

My Community Rights

Government's Right to Challenge
Understanding the
Community Right
to Challenge



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Understanding the Community Right to Challenge

The Community Right to Challenge is one of a raft of new initiatives introduced in the Localism Act 2012, and is in force from 27 June 2012.

The Community Right to Challenge is the Right for community organisations to submit an expression of interest in running services of local authority and fire and rescue authorities on behalf of that authority. If a community group, charity, parish council or group of staff of the authority identify a service they would like to run, they will need to submit an expression of interest to the authority. If the authority accepts the expression of interest, they must run a procurement exercise for the service. The interested group will need to compete with others who may wish to run the service.

Where the service is delivered as part of a statutory duty the public authority retains the statutory duty, even if they commission delivery of services to meet their statutory duties externally. This is the same as when services are commissioned out now – for example homelessness services can be contracted, but the legal duty towards homeless people remains with the local authority.

Community Right to Challenge aims to give communities more opportunities to shape and run local public services where they believe they can do so differently and better. They may think they could deliver services better or cheaper, make them more responsive to local needs, offer additional social value, or deliver better value for money. The services may be at any scale of activity from very local and small to authority wide.

How the Community Right to Challenge is to be implemented is set out in the Localism Act and regulations, and explained further in statutory guidance.

Background

The Localism Act

The Localism Act, enacted in November 2011, included new freedoms and flexibilities for local government, reforms to make the planning system more democratic and effective, and reforms to ensure that decisions about housing are taken locally.

It also introduced new rights and powers for communities and individuals. These included the Community Right to Challenge, Community Right to Bid and Community Right to Build.

The other Community Rights

Community Right to Build

Community Right to Build is a new power that gives people the right to bring forward small-scale site specific community-led developments. The proposals formed part of the Neighbourhood Planning provisions contained in the Localism Act 2011. Communities in both rural and urban areas can use the power where they want to provide more local affordable developments such as market housing or provide for new community shops and services. It will be for communities themselves to determine the type of development they want to see.

Development proposals will need to meet a minimum criteria through an independent examination and have the agreement of more than 50 per cent of local people that vote through a community referendum. The Local Planning Authority will be under a duty to assist and advise community organisations. Community organisations will be free to involve other partners if they wish to do so such as developers or housing associations.

Community Right to Bid

The Government has aimed to address the concerns that too often local buildings and land that are of great value to the community, such as a village hall or local pub, go up for sale and are purchased by a private bidder before the community has the opportunity to put together the funding to take it over themselves. The Community Right to Bid gives communities the power to submit assets (buildings or land) of community value to be kept on a list by the local authority. If any of these assets are put up for sale a six week window of opportunity is triggered, during which any local community group may express an interest to purchase the asset. If they do express an interest a further four and a half months window of opportunity is given so that the group may have time to find funding and put together a bid to purchase the asset on the open market.

Other relevant areas of policy and law

Public Service Reform

In the Open Public Services White Paper published in July 2011 the Government set out its plans for changing how public services are owned, delivered and funded. It is based on the following principles: Choice of providers for service users, decentralisation, diversification of providers, fair access to public services and accountability to users and tax payers.

Community Right to Challenge is one of the ways that the Government is implementing the white paper.

Social Value Act

The Public Services (Social Value) Act 2012 became law on 8th March 2012. This places a legal duty on public bodies to consider the social, economic and environmental wellbeing of an area in making decisions on commissioning and procurement. Public bodies will have to abide by this when making decisions on contracting out public services, including contracting triggered by using the Community Right to Challenge process.

Best Value Statutory Guidance

Authorities also have a general duty to consider 'best value' under the Local Government Act 1999, and in compliance with Best Value Statutory Guidance Sept 2011. This is defined as "having regard to a combination of economy, efficiency and effectiveness" as well as the overall value, including economic, environmental and social value, when reviewing service provision. In this they have a duty to consult before deciding how to fulfil their Best Value Duty, honour local compacts and, when considering de-commissioning, actively engage community organisations and service users and consider options for how to reshape the service or project.

Which groups can use the Community Right to Challenge?

There are four broad categories of groups who can use the Community Right to Challenge to submit an expression of interest in running a service:

- Voluntary and community bodies;
- Charities;
- Parish / Town councils;
- Two or more employees of the relevant authority.

These are called 'relevant bodies' and are defined in the Localism Act and explained in more detail in the statutory guidance.

