Localism Bill and grant allocation

the centre for public scrutiny

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Policy Briefing 7 December 2010

This is a briefing on the Localism Bill and the 2011-13 grant allocation, both of which were published on Monday 13 December. This briefing reflects changes in practice and law which, for the most part, apply in England only. In Wales, local government is devolved. However, it should be noted that a number of the provisions relating to community assets also apply to Wales, and those applying to nationally significant infrastructure projects apply to all three home nations.

The grant allocation involves a maximum cut of 8.9% to local government's "spending power", with the effect of cuts being "dampened" for the first year through the use of an £85 million fund made available by the Department for Communities and Local Government (CLG).

The Localism Bill proposes profound changes to a large number of aspects of local public service provision. In particular, greater flexibility in council governance arrangements are proposed. This briefing will summarise these changes, and comment on the broader accountability implications of the rest of the Bill.

The Bill is extremely long, and impacts on (through partial or total repeal) a number of other relating legislative provisions. This briefing is not a detailed discussion of every aspect of the Bill – readers are recommended to refer directly to the Bill, and relevant sections are footnoted throughout to facilitate this.

Contents

1. Grant allocation – implications for scrutiny

1.1 The Secretary of State, the Rt Hon Eric Pickles MP, announced on 13 December the grant allocations for English councils for 2010 to 2012. In a statement to the House of Commons, he stated that no council would receive a cut in their "spending power" of more than 8.9% in either year. An £85 million fund has been put in place for "dampening" the cuts of councils who would otherwise have had cuts of more than 8.9% imposed (37 authorities are in this category). The average, Mr. Pickles stated, was to be 4.4%. One county, Dorset, would actually receive an increase of 0.1% next year.

1.2 The "spending power" calculation, however, is not a reflection solely of the grant allocation. Spending power incorporates the formula grant, specific grants, council tax and NHS funding for social care. Stripping out the other elements and focusing exclusively on the formula grant – as previous supposition about the level of the grant has done – demonstrates that the actual cut for most authorities will, in year 1, be somewhere between 14 and 17 per cent. As expected, the cuts are "front-loaded" – they will require the most significant savings to be made over the first two years of the cycle of the recent Comprehensive Spending Review.

1.3 Implications for scrutiny - This emphasises how vital it will be that non-executive councillors take a lead in investigating proposals for service redesign and financial savings. Given that the financial impact of the funding settlement will be as bad, or worse than expected, for most authorities, councils will be making some difficult decisions about the future over the next few months. In some cases these decisions will be taken with partners – in some, inevitably, decisions will be made unilaterally.

1.4 Scrutiny functions in local authorities have an important role to play here in subjecting such proposals to independent analysis, helping the executive and its partners to think about the long term ramifications of decisions being made now – and maintaining a "horizon-scanning" view just when it is most vital. Scrutiny can also provide valuable assurance to the public, and other stakeholders, in acting as a conduit for their views through to the executive, marshalling and channeling concerns and views on proposals in a way that ensures that public debate on these issues can be as constructive and positive as possible. Following the Comprehensive Spending Review and grant allocation announcements, CfPS is about to publish a guide for OSCs about how they can measure the "social value" of services, not just the "cost of services" so that decisions about spending allocations can be informed by what communities value. CfPS will also be producing a guide to the use of value for money methodologies in scrutiny work.

1.5 Opportunities for scrutiny are explored in more detail in Policy Briefing 1, "Future challenges for scrutiny", published in July 2010.

2. Localism Bill – changes for governance and scrutiny

2.1 Specific provisions relating to overview and scrutiny in local government can be found in Schedule 2 of the Bill. Section numbers given below are those that will be given to those sections when they are enacted as part of the 2000 Act, as amended.

