THE LOCALISM ACT: AN LGIU GUIDE

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LOCAL GOVERNMENT
INFORMATION UNIT

Contents

This guide to the Localism Act brings together a series of LGiU briefings on the Act published in November and December 2011. These briefings were written by Hilary Kitchin and Andrew Ross, LGiU associates. The guide also provides an update following the publication of the commencement order on 15 January 2012 where various provisions of the Act were brought into immediate force.

Introduction

This document is an updated version of the LGiU's Guide to the **Localism Act.**

The LGiU published a guide to the Localism Act in February 2012. The guide brought together a series of LGiU briefings on the Act published in November and December 2011, alongside additional comment. These briefings were written by Hilary Kitchin and Andrew Ross, LGiU associates. There are also references to briefings written by associates Mark Upton, David Marlow, Sheila Camp and Majeed Neky. The guide was edited by Janet Sillett, LGiU Briefings Manager. This document brings readers up to date with the guidance and regulations that have been published since February and with related policy developments.

The last nine months have seen an unprecedented amount of regulations and guidance, as the government has gone through the process of implementing the Localism Act. Many issues are now clarified, whilst others are still being questioned, but many of the various provisions we have covered are in force and councils and people in local communities will now be experiencing and testing the new provisions. This guide is intended to draw together the various strands and present an overview of the legislation with links to the main supporting material, with commentary on the more important changes..

The guide is a current summary of the Act but is not meant to provide legal advice – councils will need to take legal advice as normal. It represents the up to date position as at 25 September 2012. The Localism Act gained royal assent on 15 November 2011. This guide covers:

Powers and Governance

- General power of competence
- Local authority governance arrangements
- Mayoral arrangements
- Standards
- Community rights
- Council tax referenda
- Community right to challenge
- Community assets

Planning

- Plans and strategies
- Regulations
- Community right to build orders
- Duty to co-operate

Social housing

- Overview
- Allocations and tenure reform
- Homelessness
- Regulation
- Self-financing

Powers and Governance

General Power of Competence

After research showed that the well-being power was under-used and had generated little confidence, the government has used the Localism Act to introduce a more general power. Not quite expressed as a power of general competence, it is intended to be treated as sufficiently broad to enable make councils confident that they can take on a much wider range of discretionary activities than ever before.

The general power of competence replaced the well-being power from April 2012, and is intended to provide local authorities - and parish councils that meet certain minimum standards - with the same capacity to act as an individual. Similar powers have been given to Fire and Rescue Authorities, Integrated Transport Authorities, Passenger Transport Executives, Combined Authorities and Economic Prosperity Boards.

The government's own impact assessment has emphasised that the intention is to allow authorities to act in their own financial interest to generate efficiencies and secure value for money outcomes and to raise money by charging for discretionary services and trade in line with existing powers allow authorities to engage in activities, ruled by the Court of Appeal in the 'London Authorities Mutual Ltd' (LAML) case, as outside the well-being power, such as providing certain indemnities and guarantees and engaging in speculative activities.

Tax, charging and commercial activities

Decisions will be subject to the general law, and governed by the existing regimes on taxation, precepting and borrowing (including Prudential Borrowing). Powers to charge and provide services on a commercial basis remain broadly unchanged. When using the general power, charges for discretionary services must not exceed the cost of provision for each kind of service taking one financial year with another, while authorities are unable to do anything for a commercial purpose other than through a company. Anything which is a statutory obligation, or which they could not otherwise do using the power is also precluded.

Limits on the use of the power

Councils will also be required to act in accordance with any existing and future statutory limitations or restrictions on their powers. The Secretary of State will have a power to amend or repeal enactments that prevent or obstruct local authorities from using the power, and to remove overlapping powers. Though there is no indication yet of his doing so, the Secretary of State will be able to set conditions on use of the general power, an extension of central control in comparison with the well-being powers. This may be intended as a reserve power, to be available should any 'speculative activities' risk going too far. In any event, the Secretary of State will have a reserve power to intervene and place limits on what authorities can do (note that a similar power under the well-being power was not used during the ten-year period it was in force).

Conditions attached to removing restrictions on use of the power

Concerns were expressed in parliament about the scope of the delegated power to amend and repeal conflicting legislation, principally because it was feared that this might act as a back door through which to repeal protective legislation. In response, a set of conditions has been included in the Act, which are intended to ensure that the use of the provision is proportionate to the policy

objective intended, that there is a fair balance between the public interest and the interests of any person adversely affected, that there is no removal of any necessary protection, that no person will be prevented from continuing to exercise any right or freedom that they might reasonably expect to exercise, and that any provision is not of constitutional significance.

The minister gave an assurance that, "The provision is about removing barriers to the legal capacity of authorities to act innovatively and in the best interests of their communities. It is not aimed at removing duties, nor is it, nor could it be, a general-purpose tool to remove any legislation that places a burden on local authorities".

Eligible Parish Councils

Certain parish councils will be able to use the power: key requirements are that:

- at least two thirds of the total number of parish councillors to be elected (rather than co-opted or appointed)
- the parish clerk to hold specific qualifications in local council administration
- the parish clerk to complete all 'relevant training' on the general power of competence,
- such as training provided by provided by the National Association of Local Councils

General power of competence - comment

The general power will be broader in scope than the well-being power. It being subject to constraints in other legislation should in principle prove less of a burden than might be feared from experience of the well-being power.

Despite Eric Pickles claim in his speech at LGA conference in July 2012, that "The Act's general power of competence is already being used up and down the country every day of the week", there must be some doubt about how widely it is used and understood so far. Participants at an LGiU seminar recently concluded that the culture of an authority was the main factor determining willingness to make innovative use of new powers. Nobody volunteered experience of using the general power at an informal survey of lawyers at a conference over the summer of 2012.

It will be an essential task for councillors and officers to assess how they can make the new power work for their council and the communities they represent. They will want to feel assured about their ability to tackle key local issues, and to know that they will be able to work confidently in an increasingly pressured political and economic environment, to respond to local priorities and to play a full role in local partnerships. This will involve raising awareness among members and officers, and assessments being made by legal services of the opportunities the general power presents.

The government has committed itself to a post implementation impact assessment of the new power, and will want to avoid a repetition of the situation where lack of awareness and confidence in a flagship provision means that it is underused – there is a responsibility on the DCLG and local government organisations to provide information and support in this area, as is occurring on other aspects of the Act.

It is disappointing that the government has not made a commitment to review existing legislation and weed out unnecessary restrictions. It will be up to councils to make applications to remove limits in other areas of local government law. It is additionally unfortunate that the process for introducing changes to other legislation has been made quite onerous and therefore expensive of time for local authority officers and civil servants; despite this it is important not to forget the possibility of lobbying for change.

Local authority governance arrangements

The Localism Act has been the opportunity for the government to introduce some of its key policies, in particular a return to the committee system for those councils that want it, and an (unsuccessful) strategy to generate public support for elected mayors.

The governance arrangements adopted by the majority of authorities, set in place by the Local Government Act 2000, remain, subject to a number of small adjustments. A raft of regulations, introduced in the first half of 2012, address the discharge of local functions, a new committee system, and overview and scrutiny.

Arrangements for the discharge of functions provide for :

- the discharge of executive functions by another authority or by the executive of another authority
- the discharge of functions that are not the responsibility of its executive by the executive of another local authority
- two or more authorities to discharge functions jointly.

The main change lies in the introduction of a further form of local authority governance in addition to the retained leader and cabinet and mayor and cabinet models. As promised by the Coalition government, councils now have the option of adopting a committee system. It will also be possible for councils to propose an alternative model which can be accepted by the Secretary of State if it meets certain criteria. The mayor and council manager option has gone. Any authority operating alternative arrangements was required to start operating the committee system when the relevant regulations came into force.

An authority may change from one form of governance to another, including from one form of executive arrangements to another, but no further change can then be made for a period of five years, unless approved by a referendum. Particular rules apply where an authority has an elected mayor.