Relevant bodies may submit an expression of interest in partnership with other relevant bodies, and/or non-relevant bodies. So, for example, a local community group could submit a joint expression of interest with a parish council (other relevant body) or with a commercial business (non-relevant body).

Which public authorities must consider expressions of interest through the Community Right to Challenge?

All relevant authorities must consider expressions of interest. The Localism Act lists which are relevant authorities :

- County councils;
- District councils;
- London borough councils;
- Certain fire and rescue authorities.

What services can Community Right to Challenge apply to?

The Community Right to Challenge applies to all 'relevant services'. The default position is that unless expressly excluded, all services provided by, or on behalf of, a relevant authority are defined as 'relevant services' and so can be open to a Community Right to Challenge.

Exceptions to this are services which are excluded by legislation. Some services are excluded permanently. These are:

- Individual packages of services for continuing health and social care for named individuals with complex needs, provided/commissioned by a local authority or NHS body (or jointly).

Some services are excluded up until 1st April 2014. These are:

- Services commissioned by a relevant authority or NHS body, in conjunction with one or more health services, or by an NHS body acting on behalf of a relevant authority.

In addition, services which are commissioned and managed by individuals or their representatives using direct payments do not fall within the scope of the Community Right to Challenge.

You should be able to find out if a service is subject to the Community Right to Challenge by contacting your authority.

When can an expression of interest in taking over a service be submitted?

Relevant authorities may choose to specify periods during which expressions of interest may be submitted for any relevant service. These dates must be published, including on the authority's website.

If authorities choose to specify a window of opportunity, they must have regard to the time needed for relevant bodies to prepare submissions of interest, the scale, nature and complexity of the service in question, and timescales for any existing commissioning cycle relevant to the service, or other relevant authority process for making decisions or setting budgets.

If an authority does not choose to specify a period for submitting expressions of interest then they can be submitted at any time.

How to submit an expression of interest

Expressions of interest have to be in writing, and must include certain pieces of information. Authorities can refuse to consider an expression of interest that either doesn't include all the required information, or is outside of the time period they specified.

Information that authorities can require to be included in an expression of interest:

- Financial resources of the relevant body submitting the expression of interest;
- Evidence to demonstrate that by the time of any procurement exercise the relevant body will be capable of providing the service;
- Information that identifies the services and the geographical area that the expression of interest relates to;
- Information about the outcomes to be achieved by the body providing the service, specifically how the service will promote or improve the social, economic or environmental well-being of the area and how it will meet the needs of the service users;
- Where the expression of interest is for a consortium, or proposes using a sub contractor to deliver any part of the services they must also provide information on their financial resources, and demonstrate they will be capable of providing the service by the time of the procurement exercise;
- Where the relevant body is made up of employees of the authority the expression of interest needs to include details of how it will engage other employees affected by it.

Social value

Authorities must consider the social value of expressions of interest, and in the procurement exercise it may trigger. This is required in the rules for Community Right to Challenge. It is a duty contained in the Public Services (Social Value) Act 2012. There is also a duty for authorities to consider best value, which includes economic, environmental and social value, as set out in the Best Value Guidance 2011.

Expressions of interest should demonstrate how a proposal for a service might offer social, economic or environmental benefits to the community. This could include, for example, creating local jobs, increasing local volunteering opportunities, or improving environmental conditions.

Service user needs

In demonstrating how they will deliver outcomes to meet the needs of service users of a service, the group submitting an expression of interest may use evidence published by the authority (e.g. local needs assessments) or other sources (e.g. a survey of service users).

Timetable for decision-making on expressions of interest

The authority must publish the maximum length of time that it will take them to make decisions on expressions of interests, including on their website. These may vary depending on the service. The authority must also specifically tell a group who has submitted an expression of interest of how long it will take them to inform them of their decision. This notification must be within 30 days after the end of the period for submitting expressions of interest (or if there is no specified period, 30 days after the authority received the expression of interest).

In deciding how long they need to make a decision, the authorities will consider what is a 'reasonable' period, the nature, scale and complexity of the service in question, the complexity of the expression of interest, the likely need to agree modifications in order for expressions of interest to be agreed, and timetable of the commissioning cycle, council decision making or budget setting processes.

When can an expression of interest be rejected?

Relevant authorities can reject an expression of interest on grounds listed in the regulations. The authority must give reasons for its decision, and publish these, including on the authority's website.

