

TITLE OF THE REPORT: COMMUNITY RIGHT TO CHALLENGE PROTOCOL

REPORT OF THE ACTING CORPORATE LEGAL MANAGER
PORTFOLIO HOLDER: COUNCILLOR MRS L.A. NEEDHAM

1. SUMMARY

- 1.1 Members are asked to adopt a Protocol on how the Council deals with Community Right to Challenge ('CRtC') Expression of Interest ('Eol') applications for Council services.

2. RECOMMENDATIONS

- 2.1 That the Cabinet adopts the Protocol, as set out Appendix A (which will be available on the Council's website, together with the Eol form).

3. REASONS FOR RECOMMENDATIONS

- 3.1 To ensure that the Council has a consistent approach towards any Eol and meets its legal obligations when dealing with this process.

4. ALTERNATIVE OPTIONS CONSIDERED

- 4.1 The Council is obliged to publish certain information regarding this CRtC right on its website. Consideration was given to continuing the existing approach of processing any Eol by reliance on the requirements of the legislation and not producing a protocol. However, following consultation with senior managers and staff, the conclusion reached was that more effective control could be achieved through the use of this Protocol. This would also help to ensure consistency of treatment and that legal requirements within the statutory process are met.

5. CONSULTATION WITH EXTERNAL ORGANISATIONS AND RELEVANT MEMBERS

- 5.1 Consultation has been undertaken with the Senior Management Team ('SMT'), the Leader, the Staff Consultation Forum and Political Liaison Board. Comments received have been incorporated in the Protocol appended at A.

6. FORWARD PLAN

- 6.1 This report does not contain a recommendation on a key decision and has not been referred to in the Forward Plan.

7. BACKGROUND

- 7.1 The Localism Act 2011 introduced requirements regarding the ability of certain "relevant bodies" to express an interest in providing a Council service. This right is part of a suite of Community Rights introduced under the Act (the 'Act'). As per paragraph 3 of the Protocol, a 'relevant body' is defined as a voluntary or community body; a body of persons or a Trust which is established for charitable purposes only; a Parish/ Town

Council; two or more employees of the local authority; or a Business Improvement District Body.

- 7.2 All of the Council's services are (potentially) legally included in this process even if, for example, you have contractual arrangements in place (***although there may be legitimate reasons to reject an Eol – see section 8 of the Protocol***).
- 7.3 The Council is obliged to follow the statutory process and consider an Eol if it is received. The *discretionary* element comes within certain stages of that process such as:
- Eol acknowledgement period;
 - Eol “window(s)”;
 - time specified that the process will take;
 - assistance/ amendment post submission of an Eol; and
 - what information is provided to any relevant body during the process (i.e. Outline Service Scope/ Service Specifications).
- 7.4 Note that post Eol consideration, if Cabinet decides to accept the Eol, ***then an appropriate procurement exercise must be undertaken (this will vary as per the Contract Procurement Rules - dependent on the value of the service involved)***. The relevant body that has submitted the Eol is then potentially competing against any other economic operator that has an interest in providing the service, with no guarantee that it will be successful at the end of the procurement. This is likely to be a disincentive to relevant bodies.
- 7.5 Whilst this is a fairly protracted process for any relevant body applying/ or the Council, it is not something that can (currently) be altered, as it is part of the legislative provision/ Statutory Guidance on the process. This is possibly one of the reasons why the general level of Eol applications have been slow – both nationally (and locally), see 7.6 – 7.11 below.

National background picture:

- 7.6 The CRtC right under the Act came into force on 27 June 2012. Various Statutory Instruments were issued to deal with the Eol process, together with Statutory Guidance; the most recent update to the process has been via a Business Improvement Districts (BIDs) Statutory Instrument in 2015 (and the inclusion of BID bodies as relevant bodies) .
- 7.7 To encourage relevant bodies to submit Eols, Central Government funding was made available (via the Social Investment Business) and support is offered by Locality's Community Contracting Unit to provide advice on the process. The potential funding arrangements are:
- a) Pre-feasibility grants up to £10,000 for organisations wanting to build their capacity to compete to deliver public services;
 - b) Feasibility grants up to £100,000 for organisations preparing to compete in a procurement process that are able to demonstrate that they already have the organisational capacity; and
 - c) Service delivery grants (organisations, including those benefitting from the previous stages, will be invited to apply against a set of criteria).
- 7.8 Despite this there is little evidence that this right has been exercised to any great extent. The relevant example quoted by <http://mycommunityrights.org.uk/get-inspired/> was the take over of the management of a Leisure Centre. The nearest example of such rights being exercised is in St Albans City and District Council (Recreation Grounds, Local Nature Reserves; a particular car park).

