

EXPLANATORY MEMORANDUM TO
THE COMMUNITY RIGHT TO CHALLENGE (EXPRESSIONS OF
INTEREST AND EXCLUDED SERVICES) (ENGLAND) REGULATIONS
2012

2012 No. 1313

1. This Explanatory Memorandum has been prepared by the Department for Communities and Local Government and is laid before Parliament by Command of Her Majesty.

2. **Purpose of the instrument**

These Regulations specify the requirements for expressions of interest submitted by relevant bodies using the community right to challenge provisions in Part 5, Chapter 2 of the Localism Act 2011 (“the Act”). They also specify services of a kind that are excluded from the community right to challenge.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

None

4. **Legislative Context**

- 4.1 Chapter 2 of Part 5 of the Localism Act 2011 gives relevant bodies a right to challenge for the opportunity to provide relevant services that are provided by or on behalf of relevant authorities in the exercise of their functions in relation to England. Relevant bodies are defined as a body of persons or a trust which is established for charitable purposes only, a voluntary or community body, a parish council, two or more employees of the relevant authority, and such other person or body carrying on functions of a public nature as the Secretary of State may specify in regulations. The community right to challenge is exercised by submitting a written expression of interest. Section 81(2) of the Act lists relevant authorities as a county council in England, a district council, a London borough councils, and any other person or body carrying out functions of a public nature as the Secretary of State may specify by regulations. If a relevant authority accepts an expression of interest for a relevant service, it must carry out a procurement exercise for the service.
- 4.2 This instrument implements, in regulation 3 and Schedule 1, the provision in section 81(1) (b) of the Act, which gives the Secretary of State the power to specify requirements for expressions of interest. It also provides, in regulation 4 and Schedule 2, for services of a kind to be excluded from the community right to challenge under powers in section 81(5).
- 4.3 Other provisions in Chapter 2 of Part 5 of the Act give more detail about the community right to challenge. In order fully to implement the community right to challenge, a further statutory instrument, the Community Right to

Challenge (Fire and Rescue Authorities and Rejection of Expressions of Interest) (England) Regulations 2012 has been prepared under sections 83(11) and 81(2) (d) of the Act. This will specify the grounds on which an authority may reject an expression of interest and specify certain fire and rescue authorities in England as relevant authorities. It will be subject to the affirmative resolution procedure.

5. Territorial Extent and Application

This instrument applies to England.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

Policy

- 7.1 The Coalition Programme for Government committed to “give communities the right to bid to take over local state-run services.” The community right to challenge gives effect to this commitment.
- 7.2 Many local authorities already make good use of the talents of voluntary and community groups, charities, parish councils and former employees. These bodies already successfully run a wide range of local services including in education, tackling worklessness, the environment and social care. The Government’s intention in introducing a community right to challenge is to hand the initiative to communities and the bodies that represent them who have innovative ideas about how they could deliver services differently and better.
- 7.3 The community right to challenge enables these bodies to express an interest in running a relevant service. If an expression of interest is accepted, this will trigger a procurement exercise for the provision of the service on the authority’s behalf. The community right to challenge will give groups more opportunities to shape and improve services. It will ensure groups with good ideas get a fair hearing and those groups have time to organise themselves and develop their ideas to be able to bid to run the service.
- 7.4 The community right to challenge also contributes to implementing the Open Public Services White Paper (July 2011).¹ It encourages greater diversity of service provision, has the potential to reduce costs of service provision for local public bodies, and embraces innovation and responsiveness.
- 7.5 The Modernising Commissioning Green Paper (December 2010) states the Government’s intention to take further action to help level the playing field between those competing to deliver public sector contracts. In addition it discusses common barriers faced by voluntary and community bodies in

¹ <http://files.openpublicservices.cabinetoffice.gov.uk/OpenPublicServices-WhitePaper.pdf>

bidding in procurement exercises.² In 2007/8 the voluntary and community sector received £12.8bn from statutory sources, £9.1bn of which was from contracts.³ This represented just 2% of £582bn total public spending in that financial year.⁴ So there is clearly potential for the sector to increase its role in public service delivery.

