

June 2012

1. Community Right to Challenge

The Government's Localism Act introduces a 'Community Right to Challenge' which is due to come into effect from 27 June 2012. This right enables voluntary and community bodies, charities, parish councils and employees of local authorities to submit an 'Expression of Interest' to bid in a procurement exercise to take over responsibility for providing services that local authorities currently provide. From 27 June 2012, KCC will set out a timetable of expression of interest windows for each service during which expressions of interest can be submitted. This information will be held in an Expression of Interest Register on KCC's website along with further information about the process - www.kent.gov.uk/community_and_living/right_to_challenge.aspx.

2. Social Enterprises

The Government has also expressed its commitment, under the 'Right to Provide', to the creation and expansion of employee-led social enterprises which enable public sector workers the opportunity to 'spin out' from KCC and take over the running of the services they deliver. The Community Right to Challenge process will be used to manage any 'Right to Provide' submissions from staff.

The Government's definition of a social enterprise is '***a business or service with primarily social objectives whose surpluses are principally reinvested for that purpose in the community, rather than being driven by the need to maximise profit for shareholders and owners.***' Social enterprises can take on a number of different structures:

- **Charities that trade**
- **Community Interest Companies**
- **Mutuals**
- **Co-operatives**

Government is particularly interested in the development of Mutuals. Mutuals are formed when public sector employees spin out of the Local Authority but continue to provide the service. In a mutual the employees own a significant stake of the business and have significant control over its running. For further information, see the Mutuals Information Service provided by the Cabinet Office: <http://mutuals.cabinetoffice.gov.uk/>

The statutory guidance for Community Right to Challenge provides protection for discussions between staff and KCC about spinning out services to carry on uninterrupted by other challenges. If a group of staff (2 or more employees) puts forward a proposal to KCC to spin out and run their service and KCC is considering this proposal, KCC is allowed to reject any other challenges for that service from other organisations while discussions are underway.

In accordance with Bold Steps for Kent, KCC is committed to the principle of residents, community bodies and members of staff having the opportunity to submit proposals in respect of establishing a social enterprise to deliver services to the people of Kent. The

decision to create or 'spin out' services into a social enterprise model ultimately rests with KCC. In reaching a decision on this matter, KCC will take into account value for money, best value (including social, economic & environmental value) and the best way to improve outcomes for service users and communities in making that decision.

The Community Right to Challenge provides a process by which groups of two or more employees can submit an expression of interest to form a social enterprise. However, groups of staff can also approach Commissioning & Procurement Board directly to discuss their proposal, and the Board should be informed in advance of any forthcoming expressions of interest from groups of staff. The Q&A below provides further guidance.

3. This document

KCC is supportive of staff pursuing the development of social enterprises. However, staff involvement in a proposal for a social enterprise to take over the running of a KCC service must not, in any way, interfere or conflict with their KCC employment. The purpose of this document is to assist members of staff to avoid situations where, through their involvement with a social enterprise proposal, they may inadvertently breach the expected standards of conduct.

Part A of this guidance note sets out some questions and answers for members of staff involved in a social enterprise proposal and is intended to identify what actions are appropriate and permissible under their KCC employment contract.

Part B provides information in respect of some of the key people management issues that should be taken into account. Part B also identifies some further sources of information which may be useful for members of staff who are involved in developing a social enterprise proposal.

PART A – Questions & Answers

Some of my colleagues and I are interested in setting up a social enterprise. At what stage should I make my line manager aware of this and what involvement should my line manager have in further discussions about the proposed social enterprise?

If your line manager has not been involved in the initial discussions regarding the possibility of setting up a social enterprise you will need to inform him/her at the earliest opportunity of your proposal and the potential impact it will have on members of staff in the service/unit.

A request should also be made to your line manager for a discussion about the principle of setting up a social enterprise to be included as an agenda item at a future team meeting.

Your line manager should also inform the Commissioning & Procurement Board at the earliest opportunity; this is KCC's board which will consider all staff proposals to develop a Social Enterprise and formal 'Expressions of Interest' submitted under the Right to Challenge.

What do we need to do before we start work on producing a formal Expression of Interest regarding establishing a social enterprise?

At an early stage you will need to establish the level of support within your service/unit regarding the principle of establishing a social enterprise. One of the requirements of an expression of interest is that it must explain how other employees who are affected by the proposal will be engaged, and KCC must be satisfied with the engagement, so it is important to get this right from the start. The statutory guidance is not prescriptive about how employee engagement should be carried out and suggests that normal, proportionate engagement mechanisms are used.

At this point in the process it is not essential for you to have produced a detailed formal proposal document regarding the social enterprise. However, you will need to have sufficient information and knowledge so that you are able to explain to your colleagues the potential implications of establishing a social enterprise.

