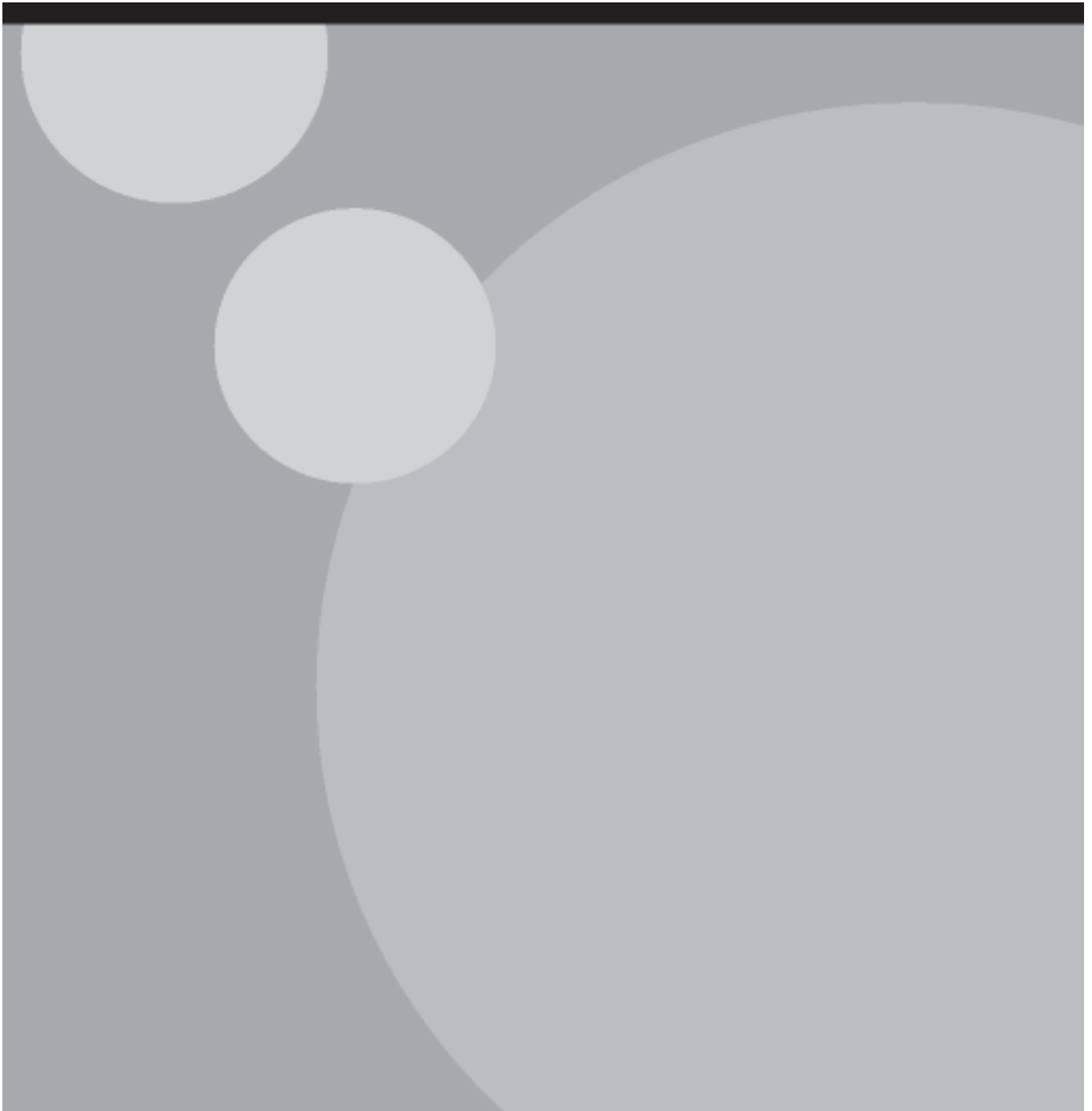




Community Right to Challenge Statutory Guidance





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May 2012
Department for Communities and Local Government

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Ministerial foreword

The Localism Act 2011 is driving a shift in power away from Whitehall and handing it back to communities, giving them more opportunities to take control locally.

The new community rights in the Act will help to create the conditions for communities to play a bigger part in shaping the world around them - whether that's shaping and running local services through the community right to challenge, taking over local assets of community value through the community right to bid, community-led development using the community right to build, or adopting a neighbourhood plan under neighbourhood planning.

Communities rightly have high expectations of local services that offer excellent value for money. But local authorities do not have to have a monopoly over service delivery in the area to ensure excellent services. Nor do they have to have all of the good ideas for where improvements can be made. The most creative authorities welcome innovative ideas from communities about how services can be reformed and improved to better meet local needs, and work with groups who believe they can run services differently and better.