The reasons that can lead an expression of interest to be rejected are:

- It does not include all the required information;
- The information is considered by the authority to be inadequate or inaccurate;
- The authority considers that the relevant body (or member of consortium or sub contractor referred to in the expression of interest) is not suitable to provide the relevant service;
- The expression of interest relates to a service provided by or on behalf of an authority to people also receiving a service provided or arranged by an NHS body which is integrated with this service, and continued integration of the service is considered by the authority to be critical to the wellbeing of service users;
- The authority has taken the decision to stop providing the service, evidenced in writing;
- The service is already subject to a procurement exercise;
- The authority and a third party have entered into negotiating that are at least in part conducted in writing to provide the service;

- The authority has published its intention to consider the provision of the service by a body that 2 or more of its employees propose to establish;
- The authority considers the expression of interest to be frivolous or vexatious;
- The relevant authority considers that acceptance is likely to lead to a contravention of the law or a breach of statutory duty.

Triggering a procurement exercise

When an authority accepts one or more expressions of interest for a service in line with the Localism Act and regulations, it must carry out a procurement exercise for the service.

Authorities must say how long it will be before an expression of interest is accepted and a procurement exercise starts. In doing so, they should have regard to the need to give groups submitting expressions of interest time to be able to compete in the procurement exercise; the nature, scale and complexity of the service being procured; and the timescales for any existing commissioning cycle, including authority decision-making and budget-making processes.

Procurement must be done in compliance with procurement law, Public Contract Regulations. This sets out the rules for the UK, from the European Union procurement directives, for advertising, specifying and awarding contracts. It also sets out which services are subject to procurement law, and which can be exempted. This could be because the contract is valued at less than the threshold set (currently 200 000 Euros) or because it comes under a list of services known as Part B services, which include health, educational, recreational, cultural and sporting services.

If an expression of interest is accepted to run a service which is exempt from Public Contract Regulations then it is up to the

authority how to decide to procure the service, in accordance with EU Treaty principles.

Authorities must consider in procurement how bids will improve the economic, social and environmental wellbeing of their area. They may include social clauses in contracts. Guidance on what they can and can't do on this is in the EU Commission publication *Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement*.

Visit our route map to find out how the Community Right to Challenge process works.

Glossary

Best value

Best Value was introduced in England and Wales in the 1999 Local Government Act. The aim was to improve local services in terms of both cost and quality in a range of activities including almost all local authority functions, including for example social services, environmental health, housing and planning. New statutory Best Value Guidance was published in 2011 and replaces previous guidance.

Commissioning

Commissioning is the process by which public bodies, in consultation with others, plan and decide what work or services are needed and how best to arrange for these to be delivered (including by procurement).

Local Compact

A local Compact is a mutually agreed document and approach to partnership working between public sector and voluntary and community sector organisations locally. It contains principles and commitments on a number of issues, including funding and procurement.

Public sector procurement

The process by which public bodies buy goods or services from other organisations, decided on in the commissioning process.

Relevant authority

Public authorities who must consider a Community Right to Challenge expression of interest, listed in the Localism Act

Relevant service

Services that a Community Right to Challenge expression of interest can be submitted for, except those listed as excluded services the regulations.

Relevant body

Bodies who can submit expressions of interest under the Community Right to Challenge.

