

Localism Act 2011
Community Right to Challenge

Policy and Guidance

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Policy and Guidance regarding the Community Right to Challenge
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1 Preface

1. The purpose of this document is to guide action the Council may have to take in response to a challenge, by a relevant body, to take over the delivery of one of its services, under the provisions of the Community Right to Challenge element of the Localism Act 2011.

2. The content of this policy draws heavily from the Statutory Guidance for Community Right to Challenge, issued by the Department of Communities and Local Government, but has been modified to fit within the Dudley context. It is recommended that this policy be used with reference to that statutory guidance.

2 Local Policy Context

3. This policy sits within a wider context of community collaboration which reflects a clear intention to further develop the relationship between the Council, the communities it serves, and the third sector. This is rooted in a key principle underpinning the Council Plan from 2013, establishing Dudley as a “Community Council”.

4. This approach is supported by a number of channels of community involvement developed since 2010 within the context of the Localism Act and in partnership with Dudley VCS and a number of local community volunteer organisations, backed by a set of externally-acclaimed principles and tools around community engagement. These include:

- Establishment of the new **Community Forums** as a key channel for community “voice”;
- Responding to calls to nominate land or buildings as community assets via the **Community Right to Bid** legislation;
- **Community Asset transfer** – exploring ways in which community organisations can assume responsibility for assets held by the Council;
- Exploring opportunities for community groups to have better use of Council-owned assets without transference;
- Making better use of “**community assets**” – i.e. people – thus connecting to the Health and Well-being agenda;
- **Community Enterprise & Innovation Fund (CEIF)** and **Dudley Innovation Fund (DIF)** – both designed to stimulate the local social enterprise sector, and encouraging local entrepreneurs to provide services that support the community and complement the Council’s strategic priorities;
- A drive towards more effective and meaningful engagement, including a focus on service delivery (exemplified currently by the “**Big Question Survey**”);

5. The Community Right to Challenge is therefore embedded within this suite of choices which together present a set of options designed to help community organisations consider the most appropriate and effective solution to issues concerning service delivery, and their level of satisfaction with the way the Council currently provides them.

3 Relevant Services

6. The community right to challenge applies to all relevant services. A relevant service is a service provided by or on behalf of the Council in the exercise of its functions, except services which are excluded from the right in secondary legislation. Exempt services are detailed below.

7. The right only applies to the **provision** of services. It does **not** provide for delegation of the functions of a Council. **The responsibility for the function itself remains with the Council.**

Exempt Services

8. The following services are excluded from the community right to challenge, either for a limited period or permanently:

- i. Until 1 April 2014, a relevant service commissioned in conjunction with one or more health services by a Council or by a Primary Care Trust, NHS trust or NHS foundation trust (in this paragraph 2.8 referred to as an “NHS body”) under a partnership arrangement or by a Council and an NHS body or a Strategic Health Authority, acting jointly.
- ii. Until 1 April 2014, a relevant service commissioned by an NHS body on behalf of a Council.
- iii. A relevant service commissioned or provided by a Council in respect of a named person with complex individual health or social care needs.

Promoting Services for the Right to Challenge

9. The policy does not seek to identify or promote any individual services *unless* the Council is actively looking for alternative delivery models around a specific service.

4 Roles and Responsibilities

a) Decision levels

10. There are two decision stages in the process: firstly, whether or not to accept an expression of interest; and secondly, to award - or not - a contract following a procurement exercise. The Act gives no guidance as to the level of seniority or role of decision-maker nor what constitutes a decision-making body and therefore this is at the discretion of the relevant authority.

11. The first decision will be made using clear criteria provided by the Act (see section 6c of the policy). It is important to gain political involvement and awareness at an early stage in the process, and for this reason it is proposed that this decision is made by Cabinet via a report provided by the Director of Corporate Resources, with advice from the Localism Steering Group.

12. If the expression of interest is accepted, the normal procurement exercise then follows. The decision to award or refuse a contract following a procurement exercise shall be taken by the relevant Director or Directors (in the event of a cross-directorate service proposal) under whom the service is provided in consultation with the relevant Cabinet Member(s).

b) Role of the Localism Steering Group

13. The role of the Localism Steering Group will be to support the Director of Corporate Resources by:

- (i) Ensuring compliance and consistent standards in the consideration of expressions of interest and any subsequent procurement exercises; making links where relevant between service areas where a challenge straddles more than one;
- (ii) Advising through learning picked up from experience elsewhere;
- (iii) Co-ordinate Directorate/service area responses to expressions of interest;
- (iv) Facilitating that process by means of a template to be made available for Directorate leads to complete (with assistant director or director sign-off), and provide officer-level challenge to that process before submitting the outcome recommendation for consideration.