- 7.6 The community right to challenge requires that relevant authorities consider the social value of expressions of interest and bids in procurement exercises triggered by the acceptance of an expression of interest. This is something the voluntary and community sector consider a particular strength of theirs.
- 7.7 The Department for Communities and Local Government is procuring for a delivery body to give advice, support and grant funding to relevant bodies wishing to use the right to challenge.
- 7.8 The policy has attracted close interest from local government and relevant bodies. A consultation carried out between 4 February 2011 and 3 May 2011 on the detail of the community right to challenge attracted over 200 responses (see section 8).

Expression of interest requirements

- 7.9 Section 81(1)(b) of the Act gives power to the Secretary of State to specify requirements for expressions of interest. These are set out in Schedule 1 to the Regulations. Paragraphs 7.10 to 7.14 of this explanatory memorandum take each of these in turn, explaining the intention and the approach we have taken.

Financial resources and capability of the relevant body and any partners and/or sub-contractors

- 7.10 If a relevant authority accepts an expression of interest then it must carry out a procurement exercise for the relevant service. This can be a significant exercise and will incur costs to the authority. Requirements 1-3 of Schedule 1 are designed as safeguards against procurement exercises being triggered without evidence that the relevant body will be able to make a credible bid to deliver the service. They will also provide part of a relevant authority's assessment of whether the relevant body is suitable to provide the service.
- 7.11 Many respondents to the consultation exercise on the detail of the community right to challenge argued that information should be provided not only in respect of the relevant body submitting an expression of interest, but also in respect of any other bodies with whom it proposes to deliver the relevant service. This is reflected in paragraph 1 of Schedule 1.

3) Details of the relevant service

- 7.12 Requirement 4 is for details of the service and the geographical area to which the expression of interest relates. This will enable the relevant authority to make an accurate assessment of what is proposed.

² <http://www.cabinetoffice.gov.uk/sites/default/files/resources/commissioning-green-paper.pdf>

³ NCVO Almanac (2010)

⁴ http://www.hm-treasury.gov.uk/d/pesa_2011_complete.pdf

4) Outcomes to be achieved

- 7.13 Requirement 5 relates to the outcomes the expression of interest proposes will be achieved. Section 83(8) of the Act requires a relevant authority to consider whether acceptance of the expression of interest would promote or improve the social, economic or environmental well-being of the authority's area. Section 83(9) ensures such considerations are also reflected in procurement exercises triggered by the acceptance of an expression of interest. The requirement to consider social value of expressions of interest and procurement bids triggered by the community right to challenge has been widely welcomed. This requirement also focuses on the need to achieve outcomes that meet service user needs.

5) Relevant authority employees

- 7.14 The final requirement for expressions of interest applies where the expression of interest is submitted by two or more employees of the relevant authority. In contrast to other relevant bodies, relevant authority employees will not be expected to have formed a body at the point at which they submit an expression of interest. Existing bodies will be submitting an expression of interest on behalf of that body, whereas employees will not yet be in such a position. Given the potential uncertainty at the time an expression of interest is submitted as to what structure relevant authority employees will use to take forward their bids, it is thought necessary for them to say how they propose to engage other employees affected by the expression of interest.

Excluded services

- 7.15 Section 81(5) of the Act gives power to the Secretary of State to specify services of a kind to be excluded from the community right to challenge. These are set out in Schedule 2 to the Regulations. Paragraphs 7.16 - 7.20 take each of these in turn, explaining the intention and the approach we have taken.
- 7.16 Our intention has been to maximise the range of services subject to the community right to challenge. The community right to challenge refers to services provided by or on behalf of that authority in the exercise of any of its functions. It does not provide for the delegation of any relevant authority function. Safeguards are included in the Community Right to Challenge (Fire and Rescue Authorities and Rejection of Expressions of Interest) (England) Regulations 2012 which set out the grounds on which a relevant authority may reject an expression of interest. For example, a relevant authority may reject an expression of interest where it considers that acceptance of the expression of interest is likely to lead to contravention of an enactment, rule of law or statutory duty.
- 7.17 In addition to the public consultation, we have engaged with other Government Departments to consider whether relevant services within their Departmental remit should be excluded from the community right to

challenge. Given the safeguards referred to above, our approach has been to limit the range of services of a kind that are excluded from the Right.