The community right to challenge paves the way for more communities to help shape and run excellent local services. This might include making services more responsive to local needs, offering additional social value outcomes, or delivering better value for money. It may act as a springboard for radical re-shaping of services, or simply trigger small changes that will make a big difference to the quality of service communities receive.

Every council should be looking carefully at how they can improve local services, deliver better value for money, and empower their communities to do more. I hope that they will embrace the community right to challenge as a positive tool that will help them to achieve these aims.



Andrew Stunell MP
Parliamentary Under Secretary of State

Introduction

Scope of the guidance

- i. This guidance provides further explanation of the legislative framework for the community right to challenge. This is contained in Part 5, Chapter 2 of the Localism Act 2011, The Community Right to Challenge (Expressions of Interest and Excluded Services) (England) Regulations 2012, and The Community Right to Challenge (Fire and Rescue Authorities and Rejection of Expressions of Interest) (England) Regulations 2012.
- ii. The Localism Act (“the Act”) was enacted on 15 November 2011. However, Community Right to Challenge provisions will be commenced at the same time as the Regulations made under those provisions comes into force, which is expected to be 27 June 2012. The Regulations are subject to Parliamentary approval. As such, this guidance is published in draft, with a final version to be published when provisions come into force.
- iii. The Regulations:
 - a) Specify information required in an expression of interest;
 - b) Specify grounds whereby an expression of interest may be rejected;
 - c) State which kinds of services are excluded from the Right; and
 - d) Add certain fire and rescue authorities as relevant authorities.
- iv. The guidance only applies to England.
- v. A glossary of terms is at Annex A at the end of this guidance.

Section 1

Relevant authorities and relevant bodies

- 1.1 The community right to challenge refers to two sets of bodies. Relevant authorities must consider expressions of interest and, where they accept an expression of interest, carry out a procurement exercise for the service. Relevant bodies are eligible to submit expressions of interest to deliver relevant services on behalf of relevant authorities.

Relevant authorities

- 1.2 The Act lists the following as relevant authorities:
- a) A county council;
 - b) A district council;
 - c) A London borough council; or
 - d) Any other person or body carrying out a function of a public nature specified by the Secretary of State in regulations.¹
- 1.3 Certain fire and rescue authorities are added as relevant authorities in the Regulations. Many fire and rescue authorities will already be relevant authorities by reason of being a local authority.

Relevant bodies

- 1.4 The Act lists the following as relevant bodies:
- a) A voluntary or community body;
 - b) A body of persons or a trust which is established for charitable purposes only;
 - c) A parish council;
 - d) Two or more employees of the relevant authority; or
 - e) Any other person or body specified by the Secretary of State by regulations.

Voluntary and community bodies

- 1.5 A voluntary body is a body that is not a public or local authority, the activities of which are not carried on for profit. It can generate a surplus provided it is used for the purposes of its activities or invested in the community.

¹ These refer to the legal status of a body. Unitary authorities fall within these categories.

- 1.6 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.
- 1.7 The definitions of voluntary and community body are intended to cover a wide range of civil society organisations. They reflect the required characteristics of such bodies rather than referring to types of organisational structure. This allows for flexibility to accommodate future forms of civil society organisation.
- 1.8 The Government expects the definition of voluntary and community body to include but not be limited to the following types of organisation:
- Community benefit societies (a type of industrial and provident society);
 - Co-operatives whose activities are primarily for the benefit of the community (another type of industrial and provident society);
 - Community interest companies;
 - Charitable incorporated organisations; and
 - Other incorporated forms of body such as companies limited by guarantee or shares where the company's Memorandum and/or Articles of Association state that the company's objects are in the interest of the community, rather than to make a profit for shareholders.
- 1.9 The way in which groups demonstrate community benefit will vary depending on their legal form and the associated requirements. Some examples are given below.

| Type of body | How community benefit is evidenced |
|--|--|
| Co-operative society | A body must register with the Financial Services Authority. It must set out the society's rules, including its activities, its character and how it is organised. This is where social and community objectives should be demonstrated. ² |
| Community benefit society | A body must register with the Financial Services Authority. Its reasons for registering must demonstrate its social objectives. It must state the society's rules and describe its activities, character and how it will be organised. It must also describe how its activities will benefit which communities, and how any surplus will be used. Its rules must not allow profit or the society's assets to be distributed to members, but that they are used to further the society's objectives. ³ |
| Company limited by guarantee or shares | A body for community interest registering with the Registrar of Companies at Companies House must provide a memorandum of association and articles of association. It may have an objects clause stating its aims and purpose. Although such objects may be commercial, if the business is a social enterprise, they must also relate to social and/or environmental objectives. ⁴ |