5 Publication and Communication

14. On its website, the Council will announce the timing of the Challenge Window, and also provide information on what this legislation means, with appropriate guidance to assist prospective relevant bodies. Such information will include:

- Eligibility (definition of “relevant body”)
- Exempt services;
- Process to follow;
- Online submission form;
- Point and channel of contact;

Internal Communication

15. At the point of entering into a procurement exercise, the Act requires the Council to “provide employees of the relevant authority, and other relevant bodies,

with a fair, reasonable and realisable opportunity to bid in the procurement exercise for the service”, so that all potentially interested relevant bodies have equal chance to bid.

16. However, the Council also recognises a need to inform employees from the point an expression of interest is received relating to the service area they work in. Therefore, on receipt of an expression of interest, then sequentially the relevant Cabinet Member, Director, management and staff should be informed, and kept informed from that point until the final outcome. This will range from a straightforward and early rejection of the expression of interest, through to the outcome of a procurement process if the challenge progresses that far.

6 Response Procedure to a submitted challenge

a) Timing of the Right to Challenge Process

(i) Challenge Time Period

17. The Act provides for relevant authorities to specify periods (of time) during which expressions of interest can be submitted in relation to a particular relevant service. Specifying a period will help the Council to manage the flow of expressions of interest and allow this to be synchronised with any existing commissioning cycles for services. Without so doing, expressions of interest can be submitted at any time.

18. In response to this, the Council will be open to receiving expressions of interest from relevant bodies to take over the running of a service it currently provides. It will set one period of time per financial year, within which it will consider such expressions. **This is to be of 2 months’ duration in April and May of each year.** The logic behind this is to provide time to consider the implications in the budget setting process for that year, and enough time for a procurement exercise to run and for any resultant service change to be implemented from the start of the next financial year.

(ii) Time Period from Receipt of Expression of Interest

19. The Council must specify the maximum period that it will take to notify the relevant body of its decision on an expression of interest and publish details of the specification including on its website. Different periods may be specified for different cases.

20. The Council must also notify a relevant body that has submitted an expression of interest of the timescale within which the authority will notify the body of its decision.

21. The Council must make this notification in writing. This must be done within 30 days after the close of any period specified by the authority for submitting expressions of interest or, if no such period has been specified, within 30 days of the Council receiving the expression of interest.

22. In specifying periods for notifying relevant bodies of decisions on expressions of interest, the Council should have regard to the following factors:

- The need to notify relevant bodies of a decision within a reasonable period;
- The nature, scale and complexity of the service to which expressions of interest relate (for example is the service shared with one or more other relevant authorities, or jointly commissioned with one or more other public bodies?);
- The complexity of the expressions of interest received (for example, do they propose radical change to the way a service is delivered?);
- The likely need to agree modifications to expressions of interest in order to accept them (see Section 7); and
- The timescales for any existing commissioning cycle relevant to the service which an expression of interest relates to, or any other the Council processes. These may include Council Cabinet decision making or budget setting processes.

23. It is proposed that receipts of Expressions of Interest are acknowledged in writing, and the relevant body informed, within 30 days of the end of the challenge time period, i.e. 31st May.

24. It is further proposed that the maximum period within which the Council will notify the relevant body of its decision in respect of an Expression of Interest is five months from the date of acknowledgement of receipt of the Expression of Interest. This should allow the Council sufficient time to take the recommendation for ratification by Cabinet.

b) Modifying an Expression of Interest

25. If the Council believes it would otherwise reject an expression of interest, it may seek instead to agree to it being modified. Any modification must be agreed with the relevant body. If an agreement cannot be reached, the Council may reject the expression of interest. Some illustrative examples of where a modification may lead to successful submission are given below.

Example 1: Part of a service not subject to challenge

A relevant body submits an expression of interest to run all 20 library services in the area. The authority has taken a decision to stop one of the services, meaning it is no longer a relevant service. The authority proposes modifying the expression of interest to relate instead to the 19 remaining libraries.