Social value

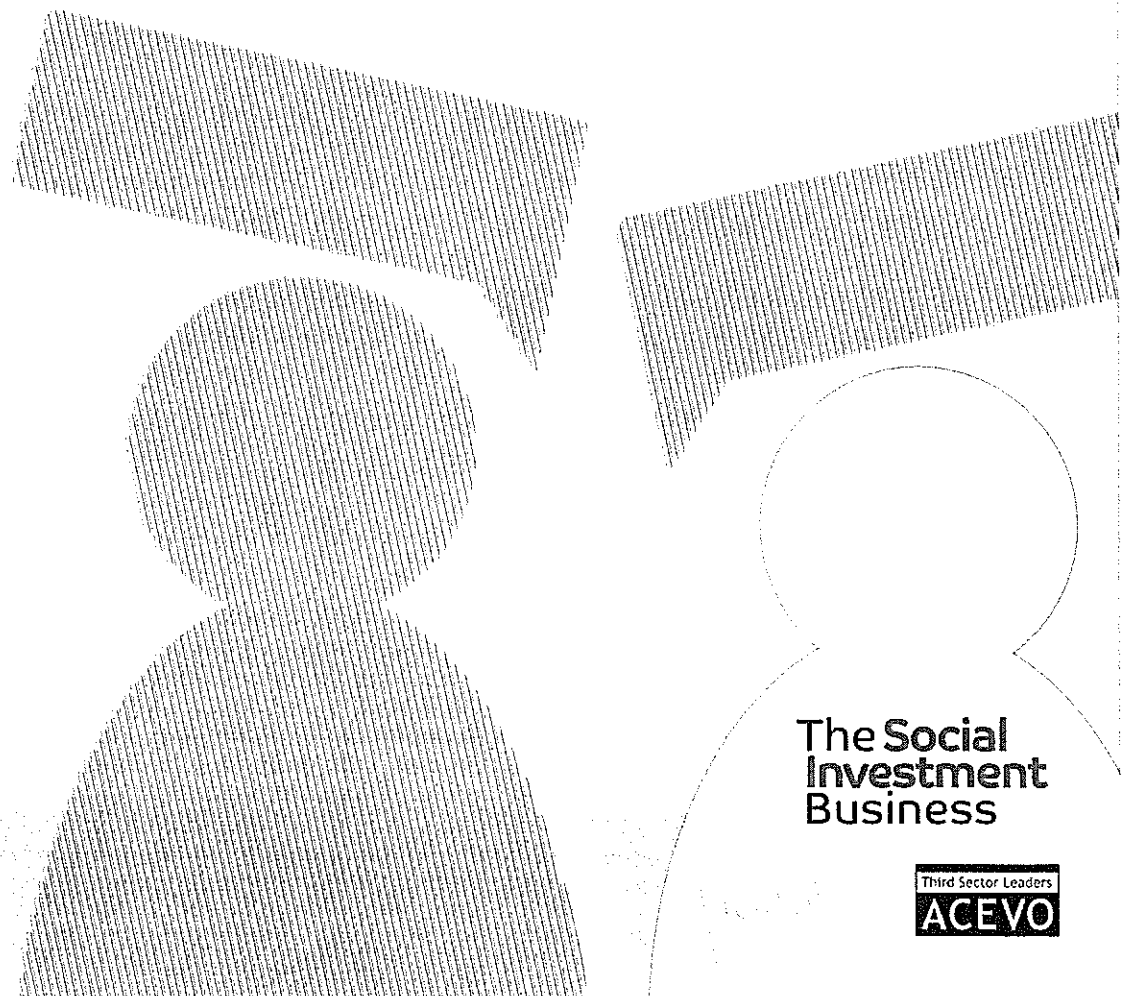
The economic, social and environmental wellbeing of the area. The Community Right to Challenge requires that authorities consider social value of expressions of interest and bids in procurement exercises triggered by a successful expression of interest.

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Community Right to Challenge

Step 4:

Submitting an
expression of
interest



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Submitting an expression of interest

All relevant authorities will be required to make public their procedures for inviting and considering expressions of interest under the Right to Challenge. You will need to find out from your authority what their processes are. They will spell out:

- When you can submit an expression of interest. Authorities can either have an open process, or they can specify particular periods when they will receive expressions of interest.
- What information they need to accompany an expression of interest. The information required by law is specified in the section below. An authority can ask for more information than this but you are NOT obliged to provide it, and the authority CANNOT reject your expression of interest simply because you do not provide information outside of the legal requirements. You may decide however that providing this extra information will help you to make your case more clearly.

Set information included in any expression of interest

Government regulations specify the information which needs to form part of any expression of interest.

1. Information about your financial resources (assets, cash reserves, investment available to you) and the same information about the financial resources of any and all partners or sub-contractors you plan to use and have named in the submission.

2. Information about your organisational capabilities to deliver the service in question (staffing, skills, experience, track record, quality systems, policies and procedures) and the same information about the capabilities of any and all partners or sub-contractors. If you do not have all of these capabilities fully in place at the time of submission of expression of interest this should not cause your expression of interest to be rejected PROVIDED THAT you can demonstrate to the authority's satisfaction a plan to put any missing components in place by the time of a procurement exercise.
3. Information which specifies clearly what the service in question is, including the geographical area to which your expression of interest relates.
4. Information about the outcomes which you would achieve if you (or your consortium) were providing the service in question. This information relates both to:

- a) How your proposals would contribute to social, economic or environmental well-being of the relevant authority's area.
- b) How your proposals would meet the identified needs of users of the service

And ONLY IF you are employees of the relevant authority and looking to "spin-out":

5. Details of how you propose to engage with other employees of the authority who would be affected by your proposals. There is no fixed guidance from Government on what the form of this engagement should be.