- 7.18 In paragraphs 2 and 3 of Schedule 2, we have excluded from the community right to challenge services that are: jointly commissioned by a relevant authority and the NHS; that are commissioned pursuant to a partnership arrangement between the NHS and a relevant authority; or are commissioned by the NHS on behalf of a relevant authority until 1st April 2014 (namely during the critical period of major changes to the NHS commissioning architecture). This will enable the new NHS commissioners, namely the NHS Commissioning Board and local clinical commissioning groups, both 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 the existing Primary Care Trusts and develop new commissioning relationships with relevant authorities in the period up to April 2014.
- 7.19 The exclusion in paragraph 4 of Schedule 2 does not have an expiry date. We have sought to protect the most vulnerable recipients of health and social care by excluding from the community right to challenge those services commissioned or provided by a relevant authority in relation to named individuals with complex needs. It was not the intention of the community right to challenge directly or indirectly to 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.
- 7.20 In addition to these, where direct payment arrangements are in place in lieu of services, for example under The Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009, these are not relevant services as the individual is effectively the commissioner for the service rather than the relevant authority. Further explanation will be given in guidance (see section 9).

Consolidation

- 7.21 This instrument does not consolidate any regulations.

8. Consultation outcome

- 8.1 A public consultation on the detail of the community right to challenge was conducted between 4 February 2011 and 3 May 2011.⁵ This asked what issues should be addressed in secondary legislation and how, and what services should be for individual authorities to determine. A total of 206 organisations and individuals responded to the consultation, including relevant authorities, parish councils, fire and rescue authorities, and voluntary and community bodies. The questions relevant to this statutory instrument that it asked are:

⁵ <http://www.communities.gov.uk/publications/localgovernment/righttochallengeconsultation>

1. Are there specific services that should be exempted from the Right? If yes, why?
 2. Are there any general principles that should apply in considering which services should be exempt?
 3. Do you agree with the proposed information to be required in an expression of interest?
 4. Is there further information you believe should be provided as part of an expression of interest? If yes, what else should be included?
- 8.2 A summary of responses to the consultation was published on 2 August 2011.⁶ A policy statement was published on 12 September 2011, setting out the intended way forward on the issues addressed in the consultation exercise.⁷

Detail of the responses to the consultation

- 8.3 Details of the consultation responses and the approach we have taken on grounds for rejecting expressions of interest and adding certain fire and rescue authorities as relevant authorities are set out in the explanatory memorandum which accompanies the Community Right to Challenge (Fire and Rescue Authorities and Rejection of Expressions of Interest) (England) Regulations 2012.

Are there specific services that should be exempted from the Right? If yes, why?

- 8.4 Of the 164 respondents who answered yes or no to this question, 112 (68%) said that specific services should be exempted from the community right to challenge. 52 (32%) said the right should apply to all services.
- 8.5 The most frequent suggestions for exemptions were:
- a) Fire and rescue services discussed in the consultation document;
 - b) Services involving safeguarding vulnerable people;
 - c) Planning and local development;
 - d) Emergency planning/civil contingencies; and
 - e) Authorities should decide which services will be exempt in their area.
- 8.6 We have carefully considered suggestions for excluding certain services and the reasons consultation respondents gave for making those suggestions. Many concerns focused on the functions to which the services related rather than the services themselves. For example, in relation to planning respondents stressed the importance of impartiality in determining planning applications. However, functions such as this will continue to rest with the authority and fall outside the scope of the community right to challenge.
- 8.7 An exclusion has been made for the most vulnerable in terms of health and social care as explained in paragraph 7.19. Notwithstanding this, we considered further the case for excluding services that involve safeguarding vulnerable people and promoting fire safety/fire prevention. Many of these services are already delivered by external organisations. In such cases the

⁶ <http://www.communities.gov.uk/publications/localgovernment/righttochallengeresponses>

⁷ <http://www.communities.gov.uk/publications/localgovernment/righttochallengestatement>

authority remains the body accountable and responsible for fulfilling its function. It is for the relevant authority to make appropriate provision in its contractual arrangements with any third party delivering services on its behalf to ensure those services are delivered to the required standards and quality. The community right to challenge does not change the commissioning body's ability to do this where a procurement exercise for a relevant service is triggered.

