

11-19 Best value: new draft statutory guidance consultation

To all APSE main contacts in England and for information to Wales, Scotland and Northern Ireland

Key issues;

- The Government has launched a consultation paper on draft statutory guidance to replace existing Best Value guidance. The draft guidance includes a revocation of statutory guidance on
- 'Creating, Strong, Safe and Prosperous Communities',
- ODPM circular 03/2003 - including The Code of Practice on Workforce Matters and The Handling of Work Force Matters in Contracting
- Repeal of the Duty to Involve and
- Repeal of the Duty to prepare a sustainable community strategy

1. Introduction

The local authority Best Value duty, and guidance relating to it, has been the subject of much debate and discussion since the formation of the Coalition Government. The Coalition Agreement entered into by the Conservative Prime Minister and Liberal Democrat Deputy Prime Minister committed the Coalition to introduce a Power of General Competence for local government, light-touch inspection and the greater involvement of the third sector in the delivery of public services. It was therefore anticipated that amendments to the Best Value framework would be forthcoming.

2. Background to the reform of the Best Value framework

A number of measures have already been taken by Government which have a fundamental impact on local authorities (predominantly affecting English rather than UK wide local councils).

In June 2010 Communities Secretary Eric Pickles announced the abolition of the Audit Commission. Following this announcement a series of statements were then made to suggest that the audit and inspection of local councils needed to be subject to 'armchair auditors'. The secretary of state argued that local councils should be more readily able to share data with local taxpayers, including the publication of spending in an online format for items over £500 alongside the salary information of senior staff.

The Decentralisation and Localism Bill (herein after referred to as the Localism Bill) was then introduced in December 2010. Although the Bill is still subject to Parliamentary process the Bill contains a number of measures including a General Power of Competence which allows councils to have 'all the same powers that an individual generally has, which will enable them to do anything apart from that which is specifically prohibited' and it is argued that this will allow innovation in response to local need. In introducing the Bill, Government referenced this as a means to 'further reduce the burden of bureaucracy' as well as advancing the involvement of the third or social enterprise sector in the delivery of local public services.

The Government has also indicated it's support for a Private Members Bill namely the Public Services (Social Enterprise and Social Value) Bill 2010-11 ,sponsored by Chris White MP. If passed this would require local authorities, when entering into public procurement contracts, to give greater consideration to economic, social or environmental wellbeing during the pre-procurement stage and is designed to strengthen the role of the social enterprise or third sector in the delivery of public sector contracts.

The draft statutory guidance on Best Value continues these policy themes in that it places new requirements upon local authorities to be sensitive to the benefits and needs of voluntary and community sector and sets out certain measures to give effect to these aims. These are detailed below in section 3 and 4 of this briefing.

3. What is the draft Best Value Statutory Guidance?

Best Value Statutory Guidance (Draft)

1. Best value authorities¹ are under a general duty of best value 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." ² Under the duty of best value, therefore, authorities should consider overall value, including environmental and social value, when reviewing service provision.
2. To achieve the right balance – and before deciding how to fulfil their Best Value duty – authorities are required to consult a wide range of local persons, including local voluntary and community organisations and businesses.³ This should apply at all stages of the commissioning cycle, including when considering decommissioning services.
3. Authorities should be sensitive to the benefits and needs of voluntary and community sector organisations (honouring the commitments set out in local Compacts) and small businesses. Authorities should seek to avoid passing on disproportionate cuts and in particular:

An authority intending to reduce or end funding⁴ or other support to a voluntary and community organisation that will materially threaten the viability of the organisation or the service it provides should give at least three months' notice to both the organisation involved and the public/service users.

An authority should actively engage the organisation as early as possible on: the future of the service; any knock-on effect on assets used to provide this service; and the wider impact both on service users and the local community.

Authorities should make provision for the organisation or wider community to put forward options on how to reshape the service or project. Local authorities should assist this by making available all appropriate information, in line with the Transparency Code of Practice.⁵

4. What do the reforms mean?

Whilst the draft statutory guidance appears to be of limited impact, in terms of involving and consulting the voluntary and community sector and small business, particularly, in decisions where funding may be reduced or withdrawn, the Government has taken the opportunity to introduce more sweeping reforms to the Best Value framework. In doing so a number of existing provisions will be revoked or repealed as part of the new guidance. These are detailed below and are broadly termed by Government as 'deregulatory measures'.

