

EXETER CITY COUNCIL

EXECUTIVE
3 JULY 2012

UPDATE ON THE LOCALISM ACT 2011

1. PURPOSE OF REPORT

- 1.1. To update on progress with the various provisions of the Localism Act and to identify any issues for the council.

2. BACKGROUND

- 2.1. The Localism Act (the "Act") provides a range of measures with the potential to shift power and responsibility towards local people. It received Royal assent on 15 November 2011, but different provisions come into force at different times.

- 2.2. The Act covers four areas of policy:

- New freedoms and flexibilities for local government
- New rights and powers for communities and individuals
- Reform of the planning system
- Social housing reform

- 2.3. The planning and housing provisions of the Act have been covered in earlier committee reports. This report covers the first two areas of policy, which include the following provisions:

1. EU financial sanctions
2. The general power of competence
3. The transfer and delegation of functions to councils
4. Changing governance arrangements
5. Predetermination
6. Standards
7. Pay accountability
8. Council tax referendums
9. Community right to challenge
10. Assets of community value

3. THE PROVISIONS OF THE ACT

- 3.1. The following paragraphs provide a brief description of each of the provisions, summarise progress with each and identify issues for the council.

4. EU FINANCIAL SANCTIONS

- 4.1. Part 2 of the Act introduces a discretionary power for Ministers to require a local authority to pay all, or part of, a European Court of Justice financial sanction where the local authority has demonstrably caused or contributed to that sanction.

- 4.2. The Government has consulted upon and published a draft Policy Statement that explains how the EU financial sanctions policy will work in practice. It sets out the safeguards that are in place to protect local authorities should a Minister seek to pass on all, or part of a EU fine. The safeguards include the requirement for a vote of approval to payment in both Houses of Parliament and referral to an independent advisory panel.

Issues for the council

- 4.3. The final Policy Statement is awaited and the council has made representations through the District Councils' Network that the safeguards in the draft statement must not be diluted.
- 4.4. A degree of reassurance is offered by the fact that, to date, the UK has never been fined regarding an infraction. Furthermore, as a matter of usual business, the council maintains a clear understanding of its legal commitments and ensures it accords with these in everyday work.

5. THE GENERAL POWER OF COMPETENCE

- 5.1. The 'general power of competence' is now in place for all English local authorities. It replaces the Wellbeing Power and gives, subject to a limited number of restrictions, local authorities the legal capacity to do anything that an individual can do that is not specifically prohibited.
- 5.2. In explaining its overall intention for the Act, the Government has said¹ :

"...the ability to act in their own interest should be a key means by which local authorities develop innovative approaches through a new civic entrepreneurialism, delivering 'more for less', resulting in more efficient and effective service delivery that is better tailored to local circumstances, with the ability to help their communities in ways previously outside their remit."

- 5.3. The power will also:
- allow authorities to act in their own financial interest to generate efficiencies and secure value-for-money outcomes.
 - raise money by charging for discretionary services and trade in line with existing powers.
 - allow authorities to engage in activities that were outside the well-being power, such as providing certain indemnities and guarantees and engaging in speculative activities.
 - provide the Secretary of State with a power to amend or repeal enactments that prevent or obstruct local authorities from using the power, and to remove overlapping powers.
- 5.4. It does not provide local authorities with any new power to raise tax or precepts, or to borrow. Neither will the proposals enable councils to set charges for mandatory services, impose fines or create offences or byelaws affecting the rights of others, over and above existing powers to do so.

¹ <http://www.communities.gov.uk/documents/localgovernment/pdf/1829750.pdf>

- 5.5. Councils will also be required to act in accordance with statutory limitations or restrictions on their powers, including general public law constraints (such as the 'reasonableness' of decisions) and specific safeguards concerning the use of financial resources.

Issues for the council

- 5.6. The General Power has been described as a radical legal and constitutional step change from the existing 'creature of statute' regime. No doubt in time the courts will have opportunities to interpret the extent of the power including, importantly, how it will operate in practice.
- 5.7. At present most councils await further guidance on use of the power. The council has not yet identified a project or initiative that would exploit the provisions of the General Power. Pending the issue of detailed regulations, officers will continue to monitor activity by other councils and explore relevant opportunities.

6. THE TRANSFER AND DELEGATION OF LOCAL PUBLIC FUNCTIONS AND MINISTER'S FUNCTIONS TO COUNCILS

- 6.1. The Act provides for any local authority to make an application to the Secretary of State to take over other local public functions that are a high priority for their communities.
- 6.2. This provision came into force on 3 December 2011. It offers an opportunity to devolve decision-making to the lowest appropriate level and, potentially, more locally responsive public services. There is now a duty on the Secretary of State to consider such proposals from councils, considering whether a transfer would promote economic development or wealth creation, or increase local accountability.