2.2 The Bill seeks to consolidate a wide range of scrutiny legislation into a single place (although provisions relating to crime and disorder remain in the Police and Justice Act 2006, and health provisions remain in the NHS Act 2006). It replaces the relevant provisions in the 2000 Act in full. It also restates the law relating to health scrutiny. When the Act is passed this will mean that provisions relating to scrutiny will be found in Part 1A of the 2000 Act, beginning with section 9F (with some additional content in Schedule A1 of the 2000 Act). CfPS will argue for the amendment of the Bill to give greater consistency of scrutiny powers. Consolidating the location of scrutiny legislation is welcome but the powers are still variable and need to fit with the health and community safety scrutiny models.

a. Governance arrangements - overview

2.3 The Bill requires that all authorities operate governance arrangements in one of three forms[1]:

- Executive arrangements (either Leader, cabinet and scrutiny or executive mayor, cabinet and scrutiny);
- Committee system (the details of which are discussed in our separate briefing on the subject, published December 2010 as Policy Briefing 4);
- Another prescribed arrangements (where a local authority submits a proposal to the Secretary of State for a different form of governance, which the SoS must then approve).

2.4 Authorities operating executive arrangements **must** continue to have at least one scrutiny committee[2], and the scrutiny provisions in the rest of the Bill (set out below) will apply to them. Authorities operating under the committee system **may** have one or more scrutiny committees[3]. It has not been made clear, but "fourth option" councils could be recognised as operating under a committee system for the purposes of the Bill, making it

[1] s9F(1)
[2] s9JA(1)
[3] s9JA(1)

unnecessary for them to undergo the possibly lengthy "change in governance" procedures (outlined below at 2.5 onwards). This also leaves the way open to current "fourth option" councils to retain, or dispense with, their scrutiny committees, at their discretion, once the Bill is enacted and comes into force. CfPS will be arguing that any changes in governance arrangements incorporate transparency, inclusiveness and accountability.

2.5 Changing governance arrangements – the process for changing governance arrangements is a two stage one.[4] First, a resolution of Full Council is required.[5] Following such a resolution, changes to governance arrangements can be made **immediately following the next relevant election[6]**.

This means that **the earliest** that any authority can change its governance arrangements (subject to the passage of the Bill) will be:

- Metropolitan districts – 2014
- Counties – 2013
- London boroughs – 2014
- Non-metropolitan districts – 2011 (although the Bill may not have received Royal Assent by this point)

and every four years after this time. It is unclear what the position will be for those authorities that elect by thirds. Different provisions will apply for the 12 core cities, which must hold confirmatory referenda on adopting an executive mayor after the Bill becomes law, with the leader of the council being a "shadow mayor" in the meantime.

2.6 The provision that changes must be made immediately following an election is likely to cause headaches for Monitoring Officers. They will have to put in place provision for immediate changes to new governance arrangements following an election – including redeployment of staff, in some instances – while the likelihood exists of an opposition party being elected who have campaigned (or voted) against a change in governance arrangements.

2.7 Under certain circumstances a referendum must be held when it is proposed to change governance arrangements. This will be where previous changes to governance were also confirmed by referendum, or where the council decides that they want to subject proposals to a referendum. This could provide a partial way around the problems identified in 2.6. The Secretary of State can also require authorities to hold referenda. These provisions mean that, once a referendum has been

[4] ss9K-9MD
[5] s9KC
[6] s9L(2)

held in an area, every future change in governance must be based on a referendum as well, which will limit changes in governance arrangements to once in every ten years in those authorities.

2.8 Sometimes a referendum to change governance arrangements may not be held. This will be the case where governance arrangements have changed within the past ten years[7], and is designed to prevent frequent changes in such arrangements. This will apply to those 12 English core cities which are being required to adopt executive mayors, as their change in arrangements will have been made by the confirmatory referenda, so they will be caught by this provision and, assuming that a referendum does confirm the change in governance arrangements to one involving an executive mayor, they will not be able to move to another system of governance for another ten years. .

b. "Executive arrangements" – leader/cabinet, executive mayor/cabinet

2.9 Powers relating to executive mayors – provisions here are extremely detailed[8] but the basic elements are as follows:

- An executive mayor can also be the Chief Executive of the authority, but may not hold the post of Head of Paid Service (which must be confirmed by Council but which requires two-thirds voting against to be defeated);
- Where this occurs the authority must appoint an officer to be responsible for providing advice to councillors;
- The Mayor must, if these provisions are adopted, set out in a report his/her plans for the operation of the authority, including cross-cutting strategy and staffing;
- Any local public service function may be transferred to the Mayor by the SoS. This must be based on a proposal from the Mayor which must be made to the SoS within one year of the most recent election (which means that we may see Mayors in some areas with different powers to those in others). "Public service" is not defined, but has the potential to be broad;
- An elected executive mayor cannot also be a councillor;
- Transitional arrangements exist whereby a council's Leader will be its "shadow mayor" in the period leading up to an election, where governance arrangements have changed accordingly. The shadow mayor does not have the powers of the elected mayor in terms of setting out his/her report on plans for the operation and staffing of the authority;

[7] s9MF
[8] ss9H – 9HO, also part of Schedule A1

- Mayors will retain the power through regulations to appoint an "assistant" (a political assistant who will be an officer of the council, analogous to the current position to support to group offices)[9].

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2.10 For scrutiny, there are significant implications here – particularly when the mayor is successful in petitioning the SoS for different powers. Where this happens, there is the possibility of a conflict between scrutiny and other non-executive functions in other public services. Inevitably, in tandem with the SoS giving his consideration to such proposals, scrutiny would also want to consider them.

2.11 Scrutiny powers under executive arrangements – as we have noted above, scrutiny powers have been consolidated in the Bill largely unamended from previous legislation. It is disappointing that the opportunity has not been taken to "tidy up" the legislation and the way that it operates – particularly so as to equalise the mismatch in the powers given over different partners, and the relative powers of counties and shire districts. As we noted earlier we plan to argue for amendments to bring in additional consistency to the legislation here.

2.12 Scrutiny in mayoral authorities would also need to be carried out under the understanding that, with executive power being more concentrated than in other arrangements, the role of non-executive councillors would be especially important. For authorities making the transition – the 12 core cities, in the first instance – a careful consideration of the powers and functions of scrutiny will need to be taken over the next year to eighteen months. CfPS will be seeking to work with these authorities to help them develop robust accountability and scrutiny arrangements.

2.13 Specific scrutiny powers which will now be covered by the Bill are:

- 9FA(1) – authorities operating executive arrangements must have scrutiny committees;
- 9FA(2) - scrutiny committees must have the power to review, scrutinise, and make reports and recommendations on matters whether or not they relate to executive responsibilities (and issues that affect the inhabitants of the area);
- 9FA(2)(f) – powers to review and scrutinise matters relating to the health service (in upper tier/unitary authorities);
- 9FA(3) – powers to set up joint scrutiny committees;
- 9FA(4) – call-in;
- 9FA(5) – a limiting function prohibiting O&S functions from exercising any functions other than these, crime and disorder scrutiny or any functions conferred by regs. However, the provision

[9] Schedule A1, paragraph 5

in 9FA(2)(e) on looking at any issue affecting local people means that this should not restrict scrutiny's remit too much;

- 9FB – statutory scrutiny officers (still only for counties and unitaries, not shire districts);
- 9FC & 9FD – councillor call for action. Further regulations can be made on this provision, which may simply reiterate the content of the existing regulations on CCfA exclusions;
- 9FE – duty of the executive to respond to recommendations, further to notification by scrutiny – the executive must comply with the requirements in the notification (which gives scrutiny the power to require the executive to give reasons for rejecting recommendations) and must respond in two months;
- 9FF – partners to "have regard to" scrutiny recommendations, but still no power to compel attendance at meetings;
- 9FG – exclusion of exempt/confidential information under the 1972 Act (although it may be that the Government's planned changes to the FOI regime will see s100A of that Act and the Schedule 12A provisions changing in due course;
- 9FH – powers of districts to make recommendations to county councils, subject to regulations;
- 9FI – powers relating to flood risk management, further to recommendations made in the Pitt Review;
- 9FJ – requests for information from partner authorities
- Schedule A1 – para 6 – education co-optees;
- Schedule A1 – para 11 – voting rights for co-optees;

2.14 It should be noted that because of these changes, any regulations/guidance issued further to the original legislation will technically lose their force.