Committee system

Under the committee system, authorities will in the main be able to decide their own decision-making structures, and it will be possible for a full council to discharge all of its functions or to delegate certain functions to a committee, sub-committee or an officer. Authorities will be able to discharge their functions jointly with other authorities or to decide that certain functions will be discharged by another authority.

Limits are placed on the functions which can be delegated by authorities operating a committee system. In summary, these include:

- approval or adoption of key strategies, including development plans, crime and disorder reduction strategies, sustainable community strategy, and youth justice plan
- approval or adoption of capital and revenue plans
- decisions about members' allowances
- applications for single-member electoral areas, and changes in a scheme for elections.

Authorities operating the committee system are not required to operate a formal overview and scrutiny system, but must comply with certain requirements – introduced under the same regulations - should they decide to appoint one or more overview and scrutiny committees. Requirements for health, flooding, and community safety scrutiny will however apply to committee system authorities

– these may be the responsibility of a relevant committee or of a separate scrutiny committee.

Some commentators have referred to the change as a return to the old committee system. Yet contributors to debates in the Lords, while recalling positive features of the former committee system, acknowledged that changes had taken place which would influence implementation of the committee system under the Localism Act. During the passage of the Bill it was noted that in those authorities that had retained a committee system (for the most part, "fourth option" councils – district councils with a population of less than 85,000) a streamlined committee system had evolved since 2000. Similarly, it was expected that experience of scrutiny would have an impact on a restored committee system.

The Centre for Public Scrutiny published a briefing giving its insights into changing to a committee system of governance, which considers the developments over the last ten years that are of relevance when considering changing and devising form of new model. In this paper, some references to the content of the Localism Bill have changed during the parliamentary process, but core issues will be of interest. The centre has also published a paper on scrutiny and the committee system.

The Centre's most recent publication, Musical Chairs – Practical Issues for Local Authorities in Moving to a Committee System, draws on studies of several councils, and discusses the impact on scrutiny. An appendix to the publication provides a governance spectrum, which places the available governance arrangements along a continuum according to the degree that they allow a consensus to be reached on council decisions.

A late amendment to the Bill was agreed that made it possible for councils to resolve to adopt a committee system and implement the change without waiting until after the next local election. Several councils have already done so – Brighton and Hove, South Gloucestershire, and Nottinghamshire County Council. Others are considering the implications of making the change.

Prescribed arrangements

The Act provides for the introduction of new forms of governance in the future, through a fourth option which makes it possible for councils (and others) to propose arrangements which may then be approved by the Secretary of State, and set out in regulations that would apply to all local authorities in England. While ministers accepted that most proposals for additional governance models will come from local authorities, it does appear that others, including representative bodies, may put forward proposals. The government may also introduce changes, but must consult local authorities in doing so.

A local authority putting forward a proposal for regulations under this section would need to demonstrate that the proposal represents an improvement, is likely to ensure that decisions are taken in an efficient, transparent and accountable way, and that it is applicable to all authorities or particular description of authority. It would be necessary to describe the way functions of the authority would be discharged and/or delegated under the proposal.

Scrutiny

The Act replaces the relevant provisions in the 2000 Act in full and consolidates the main part of scrutiny legislation into a single place. The law will continue to be found in Part 1A and Schedule A1of the 2000 Act. Provisions relating to crime and disorder remain in the Police and Justice Act 2006, and health provisions remain in the NHS Act 2006. At a late stage in the Lords a group of amendments were agreed which

- remove prescription about matters which may be referred to scrutiny by councillors who are not members of a scrutiny committee
- remove the link between local government scrutiny and local improvement targets in local area agreements
- put the scrutiny committees in non-unitary district councils in an equivalent position to those of other authorities by allowing them to hold partner authorities to account.

A large number of unsuccessful amendments were rejected, many of which aimed to extend, strengthen and introduce consistency in scrutiny. A Lords amendment which would have significantly extended the scope of partner bodies that would be subject to scrutiny was put to the vote, but was rejected.

An attempt to extend the limits on information available on contractors was also unsuccessful. The amendment had proposed a new clause which would make provision for any contract for a sum over £1 million made by a relevant authority with any person to include a Freedom of Information provision.

Mayoral arrangements

Under the Localism Act, the Secretary of State has considerable powers to trigger a mayoral referendum. Following strong and widely expressed objections, the government made considerable concessions on this part of the Bill, abandoning its proposal that existing council leaders be transformed into shadow mayors in the pre-referendum period. It also backed down on proposals that would have combined the roles of elected mayor and chief executive.

In the event, due to a number of factors including a lack of clarity about any additional powers that might be exercised by the new mayors, the mayoral referendums held in May 2012 produced an overwhelming negative response. Of ten finally held, nine polls resulted in a rejection of the mayoral model. Bristol, where a majority voted in favour, will now hold a mayoral election; elections were held in May in Salford and Liverpool, where councils had decided to proceed with a mayoral model without a referendum.

It is unlikely that the exercise will be repeated, and ministers are going ahead with the transfer of powers to councils. With the 'City Deal' announcements on July 5 2012, the government has now concluded agreements with the eight 'Core Cities' and/or their 'Local Enterprise Partnerships' (LEPs) on a range of measures to stimulate city growth and development. In the intervening period initial deals had been agreed in February 2012 with Liverpool City Council (based on their decision to adopt the elected mayor model), and in March with Greater Manchester Combined Authority (GMCA).

The government has been clear that these enhanced powers and resources must be accompanied by strengthened governance and accountability. It has also strongly indicated that 'Wave 1' is only the start of this process. It will be deepened in the core cities and extended to other areas during 2012-13 and beyond

Advocacy of mayoral models persists, with proposals for metro mayors – which would seek support for mayoralties which crossed council boundaries – still being promoted.

The potential impact of the city deals is explored in the LGiU briefing City deals – implications for enhanced devolution and local economic growth.

Other aspects of Mayor and cabinet executives

In those cities with elected mayors, it will be the mayor who decides the number of councillors to appoint to the executive. The mayor will also appoint one of the executive members to be his or her deputy, who – subject to their holding office and retaining the confidence of the mayor - will hold office for the same period as the mayor. In the absence of the elected mayor and deputy, the executive, or a member of the executive, will act in their place.

The briefing 'The future of mayoral governance and implications for city leadership' describes the history of directly elected mayors and examines the implications of where we have got to now, following the May referendums.

Standards in Local Government

New standards arrangements came into effect on 1 July 2012. Local authorities are now responsible for their own standards arrangements, and must adopt a code, make arrangements to investigate allegations, make decisions about complaints, decide on and impose sanctions for breach of the code, appoint an independent person to act as an advisor, and set up publicity about the arrangements that they have in place.

The Localism Act abolished the Standards regime introduced by the 2000 Act – the Standards Board for England, standards committees of local authorities, the jurisdiction of the First-tier Tribunal in relation to local government standards in England, and model codes of conduct for councillors. None of the functions of the Standards Board for England are preserved – it ceased functioning on 31 March. The power for the Secretary of State to issue a model code of conduct and to specify principles to govern the conduct of members of relevant authorities is removed together with the requirement for relevant authorities to establish standards committees.

The new arrangements are accompanied by a complete rejection of most aspects of the previous standards framework, the good along with the less than satisfactory. The rapidity of the changeover means that some issues remain unresolved. In a move to resolve some outstanding questions, on 2 August the government published non-statutory guidance on personal interests for elected members.

New standards requirements

The new regime applies to local authorities and a number of other public authorities in England, including parish councils. All will be under a duty to 'promote and maintain high standards of conduct by members and co-opted members of the authority'. 'Co-opted members' are those who are entitled to vote in committees and sub-committees – this briefing will only refer to members, but both are subject to the same requirements.

The duty will include an authority:

- Adopting a code of conduct which applies to members when they are acting in their capacity as members. An authority may revise its existing code (although this is now being strongly discouraged by DCLG) or adopt a code to replace its existing code. Codes must be consistent with the Nolan principles, which are set out in the Act, and include a requirement for members to register and disclose pecuniary and non-pecuniary interests.
- Having in place arrangements for the investigation of allegations (which must be in writing) and for making decisions.