² Further information is available at: http://www.fsa.gov.uk/pubs/forms/MS_appform_notes.pdf

³ Ibid

⁴ Further information is available at: <http://www.businesslink.gov.uk>

- 1.10 Some voluntary and community bodies may be unincorporated associations - for example, an unincorporated association where the stated purpose of the association in its constitution is primarily to benefit the community. We would normally expect bodies that will be delivering contracts for local authorities and other public bodies to be incorporated with limited liability, to limit the risk to individual members. If a relevant body identifies a need to incorporate in order to be capable of providing a relevant service in its expression of interest, the period between an expression of interest being accepted and a procurement exercise starting (see Section 8) will provide an opportunity for this.

Charitable bodies

- 1.11 Bodies of persons or trusts established for charitable purposes only may be a voluntary or community body, but are eligible to use the right.

Parish Councils

- 1.12 Parish councils are not listed as relevant authorities. They are however relevant bodies and can submit an expression of interest to provide services relating to functions of relevant authorities. The term "parish council" includes those councils of parishes that bear the style of town and call themselves "town councils".

Employees of the relevant authority

- 1.13 The Government is committed to giving public sector workers the right to bid to take over running the services they deliver. Two or more employees of the relevant authority are eligible to use the right. We expect employees to form an employee-led structure to take on running services under the right. Employees are not expected to have finalised all of their arrangements before submitting an expression of interest. The period between an expression of interest being accepted and a procurement exercise being carried out (see Section 8) will help here.

Partnership working

- 1.14 Whilst only relevant bodies are eligible to submit an expression of interest, they may do so in partnership with other relevant bodies and/or non-relevant bodies. Indeed, such cooperation may strengthen a relevant body's case that it is capable of providing the service. Where a relevant body proposes to deliver a service in partnership with one or more other bodies, certain information must be provided in the expression of interest in respect of all partners (see Section 4).
- 1.15 Some relevant bodies will wish to form, or be part of a joint venture. Incorporated joint ventures (the joint venture is a body in its own right) will need to meet the definition of a relevant body to submit an expression of interest. One or more bodies in a contractual joint venture (co-operative arrangements between two parties that keep their separate identities) must meet the definition of a relevant body.

Section 2

Relevant services

- 2.1 The community right to challenge applies to all relevant services. A relevant service is a service provided by or on behalf of a relevant authority in the exercise of its functions in relation to England, except services which are excluded from the right in secondary legislation.

Functions and services

- 2.2 The right only applies to the provision of services. It does not provide for delegation of the functions of a relevant authority. The responsibility for the function itself remains with the relevant authority. The things that relevant authorities are required to do or may do, their functions, are many and varied as will be the services that it may be necessary to provide in order for the relevant authority to carry out those functions.

What constitutes a function and a service?

Example 1: Planning

Section 70(1) of the Town and Country Planning Act 1990 gives powers to local planning authorities to grant or refuse planning permission where a planning application is made to the authority. The right does not allow for the function of determining planning applications to be provided by a third party.

The delivery of planning functions, for example the processing of a planning application (not the decision), may be carried out by the local planning authority itself, or by a third party on behalf of the authority.

Example 2: Youth justice

The Crime and Disorder Act (1998) places a duty on local authorities to ensure there is appropriate provision of youth justice services. Decisions (reached following consultation with interested parties as part of the commissioning cycle) on which services are provided, where they are located, funding etc. are a function of the authority. The community right to challenge will not apply here.

Individual (parts of) services with young people to prevent further offending may be provided by the local authority, or by a third party on behalf of the authority. This means the authority would set out the requirements of the service as part of any procurement exercise which potential providers would bid to deliver. This may, for example, include addressing specific difficulties faced by young offenders, such as drug and alcohol problems or homelessness. The right will apply here.

Delegation of functions

- 2.3 Orders made by the Secretary of State under section 70 of the Deregulation and Contracting Out Act 1994 have authorised named persons to carry out specified local authority functions. In addition, local authorities may have arranged for other local authorities (which includes parish councils) or named committees or officers to discharge their functions, using powers in section 101 of the Local Government Act 1972. Where this is done the authority remains ultimately responsible for the discharge of the function. Services relating to those functions therefore remain within the scope of the right, unless they are excluded in the Regulations.

