

10-75 Decentralisation and Localism Bill

To all APSE main contacts in England and Wales, Scotland and Northern Ireland for information

Key issues;

- The Decentralisation and Localism Bill contains a number of important provisions that impact upon local councils
- The Bill includes a new General Power of Competence for local authorities (within England)
- The Bill seeks to open up 25% of public sector contracts to the social enterprise sector and prescribes a 'community right to challenge' in the provision of public services

1. Introduction

Prior to the election both the Conservatives and Liberal Democrats had indicated strong support for policies towards a localism agenda. The Conservatives had committed to a reduction in performance targets and providing councils with a General Power of Competence. The Liberal Democrats' manifesto also committed to supporting greater decentralisation and greater involvement of the voluntary sector in public services.

Following the abolition of the Audit Commission the Communities Secretary, Eric Pickles MP, has now introduced the Decentralisation and Localism Bill (referred to as the Localism Bill) and in introducing the Bill referenced this as a means to 'further reduce the burden of bureaucracy' as well as advancing the involvement of the third or social enterprise sector in the delivery of local public services.

2. Key provisions

A number of key provisions impact on local government, including housing reform which will be the subject of a separate APSE briefing, and include:

- A General Power of Competence
- Community right to challenge
- Community right to buy
- Neighbourhood plans
- The Standards Board regime
- The 'predetermination' rule
- Local referendums
- Elected mayors

3. Main provisions that will impact on public service delivery issues

General Power of Competence: - Local government is governed by a myriad of statutes and regulations that govern the behaviour of local authorities. Many such statutes restrict or fetter the local authority. More recently case law raised doubts over the 'Wellbeing' powers, which councils have in respect of the Local Government Act 2000. Further details about this topic are provided in [APSE briefing 09-53](#).

The Bill in presenting a General Power of Competence will allow local authorities to do anything which is not specifically prohibited by law, allowing innovation in response to local need. The Bill allows local authorities to do anything which an individual is able to do (so long as it is not against the law), so it is a useful power of first resort. It means that local authorities will not be restricted to only doing what Parliament has expressly authorised them to do. The Bill makes it clear that the power can be exercised:

- anywhere in the UK or elsewhere;
- for a commercial purpose or with or without charge; and
- For the benefit of the Authority, its area or persons resident or present or otherwise.

Whilst the Bill provides a Power of General Competence it will not restrict the use of other powers already in existence.

The Bill however also imposes some restrictions including limitations in powers in earlier regulations. So for example commercial trading will only be permitted in function related activities where the Authority is not under a statutory requirement to provide services and through a Trading Company. This will be an area of interest to APSE member authorities who are using or have considered a Trading Company arrangement, (as with the s.95 Trading Powers under the Local Government Act 2003) though of course charging can be carried out without a Trading Company.

Charging Powers, under the Local Government Act 2003, are restricted to those areas where the service is not one that a statutory provision requires the authority to provide to the person, and that the person has agreed to its being provided. In this regard the power is subject to a duty to secure that, taking one financial year with another, the income from charges (allowed) does not exceed the costs of provision. This applies separately in relation to each kind of service.

As anticipated there is also a reserve power to the Secretary of State to restrict what authorities are allowed to do by way of anything specified by an Order.

The power will only apply to local authorities in England (including the Common Council of the City of London, the Council of the Isles of Scilly and eligible Parish Councils). Within Wales the wellbeing power will be amended to apply only to Wales.

Whilst there does not appear to be a specific limitation on raising money the powers reserved to the Secretary of State mean that such restrictions could be imposed by way of an Order. The Communities Secretary, Eric Pickles, has made it clear on numerous occasions that he does not see it as appropriate for councils to be adding to the financial burdens of local communities. This has also been evidenced by the way in which council tax increases have been effectively limited as a quid pro quo for additional central government funding than would otherwise be the case, for those authorities who are prepared to limit council tax increases. This supports the direction of travel of central government policy in terms of its view that any increased financial burdens on local residents should be avoided.

Community right to challenge: - The Bill will give communities a right of challenge to run local authority services. The Coalition Government believes that this means local communities will be able to get *'more involved in the delivery of public services and shape them in a way that will meet local preferences'*. The Bill sets out a process whereby a 'relevant body' can submit an expression of interest in providing or assisting in providing a service on behalf of the local authority, referred to as the 'relevant authority'.