Example 2: Inadequate information

A relevant body submits an expression of interest to run the waste collection services. It does not complete the financial information section. The relevant body proposes modifying the expression of interest to include this information.

Example 3: Suitable body

A relevant body submits an expression of interest to run a local youth club. It sets out how the outcomes it proposes to achieve will meet the needs of service users, but bases this on a survey of 3 out of the 250 young people who use the club. The Council proposes modifying the expression of interest to include sufficient information on which it can base its decision to accept or reject.

c) Grounds for Rejection an Expression of Interest

26. An expression of interest can be rejected if it does not meet a given set of criteria. These are set out in the table below. For advice on who makes this decision, see the section headed “Roles and Responsibilities”.

Grounds whereby an Expression of Interest may be rejected

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

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

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

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

(b) any sub-contractor referred to in the expression of interest is not suitable to provide or assist in providing the relevant service.

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

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

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

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

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

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

8. The relevant authority has published its intention to consider the provision of the relevant service by a body that 2 or more specified employees of that authority propose to establish.

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

10. The relevant authority considers that acceptance of the expression of interest

is likely to lead to contravention of an enactment or other rule of law or a breach of statutory duty.

7 Procedure following acceptance of an Expression of Interest through to the Procurement Exercise

27. The Council must specify periods between an expression of interest being accepted and a procurement exercise starting. This enables authorities to weigh up the factors below. Depending on local circumstances, this aims to allow relevant bodies the time they need to prepare to compete in the procurement exercise.

28. In specifying these periods relevant authorities should have regard to:

- The need to provide employees of the relevant authority, and other relevant bodies, with a fair, reasonable and realisable opportunity to bid in the procurement exercise for the service;
- The nature, scale and complexity of the service being procured. For example, it may take relevant bodies longer to prepare to bid for larger, complex services than smaller more straightforward ones; and
- The timescales for any existing commissioning cycle relevant to the service being procured, or any other relevant authority processes. These may include Council Cabinet decision making or budget setting processes.

29. The local authority can allow a period of time between accepting the expression of interest and commencing the procurement exercise. This is to allow the challenging body to further develop the business case.

30. It is proposed that the Council allows a period of six months between accepting an Expression of Interest and commencement of a procurement exercise.

8 The Procurement Exercise

31. A procurement exercise will require access to a number of professional disciplines including:

- Procurement;
- Commissioning;
- Legal;
- HR (for TUPE considerations if appropriate);
- Accountancy;
- Relevant service head and/or AD;
- Assessor of social, economic and environmental well-being (this should include equality & diversity)
- If relevant, service design expertise

32. When a relevant authority accepts one or more expressions of interest for a relevant service, it must carry out a procurement exercise for the service. The procurement exercise must be appropriate having regard to the value and nature of the contract that may be awarded as a result of the exercise. As is already the case, authorities will need to comply with procurement law.

33. Where the service is of a value or nature to which the Public Contracts Regulations 2006 apply and/or is not listed as an exempt service in Part B of those regulations, the procurement exercise must follow the procedures for advertising, specifying and awarding contracts set out in those regulations. Further information can be found at:

http://ec.europa.eu/internal_market/publicprocurement/index_en.htm

34. Where the Public Contracts Regulations do not apply – i.e. where the service is worth less than the threshold value, or is listed in Part B of the 2006 regulations, it is for the relevant authority to decide how to procure the service. This applies in the same way to procurement exercise triggered by the community right to challenge as those which are not. Generally, Part B services are those that the EU has considered would largely be of interest only to bidders located in the Member State where the contract is to be performed.

Consideration of social value in the procurement exercise

35. Relevant authorities must consider how both expressions of interest and procurement exercises triggered by one or more expressions of interest being accepted would promote or improve the economic, social or environmental well-being of the authority's area. This must be consistent with the law applying to the awarding of contracts. Authorities may include social clauses in contracts provided they comply with the relevant requirements. These are explained in the European Commission publication *Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement*.

9 Relevant Bodies

36. The Act lists the following as relevant bodies:

- voluntary or community body;
- A body of persons or a trust which is established for charitable purposes only;
- A parish council;
- Two or more employees of the Council; or
- Any other person or body specified by the Secretary of State by regulations.