Your discussions with your colleagues should include matters such as the different legal structures for social enterprises, the requirements of the Transfer of Undertakings Protection of Employment (TUPE) regulations and future pension arrangements. All members of staff in the service/unit must be given the opportunity to express their views and opinions on the principle of setting up a social enterprise. The viewpoints of other members of staff must be fully respected and it is not acceptable for them to feel that they have been pressurised into giving support to the social enterprise proposal. Complaints from members of staff on this matter will be appropriately investigated and, if upheld, could result in disciplinary action being taken.

What should we do if there is no consensus in the team/service regarding supporting the proposed social enterprise?

As the proposal for establishing a social enterprise will potentially affect the entire staff group employed in your team/service, gaining the support of your colleagues for the proposal is an important consideration. As the Right to Challenge only requires the involvement of two or more members of staff and the secondary regulations state that a ballot to show support is not necessary, a lack of clear support from the entire team for the principle of establishing a social enterprise is not an obstacle to the proposal progressing further. However, as above, there is a requirement for affected staff to have been sufficiently engaged, and the greater the employee support, the more chance the social enterprise has of being successful.

Where there are divergent views within the staff group regarding the proposal these differences of opinion must not impact on the professional working relationships of the members of staff concerned and they must not have any detrimental effect on service delivery.

If you are a line manager, and you are involved in the proposed social enterprise, you must not use your position within the team/service in order to attempt to alter the views of members of staff who do not support the proposal. As a line manager you will have responsibility for ensuring that there is no detrimental effect on the employee relations climate within the team and that effective service delivery is maintained.

Are we allowed to hold meetings during normal working hours to discuss the social enterprise proposal?

As identified earlier in this guidance note, at an early stage in the process you can request for the social enterprise proposal to be raised during a team meeting. In order to

avoid any detrimental impact on your normal day to day duties, any further meetings regarding the social enterprise should not be held during your normal working time. However, if there is an urgent requirement to arrange a meeting during your normal working hours you should discuss this with your line manager. If your manager is able to agree to the meeting request, and it will not have a detrimental effect on service delivery, you and your colleagues will be required to make up the time lost due to the meeting.

Will we be allowed to contact any service users to make them aware of the proposal for the social enterprise and to seek their views?

As you move forward with your social enterprise proposal you will need to have direct communication and engagement with service users and, where appropriate, their carers and relatives. However, there are some important considerations that you must take into account before making any contact with the service users.

The contact that you have with the service users at this stage of the process must not conflict with any other consultation process or review which KCC is undertaking in the same service or unit.

In accordance with the data protection principles, as set out in the Data Protection Act 1998, the information that KCC holds on service users has been collected for specific identified reasons and can only be used with the consent of the individuals concerned. You must not access or use the personal data of the service users in connection with the proposed social enterprise without seeking prior authorisation from your line manager.

Misuse or inappropriate use of information and/or personal data will be regarded as a serious matter and could lead to disciplinary action and, in certain cases, criminal prosecution. Further information regarding disclosure of information is set out in The Kent Code. <http://knet2/staff-zone/terms-and-conditions/managing-performance-and-conduct/The%20Kent%20Code.doc>

Before planning any engagement or consultation activity with service users, you should make your line manager aware and seek guidance and advice from the Communications & Engagement Team (Customer & Communities). To do please complete a work request form on KNet. <http://knet/Change/Pages/Communications-Consultation-and-Customers-.aspx>

What other information held by KCC can I use in relation to the social enterprise proposal?

If, in connection with your social enterprise, you wish to use any information collected and held by KCC - including statistical and financial data - you must first seek permission from your line manager.

Are there any other considerations that we need to take into account when engaging with service users?

Discussions regarding proposed changes to the way in which a service operates have the potential to be unsettling and concerning for the service users. It will be appropriate, ahead of any planned meetings with service users, for you to share with your line manager an outline of the information that you intend to discuss with the service users regarding the social enterprise proposal. You should also log a work request form with

the Communication & Engagement Team to ensure they are aware of any issues and can advise you accordingly.

It is not acceptable for service users to feel that they are being pressurised into giving their support to the proposed social enterprise. Complaints from service users on this matter will be appropriately investigated and, if upheld, could result in disciplinary action being taken.

The communication (written and verbal) that takes place with the service users regarding the proposed social enterprise must not include any comments or statements which could be regarded as derogatory or inappropriate in respect of the service currently being provided by KCC. Inappropriate communication with the service users could result in disciplinary action being taken.

Are there any other considerations that we need to take into account when engaging with other key stakeholders – including partner agencies?

In any communication that you have with stakeholders you must ensure that they are fully aware that you are acting in connection with the proposed social enterprise and not in your capacity as a KCC employee. You should advise your line manager of your intention to contact key stakeholders to discuss the proposed social enterprise.

