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<b>PART B:</b>	<b>RECOMMENDATIONS TO COUNCIL</b>
<b>REPORT TO:</b>	<b>POLICY AND RESOURCES COMMITTEE</b>
<b>DATE:</b>	<b>27 SEPTEMBER 2012</b>
<b>REPORT OF THE:</b>	<b>HEAD OF CORPORATE SERVICES CLARE SLATER</b>
<b>TITLE OF REPORT:</b>	<b>COMMUNITY RIGHT TO CHALLENGE</b>
<b>WARDS AFFECTED:</b>	<b>ALL</b>

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## **EXECUTIVE SUMMARY**

### **1.0 PURPOSE OF REPORT**

- 1.1 To provide an overview of the Community Right to Challenge provisions of the Localism Act 2011.
- 1.2 To consider and recommend the Council's approach, including the time periods for accepting and considering expressions of interest, notifying the relevant body of its decision, and commencing a procurement exercise.

### **2.0 RECOMMENDATION**

- 2.1 That the Council notes the Community Right to Challenge (CRC) provisions in the Localism Act 2011.
- 2.2 That the Council approves the approach set out in section 6 of the report, in particular:
  - (i) To accept expressions of interest (EoI) under the CRC duty during the period from 18th February to 31st March each year.
  - (ii) To specify individually for each EoI, by 30th April in the year in which it was submitted, the maximum period that it will take for the Council to notify the relevant body of its decision and to publish details of the specification; and to delegate this decision to the Chief Executive (in consultation with the Chairman of the Commissioning Board).
  - (iii) For services that are not currently contracted out, the maximum period that it will take to notify the relevant body of its decision and to publish details of the specification will be individually determined but normally 30th September in the year that the EoI was submitted. For services that are currently

contracted out, the maximum period will be individually determined so as to fit with the relevant commissioning cycle.

- (iv) The procurement process arising from the acceptance of any EOI will start no sooner than two months and no later than six months after acceptance.

### **3.0 REASON FOR RECOMMENDATION**

- 3.1 The Council has a statutory duty to respond to requests made in line with the Community Right to challenge

### **4.0 SIGNIFICANT RISKS**

- 4.1 There are no significant risks associated with the operation of the Community Right to Challenge. Risks associated with each Eoi will need to be assessed on a case by case basis.

### **5.0 POLICY CONTEXT AND CONSULTATION**

- 5.1 From 27 June 2012, the Localism Act 2011 introduced a right for Parish Councils, community and voluntary bodies, charitable trusts and 2 or more local authority employees to submit an Expression of Interest in taking over the provision of a service on behalf of the authority. The statutory guidance can be read at <http://www.communities.gov.uk/publications/communities/righttochallengestatguide> .

### **6.0 REPORT DETAILS**

- 6.1 This Community Right gives relevant bodies the right to submit an expression of interest (Eoi) in running specified local authority services, where they believe they can do so differently and better. It is a right to request. The relevant body that submits the EOI and triggers the procurement exercise may not eventually be the provider of the service. Where a valid expression of interest is received, the authority is required to undertake a procurement exercise for that service, which may lead to the authority awarding a contract for the provision of that service. This report recommends the arrangements which the authority should adopt in order to operate the new Community Right to Challenge.

#### **Who can submit an Expression of Interest?**

- 6.2 An expression of interest can be submitted by a “relevant body”, comprising:
- a. A Parish Council, but not limited to services or facilities within its area;
  - b. A Voluntary Body – a body, other than a local authority, the activities of which are not carried on for a profit;
  - c. A Community Body – a body, other than a local authority, which carries on activities primarily for the benefit of the community;
  - d. A body or trust established for charitable purposes;
  - e. 2 or more employees of the authority, whether or not they have formed themselves into a body for this purpose, or
  - f. Such other persons or bodies as may be specified by the Secretary of State by regulations. To date, no such regulations have been made.

It is worth noting that there is no requirement for a Voluntary or Community Body to have any local connection, and any of these bodies can submit an expression of interest in partnership with any other organisation, including a commercial organisation, or propose to sub-contract the work to a commercial organisation. Providing that this is done, there is no requirement for the relevant body to undertake the majority of, or any particular share of the work.

#### **When can Expressions of Interest be Submitted?**

- 6.3 Authorities can choose to set periods during which EOI's may be submitted, which may be different for different services. If periods are set, they must be published. The intention is to help authorities align consideration of EOI's with their commissioning cycles. If no periods are set, EOI may be submitted at any time.