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Step 5:

The relevant
authority's decision



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The relevant authority's decision

The relevant authority will now have to consider your expression of interest and inform you of their decision in writing. The length of time this decision will take will depend on whether the authority has set periods for expressions of interest to be submitted. They must notify the body within 30 days of either receiving the expression of interest or, where they have set such periods, the end of the period.

If the authority advises you that it has accepted your expression of interest, then it will trigger a procurement exercise, and you have the chance to bid to deliver the service in competition with any other organisation (including the private sector, and other bodies who are not eligible to issue a Community Right to Challenge itself). This process is outlined in step 6. The authority must also publish on its website the minimum and maximum period between it accepting the expression of interest and starting a procurement exercise. It is expected that in making a decision about the timing of the procurement process the authority should take into account the time you may need to develop your capabilities or plans further in order to compete effectively.

The authority may on the other hand advise you that it is rejecting your expression of interest, but if they do so, it can only be for one of the following reasons, and they should inform you which reason(s) have resulted in the rejection. The reasons for rejection are listed here in three broad categories:

Reasons to do with your organisation

1. The expression of interest does not comply with the regulations

For example if you cannot demonstrate that you are a "relevant body", your expression of interest is not really in relation to a relevant service, or it is submitted outside of a period for submitting expressions of interest.

2. The authority considers that you have supplied inadequate or inaccurate information

This could be for a host of reasons. The authority might for example consider that:

- You have not given precise information about the service you want to take on;
- You have not shown how you would meet the service needs and deliver things in an improved way;
- You have not given enough information about your organisation and its skills;
- You have not given enough information about how you would finance your service delivery;
- You have given information which the authority knows is inaccurate.

This is not an exhaustive list.

This basically means that you haven't given the relevant authority the information it would need to accept your expression of interest. So if this is the only reason why an authority is rejecting your expression of interest, the regulations state that the authority should consider whether it would be more appropriate to go back to ask you for more information rather than reject it outright.

3. The authority doesn't think you are a suitable body to deliver the service

Even if the information you have submitted is adequate, the authority could still determine that you do not have the organisational capability (see step 1) to deliver the service. This might be for a number of reasons, including financial resources, staff skills, or the standing required to successfully come through a procurement exercise. It is important to note that if your expression of interest involves more than one organisation in the proposed delivery (in a consortium, or through the use of sub-contracts) then the whole expression of interest could be rejected in relation to concerns about ANY of the organisations involved.

This ground also applies the judgement of suitability against the proposals in the expression of interest, including the proposed outcomes to be delivered.

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

If the authority believes that you are not really serious about delivering the service, it can reject the expression of interest for this reason alone. The authority would need to have cause to believe that you were wasting time or trying to cause trouble. If an organisation is unhappy with a service

and wants to complain about it or see it improved, it should not use the Community Right to Challenge to do this, unless it is genuine about delivering the service itself.

Reasons to do with the Service

1. The authority has already decided to stop providing the service

If the decision has already been made to stop providing a service, perhaps because of budget cuts, then your expression of interest can be automatically rejected. If however the authority is considering such a possibility but hasn't formally decided to stop the service yet, then your expression of interest cannot be rejected on these grounds – indeed it will actually need to be strongly taken into account as part of that decision-making process.

2. The authority is already in the process of commissioning the service in a different way

If the authority is already in the process of commissioning the service in a different way then your expression of interest can be rejected. It could be that a procurement process is already underway, or that the authority is already in formal negotiations with another organisation to deliver the service, or that plans are already underway for a group of employees to "spin-out" under the Government's "Public Service Mutuels" policy. In any such case, the decision to provide the service in this different way must have been formally documented – if it is just the case that the authority is thinking about going down this road then your expression of interest cannot be rejected on these grounds.

3. The service is integrated with other services arranged through the NHS and needs to remain so

If the service is already linked to other services provided by the NHS or commissioned by the NHS, then this could be grounds for rejection. However, for this to be the case the authority would need to be sure that the continued integration of these services was essential in order to protect the well-being of the particular users involved. This reason for rejection is about protecting the quality of care specifically of vulnerable people and those with complex needs.

Other reasons

1. Anything else which would mean that accepting your expression of interest would be likely to lead to a breach of the authority's statutory duties, or break the law

If anything in your expression of interest would lead the authority to be in breach of the law or a statutory duty should it accept your expression of interest then it may be rejected.