- 7.9 Most recently the Communities and Local Government Select Committee undertook an Inquiry into Community Rights on 9 June 2014 to consider the effectiveness of the legislation and process. The Committee published its report on 3 February 2015 and the (then) Government responded in March 2015.
- 7.10 In respect of the CRtC EoI process for services, the Inquiry suggested that more analysis be undertaken on the funding routes. *This recommendation was accepted, however, the outcome of this analysis is yet to be published.*
- 7.11 Another recommendation was that the Government work with local authority commissioners of services to involve communities routinely in the design of services; consider whether certain services might be reserved for community enterprises using either a normal tendering route or a Community Right process. *The Government stated that they would look at that recommendation, although it is unclear if the new Government will do so.*
- 7.12 As indicated above, at this stage the Council provides minimal information and the recommendation is to incorporate the statutory information and other procedural decision-making steps within a Protocol/ with template EoI seeking detailed information from any relevant body interested in a Council service. This Protocol will address the current legal requirements and how the Council intends to deal with any EoI. Whilst it is possible that the legal situation will change, setting out the position in a Protocol at this stage provides a better basis of control. Particular issues below, however, need to be considered.

8. ISSUES

- 8.1 It has to be stressed that the ability of a relevant body to express an interest in running a Council service is entirely statutory. The Protocol does not seek to enhance the right to do so. Some discretionary elements can be introduced within the process (for consideration by Cabinet) and are set out below.

Validation/ acknowledgement of the EoI

- 8.2 An EoI must be acknowledged within 30 days and a time frame provided when the EoI will be considered/ determined. Currently it is proposed that this “validation” step/ acknowledgement be undertaken within 10 working days by the Corporate Legal Manager in consultation with the Leader. This will be *purely* administrative at this stage – to ensure that the correct EoI form has been submitted/ full information. It is not a determination stage (which comes later in the process).

EoI Window/ & maximum time for determination of the EoI

- 8.3 Legally the Council can set a *window* for submission of EoIs or a *number of windows* for different services so long as this is made clear/ this is published. It does not have to do either.
- 8.4 An annual window has been included in the Protocol from **1 September to the end of October** to fit within a possible **10 month** consideration process, so that any EoI received would, if approved, fit in with the budget approval process effectively two years later (this would incorporate any procurement time period after the 10 months).
- 8.5 The 10 month period may be shortened; however, *as any maximum period has to be published, it has to be realistic.* This maximum period from acceptance of the validated EoI to determination has to take into account initial consideration, consultation and the Executive decision making timetable on acceptance (*and as such a decision may be a key one, it has to fit in with the forward plan requirements*). Any procurement process would then follow.

- 8.6 In terms of “*windows*” examples, only one local district authority nearby (South Cambs) appeared to include one of 1 June to 31 July. There was nothing visible on Hertfordshire County Council’s website about CRtC. Outside of this locality, Braintree District Council had an annual window of 1 April to 31 May; Wycombe District Council have different windows based on their contract register – to synchronise with their commissioning cycle. Chiltern District Council has a window from 1 October through to 30 November. Where information is unavailable it has to be assumed that no window has been set. Despite the lack of uniformity and obvious information on this, it is recommended that a window is included as it provides the authority with the ability to control the Eol process more constructively and feed this into the Council’s budgetary cycle. *It is of course a matter for Cabinet to decide as to whether to include a window or number of windows as part of this Protocol process.*

Post Eol submission modification:

- 8.7 The Council can legally modify an Eol if it would otherwise be rejected and may seek to do so if the relevant body agrees. This has been included in the Protocol following SMT support - as it may be beneficial for the Council to seek alternative service delivery and will be seen as a community friendly approach.