#### **What services can an Expression of Interest relate to?**

- 6.4 The expression of interest must relate to the provision of, or assisting in the provision of, a "relevant service", which means any service which is currently provided by or on behalf of the authority. However, the following services are "excluded services" which cannot be the subject of an expression of interest –

- a. Services provided in partnership with NHS bodies, or by an NHS body on behalf of the authority;
- b. A service provided to a named person with complex individual health or social care needs; or
- c. A service which includes the exercise of a statutory power which cannot be delegated. So, the setting of Council Tax or the determination of a planning application is not legally capable of being undertaken by anyone other than the local authority, and so cannot be the subject of an expression of interest.

- 6.5 An expression of interest can relate to services such as management and maintenance of refuse collection and re-cycling, running a leisure centre, or operation of off-street car parks. Equally, a team of Council staff might consider taking on a back office activity.

#### **The Expression of Interest.**

- 6.6 The Expression of Interest must be in writing and meet certain requirements. These include the provision of -
- a) Information about the financial resources of the relevant body which is submitting the expression of interest;
  - b) Evidence that demonstrates that by the time of any procurement exercise the relevant body submitting the expression of interest will be capable of providing or assisting in providing the relevant service. This is particularly important when dealing with an emergent staff mutual or voluntary body, which may not be fully operational at the date of submitting an expression of interest;
  - c) Information about the relevant service sufficient to identify it and the geographical area to which the expression of interest relates;
  - d) Information about the outcomes to be achieved by the relevant body or, where appropriate, the consortium of which it is a part, in providing or assisting in the provision of the relevant service, in particular

- how the provision or assistance will promote or improve the social, economic or environmental well-being of the relevant authority's area; and
  - how it will meet the needs of the users of the relevant service; and
- e) Where the relevant body consists of employees details of how that relevant body proposes to engage other employees of the relevant authority who are affected by the expression of interest.

### **Validation of Expressions of Interest**

6.7 The first stages comprise the validation and acceptance or rejection of each expression of interest.

a. What happens when an Expression of Interest is received?

When an expression of interest is received, the authority needs to check that it is submitted by a "relevant body" for a "relevant service" which is not an "excluded service". If it fails to meet these requirements, the authority notifies the person who submitted the expression of interest that it is not a valid expression of interest, but need take no further action.

b. Can the authority reject a valid Expression of Interest ?

There are 10 grounds on which the authority may reject a valid expression of interest:

1. That the expression of interest does not meet the statutory requirements, because it is not from a relevant body or is not for a relevant service;
2. That the supporting information is inadequate or incorrect;
3. That any member of the body making the bid, or of their consortium, is not suitable to provide the service. This would cover absence of a necessary qualification, or past conduct;
4. That the authority has already taken a formal decision to cease to provide the service. So an expression of interest cannot be used as a means to challenge an authority's decision to close a facility or cease a service;
5. That taking this service in isolation would result in a loss of integration with NHS services to the detriment of users of the integrated service. This prevents expressions of interest un-picking integrated Section 75 arrangements;
6. That the service is already the subject of a procurement exercise.
7. That the authority is already in negotiations in writing with a third party for the provision of the service;
8. That the authority has already published its intention to consider the provision of the service by a body to be set up by 2 or more employees;
9. That the expression of interest is vexatious or trivial; and
10. That the acceptance of the expression of interest is likely to lead to a breach of law or statutory duty. This would cover an expression of interest which would require delegation of statutory powers which cannot be delegated or where it

would lead to a breach of the authority's duty to secure best value, for example by causing greater cost by the break-up of shared service arrangements.

- 6.8 In addition, the Localism Act provides that an authority may define services and set periods during which expressions of interest may be submitted from those services, and may then refuse to consider an expression of interest which is submitted at the wrong time. This enables the authority to ensure that, for example, it receives any expressions of interest for different parts of the waste collection and disposal and recycling services at the same time so that it can deal with them in a co-ordinated manner. It could also be an advantage for county and district authorities to consider EOI within a coordinated timescale.
- 6.9 The Act also requires the authority, in considering an expression of interest, to consider whether the acceptance of the expression of interest would promote or improve the social, economic or environmental well-being of the area, but this does not form a separate ground for rejecting an expression of interest.