A relevant body is specified as

- a) A voluntary or community body
- b) A body of persons or a trust which is established for charitable purposes only
- c) A parish council
- d) In relation to a relevant authority two or more employees of that authority or
- e) Such other person or body as may be specified by the Secretary of State by regulations

In considering the expression of interest the relevant authority must take into consideration how this might promote or improve the social economic or environmental well being of the authority's area.

The relevant authority may modify the expression of interest. If the relevant body accepts the expression of interest it must carry out a procurement exercise relating to the provision on behalf of the authority of the relevant service to which the expression of interest relates.

It is important to note that these provisions are subject to further regulation and guidance that will from time to time be issued by the Secretary of State. It would appear that this would allow considerable powers for the Secretary of State to direct in what circumstances an authority would need to engage in a procurement exercise and how they should respond to expressions of interest.

Community right to buy – The Bill will place new duties on local authorities to maintain a list of land in its area that is of community value. Subject to any provision made within the Bill, it is for a local authority to decide the form and contents of its list of assets of community value. For example a list would typically include details of the ownership of the land. The authority must also consider whether assets nominated by the community known as *'Community Nominations'* should go onto the list, for

example local post office buildings, and will include assets of community value whether public or privately owned.

The intention is that this will give community organisations greater opportunity to identify and bid for assets of value to them, from which they can deliver existing or new services. A procedure is set out to consider community nominations for additions to the list. The intention, as stated in DCLG guidance, is that such a provision will help to diversify the providers of services and stimulate creative and imaginative new patterns of service and enterprise.

The Bill also sets out the procedures to notify land owners, occupiers and in the case of a community nomination the person responsible for the nomination of the inclusion or removal of land on the list. The list must be published.

Specifically the Bill places a *'Moratorium on disposing of listed land. The owner of the land included in the local authority's list of assets of community value must not enter into a relevant disposal of the land unless each of conditions A to C is met:*

Condition A is that the owner has notified the local authority in writing of the owner's wish to enter into a relevant disposal of the land.

Condition B is that either—

(a) the interim moratorium period has ended without the local authority or the owner having received during that period, from any community interest group, a written request (however expressed) for the group to be treated as a potential bidder in relation to the land, or

(b) The full moratorium period has ended.

Condition C is that the protected period has not ended.

(5) Subsection (1) does not apply in relation to a relevant disposal of land in cases of a description specified in regulations made by the appropriate authority.

In essence the Bill shapes a framework to identify assets of community value and allow for the community to bid to take over or purchase those assets. This may be a convoluted process and could create significant difficulties in policing and managing the process.

The Bill will also radically reform the planning system to give local people new rights to shape the development of the communities in which they live.

4. Wider reforms included in the Bill with financial implications:

Under the banner of increasing local control of public finance the Bill sets out the following provisions:

Council Tax referendums – The Bill will end Council Tax caps on local government, and instead give local residents the power to veto excessive increases, by requiring local authorities to hold a referendum on any proposed rise above a certain threshold.

Business rate discounts – The Bill will give local authorities the power to grant a discount in business rates. This is to enable local councils to respond locally to the concerns of local businesses.

Community Infrastructure Levy – The Bill will require local authorities to allocate a proportion of Community Infrastructure Levy revenues back to the neighbourhood from which it was raised. This will allow those most directly affected by development to benefit from it.

Chief Officer Pay - The Localism Bill places a requirement on local authorities to produce, annually, a statement setting out their policy on the remuneration of their chief officers.

Expenditure over £500 - Local authorities will be required to publish every item of expenditure over £500. Some authorities are already doing this.

5. Elected members and local democracy issues

Local referendums – The Bill will give local residents the power to instigate, via a petition, local referendums on any local issue.

Directly Elected Mayors – The Bill will include measures to provide for directly elected mayors to enable 12 cities in England to have Mayors from 2012, subject to referendums. These provisions are in tandem to similar measures to introduce elected police and crime commissioners. Directly elected mayors will be put to a vote in Birmingham, Bradford, Bristol, Coventry, Leeds, Leicester Liverpool, Manchester, Newcastle upon Tyne, Nottingham, Sheffield and Wakefield. Other cities may be subject to a vote if there are calls for a mayor and if the votes are in favour a mayoral election would then take place in May 2013.

Changes to local authority governance in England – Measures within the Bill will allow councils to return to the committee system of governance should they wish to do so.

Neighbourhood planning – The Bill introduces a new right to enable communities to permit development in full or in outline without the need for planning applications.

Community right to build - Subject to a local referendum that will require at least 50% support of the local community and the identification of suitable land and sources of finance, the community right to build are trailed as a means to enable rural communities in particular to plan for local developments.

