



BRIEFING PAPER

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Community Right to Challenge

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Summary

The Community Right to Challenge allows local communities the right to challenge how local authorities provide and run services, and potentially take over those services themselves. The *Localism Act 2011* allows voluntary or community bodies, parish councils, or two or more employees of a local authority, to challenge the provision of a local authority service.

A 'challenge' takes the form of an expression of interest, which the relevant authority must consider. If the relevant authority agrees to accept the expression of interest, it must run a procurement exercise - which would then be open to other bodies that did not provide the initial expression of interest.

The Community Right to Challenge has been used rarely so far, with some 50 expressions of interest submitted as of December 2014.

The right extends to England only.

1. Background

The *Localism Act 2011* provides a ‘community right to challenge’.¹ This gives local community groups the right to challenge local authorities’ provision of services, and to seek the opportunity to bid to run them themselves. The Act allows ‘relevant bodies’ – voluntary or community bodies, parish councils, or two or more employees of a relevant authority - to challenge the provision of that service by a local authority.

The Community Right to Challenge extends only to England. The right is summarised in the [Plain English guide to the Localism Act](#):

The Government thinks that innovation in public services can offer greater value for taxpayers’ money and better results for local communities. The best councils are constantly on the look-out for new and better ways to design and deliver services. Many recognise the potential of social enterprises and community groups to provide high-quality services at good value, and deliver services with and through them.

In some places, however, voluntary and community groups who have bright ideas find that they do not get a proper hearing. The Localism Act gives these groups, parish councils and local authority employees the right to express an interest in taking over the running of a local authority service. The local authority must consider and respond to this challenge; and where it accepts it, run a procurement exercise for the service in which the challenging organisation can bid. This makes it easier for local groups with good ideas to put them forward and drive improvement in local services.²

Voluntary or community bodies, parish councils and employees of relevant authorities may put forward a challenge. Business improvement districts (BIDs) were added to this list via regulations in 2015.³ Such an organisation can present an “expression of interest” (EOI) to a relevant authority in running a service it provides. The authority must either accept (with or without modification) or reject the expression of interest, and if it is accepted, the authority must carry out a procurement exercise for the service in accordance with normal procurement rules.

The authority must consider whether acceptance of the EOI would promote or improve the social, economic or environmental well-being of the area. The authority must notify the proposer of its decision, and if it accepts the EOI with modification or rejects it, it must set out its reasons for doing so.⁴

Government amendments made to the Bill during its passage through the House of Lords sought to improve the workability of the right and

¹ See [Part 5, Chapter 2 \(sections 81-86\)](#).

² DCLG, [A plain English guide to the Localism Act](#), 2011, p. 8

³ See the [Community Right to Challenge \(Business Improvement Districts\) Regulations 2015](#) (SI 2015/582)

⁴ The detail of the right can be found in the [Community Right to Challenge \(Expressions of Interest and Excluded Services\) \(England\) Regulations 2012](#) (SI 2012/1313), and the [Community Right to Challenge \(Fire and Rescue Authorities and Rejection of Expressions of Interest\) \(England\) Regulations 2012](#) (SI 2012/1647).

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to clarify certain issues that arose in response to Government's consultation exercise. These included:

- giving the Secretary of State the power to add other persons or bodies carrying on functions of a public nature as relevant authorities, including a Minister of the Crown or a government department;
- if the duty is extended to a person or body that exercises functions outside England, the right to submit an expression of interest will apply only to services provided by that person or body in England;
- clarifying that a public or local authority cannot be a community body (i.e. local authorities cannot challenge each other);
- removing the Secretary of State's powers to set timescales (during which challenges can be submitted) and replacing them with a requirement for relevant authorities to set these timescales instead.

During the House of Lords debate on permitting Business Improvement Districts to exercise the right, Lord Ahmad of Wimbledon, for the Government, said:

We expect BIDs to challenge to run services such as cleaning services or environmental measures. There is no limit on what projects and services can be provided through a business improvement district. It will be down to the local authority to judge whether the bid put in by the BID, among other players, can deliver the most efficient and cost-effective service locally.⁵

⁵ [HLDeb 24 Feb 2015](#) cGC321

2. How does the scheme work?

2.1 Relevant authorities and relevant bodies

The measure requires **relevant authorities** to consider expressions of interest, and where they accept an expression of interest, they must carry out a procurement exercise for the service. Relevant authorities are listed in the Act as:

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

Fire and rescue authorities are added as relevant authorities in the [Community Right to Challenge \(Fire and Rescue Authorities and Rejection of Expressions of Interest\) \(England\) Regulations 2012](#). Many fire and rescue authorities are departments within existing local authorities and thus were already covered.