2.15 As it stands, Schedule 2 contains a couple of errors in drafting that will require correction at a later stage, including:

- Reference, in relation to health, to Primary Care Trusts, which are about to be abolished. A more sensible form of words would be to refer to "organisation commissioning, or who are commissioned to provide, health services", and in fact part of section 9 does refer to health services more broadly;
- Reference to Local Area Agreements and local improvement targets, which are about to be abolished;
- The repeated reference to regulations. It seems less than likely that Government will be willing to separately place regulations similar or identical to the existing scrutiny SIs on the statute book. Now that the legal position in those regulations has been made clear, and they have been published further to consultations (mainly in 2009) it seems logical that either their contents be

amalgamated in with the Act, or that the regulation-making powers should be removed entirely. It is certainly disappointing that the Bill reiterates the extremely wide regulation-making powers of previous legislation.

c. The committee system

2.16 Much has been made of the pros and cons of returning to the committee system. These issues are dealt with in Policy Briefing 4, referred to elsewhere. The relevant part of the Bill relates to practical, procedural issues[10] - in particular, delegation of powers under a committee system. The SoS will be making further regulations on delegations. It can be expected that there will be substantial limits on the use of delegated powers for strategic decision making but that significant freedom will attach to the use of those powers for more operational decisions – encouraging a more streamlined approach to committee decision-making.

2.17 Scrutiny powers under the committee system – we have already noted that scrutiny committees may be operated by committee system authorities. The Bill makes provision for regulations about the precise powers and composition of such committees[11], which will hopefully be proportionate in nature. It should be noted that none of the provisions applying to executive arrangements (set out above) will apply to committee system O&S committees, save for specific powers are limited to scrutiny in flood risk authorities, although subsection 2 does clearly indicate that regulations may well implement those sections unamended.

2.18 Health and community safety scrutiny responsibilities are covered too. For health, scrutiny powers and duties will continue, albeit operated through the committee system rather than by a scrutiny committee per se – a relevant committee can take on the powers for health scrutiny as if it is an O&S committee[12]. For crime and disorder scrutiny under the committee system, a committee is to be designated as the crime and disorder committee **if** scrutiny committees have been set up, but if not there is no requirement to conduct scrutiny in this way[13]. The situation for wider partnership scrutiny is unclear. For committee system authorities, it may be that such scrutiny and accountability will be delivered through the service committee system. This whole area of the Bill is one where CfPS is intending to work with the sector, and Government, to ensure our principles of good scrutiny are embedded in future arrangements.

[10] s9J
[11] s9JA(2)
[12] Schedule 3, paragraph 87, inserting a new s247A into the NHS Act 2006.
[13] Schedule 3, paragraph 89, inserting new subsections s19(9A) and s19(9B) into the Police and Justice Act 2006.

d. General governance

2.19 Under section 9P councils must prepare a constitution. Under 9Q, wide powers are provided to the Secretary of State to issue supplementary guidance. Again, it is unfortunate that this wide discretion to issue guidance has been carried over from previous Act, particularly bearing in mind the current Secretary of State's previous comments on regulations and guidance issued by central Government.[14]

2.20 There is also provision for decision-making functions applying to area committees[15] and, and powers for joint decision-making between authorities[16].

2.21 Once the Bill has been passed, we will be updating our guide to scrutiny legislation, "Pulling it all together", to reflect all of these changes and making it clear which sections of existing legislation are being repealed and amended.

3. Localism Bill – more general implications for accountability

3.1 The Bill itself is divided into several main parts.[17] The one which has garnered most public attention has been the part relating to community empowerment, but there are some profound changes in other areas – planning and housing particularly – which may affect scrutiny business, particularly insofar as they suggest a new approach to strategy. Below, we have concentrated on the community empowerment provisions.

a. Community empowerment

3.2 This includes the "community right to challenge", a different approach towards "assets of community value" and provisions for local referenda, particularly in the case of council tax rises.

3.3 **Referendums** – the provisions on referendums can be treated as, in part at least, a beefing-up of the powers recently introduced on petitions, which the Bill will repeal. In the Bill, if 5% or more of people in an area sign a petition requesting a referendum on this issue a referendum will be triggered.[18]

[14] Speaking to the LGA Annual Conference in July, he said, "In the past fifty days instead of writing guidance, I've been shredding it. Instead of creating legislation, I've been dumping it. You've been a prisoner of regulation, chained to the radiator with red tape, for too long. I want to liberate you."
[15] a9EA
[16] s9EB
[17] The headings given below do not reflect specific parts or chapters of the Bill – relevant sections have been footnoted.
[18] ss40-41

3.4 A member, or members, of an authority may also request a referendum. Under these circumstances it will be for the council to decide whether it would be "appropriate" to hold a referendum.[19] Particular provisions apply in two-tier areas.

