

## COMMUNITY RIGHT TO CHALLENGE

**Council – 24 JULY 2012**

Report of the: Director of Corporate Resources and Deputy Chief Executive

Status: For Decision

Also considered by: Cabinet – 12 July 2012

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**Executive Summary:** This report sets out the duty placed on local authorities in the Localism Act 2011 to administer the Community Right to Challenge. The Community Right to Challenge allows relevant bodies to express an interest in running Council services and places a duty on a local authority to consider those expressions of interest and where they are accepted run a full tender process for the future delivery of that service.

The report proposes that Members adopt a Policy that aligns the management of the Community Right to Challenge within existing budget setting processes and ensures the Council places a priority on the cost to the District and the quality of service delivered when drawing up any tender document that is required as a result of an expression of interest under the Community Right to Challenge.

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**This report supports the Key Aim of the Corporate Plan ‘ Effective Management of Council Resources’**

**Portfolio Holder** Cllr. Mrs Davison

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### **Recommendation to Cabinet:**

- (a) To recommend to Council the approval of the Sevenoaks District Council Community Right to Challenge Policy; and
- (b) To recommend to Council that authority be delegated to the Portfolio Holder for Planning and Improvement to agree any final adjustments to the Community Right to Challenge Policy that may result from the finalisation of Government policy and statutory guidance.

### **Recommendation to Council:**

- (a) To approve the Sevenoaks District Council Community Right to Challenge Policy; and
  - (b) To delegate authority to the Portfolio Holder for Planning and Improvement to agree any final adjustments to the Community Right to Challenge Policy that may result from the finalisation of Government policy and statutory guidance.
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**Reason for recommendation:** The Council has a duty under the Localism Act 2011 to accept and consider expressions of interest to run its services under the Community Right to Challenge. By adopting a policy the Council would have a consistent and transparent approach to when it will accept expressions of interest and how each expression of interest will be treated. Failure to adopt a policy will mean the Council must accept and consider expressions of interest for its services at any time of year.

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## Introduction

- 1 Chapter 5, Section 2 of the Localism Act 2011 provides the legislative framework for the Community Right to Challenge (CRtC). The CRtC allows for relevant bodies to express an interest in running a local authority service. Local authorities must consider that expression of interest and if acceptable under the legislation must run a full procurement process for the future running of that service.
- 2 The Government published Regulations at the end of April that were due to be approved by Parliament in June 2012, with the CRtC enacted on 27 June 2012. Subsequent to enactment the Government published the final statutory guidance that local authorities require to ensure the processes they adopt in managing expressions of interest under the CRtC are in accordance with legislation.
- 3 This report provides Members with a summary of the legislation and guidance that the Council is required to follow in determining its approach to the CRtC and provides a draft policy for Members consideration and approval at Appendix A to this report.

## Legislative Framework

- 4 The Localism Act, associated Regulations and Statutory Guidance set out the rules that the Council must follow in considering its approach to the management of the CRtC. This includes:
  - Specifying the 'relevant bodies' that may submit an expression of interest;
  - Defining 'relevant services' and stating the services which are excluded from the CRtC;
  - Specifying the information required in an expression of interest; and
  - Specifying the grounds whereby an expression of interest may be rejected.
- 5 Each of these regulations is explained in more detail in the following sections of this report. It is the consideration of these regulations and the Council's own values and priorities in relation to the way it provides its services for the benefit of the community that is reflected in the draft policy for the management of the CRtC, which is set out for Members consideration and approval at Appendix A to this report.