Relevant bodies are those bodies which are eligible to submit expressions of interest to relevant authorities. Relevant bodies are listed in the Act as:

- A voluntary or community body;
- A body of persons or a trust which is established for charitable purposes only;
- A parish council (including town councils);
- Two or more employees of the relevant authority; or
- Any other person or body specified by the Secretary of State by regulations.

Relevant bodies may submit expressions of interest with other relevant and/or non-relevant bodies, and indeed the guidance comments that such cooperation “may strengthen a relevant body’s case that it is capable of providing the service”.⁶

2.2 Services subject to challenge

The right to challenge may be applied to any service provided by or on behalf of a relevant authority, except for those that are specifically excluded under regulations. Schedule 2 of the regulations lists

excluded services as:

2. A relevant service commissioned in conjunction with one or more health services—
 - a. by a relevant authority or by an NHS body under a partnership arrangement made in accordance with the [NHS Bodies and Local Authorities Partnership Arrangements Regulations 2000](#), or
 - b. by a relevant authority and an NHS body or a Strategic Health Authority, acting jointly.

⁶ DCLG, *Community Right to Challenge: statutory guidance*, 2012, p. 8

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3. A relevant service commissioned by an NHS body on behalf of a relevant authority.
4. A relevant service commissioned or provided by a relevant authority in respect of a named person with complex individual health or social care needs.⁷

Categories 2 and 3 in the above extract applied until 1 April 2014, in order to allow the NHS commissioners established by the *Health and Social Care Act 2012* to become fully operational.

Further exempt categories were applied by the [Local Authority \(Public Health, Health and Wellbeing Boards and Health Scrutiny\) Regulations 2013](#) (SI 2013/218):

5 A relevant service provided by or on behalf of a relevant authority in the exercise of any of its functions under sections 2B and 111 of, and paragraphs 1 to 7B and 13 of Schedule 1 to, the National Health Service Act 2006, except a service specified in paragraph 6.

6 A relevant service provided by a relevant authority in exercise of the Secretary of State's functions under sections 2A and 2B of the National Health Service Act 2006, in so far as it consists of the provision of such information and advice to a clinical commissioning group as the authority considers necessary or appropriate, with a view to protecting and improving the health of the people in the authority's area.

7 A relevant service provided by or on behalf of a relevant authority in respect of children aged under five years, in so far as it consists of the provision of health visiting services for the purpose of reviewing the development of the children concerned and for the promotion of their health and welfare, or the provision of other health services for that purpose.

These exemptions came into force on 1 October 2015. The exemptions in categories 5 and 6 above relate to local authority functions to improve public health, including dental health and medical inspection of school pupils.

The exemption under category 7 in the extract above lapses on 30 September 2016.⁸ The services in question were transferred to local authorities on 1 October 2015, so this exemption amounts to transitional 'protection' for them for one year.

If a service is transferred following the exercise of the right to challenge, as with any outsourcing process, the legal responsibility for the **function** itself remains with the local authority.

2.3 Expressions of interest (EOIs)

A relevant authority can specify periods of time when EOIs can be submitted in order to tie the process in with other processes, such as commissioning timetables. The EOI must be in writing and meet certain

⁷ [Community Right to Challenge \(Expressions of Interest and Excluded Services\) \(England\) Regulations 2012](#) (SI 2012/1313)

⁸ See the [Local Authorities \(Public Health Functions and Entry to Premises by Local Healthwatch Representatives\) and Local Authority \(Public Health, Health and Wellbeing Boards and Health Scrutiny\) \(Amendment\) Regulations 2015](#) (SI 2015/921), regulation 4

requirements, which are specified in the 2012 regulations. These include:

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, in particular—
 - how the provision or assistance will promote or improve the social, economic or environmental well-being of the relevant authority's area; and
 - how it will meet the needs of the users of the relevant service;
6. Where the relevant body consists of employees as described in section 81(6)(d) [i.e. where the challenge comes from two or more employees], details of how that relevant body proposes to engage other employees of the relevant authority who are affected by the expression of interest.⁹

EOIs should consider the social value of the proposal, as well as the economic or environmental benefits, as reflected in both the [Public Services \(Social Value\) Act 2012](#) and the duty of best value in the [Local Government Act 1999](#).