- Appointing at least one independent person whose views must be sought by the authority before it makes a decision following an investigation, and who is also available to any individual whose conduct is under investigation. The Act places restrictions on who may be appointed as an independent person.
- Publicising the adoption of its code of conduct, and advertising for independent people to put themselves forward for appointment.

Sanctions for failure to comply with the code are a matter for the authority, which is responsible for deciding whether to take action, and what action to take.

Failure to comply with statutory requirements for registration and disclosure of pecuniary interests may lead to conviction on one of a number of criminal offences set out in the Act. Penalties are a fine and disqualification from being a councillor for up to five years. It appears, however, that there is a loophole in the primary requirement for disclosure on election, and that as a result the sanction of prosecution would only apply to newly elected councillors over the next four years. The DCLG has attempted to deal with this in its recently published guidance, by emphasising the necessity of disclosure at all times during holding office, but this is not thought by ACSeS to provide a solution. The organisation advises that local codes should include a requirement of disclosure of interests, so that the council has some sanctions available in the case of existing members.

Principal local authorities will be responsible for administering the standards regimes of parish councils in their areas – parish councils will be required to adopt their own code of conduct.

According to the Act, a decision will not be invalidated simply because it involved a breach of the code on the part of a member – of course such a decision may fail other tests. Monitoring officers are required to maintain the register of pecuniary and non-pecuniary interests. The requirements of the register and provision for the protection of sensitive interests – such as risk a member or person connected with them being subject to violence or intimidation – are included. Members who fail to comply with the disclosure requirements will commit a criminal offence.

All current councillors have given an undertaking to observe the code of conduct adopted by their authority. Councillors elected after 9 July 2012 will no longer be required to make this declaration. The requirement was specifically linked to the statutory code of conduct which no longer applies.

The new requirements in practice

Drafting new codes

In summer - autumn 2012, councils are at different stages of preparing a new code of conduct, incorporating the principles set out in the Act and new regulations. Although authorities are required to have a code, there is no model code to be followed, and differences will emerge. Although there is now no requirement to follow a statutory form, two 'models' have been available since early April to assist in this process – an 'illustrative text' from the DCLG and a 'template' jointly prepared by the LGA, Association of County Secretaries and Solicitors (ACSeS), and SOLACE.

The publication of regulations on the registration of pecuniary interests in early June - coming into force on 1 July - made it possible to begin drawing up the detail on disclosure required in the new codes. Gaps do exist – too detailed for inclusion in this guide – some of which are being dealt with in transitional provisions and regulations, others identified by ACSeS and others, who are advising monitoring officers on the points which can be included in local codes or be included in Standing Orders.

Arrangements for investigation and decision-making

There are no specific requirements as to how councils investigate and reach decisions on an allegation that a member is in breach of a code.

During the passage of the Bill, Baroness Hanham illustrated how the government see these arrangements working in practice as follows:

"We are not going to dictate [to authorities] what those arrangements should be. They could, for example, continue to have a voluntary standards committee or they could adopt an alternative approach". Later in the same debate she said that it seemed inescapable that authorities would have some sort of committee structure to deal with complaints.

Role of independent person

In parliament the minister emphasised the need for a strong independent element in the arrangements: the independent person "should be appointed through a transparent process and… where a local authority has investigated an allegation, it must seek the independent person's view before reaching a decision about the allegation. It must then have regard to that view. We believe that this will ensure that there is a check on vexatious or politically motivated complaints".

More about the role of the independent person has emerged recently, and it is to be a curious one. Bob Neill, Parliamentary Under-Secretary at the DCLG, wrote to councils on 28 June 2012 that, "This is in no way similar to the role of the independent chairman and independent members on the former standards committees. That former role was principally to be involved in the determination of allegations about misconduct of members. In contrast the role of the new independent person is wholly advisory, providing advice to the council on any allegation it is considering, and to a member facing an allegation who has sought the views of that person".

While it will be possible to reappoint an individual who has been an independent member at any time during the past five years, they will be unable to hold that position beyond July 2013 unless the decision to appoint them is made before 24 July 2012. This will present a considerable challenge for the majority of authorities.

Sanctions

It will be particularly important for councils to be clear about the sanctions they intend to adopt. For this reason, it is necessary to have a degree of certainty about what sanctions are available when a member is found to have breached the code of conduct.

Councils will no longer be able to suspend members for serious breaches of the code, or to require that a councillor undertakes a course of training before resuming their responsibilities. No sanctions are provided in the Act, so it was significant that the Minister outlined what the government believes is available during the parliamentary debate:

"In an investigation, where a complaint was dismissed, that would be the end of the matter. Where a complaint was upheld, a council would then have a number of options open to it under existing provisions. …. In relatively minor cases, the council might conclude that a formal letter or other form of recording the matter was appropriate. Where a case involved a bigger breach of the rules, a council might conclude that formal censure-for example, through a motion on the floor of the council-was required. In more serious cases of misconduct, the council might go further and use its existing powers to remove the member from the committee or committees for a time. We believe that this approach provides effective and robust sanctions, ensuring that the high standards of conduct in

public life can be maintained, while avoiding the unnecessary bureaucracy of the standards board regime".

Advice obtained by ACSeS indicates that the minister did in fact cover the available options. These are not 'provisions' in the sense of being part of other legislation – rather they are based on the common law – on court decisions. Council legal departments will need to think through the implications of adopting these options, particularly the removal of a member from a committee where the individual councillor has been nominated to the committee by a political group.

Authorities will be expected to deal with the whole process transparently, and debates in full council and publication of the decision that a member has breached the code of conduct will have this effect.

The courts will continue to consider any breaches of criminal law by councillors, civil law will still cover libel and slander, and Section 80 of the Local Government Act (1972) provides for councillors to be disbarred from office if they are convicted of certain criminal offences. The Local Government Ombudsman will continue to investigate accusations of maladministration.

Consequences of abolition of the Standards Board for England

From the abolition of the Board:

- any existing referrals or investigations were transferred back to the relevant authority for completion
- any allegations which were being handled locally have continued through to a conclusion
- any matters relating to completed investigations or appeals which had been referred to the First Tier Tribunal continued to conclusion.
- the Board agreed handover arrangements with monitoring officers over any existing referrals or open investigations which it was unable to complete by 31 January.

Comment on the new standards regime

The speed with which this new framework was introduced means that there is still much to do and more to learn. The implementation of standards for elected members may appear to have been localised in a way that puts everything within the remit of the authority, but ministers are still firmly holding the reins. In reducing the rigour of the earlier standards regime they appear to have ignored what good it did achieve. As a result, one recognises the validity of the concerns about the robustness of the new scheme that have been expressed by the Committee on Standards in Public Life.

There can be no doubt that the new codes and decisions made under them will be tested in the court of local public opinion. When councils are considering the future of their standards regime, a key element ought to be a readiness to be as open as possible, to demonstrate that the public can expect the highest standards from their representatives, and that the council is ready to take responsibility for ensuring that these standards are both set, and met. There will be great value in ensuring that there is consensus, and that all elected members sign up to the new code of conduct, whether it is new, or a revision of the existing code. And of course, councillors should be provided with copies of the recent guidance.

Community rights

Many of the provisions in the Localism Act are being promoted as creating new rights for communities. Council tax referendums and the community right to challenge will apply in England only. Provisions for listing assets of community value will apply in England and Wales; English counties will need to comply with these requirements only where there are no district councils.

Specialist support is being made available for community groups, include funding and training, to those taking part in application processes in both England and Wales. Web-based information outlines the possibilities and covers all the community rights provided under the Act, providing information on meeting the various requirements. The government has also created a community rights website.

This advice will be supplemented by funding for community organisations. Details of the schemes are emerging at the time of writing, and will need to be tracked over coming months. It is reported that around 90 per cent of the funding will go directly to communities in the form of grants allowing them to buy support. Additional funding will support the website and advice service and a telephone helpline run by Locality, with the grants programme provided by the Social Investment Business.