## Relevant Bodies

- 6 Relevant bodies are those groups of people that are eligible to submit an expression of interest to deliver relevant services on behalf of local authorities. The Localism Act lists the following as relevant bodies:
- a) A voluntary or community body;
  - b) A body of persons or a trust which is established for charitable purposes only;
  - c) A parish council;
  - d) Two or more employees of the local authority; or
  - e) Any other person or body specified by the Secretary of State by regulations.
- 7 Under the current legislation it is not possible for district councils to bid to run the services of any other local authority.
- 8 In statutory guidance the Government does provide further clarification on what constitutes each of the relevant bodies. Importantly it clarifies that a voluntary or community body is not a public or local authority and that their activities must be carried out for the benefit of the community and not for profit. The Government also expects that they must be incorporated with limited liability. The guidance also clarifies that town councils are included under the definition of parish councils.
- 9 An area that has drawn scrutiny on a national basis is the ability of relevant bodies to work in partnership, particularly with the private sector in drawing up an expression of interest. The Government's statutory guidance clarifies that this is permitted and acceptable under the legislation, stating that:
- 'Whilst only relevant bodies are eligible to submit an expression of interest, they may do so in partnership with other relevant bodies and/or **non relevant bodies**.'*
- 10 At the time of reporting the Secretary of State has not specified any other person or body in regulations that may make use of the CRTc.

## Relevant Services

- 11 A relevant service is defined as a service provided by or on behalf of a relevant authority in the exercise of its functions. In order to help clarify this the Government provide the following example:

### Planning

The Town and Country Planning Act 1990 gives powers to local planning authorities to grant or refuse planning permission where a planning application is made to the authority. The right does not allow for the function of determining planning applications to be provided by a third party. Therefore the function of taking the planning decision is excluded from the CRTc.

The delivery of planning services, for example the processing of a planning application (not the decision), may be carried out by the local authority itself, or by

a third party on behalf of the authority. Therefore this service would be included in the CRtC.

- 12 The statutory guidance also sets out that relevant local authority services that may already be delegated to a town or parish council for example, or are already carried out in partnership with another local authority remain subject to the CRtC.
- 13 The Government only excludes a very limited number of services from the CRtC. These relate to services predominantly delivered by County or Unitary authorities in conjunction with the National Health Service. Therefore unless there is a legislative requirement for the Council to deliver a function which specifically cannot be carried out by a third party all Sevenoaks District Council services are potentially open to the CRtC.

### **Expressions of Interest**

- 14 Legislation and associated guidance allows for local authorities to specify periods when expressions of interest may be submitted in relation to a particular service. If this approach is adopted, the details of the timescales must be published. This may be useful to assist with existing procurement arrangements or ensuring expressions of interest may be considered in due time for consideration in the Council's budgetary planning. If time periods are not specified for relevant services an expression of interest may be submitted at any time.
- 15 The Council has a duty to accept and consider an expression of interest from a relevant body which is in writing and provides the information that legislation sets out is required in an expression of interest. The Council is able to request additional information from that required in legislation but cannot make inclusion of such information a requirement for the expression of interest to be considered or use it as a basis for rejecting the expression of interest. Provision of such information therefore becomes optional.
- 16 The Government sets out in regulations that the following information must be provided in an expression of interest:

1. An expression of interest must include the following information and, where the relevant body proposes to deliver the relevant service as part of a consortium or to use a sub-contractor for delivery of any part of the relevant service, the information and evidence referred to in paragraphs 2 and 3 must be given in respect of each member of the consortium and each sub-contractor as appropriate.

2. Information about the financial resources of the relevant body submitting the expression of interest.

3. Evidence that demonstrates that by the time of any procurement exercise the relevant body submitting the expression of interest will be capable of providing or assisting in providing the relevant service.

4. Information about the relevant service sufficient to identify it and the

geographical area to which the expression of interest relates.

5. Information about the outcomes to be achieved by the relevant body or, where appropriate, the consortium of which it is a part, in providing or assisting in the provision of the relevant service, in particular –

(a) how the provision or assistance will promote or improve the social, economic or environmental well-being of the relevant authority's area; and

(b) how it will meet the needs of the users of the relevant service.

6. Where the relevant body consists of employees, details of how that relevant body proposes to engage other employees of the relevant authority who are affected by the expression of interest.

- 17 In addition to the information above the Council may also require that the body submitting the expression of interest demonstrate that they meet the definition of a relevant body.