Voluntary and community bodies

37. A voluntary body is a body that is not a public or local authority, the activities of which are not carried on for profit. It can generate a surplus provided it is used for the purposes of its activities or invested in the community.

Relevant bodies and relevant authorities

38. A community body is a body which is not a public or local authority, the activities of which are primarily for the benefit of the community.

39. The definitions of voluntary and community body are intended to cover a wide range of civil society organisations. They reflect the required characteristics of such bodies rather than referring to types of organisational structure. This allows for flexibility to accommodate future forms of civil society organisation.

40. The Government expects the definition of voluntary and community body to include but not be limited to the following types of organisation:

- Community benefit societies (a type of industrial and provident society);
- Co-operatives whose activities are primarily for the benefit of the community (another type of industrial and provident society);
- Community interest companies;
- Charitable incorporated organisations; and
- Other incorporated forms of body such as companies limited by guarantee or shares where the company's Memorandum and/or Articles of Association state that the company's objects are in the interest of the community, rather than to make a profit for shareholders.

Type of Body	How community benefit is evidenced
Co-operative society	A body must register with the Financial Services Authority. It must set out the society's rules, including its activities, its character and how it is organised. This is where social and community objectives should be demonstrated.
Community benefit society	A body must register with the Financial Services Authority. Its reasons for registering must demonstrate its social objectives. It must state the society's rules and describe its activities, character and how it will be organised. It must also describe how its activities will benefit which communities, and how any surplus will be used. Its rules must not allow profit or the society's assets to be distributed to members, but that they are used to further the society's objectives.

Company limited by guarantee or shares

A body for community interest registering with the Registrar of Companies at Companies House must provide a memorandum of association and articles of association. It may have an objects clause stating its aims and purpose. Although such objects may be commercial, if the business is a social enterprise, they must also relate to social and/or environmental objectives.

Employees of the Council (staff mutual)

41. The Government is committed to giving public sector workers the right to bid to take over running the services they deliver. Two or more employees of the Council are eligible to use the right. Employees are expected to form an employee-led structure to take on running services under the right. Employees using the Right are not expected to have finalised all of their arrangements before submitting an expression of interest but will probably need to form a separate legal entity in order to bid in a procurement exercise (so that management and contractual relationships are clear). The period between an expression of interest being accepted and a procurement exercise starting will provide an opportunity for this.

10 Information Required from and by the Relevant Body

42. The table below sets out the minimum requirement of information to be submitted in an expression of interest.

Information required in an Expression of Interest

1. Where the relevant body proposes to deliver the relevant service as part of a consortium or to use a sub-contractor for delivery of any part of the relevant service, the information in paragraphs 2 and 3 (below) must be given in respect of each member of the consortium and each sub-contractor as appropriate.

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

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

4. Information about the relevant service sufficient to identify it and the geographical area to which the expression of interest relates.

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

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

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

6. Where the relevant body consists of employees of the relevant authority, details of how that relevant body proposes to engage other employees of the