Jointly commissioned/provided services and shared services

- 2.4 Some services will be shared, jointly commissioned, or jointly provided by two or more relevant authorities, e.g. tri-borough arrangements between Westminster, Hammersmith and Fulham and Kensington and Chelsea Councils for education, adult social care and children's services. Here, those authorities should agree the relevant timescales and arrangements for considering and responding to expressions of interest and, where necessary, carrying out a procurement exercise for services.
- 2.5 Other services will be shared, jointly commissioned or jointly provided by one or more relevant authority and one or more non-relevant authority, e.g. a local authority working with an NHS body. Here the application of the right will depend on:
- a) Whether the service is excluded. Certain services are excluded from the Right until 1 April 2014; and
 - b) Where responsibility for the function lies. Only relevant services (i.e. those provided by or on behalf of a relevant authority in the exercise of its functions) are within the scope of the right; and only the relevant authority is required to consider and act on expressions of interest, though others are not prevented from doing so. It is recommended that relevant authorities should seek advice from NHS bodies in assessing expressions of interest to deliver health-related relevant services where appropriate, for example (after April 2014) for jointly-commissioned services. As a minimum, the NHS commissioner should be informed that an expression of interest has been submitted and is being considered by the relevant authority.
- 2.6 Services commissioned by a relevant authority on behalf of an NHS body (i.e. an NHS service) fall outside the scope of the right.

Excluded services

- 2.7 The following services are excluded from the community right to challenge, either for a limited period or permanently:
1. Until 1 April 2014, a relevant service commissioned in conjunction with one or more health services by a relevant authority or by a Primary Care Trust, NHS trust or NHS foundation trust (in this paragraph 2.8 referred to as an “NHS body”) under a partnership arrangement or by a relevant authority and an NHS body or a Strategic Health Authority, acting jointly.⁵
 2. Until 1 April 2014, a relevant service commissioned by an NHS body on behalf of a relevant authority.
 3. A relevant service commissioned or provided by a relevant authority in respect of a named person with complex individual health or social care needs.
- 2.8 Services under bullets 1 and 2 in paragraph 2.7 are excluded temporarily until 1 April 2014. This is to enable the NHS commissioners (the NHS Commissioning Board and local clinical commissioning groups) established by the Health and Social Care Act 2012, to have sufficient time to become fully operational, consider the contractual arrangements they have inherited from their predecessor NHS commissioners (primarily Primary Care Trusts) and develop new commissioning relationships with relevant authorities in the period up to April 2014. A relevant authority should be able to advise relevant bodies if the service they wish to challenge is covered by this time-limited exemption.
- 2.9 Sure Start Children’s Centres deliver both local authority and health services. There are many different delivery models for children’s centre services across the country. As indicated in bullets 1 and 2 of paragraph 2.7, where relevant children’s centre services have been commissioned jointly by a local authority and an NHS body or by the NHS on behalf of the local authority, these services will be excluded from the right temporarily until April 2014. However, this exclusion does not prevent relevant bodies from expressing an interest in running children’s centre services that are delivered directly by local authority employees or commissioned by a local authority acting alone (i.e. not jointly with an NHS body). The Government wants to see a wide range of providers running children’s centres across the country helping to improve outcomes for children and families. Relevant bodies should be able to express an interest in delivering most children’s centre services as soon as the relevant parts of the Act are commenced and regulations come into force.⁶

⁵ Partnership arrangements referred to here must be made in accordance with the NHS Bodies and Local Authorities Partnership Arrangements Regulations 2000.

⁶ Services commissioned or provided wholly by the NHS or by the local authority on behalf of an NHS body are out of scope of the community right to challenge.

- 2.10 Services commissioned or provided under bullet 3 of paragraph 2.7 are permanently excluded because those services relate to named individuals with complex needs. It is not the intention of the community right to challenge to directly or indirectly disrupt the package of care provided to an individual patient or service user, as such disruption could result in social or clinical disadvantages for that individual. Named patient or spot contracts are usually contracts for complex packages of NHS continuing health care and social care for individuals. Such packages may last for months or years, often involve nursing home care and often the service user and or family/ carers have been offered choices in relation to the providers of that care.

Direct payments

- 2.11 Services which are commissioned and managed by individuals or their representatives using direct payments, for example under The Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009 do not fall within the scope of the community right to challenge as the individuals or their representatives, as opposed to the relevant authority, commission the services. Direct payments are one way of giving people more choice and control over the services they receive. Individuals or their representatives are given funding in lieu of services. They use this money to arrange their own care and support which meets their needs in ways that are most appropriate for them.