Revocation of guidance on workforce matters ODPM circular 03/2003.

This guidance consists of two parts:

(a) The Code of Practice on Workforce Matters in Local Authority Contracts

'The Code of Practice on Workforce Matters in Local Authority Contracts' currently provides protection against a 'two-tier' workforce. It seeks to prevent new starters to council contracts working on overall less favourable terms and conditions of employment than those staff transferred under TUPE from a local authority. This code is being revoked. This was already announced by the Secretary of State Eric Pickles to the CBI conference on the 21 March 2011 in advance of the draft Statutory Guidance on Best Value being issued and was therefore not unexpected.

(b) Handling of Workforce Matters in Contracting

The Government also intends to revoke the ***Handling of Workforce Matters in Contracting*** which covers the terms and conditions of employment and arrangements for the promotion, transfer and training offered to workers by firms contracted to work on behalf of the local authority.

The Government's proposals are also to:

(C) Revoke the Statutory Guidance 'Creating Strong, Safe and Prosperous Communities'

This guidance was issued in July 2008 and includes various aspects of the old local performance frameworks including for example local area agreements. This statutory guidance also covered the relatively new 'Duty to involve' and the Sustainable Community Strategies.

(D) Repeal of the Duty to Involve

The duty to involve is itself being repealed. This duty provided that local authorities sought to ensure local people had greater opportunities to influence decision making and provided for consultation and involvement of representatives of local people across all council functions.

(E) Repeal of the duty to prepare a sustainable community strategy – The sustainable community strategies provided an overall strategic direction and vision for economic, social and environmental well being of an area, with each Principal Authority having a duty to consult with partner authorities.

5. Does 'Best Value' survive?

The general duty of Best Value is provided for under Section 3 of the Local Government Act 1999, as amended by s137 of the Local Government and Public Involvement in Health Act 2007 and will remain. For ease of reference the relevant provisions are replicated below:

The general duty is that

(1) A best value authority must 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.

(2) For the purpose of deciding how to fulfil the duty arising under subsection (1) an authority must consult—

(a) representatives of persons liable to pay any tax, precept or levy to or in respect of the authority,

(b) representatives of persons liable to pay non-domestic rates in respect of any area within which the authority carries out functions,

(c) representatives of persons who use or are likely to use services provided by the authority, and

(d) representatives of persons appearing to the authority to have an interest in any area within which the authority carries out functions.

(3) For the purposes of subsection (2) "representatives" in relation to a group of persons means persons who appear to the authority to be representative of that group.

(4) In deciding on—

(a) the persons to be consulted, and

(b) the form, content and timing of consultations,

an authority must have regard to any guidance issued by the Secretary of State.

The amendments presented by s.137 of the Local Government (Public Involvement in Health) Act 2007 were simplistic but for ease of reference are replicated below:

In section 3 of the Local Government Act 1999 (c. 27) (best value authorities: general duty), for subsection (4) substitute—

"(4) In deciding—

(a) how to fulfil the duty arising under subsection (1),

(b) who to consult under subsection (2), or

(c) the form, content and timing of consultations under that subsection,

an authority must have regard to any guidance issued by the Secretary of State."

The overall duty of Best Value survives the proposed changes. However, the amendments which remove some of the later supporting provisions such as the *Code of Practice on Workforce Matters* and guidance on *The Handling of Workforce Matters in Contracting* do not.

6. APSE comment

It has long been anticipated that the Government would seek to amend the existing Best Value framework and provide a more robust footing to develop its ideas on the Big Society. In justifying the proposed changes to Best Value DCLG has argued in the consultation paper that *'the Government is acting in a concrete way to deliver on its commitment to localism, growth and the Big Society'* and that the new guidance is *'minimal, light touch statutory guidance setting out clear expectations when councils consider cutting funding to local voluntary and community organisations.'*

The new requirements to consult VCSE groups before funding or support changes which *'materially threaten the viability of the organisation or service it provides'* is not in itself contentious as this should already be embedded as best practice within local authorities. However, local councils may be angered by direction on these issues from central government given the purported moves to a more localist agenda since the statutory guidance seeks to place a moratorium of 12 weeks before cuts could be made to voluntary or charity funding or support (though this would seem to be a fairly unworkable or enforceable provision.)

