

By: Roger Gough, Cabinet Member for Business Strategy, Performance & Health Reform
David Cockburn, Deputy Managing Director, Corporate Director of Business Strategy and Support

To: Corporate Policy Overview & Scrutiny Committee – 22nd September 2011

Subject: Community Right to Challenge

Classification: Unrestricted

Summary: Corporate POSC Members are asked to NOTE the national proposals for the community 'Right to Challenge' and the potential implications for Kent's public services.

FOR INFORMATION

1. INTRODUCTION

1.1 The community 'Right to Challenge' is one of three key mechanisms set out in the '*Localism Bill*' which is currently proceeding through the House of Lords. The Bill introduced three new community 'rights', which come into effect from April 2012, are inherently interlinked:

a) **A Right to Provide:** The 'Right to Provide' will allow public sector staff to "spin off" their particular service from public bodies and to operate as a social enterprise or other arms length vehicle such as a co-operative or mutual trust. The 'Right to Challenge' will be the mechanism by which the 'Right to Provide' will be managed.

b) **A Right to Challenge:** The 'Right to Challenge' will open up more public services (not decision-making functions) to challenge from interested parties including parish councils, community groups and charities. Should a challenge be accepted, this then triggers a procurement exercise.

c) **A Community Right to Buy (Assets of Community Value):** The Community 'Right to Buy' will establish a 'listing' system ran by local planning authorities of assets (both public and private) considered to be of community value. Importantly, it does not require the sale of an asset to a community group but merely the provision of time (a defined 'window of opportunity') for interested community groups to prepare a bid for consideration.

2. POLICY CONTEXT

2.1 The way we provide public sector services are fundamentally changing. The financial deficit, spending cuts and restructuring mean the public sector is shrinking and we can no longer afford to provide services in the same way.

2.2 The Coalition Government is advocating the Big Society as a catalyst for public service reform. The ambition is for public services to be open to a more diverse range of providers – not just the private sector, but increasingly voluntary, community and social enterprise (VCSE) organisations - creating innovative new options for services that were once solely the domain of local authorities.

2.3 The Government's direction of travel has evolved over time, beginning with *'The Coalition Programme for Government'*, and progressing a gradual shift in policy proposals as the difficulty of navigating legal restrictions on procurement and commissioning processes (particularly EU) emerged. The *'Modernising Commissioning Green Paper'* (December 2010) indicated the Government's support for the creation and expansion of mutuals, co-operatives, charities and social enterprises, and enabling these groups to have much greater involvement in the running of public services.

2.4 **'Localism Bill'**

The policy direction was further strengthened by the *Localism Bill's* outline statutory framework for the three community 'rights' for Right to Provide, Challenge and Buy, (December 2010). The Government consulted widely on the proposals. KCC has responded to the national consultation and will make sure our own process fits with the national scheme. The Bill includes a number of powers to specify further detail underpinning the 'Right to Challenge' in regulations of which the detailed secondary legislation is not expected to be in place until Spring 2012. KCC is currently lobbying for the early publication of regulations relating to the 'Right to Challenge'. The timescale for the Localism Bill is included in Section 7.

2.5 **'Open Public Services White Paper'**

The Government's sustained commitment to this policy agenda was evident in the *'Open Public Services Paper'*, published in July 2011, following a long delay. It was widely suspected to be a back-track from earlier suggestions about opening up public services to the private sector. However choice and competition remained key principles of the White Paper, which was a confirmation of previous Localism policies, including:

- a) Opening up services to new providers in the VCSE sector – David Cameron says that “diversity should be the default position in public services”
- b) Communities, charities & employee-owned mutuals being able to bid to run public services in different ways
- c) Encouraging Joint Ventures with the private sector – particularly promoting not-for profit organisations and ventures with social aims forming joint ventures with the private sector – however the reality of the barriers of EU procurement processes remains.
- d) Local Government with a role as the “Guarantor of Standards”

The Government's Cabinet Office is still consulting on the procurement issues associated with opening up public sector provision, and working to resolve them.

2.6 **'Bold Steps for Kent'**

KCC's medium term plan, *'Bold Steps for Kent'* clearly outlines Kent's ambition to “put the citizen in control” and to improve how KCC procures and commissions services (a priority in *'Delivering Bold Steps'*), anticipating the Government's

direction of travel within the subsequent ‘*Localism Bill*’ and ‘*Open Public Services White Paper*’.