The relevant authority must specify the time periods during which it will consider EOIs, notify the relevant body of its decision, and start a procurement exercise once the EOI is accepted. The authority and the challenging organisation can agree to an EOI being modified if it would otherwise be rejected.

Once the EOI is accepted, the relevant authority must carry out a procurement exercise in accordance with normal procurement law. This opens up the process to other organisations that may not have submitted the original EOI. There is no guarantee that the organisation which submitted the original challenge will win the bid to provide the service.

The TUPE regulations will apply to any employees who are transferred to an alternative employer as a result of a successful community challenge. This issue is not specifically covered in the Act. A lack of information on prospective TUPE liabilities may make it difficult for organisations to bid for services. The Government's [Open Public Services White Paper](#) states the following:

⁹ [Community Right to Challenge \(Expressions of Interest and Excluded Services\) \(England\) Regulations 2012](#) (SI 2012/1313). 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 and evidence referred to in the first two bullet points must be given in respect of each member of the consortium and each sub-contractor as appropriate.

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Some providers cite a lack of transparency regarding potential TUPE liabilities associated with taking on a service. This has led to many providers being unable to accurately price their bids, or choosing not to bid at all, thereby reducing competition. **We will encourage public service commissioners to disclose TUPE liabilities at an early stage during a commissioning process or when the Right to Provide or Right to Challenge has been invoked.**

EOIs can only be rejected on the grounds set out in the regulations:

1. The expression of interest does not comply with one or more of the requirements specified in section 81(1) or in regulations made by the Secretary of State under section 81(1)(b) (duty to consider expression of interest).
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 interest,is 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.
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 relevant 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.¹⁰

¹⁰ See the Schedule to the [Community Right to Challenge \(Fire and Rescue Authorities and Rejection of Expressions of Interest\) \(England\) Regulations 2012](#) (SI 2012/1647)

2.4 Use of the right

No comprehensive data source on the use of the Right to Challenge exists. The Communities and Local Government Committee's report of 2015 stated that 50 expressions of interest had been submitted as of December 2014.¹¹ Similarly, a Parliamentary Answer in February 2015 said:

...we are aware of 51 Expressions of Interest submissions to councils, but this is not a comprehensive figure. Of these, we know of seven completed procurement exercises, four of which have resulted in the organisation that submitted the Expressions of Interest winning a contract. We know of two other cases where an Expression of Interest has been accepted and a procurement triggered, but not completed.

We know that voluntary groups remain interested in the Community Right to Challenge. The most recent follow up survey of organisations using the Community Right to Challenge support service showed that a further 43 groups, out of 105 respondents, were intending to submit an Expression of Interest in the next 12 months.

We do know that Challenge is recognised by the voluntary and community and parish sectors as being helpful in opening up relationships with local authorities. In a recent survey of 188 enquirers to the advice service, 25% were in negotiation with their council on potential commissioning and said negotiation had come about as a direct result of the Challenge legislation. Almost half (48%) felt that their local authority was more open to contracting with eligible bodies than before the legislation came into force and 25% were working with their authorities on commissioning as a result of the legislation.¹²

Community groups suggested that the value of the right was more often in its threat than its actual use. The National Council for Voluntary and Community Action called the right 'the nuclear option', suggesting that actual use of the right would suggest that the relationship between a voluntary group and its local authority had broken down.¹³ The Committee suggested that a more general reworking of local authority procurement, including greater reference to the [Public Services \(Social Value\) Act 2012](#), would be of more benefit than attempting to extend the Right to Challenge.

2.5 Funding

The Government has made funds available to support the right. These are summarised on the [mycommunityrights](#) website. Grants for feasibility studies (but not towards the running of the services themselves) are also available from the [Social Investment Business](#).

The Communities and Local Government Committee's report *Community Rights*, published in February 2015, stated that 216 groups

¹¹ Communities and Local Government Committee, [Community Rights](#), HC-262 2014-15, 2015.

¹² [PO 220947](#) 2014-15

¹³ Communities and Local Government Committee, [Community Rights](#), HC-262 2014-15, 2015, p. 22-3

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had received financial assistance to allow them to build their capacity to challenge.

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