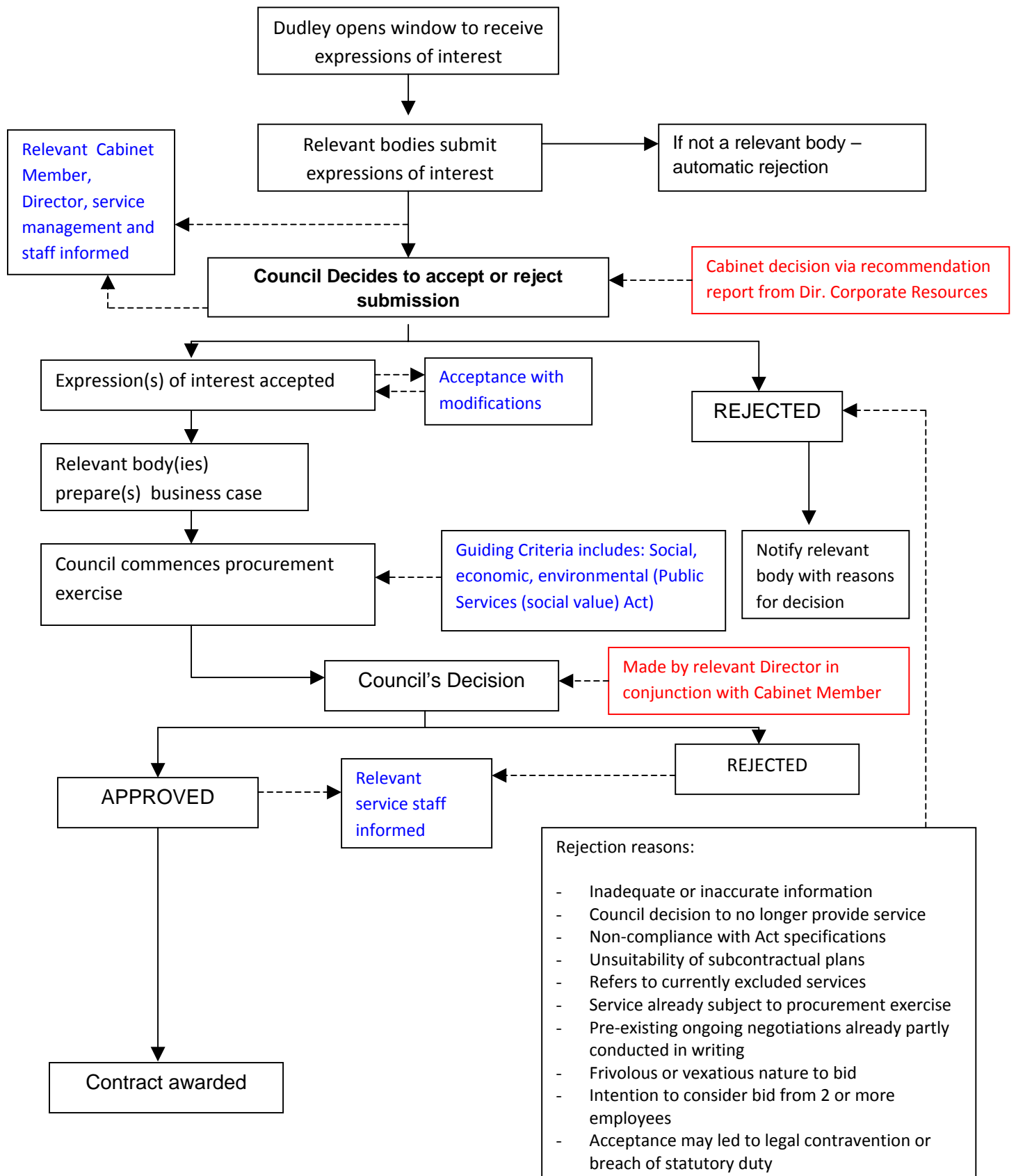
relevant authority who are affected by the expression of interest.

43. Equally a submitting body should expect to access sufficient information about the service in order to do so. From the Council's perspective, it would be appropriate to be able to release a standard set of information for any relevant service. Therefore the Council will make available the following elements:

- Name of service (e.g. waste recycling)
- Full description of scope of service reflecting how this is organised within the Council
- Descriptions of any secondary subdivisions (such as number of libraries within overall library service)
- Identified physical resources if any (equipment and physical assets)
- Relevant Directorate(s) and Cabinet portfolio holder
- Name and position of Assistant Director
- Total number of staff
- Total current annual cost of delivering the service
- Predicted future budget for service including any planned reductions in terms of budget, staff and extent of delivery
- Identified community or communities served
- Income (for chargeable services) including recent trend and predicted future income.

44. By providing such information which relates to the Council's definition of the service, the bidding organisation is able to see the full extent of the service and should be able to demonstrate how much of that service it intends to bid for.

Community Right to Challenge Logic flow Chart



Submission Form Details: (to be developed as an online form)

Questions:

Name of organisation

Type of relevant body

Proof of existence

Acting as a consortium (Y/N)

Intention to Subcontract (Y/N)

Which service (or part service) to be challenged?

What geographical area does your Expression of Interest relate to?

Financial information (financial resources of the relevant body) – also required for any subcontracted bodies or other consortium members – supporting docs allowed

Expression of capability to provide the service

Outcomes: how will provision or assistance in the provision of the service contribute to the social, economic & environmental well-being of the area?

Any other information about outcomes to be achieved (sup docs allowed)

For mutuals only: how you propose to engage other employees of DMBC who are affected?

Supporting material you would like to share to support your Expression of Interest

Contact details (name, address, email, phones, preferred method of contact)