3.5 Once a determination is made a meeting must be held to resolve whether or not to hold a referendum.[20] The Bill does not state whether this must be a formal meeting of the Council or a committee, or whether it must be public. It also doesn't state what criteria should be used to decide whether or not to proceed. This seems to be a long stop measure to prevent referenda where one cannot prima facie be declined but where another course of action may be more appropriate.

3.6 The authority/authorities concerned are not actually bound to give effect to the results of the referendum but, after it has taken place, must indicate what, if any action they propose to take.[21]

3.7 Particular provisions exist for referenda on council tax increases. Schedules 5 and 6 set out the full details.

3.8 **Scrutiny's involvement in this area** would probably be limited, although scrutiny could have a role in investigating issues that could be subject to referenda, or where a referendum is planned. There could be scope to link up issues of particular public concern which might be subject to referenda through the use of CCfA, or through call-in where they relate to proposed council decisions.

3.8 **Community right to challenge** – under these provisions, a "relevant body" (a charity, voluntary group, employee mutual) may express an interest in running local public services.[22] They can do this at any time,[23] unless an authority decides only to accept such expressions in a certain period (minimum periods may be set out in regulations). The authority must consider whether to accept the expression of interest, taking into account social, economic and environmental considerations[24] - the grounds for rejection will be set out in regulations from the Secretary of State.

[19] ss42-43 – provision for making the determination is made in s44. The circumstances in which a referendum can be rejected are actually quite limited. The most expansive provision relates to vexatious or abusive requests.
[20] ss46-47
[21] s52
[22] s66
[23] s67
[24] s68(5)

3.9 As and when an expression of interest is accepted, a procurement exercise must be carried out.[25] This opens up the possibility that, following the procurement exercise, a contract will be awarded to run the service to an organisation other than that which expressed an interest in the first place.

3.10 **Scrutiny's involvement in this area** could be significant. While scrutiny cannot become involved in detailed contract management, an investigation of this issues could be a part of a wider review of council procurement. Scrutiny could also help the authority to develop the criteria, based on social, economic and environmental considerations, used to come to a judgment on accepting expressions of interest.

3.11 As and when services are delivered by charities/mutuals/voluntary groups, scrutiny can – as with other contracts – exercise a watching brief over the issue. This should be written into contracts with such bodies.[26]

3.12 **Assets of community value** – under this part of the Bill[27], authorities must prepare a list of local assets of community value (based on the authority's own judgment but also "community nomination" of appropriate assets). These can be any assets/land owned by anyone in the area. There must be a procedure by which the inclusion of any asset on the list can be reviewed. Owners of assets can request such a review.

3.13 Where a "community nomination" is made for inclusion on the list but it is unsuccessful, it is to go onto a separate list of unsuccessful nominations, which should also include the reasons given for its rejection from the main list.

3.14 Where the owner of such an asset proposes to sell it, a moratorium applies. They must notify the authority, and community interest groups (as defined by the authority in question) will have the right to bid to buy it (although not mentioned in the Bill, this is where community loans from the proposed Big Society Bank would come into play).

3.15 **Scrutiny's involvement in this area** could be most useful at the beginning of the process, as the list is being formulated. Scrutiny could help to identify community assets based on discussion with local people – perhaps as part of a small, time-limited scrutiny review. This would ensure that the process for putting the list together is transparent, and accurately reflects public views. Scrutiny could also be consulted on the local definition for "community interest group", and included in the list of consultees itself.