- 8.8 Thirteen respondents said relevant authorities should be able to decide which services should be exempted. However, this would risk the policy being ineffective. In a briefing paper prepared ahead of the Localism Bill reaching Lords Report stage in Parliament ten representative bodies of voluntary and community groups said, "Giving local authorities the choice whether or not to respond to an Expression of Interest with a procurement exercise would negate the right to challenge entirely, by effectively allowing local authorities to ignore Expressions of Interest."⁸

Are there any general principles that should apply in considering which services should be exempt?

- 8.9 Of the 121 respondents who answered this question, 66 (55%) said services should be exempted where existing legislation requires them to be delivered by the relevant authority.

- 8.10 The most frequent suggestions or reasons why exemptions would be appropriate were:

- a) Service fragmentation would put services users, staff and/or local people at risk, or would increase insurance risk
- b) Impartiality is essential
- c) A service is closely linked to a function or other service that is exempt as a result of existing legislation
- d) Regulatory services and services that enforce legislation
- e) A service requires a provider with specialist knowledge, skills or expertise to maintain the quality of that service
- f) A service has already been contracted out or procurement has started

- 8.11 Many of the concerns raised by consultation respondents are dealt with in the grounds for rejecting an expression of interest. A relevant authority may reject an expression of interest where it is likely to lead to breach of a statutory duty. Authorities must comply with the duty of best value contained in Part 1 of the Local Government Act 1999. This requires them to carry out their functions having regard to improving economy, efficiency and effectiveness. Therefore any expression of interest will be tested against this. Another ground for rejection is where a procurement exercise for the service is already underway. A relevant authority will also be able to reject an expression of interest if the authority does not consider the relevant body to be a suitable body. This will allow an authority to reject an expression of interest if, based on the

⁸ Joint briefings for the House of Lords report stage on the [Community Right to Challenge](#) and [Community Right to Buy](#) from ACEVO, ACRE, CDF, Community Matters, Locality, NAVCA, NCVO, Plunkett Foundation, Social Enterprise UK and Urban Forum (August 2011), <http://www.navca.org.uk/localism-bill-navca-briefings>

information given, the relevant body does not have access to specialist knowledge or skills required for delivering a service.

- 8.12 It is not our intention to exclude services that enforce legislation or regulatory services. In some cases such services are already carried out by third parties on behalf of relevant authorities, so should be subject to challenge. In other cases particular legal powers mean that they must be carried out by the authority, so any expressions of interest may be rejected. In others they will constitute functions of the authority, and therefore fall outside the scope of the community right to challenge.
- 8.13 It is already common practice for commissioning authorities to make provision for conflicts of interest during the procurement process. This will continue to be the case when the community right to challenge comes into force.
- 8.14 We do not agree that services should be excluded from the community right to challenge when they are closely linked to functions or excluded services. This could lead to widespread and unnecessary exclusions. Where a relevant authority considers that accepting an expression of interest is likely to breach any statutory duty, it may be rejected. Relevant authorities already put in place appropriate arrangements in such circumstances, for example when procuring adult social care services, and will continue to do so under the community right to challenge.

Do you agree with the proposed information to be required in an expression of interest?

- 8.15 Of the 154 respondents who answered yes or no to this question, 130 (84%) agreed with the proposed information to be included in an expression of interest.

Is there further information you believe should be provided as part of an expression of interest? If yes, what else should be included?

