

## **11-52 'Community Right to Challenge' policy statement**

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

### **Key issues;**

- The new 'Community Right to Challenge' has caused some concerns within local authorities particularly as a number of issues are subject to further guidance
- APSE consulted our members and responded to consultation on the proposals
- Government has now issued a policy statement setting out its latest position on a number of matters raised by respondents to the consultation many of which will be viewed as helpful amendments by APSE member authorities.
- This briefing sets out Government's intentions on grounds to reject bids, timescales and an important matter in relation to employee based bids to run local services

### **1. Introduction**

The Community Right to Challenge is a new right provided under the Localism Bill which is detailed in APSE briefings 10-75 and 11-21 outlining how certain groups, including local authority employees can bid to run local services. The new Community Right to Challenge was subject to consultation and after our own consultation with our members APSE responded to Government raising a number of issues of concern.

Following the Bills progress Government has now issued a policy statement on the Community Right to Challenge, including amendments made to the Bill, in response to the consultation. This briefing outlines the main issues to emerge from the policy statement and developments in relation to the Community Right to Challenge.

### **2. About the Community Right to Challenge**

The Localism Bill gives communities a right of challenge to run local authority services. The Coalition Government believes that this means local communities will be able to get *'more involved in the delivery of public services and shape them in a way that will meet local preferences'*. The Bill sets out a process whereby a 'relevant body' can submit an expression of interest in providing or assisting in providing a service on behalf of the local authority, which is referred to throughout the legislation as the 'relevant authority'.

As the 'Right to Challenge' involves numerous definitions and mechanisms, in respect of the exercise of the Right to Challenge, there has been a detailed consultation

exercise and much debate about the mechanisms, and guidance needed, to give full effect to the Right to Challenge. This briefing highlights the salient changes which the Government has issued in its latest policy statement.

### **3. Relevant bodies**

The Bill allows for a 'relevant body' to express an interest in running a relevant local authority service. The initial definition of 'relevant body' included 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'.

The policy statement clarifies that this should also include organisations such as industrial and provident societies (co-operatives and community benefit companies) and community interest companies, where not all profits may be reinvested 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. The policy statement reflects that this should ensure large multi-national companies and big conglomerates cannot use the Right.

When APSE responded to the consultation we raised our members concerns that the 'relevant body' need not be a body with local connections and many members had raised concerns that larger regional or national charities could by default 'push out' local charities or groups using the Right to Challenge, and that this would create a perverse outcome. The policy statement confirms that ***'There is no requirement for a relevant body to have a local connections'***. This may be quite a disappointment to locally based charity or third sector groups.

The right to bid to take over services applies to public sector workers who are considered 'relevant authority employees' but the new policy statement says that Government does not intend to specify the sort of organisation employees should form to use the Community Right to Challenge. This would of course allow the employees to express an interest in running a service, under the Right to Challenge, but then, once the service is open to procurement, to bid under a number of forms such as a community interest company or indeed as a 'for profit' company. There are no guarantees that the employees would form 'employee co-operatives or mutuals' or operate on a non profit making basis even if the Right to Challenge is triggered using the route of a 'relevant authority employees'.

### **4. Procurement issues**

APSE raised concerns during the consultation period that regardless of the Community Right to Challenge local authorities would still need to comply with relevant procurement regulations. This is now reflected and confirmed in the policy statement, which confirms that the relevant authority, following acceptance of an expression of interest, would need to enter into a procurement exercise but that the procurement would be subject to the Public Contract Regulations 2006. There will be a requirement by virtue of clauses 71(5) and 71(6) when considering an expression of interest, and subsequent procurement exercise, to consider how that it could promote or improve the social, economic or environmental well being of its area but this must also be

within the boundaries of procurement law. [A helpful guide on these issues has already been produced by APSE and includes an interactive toolkit.](#) It is clear that regardless of the stated intentions local authorities will need to be mindful of and compliant with public procurement rules, including where appropriate European public procurement regulations.

## **5. Information in an expression of interest and grounds for rejecting an expression of interest**

Government wanted to ensure a balance between a disproportionate burden, being placed on those who want to exercise the Right to Challenge and place an expression of interest in running local services, and the public bodies, who would, on acceptance of an expression of interest in running a service, need to move into a potentially expensive and complex procurement exercise. There was a recognised need for a sensible balance to avoid any frivolous or vexatious use of procedures and an overly bureaucratic and burdensome process that would put-off potential involvement.

Government now intends to provide for the following information to be included within 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 is 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.*

Government intends 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.*

Government no longer intends to specify the following information proposed in the consultation:

- *the relevant body's case for providing the service. (Government has said that other information they 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** was a major concern to APSE. A number of factors were raised by our members in response to the consultation exercise and APSE's subsequent response on behalf of our members. The following are now intended to form the grounds for rejecting an expression of interest:-

- *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;*

Government also intends to provide the following grounds proposed in the consultation but with certain amendments:-

**'The expression of interest does not include all the required information'** will be amended to say instead that **"the relevant body provides unsatisfactory, inadequate or incorrect information in the expression of interest"**. This appears to be a sensible approach because it 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'** will be amended to **"the authority believes that acceptance of the expression of interest would lead to contravention of an enactment or a rule of law."** This again is a sensible amendment. APSE in its response to the consultation pointed out that local authorities must comply with a wide range of legislation including the statutory Best Value Duty (which although recently amended the overriding duty remains. See APSE briefing 11-53). Therefore 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 an authority's duties under the Equalities Act 2010.