'Bin taxes' – The Bill will repeal sections 71- 75 of the Climate Change Act 2008 which permitted councils to charge or fine residents based on household waste collections.

The Standards Board regime - the abolition of the standards board for England and the abolition of the need for a local authority to have a standards committee is abolished and replaced with a new duty *'to promote and maintain high standards of conduct'*.

Disclosure and registration of members' interests - The Secretary of State may by regulations make provision for or in connection with requiring the monitoring officer of a relevant authority to establish and maintain a register of interests of the members and co-opted members of the authority

The 'predetermination' rule - will be abolished to allow local councillors to speak up on any matters in their normal course of action as a local councillor including campaigning on local issues without this being considered to be a matter of 'bias' and preventing them for expressing views on local issues. This is particularly significant in terms of, for example, planning issues.

APSE comment

General Power of Competence

The General Power of Competence should help APSE member authorities remove any legacy of uncertainty stemming from recent case law, in particular in regard to using well being powers. However, the power maintains existing restrictions on trading activity which would still need to go through a company route which APSE has regarded as unnecessarily prohibitive. In the context of a General Power of Competence such restrictions are unnecessary. Charging provisions remain broadly the same and of course do not need a company route.

Community Right to Challenge

In respect of the proposed **community right to challenge** the real detail will be found once guidance is issued by the Secretary of State. It is not uncommon for reserve powers to be held by the Secretary of State to enable guidance to respond to changing circumstances or to how local councils react to legislation. This was evident during Compulsory Competitive Tendering (CCT) where guidance directed the actions of local authorities on a statutory basis.

The Coalition Government has made it clear that they would like to see 25% of contracts procured through the social enterprise sector and it is clear from the localism bill that the 'right to challenge' will provide a mechanism to enable that to occur resulting in competition for services. It remains to be seen if this is de facto a return to some form of compulsion upon local authorities to tender services. This will be dependent upon how prescriptive the guidance from the Secretary of State will be.

The guidance would also potentially contain regulations as to how a local authority should treat a community right to challenge and the boundaries by which an authority could reject a community right to challenge. The Bill is also intended, according to DCLG guidance, to end what is phrased as 'monopoly supply' so if the right to challenge does not increase the opening up of local government contracts to a competitive process then the Secretary of State could, through statutory guidance, tighten regulations to enable more work to be put out to tender.

The Secretary of State would of course be sensitive to accusations that this would herald a return to CCT, but the tendering process cannot be restricted to **only** the social enterprise sector, as this would generally be in violation of European procurement rules and therefore the process would open up services across the wider market place, including private for-profit companies.

It will of course be interesting to see how this will operate in practical terms. At a time of public spending cuts it is unlikely that councils will view competitive tendering processes as a key priority. The time and cost taken to engage in these activities will not deliver immediate savings and could in fact lead to loss of economies of scale. Moreover there is a distinct difference in demonstrating competitiveness and value for money in service provision and simply going through a competitive process of procurement which might not result in a value for money outcome.

Evidence of past involvement of social enterprise and employee based mutual or ownerships models, such as those that arose from bus deregulation, do not demonstrate sustainable outcomes. In the case of bus deregulation the worker buy-out or cooperative models were subsequently swallowed up by larger for-profit operators.

Community Right to Buy

In terms of the '**Community Right to Buy**' this is slightly misleading because there are no restrictions currently on groups of individuals getting together to purchase local land or assets from either public or private sector sales. However, the 'right to buy' is a facilitative approach to safeguard valuable community assets simply being sold off without the community's knowledge, which in turn could mean the loss of an important asset to a community. There is a question mark on this approach since it will impose a new burden upon the local authority in terms of maintaining a list. There may also be some interesting challenges from private land owners or occupiers about inclusion on the list of community assets. Nevertheless the mechanism may also prove a useful route to local authorities who are considering the future of some public buildings or assets or wish to explore how they might deal with the growing problem of empty retail units on the high street, which in turn can create ancillary problems of vandalism and play a part in an areas decline.

APSE member views

APSE wishes to engage in a constructive dialogue as to how member authorities and services will respond to the issues raised in the Localism Bill. In particular the concerns surrounding the 'Community Right to Challenge' and the practical implications that this may have for in-house service provision. In the New Year it is intended that APSE's senior staff will be conducting a series of round table events at a regional / sub-regional level to discuss these issues. If you would like to express an interest in attending one of these events (dates to be confirmed) please email Mo Baines on mbaines@apse.org.uk

Mo Baines
Principal Advisor