Section 3

Submitting expressions of interest

- 3.1 Relevant authorities may choose to specify periods during which expressions of interest can be submitted in relation to a particular relevant service. They must publish details of any periods specified in a manner as they think fit, including on the authority's website. Specifying such periods will help authorities to manage the flow of expressions of interest and allow this to be synchronised with any existing commissioning cycles for services. Where authorities choose not to set periods, expressions of interest can be submitted at any time.
- 3.2 In specifying periods for submission of expressions of interest, relevant authorities should have regard to the following factors:
- a) *The need to provide relevant bodies with sufficient time to prepare and submit expressions of interest.* In considering this, authorities may take account of how much notice they are giving relevant bodies ahead of the period;
 - b) *The nature, scale and complexity of the relevant service for which a period is being specified.* For example, it may take relevant bodies longer to prepare expressions of interest for larger, complex services than smaller more straightforward ones; and
 - c) *The timescale for any existing commissioning cycle relevant to the service for which a period is being specified, or any other relevant authority processes.* These may include Council Cabinet decision making or budget setting processes.
- 3.3 Authorities opting to specify periods are encouraged to consider where such periods can be aligned to allow expressions of interest relating to two or more services to be submitted.

Section 4

Expression of interest requirements

- 4.1 Relevant authorities must consider an expression of interest submitted by a relevant body which is in writing and meets other requirements for such an expression of interest. These are specified in the Regulations. A relevant authority may refuse to consider an expression of interest submitted outside a specified period for submitting expressions of interest. Relevant authorities may request further information from relevant bodies but they cannot make inclusion of such information a requirement in order for the expression of interest to be considered. They should make it clear in any such request that provision of the further information is optional. Information outside the scope of requirements in the Regulations may not be used as a ground on which to reject an expression of interest. Relevant authorities should make this clear to relevant bodies.
- 4.2 Relevant authorities may require the information below to be provided in expressions of interest. They may also that require bodies demonstrate they meet the definition of a relevant body (see Section 1).

Information required in an Expression of Interest

1. 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 in paragraphs 2 and 3 must be given in respect of each member of the consortium and each sub-contractor as appropriate.
2. Information about the financial resources of the relevant body submitting the expression of interest.
3. 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.
4. Information about the relevant service sufficient to identify it and the geographical area to which the expression of interest relates.
5. 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:
 - (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.

6. Where the relevant body consists of employees of the relevant authority, details of how that relevant body proposes to engage other employees of the relevant authority who are affected by the expression of interest.

- 4.3 The Government has committed, in respect of the procurement exercises it runs, to eliminating the Pre-Qualification Questionnaire for procurement exercises under £100,000 and to ensuring that organisations should only have to provide Government with the information it requires once. The Local Government Association is also keen to help reduce the perceived and real barriers and bureaucratic processes on councils and businesses when services are procured through disseminating good practice across the local government sector.

Promoting or improving the social, economic or environmental well-being

- 4.4 Relevant authorities are required to consider social value of expressions of interest and in carrying out procurement exercises. This is also reflected in the Public Services (Social Value Act) 2012 and the general duty of best value in the Local Government Act 1999. Expressions of interest should demonstrate how the proposal might offer the social, economic or environmental benefits to the community and take into account social considerations, over and above the provision of the service. This could include creating local jobs, improving local skills, increasing local volunteering opportunities, or improving environmental conditions. An example is given below of how one organisation provides social value.

Example: Social value

Bulky Bob's, a social enterprise, has won contracts with Liverpool City Council and other authorities to collect, reuse and recycle bulky household waste. Bulky Bob's reuses and recycles 70% of the furniture and white goods, reducing the environmental impact and saving councils money in landfill costs. They have helped over 34,000 low-income families gain access to affordable furniture and run training programmes which have provided more than 250 long-term unemployed people with skills and experience. They assess that the social benefits to the community are 2.5 times the initial investment.

Service user needs

- 4.5 It is important that proposals in expressions of interest meet the needs of service users. In demonstrating how they will deliver outcomes that meet the needs of users of the relevant service, relevant bodies may refer to evidence such as needs assessments prepared by the relevant authority, or other sources. This may, for example, include a survey of service users conducted by the relevant body itself.

Employee engagement

- 4.6 How employees of the relevant authority engage with other relevant authority employees is best decided locally. Nonetheless, well-established staff engagement and governance channels could play a part. The face-to-face meetings, intranet updates and staff clinics undertaken when some 1,200 staff from Hull Primary Care Trust transferred to a social enterprise under the Right to Request scheme is an example of good practice. However, we would expect the level of engagement to be appropriate and proportionate to the size and nature of the service and the number of employees directly affected by the expression of interest. There is no requirement for a ballot to demonstrate support for a proposal under the NHS Right to Request or under the community right to challenge.