You must not approach elected Members directly to discuss your proposed social enterprise. However, as identified in the Kent Code, every assistance should be given to elected Members who need information about the proposed social enterprise to deal with matters such as media enquiries. The Communication & Engagement Team can provide further guidance regarding the protocols for the provision of information to elected Members.

Who else do we need to engage with regarding the proposal for the social enterprise?

In addition to engaging with the members of staff directly affected by the proposal, you will need to engage at the earliest appropriate opportunity with the recognised Trade Unions (UNISON, GMB and Unite) and any other relevant Trade Unions. Members of staff and their representatives should be provided with information explaining the implications for them on matters such as a possible TUPE transfer from KCC and future pension provisions.

Communication and consultation with members of staff, service users and the Trade Unions will need to take place at all stages of the process of seeking to establish a social enterprise. If at the end of the procurement process you are successful in bidding to take over the running of a service you will need to formally consult with the affected staff and the Trade Unions. Please log a work request form with the Communication & Engagement Team for advice in the first instance.

Will I be allowed to carry out work on the proposed social enterprise during my normal working hours?

Duties or activities related to the social enterprise should not be undertaken during your normal working hours. It is not acceptable for your involvement in the social enterprise to interfere with the performance of your day to day duties.

If there is an urgent requirement for a particular social enterprise related task or activity to be completed and this cannot be undertaken outside of your normal working hours

you should discuss this with your line manager. Your line manager will be able to give consideration to your request to carry out social enterprise related work during your normal working hours. If your line manager is able to agree to your request, you will be required to make up the lost time at a later date.

Will I be allowed to use KCC resources when I am carrying out work in connection with the proposed social enterprise?

As identified in the Kent Code, KCC's telephone, computer systems, other equipment and materials (including stationery items) are provided for employees' business purposes. As a general rule KCC resources should not be used for work connected to the proposed social enterprise. However, some limited personal use of KCC's electronic communication facilities and devices (including phone, internet and e-mail) is permitted. Personal use of KCC resources must not be excessive and should take place during work breaks where it will not interfere with the performance of your day to day duties. Any e-mail correspondence sent from a KCC e-mail account in connection with the proposed social enterprise must clearly identify that you are not acting on behalf of KCC in respect of the matter(s) covered in the message.

Further information on the use of KCC resources can be found in the K-NET document 'Electronic Communications User Guidance: Using your electronic equipment responsibly'. <http://knet2/kcc-directory/services-and-support/it-service-desk/help-and-advice/Electronic%20Communication%20User%20Guidance%20June%202010%20-%20using%20your%20electronic%20equipment%20responsibly.doc>

Other matters to consider

Media

You need to remember that as a KCC member of staff there are certain expectations in how you conduct yourself in any dealings with the media (this includes traditional broadcast and print media as well as social media). If you have any contact with the media in respect of the proposed social enterprise you must ensure that it is understood that you are not acting in your capacity as a KCC member of staff or commenting on behalf of KCC.

In any contact with the media you must not make any comments or statements which could be regarded as derogatory or inappropriate in respect of services currently being provided by KCC. Inappropriate communication with the media could result in disciplinary action being taken. The Kent Code provides further information regarding contact with the media and advice can be sought from the Communication & Engagement team.

Conflicts of interest

You need to be aware of issues around conflicts of interest. In the event of members of staff transferring to the new social enterprise, care needs to be taken to ensure there are no conflicts of interest for them. Staff who are to transfer should not take part in negotiating the terms of the transfer on behalf of the KCC or be involved in assessing any bids from that body for any ongoing contracts.

Intellectual Property

In the course of your involvement with the process of seeking to establish a social enterprise you must not infringe any Intellectual Property Rights owned by KCC.

Intellectual Property Rights are covered by The Kent Code and breaches of the code could lead disciplinary action.

PART B – People Management Considerations

This section of the guidance note provides an outline of some the key people management issues for members of staff to consider in relation to the proposed social enterprise. During the process of attempting to establish a social enterprise members of staff should seek appropriate professional advice.

Engagement

It is essential that the members of staff affected by the proposed change are actively involved from the start and throughout the process. Members of staff should be encouraged to express their views and ideas regarding the proposal to establish a staff-led social enterprise.

Consultation with the key stakeholders

Early and meaningful consultation is essential in order to minimise the negative effects (i.e. uncertainty, anxiety, stress etc.) that can occur when proposals are put forward in relation to changes to the way a service is run. When consulting with the key stakeholders it is essential to:

- recognise the potential impact on the stakeholders arising from the proposal for establishing a social enterprise
- ensure that the consultation and communication with stakeholders is honest with regard to the reasons for the proposal and its impact
- ensure that staff and key stakeholders feel able to express their views and opinions on the proposal

The Communications & Engagement Team can provide advice on these issues via logging a work request form.