#### **Acceptance or rejection of an Expression of Interest**

- 6.10 Once an expression has been validated, it is necessary for the proper officer to conduct a review of the expression of interest to determine whether it falls within any of these criteria. This is partly a matter of fact and law, and partly a question of collecting information from the officer currently responsible for the running of the service. It is also a question of policy, because, where an expression of interest falls within one of these grounds for rejection, the authority still has a discretion and may decide to accept the expression of interest anyway. It must then notify the persons or body who submitted the expression of interest of its decision and of the reasons for that decision. If the authority acted unreasonably in rejecting an expression of interest, that decision would be open to judicial review.

#### **Shared services**

- 6.11 Particular attention needs to be given to how the authority will deal with expressions of interest for services which are provided on a joint arrangement with other authorities. Where this would result in the loss of efficiencies, it may justify rejection of the expression of interest on best value grounds. However, it is possible that expressions of interest for the relevant parts of the service have been submitted to each participating authority, so there may be a need to co-ordinate with the other participating authorities.

#### **Timescale**

- 6.12 The authority must set and publish the maximum period which will elapse between receipt of an expression of interest and the authority notifying the body which submitted the expression of interest of its acceptance or rejection of that expression of interest, but may set different maximum periods for different cases.

#### **Support for Community Organisations**

- 6.13 The Department for Communities and Local Government (DCLG) is funding a programme of support to help communities to take advantage of the CRC. The Government has launched a community rights website: <http://communityrights.communities.gov.uk/>

#### **Notifying decisions on EOI:**

- 6.14 Authorities must specify the maximum period that it will take to notify the relevant body of its decision on an EOI and publish details of the specification. However, this only has to be done once an EOI has been received.

- 6.15 Authorities may specify different periods for different cases. This is in recognition of the varying nature, size and complexity of services and/or EoI; the likely need to agree modifications to EoI in order to accept them; and the timescales of any existing relevant commissioning cycles.
- 6.16 The authority must notify the relevant body of the timescale within which the authority will notify the body of its decision. This must be done within 30 days after the close of any period specified by the authority for submitting EoI or, if no such period has been specified, within 30 days of the authority receiving the EoI.
- 6.17 The authority must notify the relevant body of its decision and, if the decision is to modify or reject the EoI, give reasons for the decision. The authority must also publish the notification in such manner as it thinks fit, which must include publication on the authority's website.

**Appeal process following rejection of EoI**

- 6.18 DCLG has said that it has no immediate plans for an appeals process in the event of an authority rejecting an EoI, but this will be kept under review as the right is implemented.

**Modifying an EoI:**

- 6.19 If the authority believes it would otherwise reject an EoI, it may seek instead to agree to it being modified. Any modification must be agreed with the relevant body. If an agreement cannot be reached, the authority may reject the EoI.

**Period between an EoI being accepted and a procurement exercise starting:**

- 6.20 Authorities must specify minimum and maximum periods between an EoI being accepted and a procurement exercise starting. In specifying these periods, authorities should have regard to relevant bodies and employees of the authority being given a fair, 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.

**Procurement exercise:**

- 6.21 Where an authority accepts one or more EoI for a service it must carry out a procurement exercise for the service. This includes situations where the relevant body subsequently withdraws its EoI.
- 6.22 Authorities will need to comply with existing procurement law, including threshold values and consider how both EoI and procurement exercises triggered by one or more EoI being accepted would promote or improve the economic, social or environmental well-being of the authority's area.

**Proposed approach to be taken by the Council**

- 6.23 The CRC should be seen as a last resort for communities when all other avenues have been exhausted. The Council will publish its overall approach including:
- Publicising contact points that communities can use for starting conversations about the part that they could play in shaping and running local services
  - Publicising a contact point for the CRC process
- 6.24 The number and nature of EoI that might be submitted to the Council is unknown. The government have estimated in the impact assessment for the CRC that between 500 and 530 EoI will be submitted a year across all local authorities.

- 6.25 It will be necessary to ensure that EoI are considered at the appropriate time in the relevant commissioning cycle. As many contracts are for longer than a year, the appropriate time in the commissioning cycle may be one or more years away. The Council has liaised with other councils in North Yorkshire on the likely window for EoI.
- 6.26 Specifying a period will align consideration of EoI with commissioning cycles and enable the most effective use of resources when EoI are being evaluated. This window is also in line with that of North Yorkshire County Council and is being considered by other Districts in North Yorkshire.