However, the changes to revoke the *Code of Practice on Workforce Matters* and the *Handling of Workforce Matters in Contracting* could be construed as picking an unnecessary fight with local government and its workforce. These provisions were important provisions to protect the public sector purchasers and their staff from contractors bidding on the basis of crude cost cutting measures. They were specifically designed to ensure that contracts were not awarded at the expense of wages and enshrined quality, as a balanced measure with cost, as part of the contracting process. More enlightened contractors recognised the value of a balance of cost and quality in contracting and both elements of the guidance were in fact developed in close association with contractors. The provisions relating to staff training and skills were equally designed to ensure that quality was at the heart of the framework and that those providing public service contracts were suitably trained for the job, again driving quality rather than price only considerations.

The draft guidance, in accordance with requirements, carries an Equality Impact Assessment (EIA) but this is, in APSE's view, a rather poorly considered assessment in this case. Whilst the EIA quotes the percentages of Voluntary, Community and Social Enterprise Organisations which benefit certain groups (from the changes) the Equality Impact Assessment fails to make any similar comparisons to those groups, including specifically the local authority workforce and local communities, generally served by the local authority. These groups may be beneficiaries of the existing guidance that it is proposed to be withdrawn and they could be subject to a potential adverse affect which a properly conducted EIA would at least consider.

Moreover it is widely accepted that the local government workforce is predominantly female and that there are pockets of low paid female workers who might again be beneficiaries of the existing guidance, protecting any diminution in pay, terms and conditions and training and skills. The EIA states that it will keep the need for a full Equality Impact Assessment under review (a full assessment has not yet been carried out) and APSE believes that this is essential before these proposals are given statutory effect through new guidance.

In any event the Government has already pledged to support a private members Bill sponsored by Chris White MP, The Social Enterprise and Social Value Bill which seeks to enshrine in law a requirement that the Secretary of State and local authorities publish strategies in connection with promoting social enterprise; to enable communities to participate in the formulation and implementation of those strategies; and to require that public sector contracts include provisions relating to social outcomes and social value; and for connected purposes. Arguably therefore this Bill would have enhanced existing Best Value guidance in terms of its application to decision making that has an impact on local third sector organisations, alongside local business and therefore it is questionable whether the new guidance, as it relates to these specific groups is necessary.

The Secretary of State would undoubtedly argue that this new guidance is essential to prevent unnecessary and disproportionate cuts impacting upon the third sector. Councils would no doubt respond to that argument by saying that such guidance

undermines the prospective new powers provided under the Decentralisation and Localism Bill which purports to offer a General Power of Competence and greater autonomy over local decision making.

APSE member views

APSE intends to formally respond to the draft guidance through the consultation process with DCLG. We would therefore welcome your views on the key issues including:

- Do you agree or disagree with the new draft guidance in terms of the guidance as it relates to the third sector?
- Do you agree or disagree with the revocation and repeals of
 - The Code of Practice on Workforce Matters
 - The Handling of Workforce Matters in Contracting
 - The removal of the 'Duty to Involve'
 - The revocation of 'Strong, safe and prosperous communities'

Please email your comments to Mo Baines at APSE on mbaines@apse.org.uk.

APSE would also welcome the views of both members and contractors on the merits of a replacement memorandum of understanding to ensure best practice in local authority contracting which would include avoiding the development of a two tier workforce, ensuring training, skills and quality in contracts and the use of community benefit clauses in procurement.

Mo Baines
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¹ A local authority; a National Parks authority; the Broads Authority; police and fires authorities, the London Fire and Emergency Planning Authority; a Waste Disposal Authority, Joint Waste Authority, an Integrated Transport Authority; Transport for London; the London Development Agency. See Section 1 of the *Local Government Act 1999*. Economic prosperity boards established under section 88 and Combined Authorities established under section 103 of the *Local Democracy, Economic Development and Construction Act 2009*.

² Section 3 of the *Local Government Act 1999* (as amended by s137 of the *Local Government & Public Involvement in Health Act 2007*).

³ Section 3(2) of the *Local Government Act 1999*.

⁴ Where "funding" means both grant funding and any fixed term contract, where, on the basis of past practice the organisation might have some basis for expecting the funding or contract to be continued.

⁵ Ministers are currently considering responses to the consultation on the Code, which closed on 14 March 2011.