- 8.16 139 respondents made additional comments and/or suggested further information to be required. The most frequent were:
- a) Proposals for how the service would be delivered (including staffing models), the outcomes and how they would be measured, and how the relevant body would achieve value for money;
 - b) Details of the relevant body (and any partners in a partnership), including track record of service delivery, relevant skills, accreditation and experience, its structure and governance, health and safety policy, etc.;
 - c) Information should depend on the service and/or locality. Twenty argued for local flexibility. Thirteen said information required should be proportionate and appropriate to the service being challenged. Others said there should be sufficient information to enable the relevant authority to make a decision;
 - d) The relevant body's understanding of relevant legislation and requirements to deliver the relevant service. Nineteen cited the Single Equality Duty. Some said the relevant body should deliver requirements of the duty to a similar standard as the relevant authority would be required to;

- e) Social value;
 - f) The relevant body's plans for longer-term sustainability, how it proposes to manage the risk of service failure, and its contingency plans;
 - g) The relevant body's support from and/or engagement with service users; and
 - h) Relationship between the expression of interest, pre-qualification, and the procurement exercise. Suggestions ranged from having no overlap, to brief details in the expression of interest with greater detail at the procurement stage, to the expression of interest being like a competitive tender.
- 8.17 In specifying the requirements for an expression of interest, we have sought to ensure relevant authorities have sufficient information to reach a decision, and to avoid a disproportionate burden on relevant bodies. The majority of respondents broadly agreed with proposals in the consultation document.
- 8.18 We have taken on board suggestions that where a relevant body proposes to deliver the relevant service in partnership with others, financial resources and capability requirements should be applied in respect of each partner. We welcome respondents' support for the Act making provision for social value to be considered at both the expression of interest and procurement stages.
- 8.19 These Regulations require relevant bodies to give details of the outcomes to be achieved by the relevant body's provision or assistance in the provision of the relevant service, in particular around social value and fulfilling service user needs. We have been clear that the expression of interest stage is not part of the procurement exercise but an opportunity to trigger such a process. It will be once the relevant authority has specified the requirements in conducting the procurement exercise that bidders will need to set out how they propose to deliver the specified outcomes. It is already common practice for commissioning authorities to make appropriate provision in contractual arrangements to prevent and, in such eventuality, manage service failure.
- 8.20 Our approach has been to determine the categories of information required in an expression of interest. This transparency and consistency will give some certainty to relevant bodies. The detail required will depend on the scale and nature of the relevant service that is the subject of an expression of interest.
- 8.21 A relevant body will need to demonstrate it will be capable of providing the relevant service. They will also need to demonstrate how they meet service user needs. Together, these should demonstrate an understanding of the requirements to deliver relevant services. It will be for the relevant authority to specify service requirements, including in relation to equalities, in the procurement exercise.

9. Guidance

The Act requires relevant authorities to have regard to any guidance issued under section 85(2) by the Secretary of State. Statutory guidance on the community right to challenge will be published, in draft when these regulations are laid, and in final form when they are commenced.

10. Impact

- 10.1 The community right to challenge does not impact on business, charities or voluntary bodies.
- 10.2 An assessment was made of the new burdens on relevant authorities as a result of this policy during the passage of the Localism Bill⁹. A separate Impact Assessment has therefore not been prepared. The published Impact Assessment covers activities that relevant authorities will have to undertake, such as considering expressions of interest and carrying out procurement exercises triggered by the community right to challenge.

11. Regulating small business

The legislation does not apply to small business.

12. Monitoring & review

- 12.1 Success criteria for the community right to challenge are set out in the Impact Assessment.
- 12.2 The Department for Communities and Local Government intends to take a light-touch approach to monitoring and reviewing implementation of this policy. This may include asking representative groups of relevant bodies and relevant authorities about their experience of the community right to challenge and seeking opportunities to influence independent researchers to include partial or full evaluation of the community right to challenge when examining related topics. We believe this is a proportionate approach to reviewing this policy given its cost and the Government's commitment to reducing bureaucracy. Beyond this, and in line with a policy of decentralisation, it is for individual local authorities to monitor the operation of specific applications of this policy.

13. Contact

Angela Harrowing at the Department for Communities and Local Government
Tel: 0303 444 1349 or email: angela.harrowing@communities.gsi.gov.uk can answer any queries regarding the instrument.

⁹ <http://www.communities.gov.uk/documents/localgovernment/pdf/1829777.pdf>