Council tax referendums

CLG Council tax referendums Information Note January 2012

Local authorities will be required to hold a referendum if calculations based on principles determined annually by the Secretary of State result in a council tax for the financial year that is 'excessive'. A parallel set of rules will apply to precepting authorities. The principles, which include a comparison with the previous year, must be approved by the House of Commons. The Secretary of State has the option of specifying an alternative amount for two or more authorities.

An authority that wishes to propose a council tax increase that exceeds that allowed by the principles set by the Secretary of State will be required to produce a substitute set of figures, which will apply if their main proposal is not approved in a referendum. If an authority fails to hold a referendum the substitute calculation will apply by default – an authority can in effect decide to forgo a referendum and adopt its substitute calculation. Local authorities will be required to conduct referendums on behalf of precepting authorities, but be able to recover their costs. The Act provides for the timing of referendums. Publicity, limits on expenditure, conduct of members and staff of the authority regulations are covered in regulations, broadly modelled on the existing rules for referendums. Those entitled to vote in local elections will be entitled to vote in a referendum.

In debates on the Bill, concerns were expressed that it would be necessary to avoid using the word 'excessive'. Lords were told that ministers are taking advice from the Electoral Commission on the form of the referendum question – and indeed the final form of the question was revised after rigorous criticism by the Commission.

The Act also allows for those rare circumstances where compliance with a calculation based on the annual principles would result in an authority being unable to meet its financial obligations or to discharge its functions. In these instances the requirement to hold a referendum will be lifted and the amount of council tax determined by the Secretary of State.

The new system applied from 2012-13 – a year in which the government wanted to see a council tax freeze, and provided support grant to facilitate decisions by individual authorities to freeze tax for their areas. Parliament approved a report containing the principles for the current fiscal year on

8 February 2012, setting out requirements for referendums in those cases where proposed council tax increases exceeded 3.5% for most principal authorities, 3.75% for the City of London and 4% for police authorities and single-purpose fire and rescue authorities. No equivalent principles apply to town and parish councils for 2012-13 but they may apply in future years.

Those councils that set increases did so at rates between two and 3.5 per cent and avoided the need for a referendum. Many authorities will face the implications of long term low or no council tax rises in 2013 -14, when it is probable that no support grant will be available. At least one authority is reported as already having warned that it will hold a referendum on a substantial increase from a low base next year.

Community Right to Challenge

The Community Right to Challenge came into force on 27 June 2012. Under the Right, local authorities must consider expressions of interest in providing a service, and where they accept an expression of interest, must carry out a procurement exercise for the service.

Two sets of regulations have been laid in parliament for approval by that date. The first set of regulations sets out the requirements for making an expression of interest and specifies services excluded from the Right. The second set specifies certain grounds on which expressions of interest may be rejected and adds separate fire and rescue authorities as relevant authorities (i.e. to the list of bodies whose services are subject to challenge). DCLG has also published the final statutory guidance.

The framework is already familiar, having been set out in the Localism Act and reported during the parliamentary process. The regulations and guidance add:

- A closer definition of what information organisations will need to present in order to be successful
- More detail on which organisations can apply
- State which services are excluded from the Right
- Provide some clarity over the circumstances in which authorities can reject expressions of interest, and how they can be negotiated.

There is less clarity on some other issues, particularly the possibility of considering an in-house alternative where a tendering process is triggered by a successful expression of interest.

Relevant authorities and relevant bodies

Under the community right to challenge, 'relevant authorities' must consider expressions of interest by 'relevant bodies'. The Act applies to all local authorities, and lists relevant bodies by type. It allows expressions of interest by voluntary and community bodies, organisations set up for solely charitable purposes, parish councils, and by two or more employees of the local authority.

The statutory guidance is important in giving more information on those organisations which are considered to be relevant bodies, and on how expressions of interest may be presented.

The definitions of voluntary - broadly non-public, not for profit, investing surpluses in activities or the community – and community bodies – primarily for the benefit of the community – are intended to cover a wide range of civil society organisations. The right to challenge is not limited to locally based organisations.

Parish councils are not required to consider expressions of interest, but can make a submission to carry out a local authority service. Two or more employees are eligible to use the right, and are expected to form an employee-led structure to take on running the proposed service.

Partnership working: the possibility of relevant bodies submitting expressions of interest both with other relevant bodies and with non-relevant bodies is likely to be significant. According to the guidance:

- such cooperation may strengthen a relevant body's case that it is capable of providing the service
- information in the expression of interest must be provided in respect of all partners.

The guidance envisages expressions being received from joint ventures:

- an incorporated joint venture would have to meet the definition of a relevant body, however,
- in a contractual joint venture, in which the parties keep their separate identity, it is sufficient that one organisation meets the definition of a relevant body.

Relevant services

This is more difficult to define. In essence, the Right applies to any service provided by – or on behalf of – a local authority in the exercise of its functions, unless specifically excluded by the regulations.

The Right is solely concerned with provision of services. Responsibility for the function remains with the authority. This has always been the case. To take an example given in the guidance, decisions about what youth services are provided is made by the authority; individual parts of the service may be provided in-house, or by a third party. The Right would apply to the individual parts of the service.

The Right also applies where authorities have quite lawfully arranged for their functions to be met in other ways, for example by other local authorities or parish councils. And it will apply to shared, jointly commissioned or jointly provided services, where local authorities have made arrangements to work together.

Whether it applies to services shared or jointly commissioned with an NHS body (which is not covered by the Act) will depend on:

- whether the service is excluded (see below)
- where responsibility for the function lies.

Excluded services

Under the Regulations, a number of health and children's services are excluded from the Right, either permanently, or in most cases, until 1 April 2014.

Services excluded until 2014 – a date chosen to allow the new NHS Commissioning Boards and local clinical commissioning groups to have time to become operational – are those currently commissioned jointly or under a partnership arrangement between a local authority and NHS bodies, and any services commissioned by an NHS body on behalf of a local authority.

Children's centre services commissioned in similar ways are also excluded until 2014. This does not prevent relevant bodies from expressing an interest in children's centres run directly or commissioned by a local authority alone as soon as the Right comes into effect. Services that relate to named individuals with complex needs, and services managed through direct payments are permanently excluded or treated as not falling within the scope of the right to challenge.

Local authorities are expected to be in a position to advise on whether the exclusion rules apply to a particular service.

Expressions of interest

Submission

Local authorities will need to make judgements about which services are likely to be open to expressions of interest in order to manage the process most effectively, should it arise. The alternative to specifying periods during which expressions of interest can be submitted in relation to a particular service (as allowed under the Act), is to receive submissions at any time.

It is probable that authorities will establish a timetable that specifies periods both for making expressions of interest and for the period between acceptance and the start of a procurement exercise.

Details of periods when the authority is open to expressions of interest for particular services must be published, including on websites. The guidance gives detail on factors that the timetable should take into account:

- The need to provide sufficient time to prepare
- The complexity of the service
- The authority's commissioning and decision-making cycles.

Requirements

Local authorities must consider an expression of interest which is in writing and meets the requirements set out in the regulations.

They may:

- Refuse to consider a submission submitted outside a specified period
- Require organisations to demonstrate how they meet the definition of a relevant body
- Request further information – though cannot make this a condition of consideration or rely on information outside the scope of the regulations as a ground for rejection.

Information required in an expression of interest is, in summary:

1. Information about financial resources of all involved, including proposed consortium members and sub-contractors
2. Evidence that the organisation (and others involved) will be capable of providing or assisting in providing the relevant service by the time of any procurement exercise
3. Sufficient information to identify the relevant service
4. Information about the outcomes to be achieved, including how these will promote or improve the social, economic or environmental well-being of the area, and meet the needs of service users In the case of employees of the authority, details of how other employees will be engaged and affected.

The guidance provides additional detail on matters relevant to meeting user need, and to the content of submissions from employees. Illustrations of weight being given to submissions that take account of well-being over and above the provision of the service are also provided, but should be treated with care in the case of larger contracts that may fall within European procurement rules.