### **Decisions on Expressions of Interest**

- 18 The Council must specify the maximum period that it will take to notify a relevant body of its decision on an expression of interest. The time period may vary for different services and must be published, including on the Council's website. In addition the Council has a duty to communicate the maximum time period for a decision directly to the body submitting the expression of interest, this must be within 30 days of receiving the expression of interest and be in writing.

- 19 In deciding on a maximum period the Council will take to reach a decision on an expression of interest the Council must have regard to a number of factors set out in statutory guidance. The timescale must be reasonable, but may also relate to the complexity of the service to which the expression relates, the complexity of the expression of interest itself, and current procurement or budgetary timescales.

### **Rejecting an Expression of Interest**

- 20 The Government has set out in Regulations 10 grounds on which an expression of interest may be rejected. These are:

1. The expression of interest does not comply with any of the requirements specified in the Localism Act 2011 or in Regulations.

2. The relevant body provides information in the expression of interest which in the opinion of the relevant authority, is in a material particular inadequate or inaccurate.

3. The relevant authority considers, based on the information in the expression of interest, that the relevant body or, where applicable –

(a) any member of the consortium of which it is a part, or

(b) any sub-contractor referred to in the expression of interest

is not suitable to provide or assist in providing the relevant service.

4. The expression of interest relates to a relevant service where a decision, evidenced in writing, has been taken by the relevant authority to stop providing that service.

5. The expression of interest relates to a relevant service –

(a) provided, in whole or in part, by or on behalf of the relevant authority to persons who are also in receipt of a service provided or arranged by an NHS body which is integrated with the relevant service; and

(b) the continued integration of such services is, in the opinion of the relevant authority, critical to the well-being of those persons.

6. The relevant service is already the subject of a procurement exercise.

7. The relevant authority and a third party have entered into negotiations for provision of the service, which negotiations are at least in part conducted in writing.

8. The relevant authority has published its intention to consider the provision of the relevant service by a body that two or more specified employees of that authority propose to establish.

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

10. The relevant authority considers that acceptance of the expression of interest is likely to lead to contravention of an enactment or other rule of law or a breach of statutory duty.

21 In addition to the above reasons for rejection the Council may also refuse to consider an expression of interest if it is submitted outside of any published timescales that the Council may chose to set for expressions of interest to be accepted for any given service.

22 Where the Council choses to reject an expression of interest it must notify the relevant body, clearly stating the reasons for doing so and also publish that notification on its website.

### **The Procurement Exercise**

23 If an expression of interest is accepted the Council has a duty to run a full procurement exercise. The procurement exercise would be open to any potential bidders from the private, public or third sector and be operated in accordance with the Council's own financial and contract procedure rules.

24 The Council must specify the minimum and maximum time period between accepting an expression of interest and a procurement exercise starting. The timescale must be reasonable, allowing sufficient time for the body submitting the expression of interest to properly compete for the service, have regard to the

complexity of the procurement exercise and any existing contractual obligations, procurement or budgetary timetables the Council already has in place.

### **Sevenoaks District Council approach**

- 25 Set out at Appendix A to this report is a draft policy for the management of the Community Right to Challenge at Sevenoaks District Council for Members consideration.
- 26 The draft Policy aims to strike a balance between the Council being able to consider expressions of interest that may enhance the level of service and value for money delivered to the community but also ensuring appropriate processes are put in place for the proper management of expressions of interest within the resources the Council has available.
- 27 Key to this is a proposal that Members limit the time period when expressions of interest are accepted. The suggested time limited period is for a period between 1 June and 31 July that would ensure expressions of interest can be considered as an integral part of the Council's budget setting process. This would ensure that the Council is able to consider any potential amendments to its future service delivery models within existing process, delivering efficiency and also ensuring proper financial management and protecting the strength and stability of the 10 year budget.
- 28 Within this approach there would be some exceptions. For example where the Council already has contracts in place to provide a service to a third party or a third party is contracted to carry out a service on the Council's behalf. The Council would publish, on its website, separate timescales for expressions of interest for these services in line with the end of the current contractual obligations as is required by legislation.