2.7 ‘Bold Steps’ set out a vision “to develop a new model for the delivery of public services in Kent” by radically rethinking KCC’s approach to the design and delivery of services. In short, the Council must choose to either ‘make’, ‘buy’ or ‘sell’ services”. Priority outcomes in ‘Bold Steps’ to support this vision include:

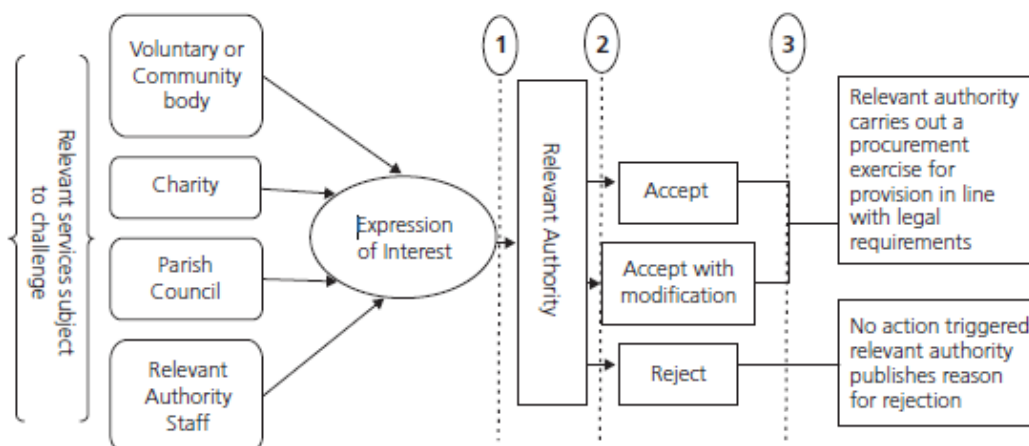
- a) “We want to put power in the hands of residents so they have the opportunity to shape how services are provided to them and their local communities”
- b) “We want to make it easier for voluntary organisations and community groups to deliver our services”
- c) “We will gain maximum commercial value from our services”
- d) “We will drive efficiency through a new focus on competition and market testing”

2.8 ‘Bold Steps for Kent’ indicated KCC’s ambition to become a strategic commissioning authority. This will increasingly result in KCC moving from direct (“in-house”) provision of services to more commissioned services (opening up services through procurement exercises to a wider range of providers) and encouraging new models of delivery.

2.9 ‘Bold Steps’ also suggested a *Right to Bid* process to give staff an opportunity to put forward a bid to provide a KCC service as a social or commercial enterprise, if they believe it would make the service more efficient, effective and competitive. This proposal has effectively become the ‘Right to Challenge’, which will be subject to the national regulations from April 2012.

3. RIGHT TO CHALLENGE

3.1 The ‘Right to Challenge’ will encourage interested parties to put in proposals to ‘bid’ for public services via an open procurement exercise. Effectively it introduces a new ‘expression of interest’ (EOI) stage at a pre-determined number of weeks before formal procurement of a service can begin, allowing community groups, charities and staff to express an interest in running a service and then utilise the time period between the ‘expression of interest’ and formal procurement starting to develop their alternative delivery vehicle. The outline national process (featured in the Government consultation) is summarized in the diagram below:



- 3.2 The diagram demonstrates several key stages of the process:
- (1) Public bodies will be able to specify '**windows**' (periods of time) in which to receive EOI's. Once the EOI's are received, the public body is required to assess the applications based on national criteria.
 - (2) There are 3 options for decision, defined in national regulation:
 - a) **Accept** – application proceeds to standard procurement exercise
 - b) **Accept with modification** – public body can request further development or evidence to support the application (e.g. proof of financial sustainability)
 - c) **Reject** – there will be national criteria on why an application can be rejected (e.g. frivolous or vexatious applications).
 - (3) If the public body accepts with modification or rejects an Expression of Interest, it must **publish** the reasons for its decision. The '*Open Public Services White Paper*' has also introduced recourse to an **ombudsman** for any interested party with an objection to the public body's decision to reject.
- 3.3 The detailed Secondary Legislation will specify exactly how the process is expected to work in practice. However the publication of the national consultation responses, and recent debates in the House of Lords indicate that Local Authorities may get some discretion over issues such as which services are "challengable", and power to specify time periods in the process e.g. time between receiving EOI's and deciding whether to accept or reject them.

4. ANALYSIS

- 4.1 KCC embraces the concept of the 'Right to Challenge', and supports the principles of the '*Localism Bill*' and '*Open Public Services White Paper*' to open up public services, which compliment KCC's policy direction in 'Bold Steps'. However, there are several limitations with the emerging process, and implications for Kent.
- 4.2 ***Demand Led vs. Programmed Approach***
- Two fundamental options were set out in the consultation process for Right to Challenge:
 - (1) Publish Expressions of Interest (EOI) as part of the commissioning / procurement framework for all commissioned and procured services; or
 - (2) Accept EOI as and when received from relevant parties and consider each on merit
 - Both options create issues. There is unknown demand and appetite for 'Right to Challenge' amongst potential interested parties, and there will be cost and bureaucracy required to publish a Contracts & Grants Register and EOI for all services to fulfil the national requirements for Option 1.
 - However, if KCC followed a demand led process, services could be 'picked off' in isolation leading to a less strategic approach and time and effort spent reacting to an unknown burden of EOI requests, rather than taking a proactive approach.
 - Following extensive dialogue across the organisation, KCC is working toward Option 1, by taking a considered programmed approach, better allowing a more managed process to the benefit of KCC and potential bidders alike.