## **6. Grounds for exempting services and extending the right to other public bodies**

No specific services or principles for exempting a service or services have been identified as the consultation did not reach any kind of consensus. Clause 69(4) however enables the Secretary of State to specify in regulations which services may be excluded from the right.

Similarly there was not a consensus reached on extending the right to challenge to other public bodies. Views were specifically sought on extending the right to challenge to all Fire and Rescue Authorities. Some are of course provided for as they fall under County Councils but others are not. Similarly some suggested that the right be extended to 'all public bodies'. As no consensus was reached there are ongoing

discussions with representatives of the Fire and Rescue sector. In terms of extending the powers to other public bodies through the Delegated Powers and Regulatory Reform Committee the Government is now proposing a further amendment to make the power to add relevant authorities exercisable by affirmative resolution.

## 7. Timescales

As part of the consultation process views were sought on the mechanism by which timescales would be set for local authorities to consider expressions of interest made under the right to challenge.

In our response to the consultation APSE expressed concerns that central direction on timings, in which a local authority would need to comply at a local level, would be unworkable. This was a view shared by many respondents to the consultation. Government has now conceded this point and agrees that rather than timetables being set centrally local authorities will have the ability to set their own timescales in order to synchronise with commissioning cycles for local services. As a result of this rather than a power for Government to set timescales centrally there will be a **new requirement on local authorities** to publish their own timescales but that these will need to have regard to factors which will be set out in guidance.

The factors in the guidance are likely to include:-

- 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 (e.g. Council Cabinet decision making or budget setting).

Similarly the timescale for notifying relevant body of a decision on an expression of interest will now be determined locally but there will be a requirement on the 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. Factors to be considered in setting the timescales (the need to notify relevant bodies of a decision within a reasonable period) are proposed to include:-

- the nature, scale and complexity of the service to which expressions of interest relate (e.g. 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 (e.g. 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 (e.g. Council Cabinet decision making or budget setting).

## 8. APSE commentary

Many of the amendments proposed will be viewed as helpful by APSE member authorities and address the concerns raised by APSE in response to the consultation. This is particularly the case when considering the need for local authorities to have regard to Best Value (see latest APSE briefing 11-53) and other statutory and non-statutory considerations when determining the most effective way to run local services. It is welcomed that the grounds for rejection appear to be reasonably broad, whilst sensibly balancing the intended new rights to be properly considered by local authorities. However the real test will be what further guidance is issued by the Secretary of State. It is hoped that in the interests of a truly localist agenda the tendency for central Government to intervene in local matters will be resisted and any further guidance will be sensible, light touch and workable to enable local elected members to determine local responses and meet local needs.

APSE also welcomes the ability for timescales in considering expressions of interest to be determined locally, again subject to guidance, rather than the imposition of timescales from central Government.

One area that does however cause concerns is that relating to expressions of interest coming forward from public sector workers. The new policy statement says that Government **does not intend** to specify the sort of organisation employees should form to use the Community Right to Challenge. Thus far this proposed new right, allowing public workers to take over running public services, has been expressed in terms of developing co-operative or mutual approaches to public service delivery. In reality the new right could just as easily see public workers setting up 'for profit' companies to run local services, subject of course to procurement exercises, even though the Right to Challenge is triggered using the route of a 'relevant authority employees' under the Localism Bill. This is at odds with numerous ministerial statements including one made by Francis Maude on the 17 November 2010 where Mr Maude stated that he expected that 'staff taking part in the scheme [Right to Challenge] would *'continue to be paid by the state and would not be able to receive a financial return on shares owned in the mutual'*. However, if there is nothing to fetter public sector workers placing a bid based on a for-profit operating basis, it is irrelevant whether or not a mutual route would prevent a financial return since there is no compunction on the bidding workers to provide the services under a mutual or co-operative arrangement. This raises the spectre of management buy-out arrangements or ESOPS (Employee Share Ownership Plans) most commonly associated with the outcomes of bus deregulation in the 1980's.

This latest policy development also runs against the thrust of announcements made by the DCLG ministerial team on the 11 December 2010. In trailing new powers for 'employee led' models of service delivery the DCLG closely linked suggestions that this would be through co-operative or mutual routes. APSE is not suggesting that co-operatives or mutuals should be the only way forward for employee led options. Indeed our comprehensive study, carried out in partnership with De Montfort University and the international KTP (Knowledge Transfer Programme) '[Proof of Delivery](#)' seriously questions the evidence of service improvement, or costs savings, to be achieved through the co-operative or mutual routes. Nevertheless it is interesting that the final new rights are simply to open up public services to bids, without any fetters on the nature of the eventual service provider models, despite previously the employee led 'Right to Challenge', being announced as a means of developing employee led co-operatives and mutuals in local service delivery.

APSE has also pointed out to member authorities and to central Government that should expressions of interest in services be accepted, and thus subject to a procurement exercise, it will be difficult for local authorities to determine the outcomes of that procurement exercise. Services could just as easily be awarded under contract to the private sector as to any voluntary or third sector group, albeit Government has attempted to restrict expressions of interest coming from large conglomerates. It should be noted that once a procurement route is opened up it will be difficult to exclude bidders from such companies or organisations.

APSE has strongly argued for a collaborative approach to service delivery and local outcomes, rather than Government attempting to influence or steer local choices in service delivery. Mechanistic legislative processes will always be potentially open to unintended consequences.

APSE will be considering how local authorities could look to develop responses to the new Right to Challenge, through our new advisory group which is the 'Service Delivery Models Group'. For details of this new group which is free for member authorities to attend please email Mo Baines on [mbaines@apse.org.uk](mailto:mbaines@apse.org.uk).

Mo Baines

Principal Advisor