Notification of decisions

The Act requires an authority to establish a timetable for making its decision and notifying those concerned. While the timetable must be provided within 30 days after the close of the period specified for submissions, or otherwise receiving an expression of interest, the authority is allowed to take a number of factors into account in determining a reasonable period for considering and reaching a decision. This may include the likely need to agree modifications of the expression of interest, and any commissioning cycle and decision-making processes.

Grounds for rejection

An expression of interest may be rejected, but only on grounds set out in the regulations. These are generally practical in scope. It is made clear that an authority cannot start considering alternatives after an expression of interest has been received.

The statutory guidance sets out the full grounds and guidance on how they will operate. In summary, grounds for refusal may be:

- failure to comply with the statutory requirements
- a material inadequacy or inaccuracy in the information provided
- unsuitability of the organisation or any of its partners or sub-contractors
- a decision to stop providing the service has already been made
- the service is one provided to people who are also in receipt of NHS services in an integrated package and a continuation of the service is critical to their well-being
- a procurement exercise is already underway
- negotiations to provide the service are already underway, in writing, with a third party
- notice has already been given that the authority is considering a proposal for the service from its employees
- the expression of interest is frivolous or vexatious
- acceptance is likely to breach another legal obligation.

It will be necessary to give proper consideration to an expression of interest, and to consider whether the organisation making the submission should be asked to provide more before rejecting a submission where information is lacking. It will not be possible to take into account information other than that which may be required under the regulations, so that requests for additional information may well prove a useful tool.

It will be important that records of commissioning and procurement processes and decisions are made and published in accordance with the regulations. This will be crucial where negotiations with a third party or to establish a public sector mutual are sufficiently progressed to continue.

Local authorities will have to comply with other duties when carrying out this function and when procuring services. The guidance refers to the best value duty (most recent guidance September 2011) and to a new piece of legislation that introduces social value considerations into procurement processes. An LGiU briefing describes and comments on the Public Services (Social Value) Act .

Equality obligations will also apply.

Questions have clearly been asked about the relevance of the best value duty during the recent consultation period: these were dealt with in a Parliamentary Question on 14 June. Having been asked whether an assessment had been made of the compatibility of the best value duty and the Right to Challenge, the minister replied that, "The purpose of the draft statutory guidance on the community right to challenge is simply to provide further explanation of provisions in the Localism Act 2011and associated regulations. It does not seek to change any aspect of the duty of best value, and it is acknowledged in section 6 of the guidance that authorities will need to comply with this duty".

Modifying expressions of interest

An expression of interest can be modified by agreement. This will occur when a submission would be rejected unless changes were made. If no agreement is reached, the expression of interest may be rejected.

Examples given in the guidance indicate that this makes it possible to both clarify an expression of interest and ensure that the additional information can be relied upon in deciding whether it must be accepted or should be rejected.

Procurement exercises

The rule is clear: once an authority accepts an expression of interest for a relevant service it must carry out a procurement exercise. This will follow the processes adopted by the authority and comply with procurement law.

It will be necessary to consider how both acceptance of expressions of interest and conduct of procurement exercises will promote the economic, social and environmental well-being of the authority's area. The guidance encourages the use of social clauses in contracts subject to European rules.

Following response to the consultation on the draft guidance, the paragraphs on the implications of an authority considering an in-house bid alongside the tender process have been deleted. Originally, the guidance had suggested that this will require considerable care, and that it was considered unlikely that an in-house bid can be considered as part of the tendering process. The removal of these paragraphs results in greater clarity in the guidance, and means that local authorities are able to make their own decisions, with appropriate advice, on considering an in-house bid.

Right to challenge - comment

It is too early to judge whether the community right to challenge will have a major impact. There are of course immediate practical implications. Some local authorities may already be considering how to manage forthcoming procurement processes, bearing in mind that expressions of interest are possible in specific sectors. Others may be cautious about defining services that risk fragmentation if subjected to a number of differing expressions of interest. On the other hand, organisations that might be expected to submit expressions of interest are no doubt making a reality check on the implications for their own future and for the future of local services.

Process and policy issues may be better managed by setting a timescale for particular services, and allow councils to retain control of the agenda, although this has its own pitfalls. Some local government commentators have expressed concern about the administrative burden of mapping out

services and preparing to process expressions of interest. Councils will certainly need to line up legal expertise and training for commissioning staff in service areas.

Protocols and policy guidance will be useful. It may also be worthwhile ensuring procurement teams are briefed, as new obligations to have regard to social considerations will apply through all stages.

Though these are important issues, the regulations and guidance raise some more fundamental questions which are as yet unresolved.

Is the Right a Trojan horse?

This has been the most controversial topic, and remains a live issue. The risk arises from more than one perspective. Firstly, by triggering a full procurement exercise once an expression of interest has been accepted, the opportunity to bid is opened up to established municipal contractors. As the National Association for Voluntary and Community Action observed in a recent briefing, "This will be open to any organisation with an interest in delivering services, including large national and private sector delivery organisations, unaccountable in any real way to local people".

Secondly, it will be possible for expressions of interest to be supported by organisations without any status under the right to challenge. Eric Pickles has, according to the LGC, "promised to come down hard on private firms that seek to abuse the new community 'right to challenge' to take over public services – threatening fresh legislation if necessary". Yet it will be possible for firms to bid legitimately in partnership with local bodies without any need to offer inducements or set up bogus community groups.

It is debatable whether this outcome was anticipated when the Right was first proposed, but it is hard not to see the scheme in the light of wider government policy on public services. For the future, there will be two tests of the legislation: whether it will meet the realistic expectations of community groups, and whether the process involved enables local authorities to provide services are delivered on the basis of best value and interests of local people.

What are the issues for local organisations?

Many will have been disappointed that the outcome of a successful expression of interest is a procurement exercise in which organisations may be ill-equipped to compete. Others may agree with the reported observation of a legal advisor, that it will be hard for organisations to submit bids without inadequacies and errors, and be hard to show that they are able to take on a service. The regulations and guidance provide opportunities to correct inaccuracies and to provide missing information: councils will be wise to ensure that this approach is followed by those managing the process.

It must be right, however, that the regulations do require that organisations show how they plan to ensure that they will be in a position to provide the service at the appropriate time – after all, public money is being committed to the process. The same legal advisor's observation that 'groups will need to do their homework' is surely correct, and should result in a more satisfactory process from their perspective. Resources are available, as already indicated, and are being widely discussed in the voluntary sector.

It will be important for councils to consider applications from local organisations with care: the alternative is for the sector to see their council, rather than the legislation, as generating the problem. It will also be essential to be transparent about procurement processes, and for groups to be aware of the full implications of their taking part, before starting the process.

Grounds for refusal

The basis on which an expression of interest can be rejected is essentially practical, covering some basic topics while preventing councils from circumventing the process by adopting alternative measures.

Some issues are touched on lightly in the guidance and call for further exploration. The regulations do not specify refusal on grounds of failing to deliver best value, or failing to include viable social outcomes, but it appears that these issues are implied in the final ground, by which a council can reject a submission if it is likely to lead to a breach of a statutory duty or other legal requirement. The guidance prompts councils to have regard to their duty to secure best value.

Social issues

It is a welcome requirement for submissions to demonstrate the promotion of social, economic or environmental outcomes. The Public Services (Social Value) Act 2012 will also have an – as yet little understood – impact on the overall process of submissions and procurement exercises. This is another topic requiring early exploration, as some important questions are raised. Will it be possible to refuse expressions of interest that fail to offer realistic - or any - outcomes? What legal difficulties will be posed in reconciling procurement duties with these obligations and how can they be resolved?

In-house options

The government no longer intends to give guidance on this subject. Some commentators have likened the position to the experience of CCT, with the council prevented from considering a bid from its in-house team once the procurement process is triggered by a successful expression of interest. The problem arises because the in-house team is not a legal entity and so is unable to submit a legal tender or enter into a contract with the council. An in-house option may be considered alongside a tendering process, but it is generally acknowledged that there are difficulties in this, and the process is at risk of challenge. There can be no doubt that careful attention will be given to this issue, with some solutions emerging. The necessity of considering best value within the overall scheme may well be a determining factor.