### **Key Implications**

#### Financial

- 29 The Council will endeavour to ensure that the costs associated with managing the Community Right to Challenge process will be met from existing resources and budgets.
- 30 The Council may incur additional costs relating to its Procurement function where an expression of interest is accepted. It is anticipated that New Burdens funding will be payable in respect of the Community Right to Challenge but Government are still to confirm this. It is estimated from the Governments Impact Assessment that if New Burdens funding is payable it will be in the region of £8,500 in the first year, reducing in future years as the number of expressions of interest expected reduces.
- 31 There is potential under the Community Right to Challenge for expressions of interest to result in a procurement exercise that drives down the cost of service delivery. However the impact on wider service costs could be significant as the Council suffers from diminishing economies of scale. This will need to be

considered as part of each procurement process ensuring overall value to the taxpayer is not detrimentally affected.

#### Community Impact and Outcomes

- 32 The Community Right to Challenge is unlikely to have a significant impact on the community in terms of their experience of service delivery. The Council will ensure that service standards do not decline in the case where there is a successful expression of interest for any Council service.
- 33 Using the full powers of the legislation the Council may be able to improve community outcomes by ensuring that any external provider that may successfully be awarded a contract to run a council service improves the social, economic or environmental well-being of the area.

#### Legal, Human Rights etc.

- 34 Failure to administer the Community Right to Challenge in accordance with regulations will leave the Council in breach of the duties placed upon it by the Localism Act 2011.
- 35 The Council in considering expressions of interest must have due regard to existing legislation that provides the powers and regulations for delivering services and ensure employment law legislation is followed in the contracting of any services.

#### Resource (non-financial)

- 36 None.

#### Value For Money and Asset Management

- 37 The Council will ensure that any procurement exercise delivers value for money to the taxpayer through a rigorous and structured tender process. However this may have a detrimental impact on the value for money or related services that were not subject to the expression of interest that will need to be considered in more detail as circumstances demand.
- 38 If the Council did contract out any services as a result of the Community Right to Challenge it is likely that there would be some impact on the Council's assets. This could range from accommodation being vacated in Council offices to the transfer or sale of assets to benefit the level of service and value for money achievable through any procurement exercise.

#### Equality Impacts

- 39 *Does the activity have the potential to cause adverse impact or discriminate against different groups in the community?*

No. The Council is able to ensure through its Procurement Strategy that equality is a significant consideration in the tendering of services.

- 40 *Does the activity make a positive contribution to promoting equality?*



Yes. There is potential for the Council to ensure that any service provider considers the social benefits for the District when competing for services under the Community Right to Challenge. Under these circumstances the Council is in a position to ensure a positive contribution is made to promoting equality.

**41**     *Summary of Impacts*

An assessment of the potential impacts of the Community Right to Challenge Policy has identified no detrimental impacts to Equality Groups.

**42**     *How the equality impacts weigh on other factors relating to the decision*

The impact assessment has identified no potential detrimental equality impacts. As a result the equality impacts do not weigh on other factors relating to this decision.

**Conclusions**

- 43**     The Localism Act 2011 places a duty on the Council to administer the Community Right to Challenge in accordance with legislation, Regulations and Statutory guidance. A Policy has been proposed for Members consideration that complies with the legislative framework but also allows the Council to make the most efficient use of its limited resources to effectively and fairly manage the Community Right to Challenge through its existing budget setting procedures.

**Risk Assessment Statement**

- 44**     Setting out the Council's approach to the Community Right to Challenge in a Policy minimises the risk of failing to comply with the relevant legislation.

**Appendices**

Appendix A – Community Right to Challenge Policy

**Background Papers:**

Localism Act 2011

<http://www.legislation.gov.uk/ukpga/2011/20/contents>

Community Right to Challenge Regulations

<http://www.legislation.gov.uk/all?title=right%20to%20challenge>

Community Right to Challenge Draft Statutory Guidance

<http://www.communities.gov.uk/communities/communityrights/righttochallenge/>

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