Issues for the council

- 6.3. Under the Act the Secretary of State is allowed to set out in regulations the criteria to which he or she should have regard in considering any relevant proposal and these are awaited. As with the General Power of Competence, pending the issue of detailed regulations, officers will continue to monitor activity by other councils and explore relevant opportunities.

7. CHANGING GOVERNANCE ARRANGEMENTS

- 7.1. The Act introduces a further form of local authority governance, in addition to the leader and cabinet mayor and cabinet models. As promised by the Coalition government, councils now have the option of adopting a committee system. It will also be possible for councils to propose an alternative model which can be accepted by the Secretary of State if it meets certain criteria. There are also changes to the procedures for district councils that decide to move to a scheme of whole council elections.
- 7.2. Under the Scrutiny provisions the Act removes prescription about matters which may be referred to scrutiny by those councillors who are not members of a scrutiny committee. It also puts the scrutiny committees in district councils in an equivalent position to those of other authorities by allowing them to hold partner authorities to account.

Issues for the council

- 7.3. Under the Act the Secretary of State is allowed to set out in regulations the criteria and these are awaited.

8. PREDETERMINATION

- 8.1. The Act clarifies that the normal activities of a councillor – such as campaigning, talking with constituents, expressing views on local matters and seeking to gain support for those views – “should not lead to an unjust accusation of having a closed mind on an issue that can lead to a legal challenge.”

Issues for the council

- 8.2. All members have been issued with advice on predetermination by the council's Monitoring Officer.

9. STANDARDS

- 9.1. The new arrangements for local authority standards came into force on 1 July 2012. These include a requirement for councils to:
- Adopt a code of conduct for members that is compliant with the 'Nolan' principles of standards in public life and for Members to register and disclose pecuniary interests as defined in regulations.
 - Include the involvement of an Independent person providing assurance that the new arrangements will not be abused.

Issues for the council

- 9.2. The council's new arrangements were reported to the Standards Committee on 21st June and these will be ratified by full council on 17th July.
- 9.3. The Monitoring Officer has drawn Members' attention to the new criminal offence of failing to disclose a pecuniary interest where a person fails, without reasonable excuse, to notify the Monitoring Officer of a disclosable pecuniary interest, or participates in any discussion or vote at a meeting where he/she had a disclosable pecuniary interest.

10. PAY ACCOUNTABILITY

- 10.1. Local authorities must now publish a pay policy statement every year. The statement must articulate an authority's own policies towards the pay of its workforce, particularly its senior staff and its lowest paid employees. The statement must be approved by full council and published on the website.

Issues for the council

- 10.2. The council's 2012-13 pay policy statement was submitted to Executive on 7th February and full council on 21 February 2012. Further work will continue in the coming year on the council's remuneration policies and procedures prior to publication of the 2013-14 pay policy statement.

11. COUNCIL TAX REFERENDUMS

- 11.1. The Act includes provisions for the Secretary of State to propose principles defining an excessive increase in council tax for any financial year. Each local authority must determine whether its council tax increase is excessive by reference to the principles and, if so, arrange for a referendum to be held. It must also make substitute calculations which would result in a non-excessive increase in council tax, and which would apply if the authority's council tax increase is rejected in a referendum. The result of the referendum will be binding.

Issues for the council

- 11.2. For 2012-13 the principles defined that a referendum would be triggered if the council tax increase exceeded 3.5%. The principles for 2013-14 are expected in January 2013 and these will be considered as part of the council's budget setting process.

12. COMMUNITY RIGHT TO CHALLENGE

- 12.1. Under the community right to challenge (CRTC) a broad range of alternative service providers are able to submit an expression of interest to run a council service, or part of a service. The council must consider expressions of interest and, where it accepts them, run a procurement exercise for the service. The challenging organisation, and other interested parties, can take part in this exercise.

- 12.2. The CRTC commenced on 27 June 2012.

Issues for the council

- 12.3. The procedure for dealing with a CRTC is largely prescribed in the Government's statutory guidance. However, it is proposed that the council adopts its own guidance, which covers both the statutory provisions and the council's procedures for responding to a challenge. Draft guidance is included at Annex A. In summary, this covers:

- What is meant by a community right to challenge
- Who can make a challenge
- Which services can be challenged
- How and when a challenge can be made
- How and when the council will deal with a challenge.