Right to Bid for Community Assets

From 12 October 2012 parish councils, community councils in Wales, and local voluntary and community organisations will be able to nominate local land or buildings to be included in lists of community assets maintained by local authorities. In the event of a proposed sale, a process will be triggered that allows a community interest group – more closely defined than a voluntary or community organisation – to express an interest in bidding to purchase the property.

The process, already outlined in the Act, has been fleshed out by draft regulations, introduced in late June 2012. The final regulations were approved by parliament in September and came into force on 20 September 2012. These can be found here.

Provisions for listing assets of community value will apply in England and Wales; English counties will need to comply with these requirements only where there are no district councils.

The land to which the Assets Scheme applies may be of any size, may be publicly or privately owned, may lie in more than one local authority area, and may or may not consist of registered land (i.e. land entered on the register maintained by the Land Registry). Nomination of a site does not have to pay

regard to any of these factors, and it is therefore possible for a nominated site to be divided between different owners or different local authority areas, and to consist partly or wholly of unregistered land.

A local authority will have eight weeks from receiving an application to decide whether a property must be listed, according to a number of criteria. A property will qualify where its current primary use furthers the social wellbeing or social interests of the local community, and where it is realistic to think that this use will continue. A property will also qualify when it has been in such use in the recent past, and this may realistically recur within the next five years (whether or not in the same way as before). Social interests include culture, recreation and sport.

In addition to providing information on the land, voluntary and community sector applicants will have to demonstrate a local connection by showing that their activities are wholly or partly concerned with the local authority area or that of a neighbouring authority, and that any surplus they make is wholly or partly applied for the benefit of that area.

They will also have a charitable or other not-for-profit status, or if unincorporated, must demonstrate a membership of at least 21 local government electors. Listing applications may also be made by neighbourhood forums set up under the planning provisions of the Localism Act.

The effect of a property's inclusion on the list will be to require the owner of the property to notify the local authority when intending to dispose of a listed asset, so triggering a moratorium period during which community interest groups can apply to be treated as potential bidders. At this stage groups must show a local connection and must have a legal status – unincorporated organisations and neighbourhood forums are excluded.

The owner will be able to begin the sale process after an interim period of six weeks if no bidder has come forward; if a written intention to bid is received in that time then the full six month moratorium period will apply. The sale itself takes place under normal market conditions. An eighteen month protection period has also been created: if this expires before the property is sold the original notification process must start again.

Properties will be listed for five years. Councils will be responsible for notifying owners and occupiers of listings and receipt of notices, and for publicising the possible sale of a listed asset. It will be necessary for neighbouring councils to cooperate where a property falls in more than one local authority area. Councils will also need to maintain lists of properties where nominations have failed.

Certain buildings or land are excluded – primarily land attached to residential property, with some nuances where property includes partial residential property. Sites covered by the Caravan Sites Act and land used by public utilities are also excluded. Nor will the rules apply to a wide range of non-commercial disposals of the land, for example on inheritance.

The proposal inevitably involves considerable interference in private rights. These are protected to some degree by the owner of a listed property being able to request a review of the listing, and by the introduction of an interim moratorium period. A property will only remain on a list for five years, when a further application would need to be made. Listing will be recorded on the Land Registry.

The Act provides rights of review and appeal on the listing of a property, and makes provision for compensation to be paid to landowners for losses arising from being involved in a lengthier sale period. The scheme makes provision for compensation to private property owners.The regulations place no restriction on what type of loss may be claimed, but they specify that a claim may arise from a delay in selling or may be for expenses incurred in appealing successfully against a local authority review decision. As local authorities best understand local circumstances, they will have responsibility

for determining compensation for loss and expenses. The government will meet the cost of compensation payments that exceed £20,000 in a financial year up to March 2015, whether a local authority receives one large claim of more than £20,000 or a number of smaller claims in one financial year that add up to more than £20,000. Funding from 2015 onwards will be considered in due course.

Compensation covers both additional expenses and loss in value incurred as a result of a sale being delayed. A new jurisdiction is being created for First Tier tribunals to hear compensation appeals.

The rationale for the scheme is explained in the most recent impact assessment (IA), as creating the basis for models of asset management and service provision that are not available to the public and private sectors. The process, which will apply to both public and private property, is in addition to existing opportunities for the transfer of public assets to community organisations, principally under the General Disposal Consent Order 2003, at less than market value.

The government published an explanatory memorandum to the regulations which can be found here.

Right to bid for community assets - comment

The provision of support and funding will of course encourage many to make applications to list local pubs, shops, community centres, and libraries, but a certain amount of caution is necessary on the likely take-up of the right to bid for community assets. Even where organisations have the skills and knowledge to start the process, raising funds to buy a property at market rates will be a considerable challenge. While the use of a particular asset may be linked to a particular service, the distinctions between the much wider power to challenge to provide a service and the need to demonstrate a local connection to succeed in purchasing a listed asset appear unlikely to lead to many inter-related applications.

The criteria finally adopted for successful listing appear wide enough to allow a reasonable discretion on the part of decision-makers: for a nomination to succeed, proposers must demonstrate significant social value in use of the property, and must also demonstrate their own local connections.

Councils will benefit from planning ahead for the implementation of these new provisions. It will be a particular challenge to manage expectations: the realities of competing locally to provide services or taking steps to protect a local social asset are likely to be less certain than suggested by the rhetoric which is accompanying the promotion of the Act. There is a democratic and pragmatic role for local authorities in communicating information. For example, a local community may wish to take over a closed post office building, thinking they can do so and so save the service, and believing this is possible using the Localism Act. In reality this will be much harder to achieve, and there will be a risk that the council appears uncooperative, rather than the legislation failing to meet expectations. Indeed, it would probably be useful for councils to design a short decision-making protocol on how they will deal with applications, in line with the regulations. There are risks, as decisions can be challenged, however having a clear and open approach to applications will reduce that risk by showing consistency etc. It would be sensible to put a draft past council lawyers before publishing it. A protocol and application form would help applicants too.

It will be important that councils are not perceived as obstructing these opportunities, but can provide a basis that will enable local organisations to use the new provisions in a constructive rather than adversarial way.

Planning

Part 6 of the Localism Act addresses changes to the planning system.

Plans and strategies

The act sets out:

- the abolition of regional spatial strategies (RSS) as part of the planning framework and the return of powers over housing and planning matters to local authorities (the London Plan will be retained in the capital)
- a duty to co-operate: the act includes a new duty on local planning authorities (LPAs) - and county councils in England that aren't LPAs - to 'co-operate in relation to planning of sustainable development'
- changes to the enforcement regime, including a new power for LPAs to 'refuse to make a decision on a retrospective planning application while enforcement action is taking place' and a new 'planning enforcement order' to counter deliberate deception or concealment to avoid planning regulations. Changes that took effect from April 2013 included powers to prevent the "twin tracking" of a retrospective planning application with an appeal against an enforcement notice on the grounds that planning permission ought to be granted. The retrospective planning application would still have its usual right of appeal. Local Authorities can now also take action against concealed breaches of planning control even after the usual time limit for enforcement has expired.
- The Localism Act made provisions for a new level of development plan: the neighbourhood plan. It also ushered in neighbourhood development orders, which can help communities to identify what development they want without planning permission being required, and community right to build orders, which are a type of neighbourhood development order.

The National Planning Policy Framework, which is not technically contained within the provisions of the Localism Act; is however a key element of planning policy with many links to the Act. From 27 March 2013 the policies in a local plan will be weighted according to how closely they reflect those of the NPPF.

The act retains the Community Infrastructure Levy (CIL) but includes some provisions for communities to have more control over how the levy is spent and how that spending is monitored (the government is currently consulting on regulations related to this change.

Regulations

Changes to the enforcement regime were brought into effect via a commencement order published on 15 January. This clarified the rules on predetermination - this is the provision where councillors are freer to talk about issues before they decide them. The clarified rules on predetermination still require a planning committee member to have an open mind when determining a planning application. However, proof of previous campaigning against a proposed planning application would not be proof that the member had a closed mind.