Outline Service Scope and Service specifications:

- 8.8 Two potential stages have been included in the Protocol following SMT consideration. The first would be post Eol validation when an Outline Service Scope would be provided to the relevant body and considered for up to 6 weeks. The relevant body must then confirm in writing that they still wish to proceed with the Eol. *There is no requirement to provide an Outline Service Scope*; the purpose of providing one would be to promote a realistic appraisal of the service requirements by the relevant body prior to any consultation and further consideration by Cabinet.
- 8.9 Following any consultation, the Eol / consultation responses and more detailed Service Specifications will be prepared by the relevant service Lead Officer for a report to the Cabinet (by the Corporate Legal Manager - unless this involves Legal Services – in which case this will be by a Strategic Director or the Chief Executive). This will then allow Cabinet the opportunity to have full comparative data/ information before confirming acceptance of the Eol.
- 8.10 Finally, as outlined above and in the Protocol, if Cabinet decides to accept an Eol, then a procurement exercise must legally be undertaken. Whilst this is a fairly laborious processes for any applying relevant body/ or the Council, it is not something that can (currently) be altered¹, as it is part of the legislative provision/ Statutory Guidance. Incorporation of more “reality check” stages via the Protocol (such as detailed Eol template/ validation and Outline Service Scope) should ensure that only viable Eol’s proceed for Cabinet consideration.

- 8.11 Once adopted the Protocol will be published on the Council’s website.

9. LEGAL IMPLICATIONS

- 9.1 The Council is legally required to consider any Eol for a Council service by a relevant body, to confirm receipt and time periods within 30 days and to set out the maximum time period it will take the Council to consider an Eol. If the Eol is accepted then it would have to undertake any relevant procurement exercise. In the absence of set processes, the Council would have to accept any expression in writing, whether it contained basic information or not throughout the year. Whilst the Council would still be able to reject an Eol if it did not meet the statutory requirements, the flexibility is more limited.

¹ But see Review recommendations outlined at 7.11
CABINET (29.9.15)

- 9.2 Incorporation of the legal and more discretionary elements of the process into a Protocol and template Eol therefore allows the Council to approach the matter more systematically.
- 9.3 The Cabinet's terms of reference include at paragraph 5.6.1 *"to prepare and agree to implement policies and strategies other than those reserved to Council"*. The report and Protocol are therefore appropriate areas of consideration and approval by Cabinet.

10. FINANCIAL IMPLICATIONS

- 10.1 There are no capital or revenue implications arising from the content of this report. There may be implication for any successful Eol submitted/ procurement process that result.

11. RISK IMPLICATIONS

- 11.1 Appropriate Protocols help to ensure good governance of the Council and therefore reduce risk of poor practice or unsafe decision making.

12. EQUALITIES IMPLICATIONS

- 12.1 The Equality Act 2010 came into force on the 1st October 2010, a major piece of legislation. The Act also created a Public Sector Equality Duty, which came into force on the 5th April 2011. There is a General duty, described in 12.2, that public bodies must meet, underpinned by more specific duties which are designed to help meet them.
- 12.2 In line with the Public Sector Equality Duty, public bodies must, in the exercise of its functions, give **due regard** to the need to eliminate discrimination, harassment, victimisation, to advance equality of opportunity and foster good relations between those who share a protected characteristic and those who do not. The contents of this report do not directly impact on equality, in that it is not making proposals that will have a direct impact on equality of access or outcomes for diverse groups.

13. SOCIAL VALUE IMPLICATIONS

- 13.1 The recommendation made in this report does not constitute a public service contract; therefore the measurement of 'social value' as required by the Public Services (Social Value) Act 2012 need not be applied. However, (as set out under 6.4 of the Protocol) under the Act, any specific CRtC Eol needs to address how the provision or assistance will promote or improve the social, economic or environmental well-being of the NHDC area. If the Eol is validated, this will then be considered by Cabinet and subsequently if the Eol is accepted, as part of any relevant procurement process. Otherwise the equalities implications and opportunities are identified in the relevant section at paragraph 12.

14. HUMAN RESOURCE IMPLICATIONS

- 14.1 There has been consultation with the Staff Consultation Forum and general awareness training can be provided to the senior managers group and more generally via Team Talk.

15. APPENDICES

- 15.1 Appendix A – draft Community Right to Challenge Protocol, including Eol template.

16. CONTACT OFFICERS

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17. BACKGROUND PAPERS

17.1 The Localism Act 2011, Statutory Guidance June 2012 & 2015 Review outlined in Protocol Appendix A.