

## The Localism Bill

This briefing paper was prepared by the LexisNexis legal intelligence team

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### Plain English guide to the Localism Bill

1. The Coalition government has issued a 'plain English guide' to its flagship Localism Bill.
2. A key element of the Localism Bill is the 'Community right to challenge'. The plain English guide explains: "The best councils are constantly on the lookout for new and better ways to design and deliver services. Many recognise the potential of social enterprises and community groups to provide high-quality services at good value, and deliver services with and through them."
3. This seems to indicate that the objective is to promote partnership agreements, or the outsourcing of service provision to local social enterprises or community groups who exercise the community right to challenge. For example, if a community group wished to take a direct part in the provision of local transport services, it would seem to follow that the group's proposal ought to lead to an opportunity to negotiate with the local authority and to agree terms on which the service might be devolved to the community.

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4. That is not what the Localism Bill says. The Bill proposes a right to challenge the way local public services are delivered. A successful challenger will not necessarily end up as the new provider; this is a right to challenge a service, not a right to run it.
5. Exercise of the right involves submission of an 'expression of interest', defined by clause 66 of the Bill as "an expression of interest in providing or assisting in providing a relevant service on behalf of an authority"
6. On receipt of an expression of interest the local authority must decide whether to accept or reject it, taking into account how the challenge might improve the social, economic or environmental well-being of the area.
7. If the local authority accepts the expression of interest then clause 68(2) of the Bill provides that it must then carry out a procurement exercise relating to the provision on behalf of the authority of the service to which the expression of interest relates.
8. The Bill goes on to say that the procurement exercise "must be such as is appropriate having regard to the value and nature of the contract that may be awarded as a result of the exercise".
9. The local authority's conduct of the exercise – and any rules issued by the Secretary of State – must be consistent with the EU and UK provisions governing public procurement.
10. The process cannot be loaded in favour of the social enterprise or community group whose expression of interest triggered it.

## Challenges to ensuring the Bill works as intended

11. In November 2010 the EU Commission issued a report highlighting the obstacles faced by small and medium sized enterprises seeking to participate in public procurement processes. Significant barriers include:
  - Lack of knowledge about tender procedures
  - The cost of preparing proposals
  - High qualification levels and certifications required by contracting authorities
  - Requirements for financial guarantees
  - Excessive administrative burdens
12. The EU report emphasises costs as a particular issue. Since many costs are fixed, small and medium sized enterprises face a disproportionate burden compared with larger commercial operators.
13. Those deterrents and disadvantages may well be amplified where the bidder is a small social enterprise or local voluntary group, as envisaged by the Localism Bill. The result of their successful 'expression of interest' would be to pitch them into direct competition with commercial organisations likely to have far more experience and depth of resource in the procurement process, both in terms of navigating the procedure and challenging the outcome. Having sought to wrest control of key local services from a local authority, groups might find that they have achieved no more than the privatisation of those services.
14. Once a group has triggered a procurement process, they have no control over the outcome, and no opportunity to arrest its progress. Clause 69(7) of the Bill expressly provides that while an expression of interest can be withdrawn, whether before or after a decision has been reached by the local authority, withdrawal cannot prevent the local authority from pressing on with a procurement process should it decide to do so. In practice, expressing an interest in providing, or helping a local authority to provide, services might achieve no more than paving the way for a commercial takeover.

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