The Neighbourhood Planning (General) Regulations 2012 came into force on 6 April 2012. These flesh out some of the detail and responsibilities for local authorities relating to neighbourhood plans, neighbourhood development orders and community right to build orders. The regulations include rules relating to:

- accepting and publicising an application for establishing a neighbourhood area/ neighbourhood forum (Parts 2 and 3)
- publicising the designation of a neighbourhood area/neighbourhood forum (Parts 2 and 3)
- additional conditions for people seeking to initiate a community right to build order (Part 4)
- the process of receiving and publicising a neighbourhood plan proposal, submitting it for examination and publicising the decision and the plan if approved (Part 5) (Part 6 covers the same territory for neighbourhood development orders and community right to build orders).

Further sections cover enfranchisement rights relating to community right to build orders (Part 7), revocation or modification of plans/orders (Part 8), and the provisions of relevant European legislation (Part 9, also see Sections 2 and 3). Section 1 summarises who should be consulted by neighbourhoods when preparing plans/orders.

In June 2012 the government also published draft regulations on the local referendum that will be held to decide whether a neighbourhood plan, development order or community right to build order is adopted. Following criticism from the Electoral Commission on the complexity of the proposed referendum questions, the government simplified these to the following:

1. Do you want [insert name of local planning authority] to use the neighbourhood plan for [insert name of neighbourhood area] to help it decide planning applications in the neighbourhood area?
2. Do you want the type of development in the neighbourhood development order for [insert name of neighbourhood area] to have planning permission?
3. Do you want the development in the community right to build order for [insert name of neighbourhood area] to have planning permission?

The Electoral Commission welcomed the revised wording.

The draft regulations cover how a referendum should be conducted, where, when (a referendum can be combined with another poll if they are scheduled to occur within 28 days of each other) and by whom. They also set out limits to referendum expenses (calculated according to how many eligible voters there are).

Community right to build orders

Community right to build orders allow neighbourhoods to propose development needed by the community without the need for planning permission, provided the majority of local people agree via a referendum. Although they are a type of neighbourhood development order, they can be proposed by a community organisation rather than a forum or parish/town council. Part of this process includes preparing a business case; any financial benefit the development generates must be used for the benefit of the local community, for example, maintaining local facilities.

To support this new kind of order, in May 2012 the government announced £17 million over 3 years to help community groups develop orders and get them adopted (there is an 'early bird bonus' of £2000 on offer for those groups that get a proposal submitted by March 2013). The funding is being managed by the Homes and Communities Agency (HCA) – which has published guidance.

The government is also funding the organisation Locality to provide support and mentoring for community groups interested in developing right to build orders. This includes a dedicated website – which already contains a number of helpful resources – and a helpline.

Duty to co-operate

The NPPF states that 'local planning authorities will be expected to demonstrate evidence of having effectively co-operated to plan for issues with cross-boundary impacts when their local plans are submitted for examination' (para 81).

In its short guide on the duty to co-operate (enshrined in the Localism Act 2011), the Planning Advisory Service (PAS) states that the duty is the 'first thing' that the planning inspectorate (PINS) will look at. While the duty to co-operate is a very important element in the inspection of a range of plans, what it means in practice is only becoming clear as inspectors begin to pass judgement about the relevance of the duty at examinations in public regulations. PINS has urged LPAs to take the duty to cooperate 'incredibly seriously'. Emerging advice seems to be that while inspectors can adjourn plan examinations so that LPAs can resolve problems identified during the examination, this option is not available to them when assessing if the duty to co-operate has been met. This is because the duty must be met when plans are being prepared. If that has not been fulfilled, then the plan will be unsound.

PAS suggests that when preparing evidence to demonstrate how they have fulfilled the requirements of the duty LPAs should highlight the 'practical policy outcomes' that have come out of the joint process.

Social housing

Part 7 of the Localism Act deals with the reforms to social housing, homelessness and housing finance.

The government says that the changes set out in the act will give local authorities 'the flexibility to better manage their housing stock by adapting to meet local needs'.

The most significant changes for local authorities are that they can:

- offer homeless people tenancies in private sector accommodation instead of being obliged to offer social housing
- offer new social housing tenants shorter, fixed-term (minimum two year) tenancies
- decide who goes on their housing waiting lists, with central government setting out who it feels has the greatest housing needs
- keep rental income to spend on housing investment locally.

Local housing authorities must now prepare a tenancy strategy to guide decisions social landlords working in their area make on:

- the kinds of tenancies they grant
- the circumstances in which they will grant a tenancy of a particular kind
- the length of tenancies
- the circumstances in which they will grant another tenancy when an existing one expires.

For new social housing tenants, landlords can now issue fixed-term ('flexible') tenancies: social housing no longer comes with a 'tenancy for life'. The length of the fixed term has been subject to much debate, and guidance on how this should be applied is still vague. However, the act does set a minimum of two years.

Local housing authorities in England have been drawing up, and consulting on, new tenancy strategies in readiness for the reforms to social housing tenure. The commencement order published in January 2012 brought into force sections 151 and 152 of the Localism Act 2011 and parts of sections 150 and 153. Together those four sections set the framework for tenancy strategies and require that the final strategy in every local authority area is agreed and published by 15 January 2013 at the latest.

Councils can also begin drawing up and consulting on new allocation schemes to reflect the changes to allocation law being made by the Localism Act 2011 sections 145-147. However, they must have regard to the statutory guidance issued by the secretary of state and to regulations he has made and the present statutory guidance only refers to the current law.

Allocations and tenure reform

Local authorities are required to have consulted on and produced a tenancy strategy by January 2013. Social landlords active in the area will need to have regard to the strategy, especially regarding the use of fixed term tenancies.

The LGA has published Writing an Effective Tenancy Strategy, which gives a step-by-step approach to the process, including a number of top tips. The guide says that the timetable for producing a strategy will need to allow enough time to:

- gather evidence
- hold initial discussions about the key issues with other elected members, landlords and residents
- produce a draft
- get landlords to consider and comment on the draft
- iron out points of disagreement
- produce a final version and take it through the council's formal processes.

The rules on who will be entitled to succeed to a secure tenancy have also been revised, limiting the right to a spouse or civil partner who satisfy the residency criteria. This change is not retrospective and consequently only applies to new tenancies

The Localism Act allows councils to set their own priorities for their housing waiting lists. Every local housing authority (in England) needs to prepare an allocation scheme which sets out their priorities for determining housing need (for example, the act says that 'reasonable preference' should be given to homeless people, people occupying unsanitary or overcrowded housing, people who need to move on medical needs and so on). The allocation scheme should also set out the procedure a local housing authority will follow for allocating housing accommodation.

On 18 June 2012 the changes to the allocation legislation – contained in sections 145 to 147 of the Localism Act – came into force.

On 29 June 2012 the government published its final guidance, having consulted over the spring. It replaces all previous statutory guidance relating to allocating social housing.

At the heart of the changes is that social housing may only be allocated to 'qualifying persons' and that housing authorities now have 'the power to determine what classes of persons are or are not qualified to be allocated housing'.

Local authorities are still required to base their allocation policies on reasonable preference categories first – homelessness, overcrowding and medical or welfare grounds, and hardship. They then have the power to set priorities to help allocate housing between households with similar levels of housing need.

Note that the government has also published draft regulations to require local authorities to include in their allocation schemes additional preference to former members of the Armed Forces and related groups.

For example, Bournemouth has changed its priorities for people who qualify on their waiting list to:

- local people in housing need and on low incomes
- people who are making a positive contribution to the local community, such as those in training/ education, or in employment
- applicants who have served in the HM Forces in the last five years.

Homelessness

The Localism Act gave councils more freedom to place homeless people in private sector accommodation. Concerns about the quality of private rented sector housing has led the government to publish a draft order for consultation (the deadline for responses was 26 July 2012) – Homelessness (Suitability of Accommodation) (England) Order 2012 – which sets out the standards that private sector housing for homeless people must meet including having a gas safety record, an

energy performance certificate and a written tenancy agreement.