Section 5

Notifying decisions on expressions of interest

- 5.1 The relevant authority must specify the maximum period that it will take to notify the relevant body of its decision on an expression of interest and publish details of the specification including on its website. Different periods may be specified for different cases.
- 5.2 The relevant authority must also notify a relevant body that has submitted an expression of interest of the timescale within which the authority will notify the body of its decision.
- 5.3 The relevant authority must make this notification in writing. This must be done within 30 days after the close of any period specified by the authority for submitting expressions of interest or, if no such period has been specified, within 30 days of the relevant authority receiving the expression of interest.
- 5.4 In specifying periods for notifying relevant bodies of decisions on expressions of interest, relevant authorities should have regard to the following factors:
 - a) The need to notify relevant bodies of a decision within a reasonable period;
 - b) The nature, scale and complexity of the service to which expressions of interest relate (for example is the service shared with one or more other relevant authorities, or jointly commissioned with one or more other public bodies?);
 - c) The complexity of the expressions of interest received (for example do they propose radical change to the way a service is delivered?);
 - d) The likely need to agree modifications to expressions of interest in order to accept them (see Section 7); and
 - e) The timescales for any existing commissioning cycle relevant to the service which an expression of interest relates to, or any other relevant authority processes. These may include Council Cabinet decision making or budget setting processes.

Section 6

Grounds whereby an expression of interest may be rejected

- 6.1 Relevant authorities may only reject an expression of interest on one or more of the grounds specified in the Regulations. These are listed below.
- 6.2 If an authority decides to modify or reject an expression of interest, it must give reasons for that decision in its notification to the relevant body (see Section 5). The authority must publish the notification in such a manner as it thinks fit, which must include publication on the authority's website.

Grounds whereby an Expression of Interest may be rejected

1. The expression of interest does not comply with any of the requirements specified in the Act⁷ or in regulations.⁸
2. 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.
3. 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.
4. 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.
5. 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.

⁷ Section 81(1) of the Localism Act

⁸ Made by the Secretary of State under section 81(1)(b) (duty to consider expression of interest)

6. The relevant service is already the subject of a procurement exercise.

7. 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.

8. 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.

9. The relevant authority considers that the expression of interest is frivolous or vexatious.

10. 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.

Inadequate and inaccurate information

6.3 A judgement on the adequacy and accuracy of information supplied by a relevant body must be based only on the information that the relevant authority may require (see Section 4). Relevant authorities need to have sufficient information on which to base a decision on whether or not to accept an expression of interest. A relevant authority may consider whether sufficient and accurate information is given, for example, on financial resources, the area to which the relevant service relates, or how the proposal will meet service user needs. If a relevant authority considers that the information in an expression of interest is inadequate or inaccurate it should consider asking the relevant body for further information.

Suitability of relevant body

6.4 The judgement of suitability must be based on the requirements for information to be included in an expression of interest (see Section 4). For example, a relevant authority may judge that a relevant body does not have the financial resources to undertake the service, or does not demonstrate that it will be able to partake in a procurement exercise. The relevant authority may judge that the relevant body does not have the approved or qualified staff that can carry out the service. The judgement on suitability must not be based on information other than that which the relevant authority may require under the Regulations.

Relevant authority has stopped/decided to stop providing the service

- 6.5 The community right to challenge is not a mechanism to require relevant authorities to provide services that they have stopped providing, or have taken a decision to stop providing. A decision to stop providing a service is considered to have been taken once it has been approved or endorsed by the authority. How this is done will vary according to the authority's established processes and delegation arrangements. For example, such decisions may be taken at different levels, such as Cabinet Committee or by an individual officer. Relevant authorities should be aware that this ground for rejection does not allow an expression of interest to be rejected before the decision is made to stop the service. Indeed the situation where consideration is being given to the possibility of stopping a service is just the sort of circumstance when an expression of interest in providing that service from a relevant body may be critical.

Continued integration

- 6.6 A relevant authority may decide to reject an expression of interest related to integrated services (i.e. a relevant service which is provided by or on behalf of a relevant authority to a person who also receives a service provided or arranged by an NHS body) where it considers that the continued integration of the services is critical to the well-being of the persons in receipt of the integrated services. This may affect health, health-related and social care services, such as services for frail and older people, and those with issues relating to mental health, dementia, learning and physical disabilities.
- 6.7 Not all integrated services will be subject to this ground for rejection. The examples below illustrate how this may be assessed for day centres for adults with a learning disability.

Example 1: Integration critical to the well-being of persons

A day centre for individuals with complex needs. The health and social care staff work side by side to deliver personal care support and medical treatment to individuals who require considerable monitoring and individual care.

Example 2: Integration not critical to the well-being of persons

A day centre for individuals with mild to moderate needs where they gain support with daily tasks, undertake a range of activities, including for example activities which may help them find employment, and also receive health advice.