4.3 **Procurement Barriers**

- 'Right to Challenge' currently only provides community groups additional time before formal procurement process starts – effectively a right to compete, with no guarantee of success at procurement stage.
- Accepting a 'Right to Challenge' implies that there should be enhanced social value in the procurement criteria for that service, but it doesn't remove requirements for value for money or quality. KCC will need to amend better understand the concept of social value and how it can be defined in procurement, and reflect this in its procurement guidance.
- Procurement law is clear that any social value ascribed to a procurement has to be able to be delivered by all potential providers – including private sector
- The risk is that some private sector providers might become predatory and their scale, sustainability and financial strength may provide a significant advantage in the procurement process against community groups and staff.
- All procurement of services over the £156K EU procurement limit will be subject to EU procurement law, with the associated costs and restrictions of this process.

4.4 **Expectation Management**

- With secondary legislation not expected to be in place until Spring 2012, there are many unknowns and changes still to develop with the Right to Challenge process
- The procurement barriers (above) mean that interested parties from the voluntary & community sector, parishes, residents and staff might be discouraged from submitting an EOI.
- The gap in public understanding between the Government's ambition for the 'Right to Challenge' process and the complex legal and procurement framework public bodies must operate within (which is not easily challengeable or changed).

4.5 **Implications for KCC**

- The extent to which KCC will be able to effectively manage the process is still emerging. KCC will have to work within any national restrictions and regulations of the process.
- Publishing reasons for 'accept with modification' and rejection of EOI, the recourse to an ombudsman for rejection decisions, unknown demand for the process and additional procurement exercises may create additional cost and bureaucracy for KCC. KCC must ensure wherever possible that we minimise unnecessary bureaucracy.
- KCC has limited capacity as we proceed through the changes to the organisation in 'Change to Keep Succeeding'. This means KCC will have to carefully prioritise how many opportunities open up, how often we do so (to manage demand) and how long we take to make decisions on EOI, within capacity limits.
- KCC will have to maintain an effective use of strategic resources, by ensuring proposals submitted under 'Right to Challenge' align with savings outlined in the Medium Term Financial Plan and other key strategies (e.g. Asset Strategy).
- We believe that KCC is developing a robust approach to 'Right to Challenge'. Any new processes involve an element of risk and KCC will have to ensure it

learns from our early EOI decisions and refine processes and approach accordingly.

5. KENT'S RESPONSE TO THE RIGHT TO CHALLENGE

- 5.1 KCC is preparing early to respond to the potential opportunities of the 'Right to Challenge' which compliments our ambitions in 'Bold Steps for Kent' (set out in **Policy Context**). KCC's Cabinet and Corporate Management Team (CMT) are considering what KCC needs to do to prepare to seize the opportunities and manage the implications and limitations of 'Right to Challenge'.
- 5.2 To do so, KCC has decided to take a proactive, programme approach called the 'Future Service Options Programme', which is being programme managed by Business Strategy on behalf of Cabinet & CMT to prepare for the launch of 'Right to Challenge' in April 2012.
- 5.3 A detailed programme of activity is currently underway that supports 'Bold Steps for Kent' by developing a new model to review options for the design and delivery of services in KCC by deciding whether to 'make, buy or sell services", in advance of opening up services for Expressions of Interest under the 'Right to Challenge'. A programme plan is available as a Background Document.

6. TIMETABLE

- The '*Localism Bill*' is currently being debated in the House of Lords. It is expected to receive Royal Assent this autumn, with secondary legislation on 'Right to Challenge' expected in spring 2012, in effect from April 2012.
- KCC's Future Service Options Programme runs from July 2011 to April 2012.
- Cabinet & CMT will prioritise the programme for Make, Buy, Sell Reviews in Nov 2011 and Jan 2012 to determine which services to open up under 'Right to Challenge'.
- KCC will publish the first Right to Challenge EOI opportunities online from April 2012.

7. RECOMMENDATIONS

- 7.1 The Corporate Policy Overview & Scrutiny Committee is asked to NOTE the implications of the forthcoming 'Right to Challenge' in the Localism Bill which will come into effect from April 2012, for INFORMATION.

Background Documents:

Right to Challenge Presentation for Corporate POSC (22nd September 2011)

Future Service Options Programme Plan (August 2011)

Officer Contact:

David Whittle, x: 6969, Liz Sanderson, x: 1703 - Business Strategy