The proposed Order sets out where an offer is not to be considered suitable but does not apply to temporary accommodation. It covers five main areas:

- Physical condition of the property - the local authority should be of the view that the property is in a reasonable physical condition for it to be suitable.
- Health and safety matters (e.g. gas, electrical and fire safety) - the landlord must have complied with existing legislation and taken reasonable precautions to prevent carbon monoxide poisoning, for example by installing a carbon monoxide alarm.
- Licensing for Houses in Multiple Occupation - the accommodation is not considered suitable if it is in an unlicensed HMO.
- Landlord behaviour - the government proposes bringing in a similar test to the current 'fit and proper' person requirements for landlords of Houses of Multiple Occupation.
- Elements of good management - the landlord should supply an Energy Performance Certificate and a written tenancy agreement.

Although the government has rejected an option that local authorities use only accredited private landlords for discharge of the homelessness duty because this would place additional burdens on landlords and councils, it has taken a "middle way" between doing nothing and extending accreditation. Thus, the Order proposes that private sector accommodation is not suitable under the circumstances set out below:

- the local housing authority are of the view the accommodation is not in a reasonable physical condition
- the local housing authority are of the view that any electrical equipment provided does not meet with the identified Electrical Equipment (Safety) Regulations
- the local housing authority are of the view that the landlord has not taken reasonable fire safety precautions with the accommodation and any furnishings supplied
- the local housing authority are of the view the landlord has not taken reasonable precautions to prevent the possibility of carbon monoxide poisoning
- the local housing authority are of the view the landlord is not a fit and proper person to act in the capacity of landlord
- a House of Multiple Occupation is subject to mandatory or discretionary licensing and it is not licensed
- the property does not have a valid Energy Performance Certificate
- the property does not have a current gas safety record
- the landlord has not provided the local housing authority with a written tenancy agreement which the local housing authority considers to be adequate.

In the light of some local authorities seeking to house homeless applicants well outside the local authority area, the government is proposing to specify in secondary legislation a number of factors to be taken into account when considering whether a property's location is suitable for discharge of the homelessness duty. The proposed factors are set out below.

- distance of the accommodation from the applicant's previous home;
- disruption to the employment, caring responsibilities, or education of members of the household;

- access to amenities such as transport, shops and other necessary facilities; and
- established links with schools, doctors, social workers and other key services and support essential to the well-being of the household.

Social housing regulation

The Act abolished the Tenant Services Authority ("TSA"), introduced as the regulator of social housing in England.

From 1 April 2012, the regulatory functions of the TSA transferred to the Regulation Committee of the Homes and Communities Agency. The Committee carries out economic regulation (ensuring financial viability of providers and value for money) and also consumer regulation (ensuring that the provision of housing is well-managed and of appropriate quality, tenants are given an appropriate degree of choice and protection and are suitably involved in the management issues).

The Regulation Committee can use its monitoring and enforcement powers if it has reasonable grounds to believe that there has been a failure which has resulted in serious detriment to the tenants or if there is a significant risk that there will be such a failure without its intervention.

The Act also provides for the creation of a unified service for investigating complaints about social landlords. Under the present system, complaints by tenants of a local housing authority are made to the Local Government Ombudsman and those brought by tenants of private providers of social housing are to the Independent Housing.

The main provisions come into effect from 1 April 2013. These are:

- A single mandatory Ombudsman. Local housing authorities will become 'registered providers', which is the legal status of housing associations and other bodies registered with the regulator of social housing. As a result, complaints against local authorities in their role as social landlords (as well as in respect of their ownership and management of leasehold housing) will, from 1 April 2013 onwards, be considered by the Housing Ombudsman. Other landlords or managing agents will continue to join the Housing Ombudsman voluntarily.
- A power for the Ombudsman to enforce his decisions. The Secretary of State will have the ability to enable the Housing Ombudsman to apply to a court to have his determinations enforced when necessary.
- A new role for MPs, Councillors, and Tenant Panels. Tenants of registered providers will be able to request that their complaints be considered by a 'designated person' once they complete the internal procedure of their landlord. Such a person can be an MP, a local councillor, or a recognised Tenant Panel. The designated person may help resolve the complaint directly, may refer the complaint to the Ombudsman, or may decline doing either. In the latter case the complainant may approach the Ombudsman for his consideration of the complaint. The complainant may also approach the Ombudsman directly if more than eight weeks have elapsed since the completion of the internal procedure of the landlord, without the need to involve a designated person first.

The National Tenant Policy Organisations Forum has published a guide called Tenants Panels: Options for Accountability. Part of the aim of this guide is to help tenants understand the potential for this new role set out in the Localism Act, and what they need to do to become designated.

Self-financing

The Localism Act enacts the legislation required to replace the Housing Revenue Account Subsidy System with self-financing for council housing, which came into force in April 2012. Local authorities will now keep the rent they collect from social housing tenants and use it to maintain housing locally.

To accompany this change the government published Implementing Self-financing for Council Housing (February 2011): and Self-financing – Planning the Transition (July 2011): this sets out the detailed steps for government and councils ahead of the April 2012 launch. The CLG website explaining self-financing can be found here.

Councils are required to develop housing plans in consultation with social housing tenants. The government says that local housing authorities should use these plans to consider: what investment existing homes will need and the scope to replace stock with new homes that better meet future needs

- what rents they will need to charge and how the income will be used
- how they will provide information to tenants and local taxpayers about income, spending and investment plans after the complexities of the subsidy system have been removed.

Sources

Powers and Governance

Centre for Public Scrutiny (2012) , Musical Chairs Practical issues for local authorities in moving to a committee system

Committee on Standards in Public Life (2012) Letter from the Chairman to Eric Pickles

DCLG (2012) Community Right to Challenge Statutory Guidance

DCLG (2012) Letter from Bob Neill to local authorities on new standards arrangements

HM Government (2011) The Localism Act Explanatory Notes

HM Government, The Localism Act 2011

HM Government, Local Authorities (Arrangements for the discharge of functions) Regulations 2012

LGA (2012) Template Code of Conduct

Locality (2012) My Community Rights website

Planning and Housing

DCLG (2011) The National Planning Policy Framework

DCLG (2012) Allocation of accommodation: Guidance for local housing authorities in England

DCLG (2012) website on self-financing

HM Government (2012) The Neighbourhood Planning (General) Regulations 2012

HM Government (2012) The Neighbourhood Planning (Referendums) Regulations 2012

HM Government (2012) The Localism Act 2011 (Commencement No. 2 and Transitional and Saving Provision) Order 2012

Homes and Communities Agency (2012) Community Right to Build

LGA (2012) Writing an Effective Tenancy Strategy

The National Tenants Panel (2012) Options for Accountability

PAS (2012) Advice on the Duty to Co-operate

Pinsent Masons (2011) The Localism Act Impact on Planning Law

Links to LGiU briefings

NB The full briefings are only available to LGiU members

Localism Act: Powers and Governance November 2011

Localism Act: Planning November 2011

Localism Act: Social Housing November 2011

Localism Act: Community Rights November 2011

Urban autonomy? City deals and elected mayors February 2012

Community Right to Challenge May 2012

City deals – implications for enhanced devolution and local economic growth July 2012

NPPF update Summer 2012 July 2012

Neighbourhood Planning Summer Update July 2012

New Standards in Local Government July 2012

High income social tenants: Pay to Stay consultation August 2012

Public Services (Social Value) Act 2012 August 2012

Right to Bid for Community Assets August 2012

About the LGiU

The LGiU is a local government think tank and membership organisation - with nearly 200 local authorities and others subscribing to its networks . Our mission is to strengthen local democracy to put citizens in control of their own lives, communities and local services. We work with councils and other public services providers, along with a wider network of public, private and third sector organisations. Through information, innovation and influencing public debate, we help address local and national policy challenges such as demographic, environmental and economic change, improving healthcare and reforming the criminal justice system. We publish 200 expert briefings annually on key policy issues and co-ordinate the Local Government All Party Parliamentary Group. We also organise the Children's Services Network (CSN) and Local Government Flood Forum (LGFF) and are the host organisation for Local Energy Ltd.

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