- 6.8 If the relevant authority receives an expression of interest for a service where this ground for rejection may apply, it is recommended that the authority should seek advice from the NHS body in assessing it. As a minimum, the NHS body should be informed that an expression of interest has been submitted and is being considered by the relevant authority.

Authority entered negotiations with a third party

- 6.9 This ground for rejection seeks to achieve a balance between giving groups the opportunity to submit expressions of interest and allowing processes, such as negotiations for a grant agreement, that are sufficiently progressed to be concluded. If an authority is merely considering options for future service provision, one of which is to negotiate for a third party to provide the service, this ground for rejection could not be applied.

Authority published its intention to consider mutualising the service

- 6.10 Under the Government's public service mutuals policy, employees proposing to establish a public sector mutual are encouraged to do so in a way that that gives employees a high degree of control. More information can be found at: <http://mutuals.cabinetoffice.gov.uk/>
- 6.11 This ground for rejection seeks to achieve a similar balance to that relating to negotiations in paragraph 6.9 above. It allows relevant bodies to submit expressions of interest before the point at which a relevant authority has published its intention to consider the provision of a relevant service by an organisation that will be established by 2 or more specified employees. Once past that point, this ground for rejection allows such processes that are sufficiently progressed to continue.
- 6.12 Relevant authorities will need to publish their intention under this ground for rejection. How they do this is best decided locally. This may, for example, include a statement on the authority's website, minutes of a Cabinet Committee meeting, or an announcement in a speech. Relevant authorities must ensure they are able to evidence that they have published their intentions in order to be able to reject an expression of interest on this ground. Authorities are encouraged to consider how such publication can be made easily accessible for relevant bodies that may wish to submit expressions of interest.

Frivolous or vexatious

- 6.13 We consider a request would be vexatious if it is likely to cause distress or irritation without justification, or if it is aimed at disrupting the work of an authority or harassing individuals in it. A request could be considered frivolous if it is apparent that it is not a genuine offer to provide a service and lacks any serious purpose. This will allow relevant authorities to reject expressions of interest where, for example, a relevant body wishes to make a complaint about a service rather than wishing to compete to deliver it.

Likely to lead to contravention of rule of law/statutory duty

- 6.14 This ensures that a relevant authority is not required to accept an expression of interest which would put it in breach of the law.

Example:

The Safeguarding Vulnerable Groups Act 2006 prevents anyone included on the Children's Barred List from providing childcare services. If a relevant body proposed that employed staff who were on the list would run such a service then the expression of interest could be rejected on the grounds that acceptance would be likely to contravene a rule of law.

- 6.15 A local authority will have to comply with its best value duty when procuring services, which requires it 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. Guidance on the best value duty was published in September 2011.⁹

⁹ <http://www.communities.gov.uk/documents/localgovernment/pdf/1976926.pdf>

Section 7

Modifying an expression of interest

- 7.1 If a relevant authority believes it would otherwise reject an expression of interest, 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 relevant authority may reject the expression of interest. Some illustrative examples of where a modification may lead to successful submission are given below.

Example 1: Part of a service not subject to challenge

A relevant body submits an expression of interest to run all 20 library services in the area. The authority has taken a decision to stop one of the services, meaning it is no longer a relevant service. The authority proposes modifying the expression of interest to relate instead to the 19 remaining libraries.

Example 2: Inadequate information

A relevant body submits an expression of interest to run the waste collection services. It does not complete the financial information section. The relevant body proposes modifying the expression of interest to include this information.

Example 3: Suitable body

A relevant body submits an expression of interest to run a local youth club. It sets out how the outcomes it proposes to achieve will meet the needs of service users, but bases this on a survey of 3 out of the 250 young people who use the club. The relevant authority proposes modifying the expression of interest to include sufficient information on which it can base its decision to accept or reject.

Section 8

Period between an expression of interest being accepted and a procurement exercise starting

- 8.1 Relevant authorities must specify periods between an expression of interest being accepted and a procurement exercise starting. This enables authorities to weigh up the factors below. Depending on local circumstances, this aims to allow relevant bodies the time they need to prepare to compete in the procurement exercise.
- 8.2 In specifying these periods relevant authorities should have regard to:
- a) The need to provide employees of the relevant authority, and other relevant bodies, with a fair, reasonable and realisable opportunity to bid in the procurement exercise for the service;
 - b) The nature, scale and complexity of the service being procured. For example, it may take relevant bodies longer to prepare to bid for larger, complex services than smaller more straightforward ones; and
 - c) The timescales for any existing commissioning cycle relevant to the service being procured, or any other relevant authority processes. These may include Council Cabinet decision making or budget setting processes.
- 8.3 A relevant body may submit an expression of interest at any time if the relevant authority has not set a period under section 82(2) of the Act. The relevant authority may well already have a contract with a third party to provide that service. It is for the relevant authority to set the period between accepting an expression of interest and starting a procurement exercise. In order to take into account its contractual obligations and commissioning cycle. It would be undesirable if an expression of interest was accepted and there was a lengthy period before a procurement exercise could be started.