Training & development

Training in respect of social enterprises is being co-ordinated centrally through the HR Learning & Development Team. Please contact [Coral Ingleton](#) in the first instance.

TUPE

The Transfer of Undertakings (Protection of Employment) Regulations 1981 & 2006 (TUPE) protects employees' terms and conditions of employment when a business or service is transferred from one owner to another. If TUPE applies, members of staff transferring to the new organisation will do so on their existing terms and conditions of employment. The continuity of service and other employment rights of the transferring staff are also preserved. When a TUPE transfer takes place both the old and new employers are required to inform and formally consult with the members of staff affected by the transfer.

KCC acts in the expectation that all externalisation of its services will be covered by the TUPE Regulations, the only exception being where specific legal advice has been obtained to the contrary. The law regarding TUPE transfers is complex and is continuing to evolve. Bidders for KCC contracts are required to take their own advice on whether TUPE applies and the implications of TUPE.

Following a TUPE transfer any variation to the employee's terms and conditions of employment will be void if the sole or principal reason for the variation is the transfer itself, or a reason connected with it that is not an economic, technical or organisational (ETO) reason entailing changes in the workforce.

Pension Provisions

Pension provisions are important for members of staff and must be considered at an early stage in the process of seeking to establish a social enterprise. As part of the TUPE process the new employer must ensure that it will be able to offer a 'broadly comparable' pension scheme.

It is essential for members of staff to have an appreciation of the costs associated with pension provisions and for these to be taken into account when producing a formal Expression of Interest.

The new employer, i.e. the staff-led social enterprise, can request admitted body status with the LGPS so that the members of staff who have transferred can continue to have access to the LGPS. The social enterprise seeking admitted body status will need to make this request via the KCC Pension Team.

If the social enterprise is intending to request admitted body status with the LGPS it is essential that discussions with the KCC Pension Team take place at the earliest opportunity. The financial implications of an admission agreement need to be understood by the new employer.

Formal consultation

Formal consultation regarding a TUPE transfer must be conducted in good time with the affected members of staff and the recognised Trade Unions. The consultation process should clearly identify what the transfer involves, to deal as soon as possible with any concerns that arise and to ensure that the delivery of service is not compromised in the run-up to a transfer.

Formal business case

In order to put forward a proposal to establish a Social Enterprise, you will need to develop a strong business case that explains how your Social Enterprise will provide the service. When developing the business case, you should consider the potential overheads and use of resources (including use of property/premises, ICT equipment, HR support, payroll etc) that may be required to run the service as an independent Social Enterprise in the future, and factor this into the financial planning of your business case.

A key aspect of the business plan will be to demonstrate financial viability and sustainability of the proposed social enterprise. The staffing and employment costs will need to be taken into account as part of the financial planning process.

Your business plan should also include information about the proposed legal structure for your social enterprise and its governance arrangements. The most common types of legal structures are:

- Company limited by Guarantee
- Company limited by Shares
- Some industrial and provident societies such as community benefit societies

- Community Interest Companies

Statutory guidance for Right to Challenge states that Government would usually expect bodies that will be delivering services for local authorities to be incorporated with limited liability, to limit the risk to individual members. It is not necessary for your proposed Social Enterprise to be incorporated by the time you submit an expression of interest. If your expression of interest is successful, the period between acceptance and the start of the procurement exercise provides time for this to happen.

There are advantages and disadvantages to each of the options for the legal structure of the social enterprise and they may vary according the case specific details of the service in question. As part of the business planning process, members of staff involved in the proposals will need to investigate which structure is most appropriate for their social enterprise. Policy & Strategic Relationships Team in Business Strategy can provide briefing notes on different models and legal entities available and national advice is also available (see below.) It is highly recommended for you to seek appropriate independent professional advice on financial and legal matters.

Equality Impact Assessment regarding the employees and other stakeholders affected by the change process

The Equality Impact Assessment process should examine the impact of the transformation of the service on the key stakeholders under the different protected characteristics. It should determine what actions are required to address any issues which have been identified during the equality screening process. An Equality Impact Assessment form is available on KNet here: <http://knet2/policies-and-procedures/equality-and-diversity/Equality-Impact-Assessments> and advice can be sought from the Equality & Diversity team via a work request form.

Sources of further information

There are detailed briefing notes available from the Policy & Strategic Relationships Team in Business Strategy on:

- Community Right to Challenge - process and policy implications
- KCC's approach to Community Right to Challenge
- Social Enterprise models and legal entities

Contact jenny.dixon-sherreard@kent.gov.uk

The Community Right to Challenge section of KCC's website also provides links to useful guidance and support on the Right and setting up a Social Enterprise: www.kent.gov.uk/community_and_living/right_to_challenge.aspx.