- 12.4. The statutory guidance entitles the council to set a timeframe during which expressions of interest must be submitted. For example, the council may decide that expressions of interest should only be made in January of each year, or January and June of each year. However, as the volume of potential challenges is currently unknown it is proposed that, subject to review every 12 months, no timeframe is set at this time. Expressions of interest for services can then be submitted at any time during the year (excluding those services which are already contracted out where the date of contract renewal will determine the timeframe). This position is reflected in paragraph 5 of the attached draft guidance.

13. ASSETS OF COMMUNITY VALUE

- 13.1. Otherwise known as 'the community right to bid', these provisions provide extra time for parish councils and local voluntary and community groups to prepare their bid to purchase a listed community asset should the current owner choose to dispose of it.
- 13.2. Local authorities will be required to maintain a list of public or private assets of community value and put it forward for consideration by communities. As and when listed assets come up for disposal (either the freehold or a long leasehold), communities will be given the chance to develop a bid and raise the capital to buy the asset. If local groups are interested in buying the asset they will have six months to prepare a bid to buy it before the asset can be sold.

Issues for the council

- 13.3. Detailed regulations are awaited on the introduction of the community right to bid. Responsibility for this function will sit within City Development and the Projects and Business Manager will oversee the register of Assets of Community Value. When detailed regulations are published local guidance, similar to the attached draft guidance for the community right to challenge, will be prepared. The Government recognises that the Right to bid places an administrative burden on district councils and has agreed to make provision for compensation.

14. INFORMATION ON THE LOCALISM ACT

- 14.1. A simple guide to the Localism Act has been published on the council's web site to ensure that it is well-prepared to respond to public demand for these measures and to explain what the public can expect.

15. RECOMMENDATIONS

- 15.1. It is recommended that Executive:
- (i) Notes progress on the various provisions of the Localism Act.
 - (ii) Identifies any issues for the council in addition to those set out above.
 - (iii) Supports the proposal in paragraph 12.4 to not set a timeframe for expressions of interest under the community right to challenge, subject to review of this position every 12 months.
 - (iv) Agrees the Council's draft guidance on the community right to challenge at Annex A.

CHIEF EXECUTIVE

Local Government (Access to Information) Act 1985 (as amended) Background papers used in compiling this report:

Localism Act 2011
Community Right to Challenge: Statutory Guidance (Draft). May 2012. Department for Communities and Local Government
Community Right to Challenge: Policy Statement. September 2011. Department for Communities and Local Government

LOCALISM ACT 2011

COMMUNITY RIGHT TO CHALLENGE

DRAFT GUIDANCE

Introduction

The Community Right to Challenge was introduced on 27th June 2012 as part of the Localism Act 2011. Under the right a broad range of alternative service providers can submit an expression of interest to run a council service, or part of a service. The council must consider expressions of interest and, where it accepts them, run a procurement exercise for the service. The challenging organisation, and other interested parties, can take part in this exercise.

In summary, this guidance explains:

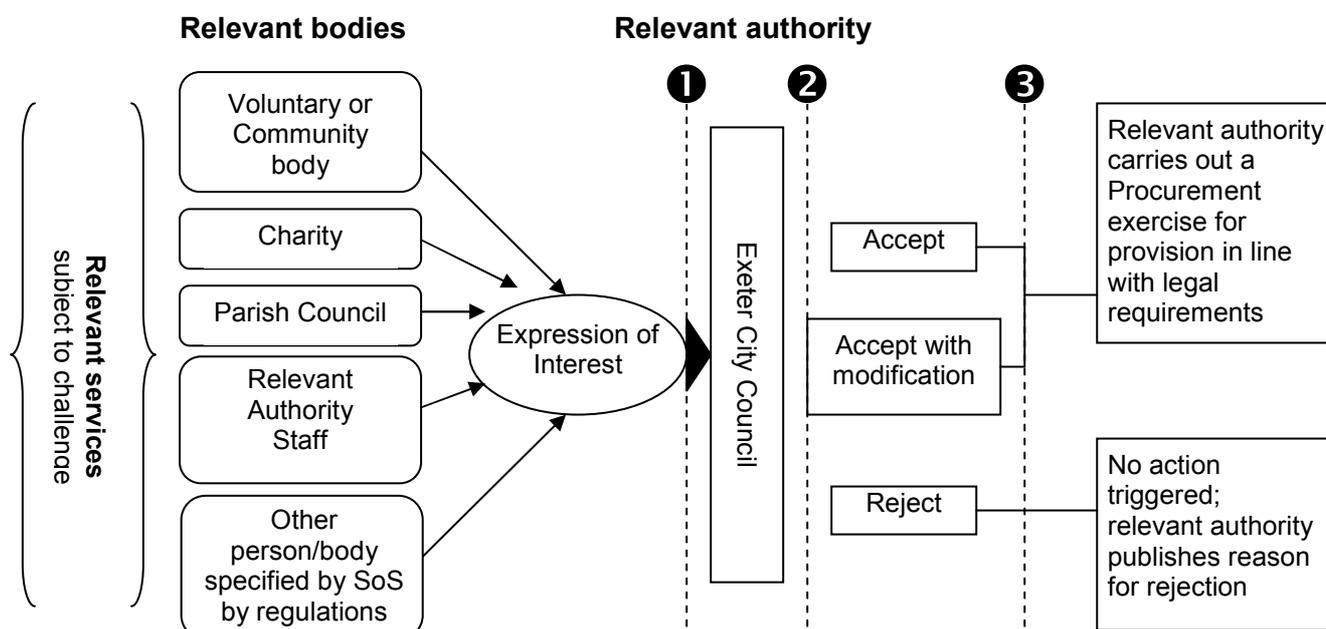
- What is a community right to challenge
- Who can make a challenge
- Which services can be challenged
- How and when a challenge can be made
- How and when the council will deal with a challenge.

