in what should be submitted.

*“...we are seeking to achieve a balance between ensuring a relevant authority has sufficient information to reach a decision...and avoiding a disproportionate burden on relevant bodies”*

The DCLG policy statement suggests that areas for inclusion will include:

- Details of the relevant body (including consortia, sub-contractors)
- Details of their financial situation
- Details of the service they wish to challenge
- Details of their ability to participate in subsequent procurement exercise
- The case to show it is capable of providing the service
- Outcomes to be achieved and improvements for users

**Refusal** will only be permissible on one or more grounds set out by the Secretary of State (SoS). The DCLG policy statement suggests the following will be allowed reasons:

- 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;

Some of these are strictly procedural such as the window for submission or already under contract. However other grounds will be subject to definition and determination.

Other grounds are also being considered. This may include “unsatisfactory, inadequate or incorrect information” in the EoI. Specifically the policy statement says this “will ensure consistency with the PQQ template for procurement provided by the OGC”.

Grounds will also include where acceptance “would lead to contravention of an enactment or a rule of law”. This would cover for example equalities duties as well perhaps as best value duties. It will be interesting to see whether, for example, BV duties can be invoked to reject an EoI where that submission would lead to the break up or cherry picking of a service and leave only an expensive residual service in the hands of the authority.

The DCLG policy statement makes clear that acceptance of an EoI does not remove or vary any legal duties around **procurement**:

*“...the provisions do not make any changes to procurement law...the procurement exercise (should) be appropriate having regard to the value and nature of the contract that may be awarded as a result.”*

This specifically includes OJEU regulations and of course our own standing orders and schemes of delegation.

Under s.83(8) when considering the EoI we must “consider whether acceptance...would promote or improve the social, economic or environmental well-being of the authority’s area”. Furthermore when running a procurement process following acceptance we must “consider how it might promote or improve the social, economic or environmental well-being of the authority’s area by means of that exercise.”



## **Appendix 2 – CRtC timetables**

The suggested timetable is designed to protect and ration resources to deal with unknown numbers of expressions of interest.

This would form the basis of an annual cycle of possible challenge, response and procurement. As the use of this power evolves around the country and in light of any local challenges Cabinet may need to refine this over time.

March – April – allowable window for submission of expressions of interest

May – July – assessment and analysis of expressions

September – Cabinet report on expressions and recommended decisions

Assuming acceptance of the expression:

October – December – preparation of tender documents and procurement process

January – September – procurement / OJEU process

October – December – mobilisation, TUPE contract etc

April – go live

On this basis we would be open for EoI submission in March 2013 with, in theory, any successful challenge and procurement exercise leading to change of delivery in April 2015

It needs to be stressed that subsequent guidance may impact our ability to design a timetable along these lines and with these periods of window and / or built in timetables