[25] s68(2)
[26] "Small print, big picture" (CfPS, 2008)
[27] s71 – s82

b. Planning

3.16 This part of the Bill covers a wide range of planning issues. Some of the operational issues around planning decision-making are less relevant, but in strategic terms the broad changes to the Town and Country Planning Act regime are significant, and deserve consideration by practitioners. Some include:

- Abolition of Regional Spatial Strategies;
- Changes to the operation of the Community Infrastructure Levy (previously s106 agreements);
- Changes to various parts of the Local Development Framework approach, including minor changes to the adoption of Development Plan Documents and the approach to the preparation of local development schemes;
- Neighbourhood planning (in particular the duty being placed on those who are seeking planning permission to directly consult local people on proposals, and other community consultation proposals);
- Various provisions relating to enforcement;
- Changes to the way that national planning policy statements are developed;
- The abolition of the Infrastructure Planning Commission, but the retention of powers by the SoS for planning proposals of national significance.

c. Housing

3.17 The main focus of likely scrutiny interest here will be social housing tenure reform, and reforms to tenant scrutiny. Other proposals include changes to the law around homelessness and the powers of the Housing Ombudsman. The Homes and Communities Agency remains, although its powers in London will now be directly given to the Mayor.

3.18 **Social housing tenure reform / tenants' rights** – housing authorities must prepare tenancy strategies[28], covering the types of tenancy granted, the circumstances in which tenancy will be granted and length of terms and circumstances in which tenancies will be renewed. The Bill does not specify this, but such strategies will involve giving additional clarity to choice-based lettings arrangements[29]. Flexible tenancies are also being created as a halfway house towards secure tenancies, which apply to many properties[30].

[28] s126
[29] See Library Monitor 11, "Choice based lettings".
[30] ss130 - 134

3.19 Schedules 16 and 17 of the Bill makes provisions relating to standards of social housing. Responsibility for regulating social housing passes to the Homes and Communities Agency[31]. The HCA, in its role as the regulator, will take on responsibility for ensuring that key standards are met, and will be able to accept submissions from a number of stakeholders in reaching this judgment, including bodies representing tenants' interests.[32]

3.20 **Scrutiny's involvement in this area** is likely to link closely with any work on choice based lettings. Tenancy strategies will be important documents, and scrutiny committees may want to investigate their development and the extent to which they assist both in housing supply and housing mobility. The HCA's regulatory powers over standards of social housing are powers of which scrutiny needs to be aware, particularly in the context of the context of recent work conducted by the Tenant Services Authority (who are being abolished) and their work in encouraging more tenant involvement in investigations in service standards.

d. Miscellaneous, including standards, pay, EU fines, London and repeals

3.20 These include:

- The abolition of the current standards regime, with declarations of interest now seen as a prime means to assure standards of appropriate conduct, and with serious issues now to be dealt with through criminal means;
- Removal of the rule against predetermination (which prevents councilors from being involved in making decisions – mainly in planning - where they have already expressed an opinion on the issue);
- Provisions relating to senior officer pay (including the requirement to make a senior pay policy statement – something which scrutiny might well be interested in taking a look at);
- The requirement to hold a ballot when it is proposed to impose a business rate supplement (which may have been prompted by criticism of the imposition of a BRS in London to help fund Crossrail);
- A requirement – that has proved extremely controversial, and which the LGA has strongly criticised – that councils be responsible for paying certain EU fines;
- Changes to London governance which reflect proposals put to the Secretary of State earlier this year by the Mayor, the London Assembly and London Councils – principally, around the creation of Mayoral Development Corporations;

[31] Schedule 16
[32] Schedule 17, amending the Housing and Regeneration Act 2008 to include a new section 198A(6).

- Repeal of the duty to promote democracy and the duty to have a local petitions scheme (which only came into force recently). Although the petitions power is being repealed, there is some logic in local authorities retaining their existing procedures given that they are already in place, and that local petitioning will be key to the successful operation of the new referendum powers.

Further reading

"Small print, big picture" (CfPS, 2008)

"Accountability works!" (CfPS, 2010)

Local Government Association: "Provisional Local Government Finance Settlement", briefing published 14 December 2010

Local Government Association: "Localism Bill: on the day briefing", published 13 December 2010

CLG: "Guide to localism and decentralisation", published 13 December 2010

Localism Bill 2010-11
Volume I at
http://www.publications.parliament.uk/pa/cm201011/cmbills/126/11126part1.pdf
Volume II at
http://www.publications.parliament.uk/pa/cm201011/cmbills/126/11126part2.pdf)