Reference should also be made to the [Government's Statutory Guidance](#).

1. What is the community right to challenge?

Under the community right to challenge a 'relevant body' is able to submit an expression of interest to run a service, or part of a service for a 'relevant authority'.

The key elements of the process are captured in the diagram below.



2. Who can submit an expression of interest - what is a relevant body?

The following are relevant bodies that are eligible to submit an expression of interest:

- a voluntary or community body;
- a body of persons or a trust which is established for charitable purposes only;
- a parish council;
- two or more employees of the relevant authority; or
- any other person or body specified by the Secretary of State by regulations.

In the Act “voluntary body” means a body that is not 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.

A “community body” is a body which is not a public or local authority, the activities of which are primarily for the benefit of the community.

3. What is a relevant authority?

As a district council, Exeter City Council is a relevant authority. The following are also relevant authorities:

- A county council;
- A London borough council;
- Any other person or body carrying out a function of a public nature specified by the Secretary of State in regulations.

Certain fire and rescue authorities are also added as relevant authorities in the regulations.

4. What is a relevant service?

A relevant service is a service provided by, or on behalf of the council in the exercise of its functions (except services which are excluded from the right in secondary legislation).

The right only applies to the provision of services. It does not provide for delegation of the council's "functions". Generally speaking, a function is a duty or power that requires decision-making by, for example, a responsible member or officer or a council committee, whereas a service does not. For example, decisions on planning applications would be a function, but waste collection is a service.

Under the regulations, a number of health and children's services are excluded from the right, either permanently or in most cases, until 1 April 2014. Services that relate to named individuals with complex needs, and services managed through direct payments are permanently excluded or treated as not falling within the scope of the right to challenge.

5. When can expressions of interest be submitted?

The council is entitled to specify a period during which expressions of interest can be submitted either for all services or for particular services.

At present the council has decided not to specify a period and expressions of interest may therefore be submitted at any time. This position will be reviewed every 12 months (starting in July 2013).

For services or parts of services currently provided by bodies other than the council, those submitting expressions of interest should note that contractual obligations may mean there is an extended timescale for the council to make a decision on an expression of interest.

The community right to challenge is not a right to deliver the service if an expression of interest is submitted or accepted. It is for the council to decide, in line with statutory provisions, whether to reject or accept (with or without modification) an expression of interest.

6. How do I submit an expression of interest?

An expression of interest form is available on the council's website ([Click Here](#)).

All expressions of interest should be sent to:

Corporate Manager
Policy, Communications and Community Engagement
Exeter City Council
Civic Centre
Paris Street
Exeter
EX1 1JN

policy.unit@exeter.gov.uk

7. What information should be included in an expression of interest?

In order to initiate a challenge a relevant body must submit an expression of interest that includes the following information:

- (i) details of how they meet the definition of a relevant body;
- (ii) details about their financial resources;
- (iii) evidence that demonstrates that by the time of any procurement exercise the relevant body will be capable of providing or assisting in providing the relevant service;
- (iv) details of the relevant service sufficient to identify it and the geographical area to which the expression of interest relates;
- (v) details 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 services, in particular:
 - a) how the provision or assistance will promote or improve the social, economic or environmental well-being of the relevant authority's area; and
 - b) how it will meet the needs of the users of the relevant service.
- (vi) where the relevant body consists of employees of the council details of how that relevant body proposes to engage other employees of the council who are affected by the expression of interest.