**It is recommended that the Council specifies a period during which it would accept EoI and that this is the period from 18th February to 31<sup>st</sup> March each year.**

- 6.27 It is recommended that the Council specifies individually for each EoI, by 30 April in the year in which it was submitted, the maximum period that it will take to notify the relevant body of its decision and to publish details of the specification. Key factors in determining the maximum period will include:
- the nature, size and complexity of services and/or the EoI
  - the likely need to agree modifications to the EoI in order to accept it
  - the timescales of any existing relevant commissioning cycles.

**It is recommended that the decision regarding maximum period is delegated to the Chief Executive in consultation with the Chairman of the Commissioning Board, on the advice of an officer panel which will include legal and procurement experts.**

- 6.28 For services that are not currently contracted out, the maximum period that the Council will take to notify the relevant body of its decision and to publish details of the specification will be individually determined. It is anticipated that this will not normally be later than 30<sup>th</sup> September in the year that the EoI was submitted, but in some circumstances the period may be longer.
- 6.29 For services that are currently contracted out, the maximum period that the Council will take to notify the relevant body of its decision and to publish details of the specification will be individually determined so as to best fit with the relevant commissioning cycles.
- 6.30 Evaluation of EoI and discussions regarding any potential modifications with the relevant body, would be undertaken by an officer panel (including legal and procurement expertise), before making a recommendation at the appropriate time to the Commissioning Board.

**It is recommended that the minimum period between an EoI being accepted and a procurement exercise starting be two months and the maximum period be six months.**

- 6.31 This takes into account the advice in the statutory guidance that relevant bodies and employees of the authority are given a fair, reasonable and realisable opportunity to bid in the procurement exercise for the service whilst cautioning against having a lengthy period between an EoI being accepted and the commencement of a procurement exercise.

- 6.32 The Council will publish on its website:
- information about the CRC including the period during which it will accept EoI, the process that will be followed and the likely timetable;
  - a contact point for the CRC process and contact points that communities can use for starting conversations about the part that they could play in shaping and running local services; and
  - details of EoI received and decisions reached.
- 6.33 The Council will also use existing networks and communication channels to provide information about the CRC to local voluntary and community organisations, local charities, parish councils and employees.
- 6.34 In evaluating an EoI, the Council will need to consider its statutory Best Value duty (Section 3 of the Local Government Act 1999) to “make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness”. This will include the impact of EoI on the economy, efficiency and effectiveness of the service and linked services across the whole of the county, not just the service and/or geographical area specified in the EoI in isolation.
- 6.35 Following the usual practice, consideration will need to be given as part of any procurement exercise to the length of contract likely to give best value to the Council. Depending on the service areas where interest is expressed, it is possible that some may be in areas likely to see changed requirements in the future, and it may be appropriate to award contracts for a relatively short time period, linked to the budget cycle, particularly during periods when the Council’s budget is under pressure.

#### **The Procurement Exercise**

- 6.36 Once a valid expression of interest has been accepted, the authority must conduct an appropriate procurement exercise which will be run in accordance with the requirements of legislation and the Constitution of the Council.

### **7.0 IMPLICATIONS**

- 7.1 The following implications have been identified:

a) Financial

The financial consequences of managing the CRC, including publicising the process and evaluating EoI, will have to be met primarily from within existing staff resources, although DCLG has paid a small additional grant (£8k) in respect of the new burdens associated with CRC.

If an EoI is accepted, there will be additional costs associated with running a procurement exercise. These will vary according to the nature and complexity of the service, but could be considerable.

b) Legal

The Council has a statutory duty to consider all EoI received under the CRC.

c) Other

No significant impact has been identified for any of the protected groups identified in the Equality Act 2010 with regard to the CRC process; which accords with the impact assessment undertaken by DCLG prior to the draft legislation being considered by parliament.



The evaluation of all EoI will need to include an assessment of the potential impact on all protected groups.

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**Background Papers:**

Localism Act 2010 -

Community Right to Challenge - Statutory Guidance –

<http://www.communities.gov.uk/publications/communities/righttochallengestatguide>

Community Right to Challenge – Impact Assessment -  
<http://www.communities.gov.uk/documents/localgovernment/pdf/1829777.pdf>

**Annex A**

# Community Right to Challenge Process