Section 9

The procurement exercise

- 9.1 When a relevant authority accepts one or more expressions of interest for a relevant service, it must carry out a procurement exercise for the service. The procurement exercise must be appropriate having regard to the value and nature of the contract that may be awarded as a result of the exercise. As is already the case, authorities will need to comply with procurement law.
- 9.2 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 the procedures for advertising, specifying and awarding contracts set out in those regulations. Further information can be found at:
http://ec.europa.eu/internal_market/publicprocurement/index_en.htm
- 9.3 Where the Public Contracts Regulations do not apply – i.e. where the service is worth less than the threshold value, or is listed in Part B of the 2006 regulations, it is for the relevant authority to decide how to procure the service. This applies in the same way to procurement exercise triggered by the community right to challenge as those which are not. Generally, Part B services are those that the EU has considered would largely be of interest only to bidders located in the Member State where the contract is to be performed.

Consideration of social value in the procurement exercise

- 9.4 Relevant authorities must consider how both expressions of interest and procurement exercises triggered by one or more expressions of interest being accepted would promote or improve the economic, social or environmental well-being of the authority's area. This must be consistent with the law applying to the awarding of contracts. Authorities may include social clauses in contracts provided they comply with the relevant requirements. These are explained in the European Commission publication *Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement*.¹⁰

¹⁰http://www.procurement.ie/sites/default/files/Buying%20Social_SocConsidPubProcu_101210.pdf

Example:

In conducting a procurement exercise for its school transport services, London Borough of Waltham Forest asked bidders to demonstrate how their proposal could contribute to efficiencies and give added value to the service. This accounted for 10% of the assessment score and gave bidders the opportunity to demonstrate how they could achieve a wider impact from their service to local community. The contract was won by HCT Group, a social enterprise. It proposed to reinvest any profits into a learning centre for long-term unemployed people in the borough.

Relevant authorities competing in their own procurement exercises

- 9.5 It is unlikely to be possible for an in-house team to submit a formal bid as part of a tender process because an in-house team will not be a separate legal entity that could submit a tender and contract with the relevant authority. An in-house team may in certain situations submit a proposal that could be considered alongside the tender process but evaluating an in-house bid that makes use of authority premises, assets and employees against tenders submitted from external organisations is extremely difficult and any attempt to do so risks being challenged by an unsuccessful provider. As the community right to challenge requires that acceptance of an expression of interest will lead to a procurement exercise, relevant authorities should consider very carefully the consequences of considering an in-house bid at the same time.

Transparency

- 9.10 Authorities should have regard to the DCLG's Code of Recommended Practice on publishing new contracts and tenders information as part of the government's transparency agenda.¹¹

¹¹ <http://www.communities.gov.uk/localgovernment/transparency/transparencyguidance/>

Annex A

Glossary of terms

| | |
|---------------------------------|---|
| <i>NHS body</i> | Except where another meaning is given in paragraph 2.7 of this Guidance, NHS body has the same meaning as set out in the National Health Service Act 2006. |
| Pre Qualification Questionnaire | A stage in the procurement process used to shortlist organisations to be invited to tender. The questionnaire assesses the suitability of organisations' commercial, technical and financial capabilities. |
| <i>Relevant authority</i> | Public body listed in the Act and the Regulations whose services can be challenged under the community right to challenge. The Act lists district, county and London borough councils as relevant authorities. Certain fire and rescue authorities are added as relevant authorities in the Regulations. |
| <i>Relevant body</i> | A body listed in the Act which can express an interest in providing a relevant service. The Act lists voluntary and community bodies, bodies of persons or trusts established for charitable purposes only, parish councils and two or more employees of the relevant authority as relevant bodies. Other persons or bodies can be specified as relevant bodies by regulations. |
| <i>Relevant service</i> | A service provided in the exercise of any of a relevant authority's functions, either by the relevant authority using its own workforce, or provided on its behalf under a service contract or some other arrangement, unless such a service is excluded from the community right to challenge in the regulations. |
| <i>The Act</i> | The Localism Act 2011 |
| <i>The Regulations</i> | The Community Right to Challenge (Relevant Authorities and Rejection of Expressions of Interest) (England) Regulations 2012 and the Community Right to Challenge (Requirements for Expressions of Interest and Excluded Services) (England) Regulations 2012. |
| <i>The Right</i> | The community right to challenge. |