Where the relevant body proposes to deliver the relevant service as part of a consortium or to use a sub-contractor for delivery of any part of the relevant service, the information under

(ii) and (iii) must be given in respect of each member of the consortium and each sub-contractor as appropriate.

8. What will the council do when it receives an expression of interest?

When an expression of interest is received by the council, we will notify the relevant body in writing of the timescale within which we will reach a decision. We will do this either within 30 days after the close of any period specified or, if no such period has been specified within 30 days of receiving the expression of interest. We will publish this on our web site. Different periods may be specified for different cases.

A panel consisting of the service manager responsible for the service, the relevant Portfolio Holder, the Assistant Director, an officer from the Contracts Unit with procurement expertise and one member from the two opposition groups will consider expressions of interest.

The panel will review the expressions of interest against the required information outlined above (see section 7) and the grounds for rejection (see section 9 below).

A report will be presented to Scrutiny Committees on an annual basis detailing expressions of interest received and the decisions made. The report will be published on the council's website.

9. When can the council reject an expression of interest?

Expressions of interest can be rejected on one or more of the following grounds:

- (i) the expression of interest does not comply with any of the requirements specified in the Act or in regulations
- (ii) the relevant body provides information in the expression of interest which in the opinion of the relevant authority, is in a material particular inadequate or inaccurate
- (iii) the relevant authority considers, based on the information in the expression of interest, that the relevant body or, where applicable -
 - a) any member of the consortium of which it is a part, or
 - b) any sub-contractor referred to in the expression of interestis not suitable to provide or assist in providing the relevant service
- (iv) the expression of interest relates to a relevant service where a decision, evidenced in writing, has been taken by the relevant authority to stop providing that service
- (v) the expression of interest relates to a relevant service -
 - a) provided, in whole or in part, by or on behalf of the relevant authority to persons who are also in receipt of a service provided or arranged by an NHS body which is integrated with the relevant service; and
 - b) the continued integration of such services is, in the opinion of the relevant authority, critical to the well-being of those persons
- (vi) the relevant service is already the subject of a procurement exercise
- (vii) the relevant authority and a third party have entered into negotiations for provision of the service, which negotiations are at least in part conducted in writing
- (viii) the relevant authority has published its intention to consider the provision of the relevant service by a body that 2 or more specified employees of that authority propose to establish
- (ix) the relevant authority considers that the expression of interest is frivolous or vexatious
- (x) the relevant authority considers that acceptance of the expression of interest is likely to lead to contravention of an enactment or other rule of law or a breach of statutory duty

If the council rejects an expression of interest it must give reasons in its notification to the relevant body and also publish the notification on the council's website.

There is no appeals process to the community right to challenge therefore it could be subject to judicial review.

10. What happens when the council accepts an expression of interest?

Where it accepts an expression of interest the council must carry out a procurement exercise relating to the provision of the relevant service in which the relevant body can bid alongside others. This means the relevant body that triggers the exercise may not eventually be the provider of that service.

11. What happens if the council wants to modify an expression of interest?

Any modification must be agreed with the relevant body submitting an expression of interest. If an agreement cannot be reached, the council may reject the expression of interest.

If the council accepts with modification an expression of interest it must publish the reasons for its decision which must include publication on the council's website. A procurement exercise must then be carried out.

12. How will relevant bodies be informed of the decision on the expression of interest?

The council will notify the relevant body in writing of its decision on an expression of interest and will specify the period between an expression of interest being accepted and a procurement exercise starting. This aims to allow relevant bodies the time they need to prepare to compete in the procurement exercise. Details of the expressions of interest received and the decisions made will be published on the council's website.

13. When will a procurement exercise be carried out?

A procurement exercise will be carried out when the council accepts one or more expressions of interest for a relevant service. The procurement exercise will be led by the Contracts Unit and will be appropriate to the value and nature of the contract.

Where the service is of a value or nature to which the Public Contracts Regulations 2006 apply and/or is not listed as an exempt service in Part B of those regulations, the procurement exercise must follow procedures for advertising, tendering and awarding contracts set out in those regulations.

Other organisations may bid in the procurement exercise that follows a successful challenge relating to the provision of the service – these could include other relevant bodies, or private sector organisations.