

Supporting members



Defending services

Branch guide: Best Value update (England and Wales)



Introduction

Best Value was a key policy for local government first introduced by the Labour government in 1997, and rolled out across the UK. The fundamental Duty of Best Value ('The Duty') still exists but we are seeing important changes in the wider local government policy context. This means it is useful to revisit the duty and what it should mean in practice for branches facing privatisation proposals.

This guide focuses on Best Value in England and Wales taking account of changes that have occurred since the Conservative-led coalition government came into power in 2010, including the Community Right to Challenge and other parts of the Localism Act 2011. This guide should be read in conjunction with the branch guide to the Community Right to Challenge.

With the emphasis in government policies on localism and market provision, Best Value has become a less prominent policy driver in many councils. Anecdotal evidence would

suggest some local authorities are failing to monitor their compliance with the Duty following the legislative changes. This guide puts the Duty of Best Value into perspective in light of these changes.

This guide does not look at Best Value in Scotland where there have been different policy context changes including updated criteria used in Best Value audits (Best value 2). Scottish branches can access guidance via their regional office.

This guide looks at:

1. The Duty now
2. How the context has changed (England)
3. Wales Programme for Improvement (Wales)
4. Branch action: using the Duty

1. The Duty now

The first thing to say is that the overriding Duty from the 1999 Act still exists:

“A best value authority must make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency, and effectiveness.”¹

The parts of the Duty can be summarised as:

- i. Continuous improvement in functions
- ii. Having regard to a combination of:
 - a. Economic value
 - b. Efficiency
 - c. Effectiveness

The Public Services (Social Value) Act 2012² also places obligations on local authorities in England and Wales to consider how to improve social, economic and environmental well being. However it does not change the Duty, it simply adds to it.

The new statutory guidance for England talks about social value in terms of procuring or commissioning goods and services, perhaps deliberately overlooking in-house service provision.

“...authorities should consider overall value, including economic, environmental and social value, when reviewing service provision. As a concept, social value is about seeking to maximise the additional benefit that can be created by procuring or commissioning goods and services, above and beyond the benefit of merely the goods and services themselves.”³

However UNISON argues that social value should also be considered when looking at in-house services.

Local authorities are still bound by the Duty to Consult⁴. This duty requires the authority to consult with representatives of local tax payers or rate payers, users of services, and people who have an interest in an area where the local authority carries out its functions (‘representatives’). Local authorities must also consult local voluntary and community organisations and small businesses⁵. The local authority must consult in deciding how to fulfil the Duty of Best Value. You as UNISON branches should argue that the consultation should also include you as representatives of the workforce.

The High Court recently dismissed a judicial review application from a Barnet resident seeking to challenge Barnet Council’s large scale privatisation programme because it was out of time – but the judge did affirm that the Council was under an obligation to consult with ‘representatives’ “in respect of decisions taken in 2010/11 to **outsource the performance of its functions and services**”(emphasis added). The council argued that it did not have to consult specifically on proposals to privatise services, but the judge found that the council should have done so and had therefore not complied with the requirements of the 1999 Act.⁶

1 s3(1) Local Government Act 1999

2 For further information see UNISON’s Branch Guide to social value

3 Best Value Statutory Guidance (Sept 2011)

4 s3(2) Local Government Act 1999

5 Best Value Statutory Guidance (Sept 2011); s3(4) Local Government Act 1999

6 [http://www.barnetunison.me.uk/sites/default/files/20130429134655000%20\(1\).pdf](http://www.barnetunison.me.uk/sites/default/files/20130429134655000%20(1).pdf)

2. How the context has changed (England)

The previous statutory guidance has been withdrawn and the Duty of Best Value in England is now only backed up by a single page document from the Department for Communities and Local Government: Best Value Statutory Guidance⁷. The Government has been deliberately light-touch in prescribing compliance with the Duty.

Some have questioned whether the Duty still applies following the introduction of the Community Right to Challenge in England. The Duty does still apply and this is clearly acknowledged in the Community Right to Challenge guidance which states:

“A local authority will have to comply with its best value duty when procuring services, which requires it to make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness.”⁸

Furthermore, one of the limited number of grounds (ground 10) for rejecting an expression of interest under the Community Right to Challenge is that acceptance would lead to a breach of a statutory duty. This includes the Duty of Best Value. Therefore, if an expression of interest is made to a local authority, and the local authority considers that the expression of interest does not represent ‘best value’, it can reject that expression of interest. This avoids triggering a procurement process.

Recent changes to the Duty have sought to create a greater link or interaction with Government policy on the community and

voluntary sector. The guidance includes a specific reference to the national Compact⁹ between central government and the voluntary and community sector, and the need not to undermine local Compacts.

Included within the new statutory guidance are requirements that:

“• An authority intending to reduce or end funding (where ‘funding’ means both grant funding and any fixed term contract) or other support to a voluntary and community organisation or small business should give at least three months’ notice of the actual reduction to both the organisation involved and the public/service users.

• An authority should actively engage the organisation and service users as early as possible before making a decision on: the future of the service; any knock-on effect on assets used to provide this service; and the wider impact on the local community.

• Authorities should make provision for the organisation, service users, and wider community to put forward options on how to reshape the service or project. Local authorities should assist this by making available all appropriate information, in line with the government’s transparency agenda.”¹⁰

Whilst it is not clear why some of the above is included in the Best Value guidance, the third bullet point is of interest, in particular: “Authorities should make provision for the organisation, service users, and wider community to put forward options on how to reshape the service or project.”

⁷ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/5945/1976926.pdf

⁸ Para 6.5 Community Right to Challenge Statutory Guidance https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/5990/2168126.pdf

⁹ http://www.compactvoice.org.uk/sites/default/files/the_compact.pdf

¹⁰ Best Value Statutory Guidance (Sept 2011)

There is no reason why this should not cover trade unions putting forward requests or suggestions for service improvement plans on in-house options if privatisation is being proposed.

Branches should also consider working closely with user groups to put forward options which would better meet users' needs. The options should oppose cuts – or argue for improvements – to pay, pensions, and conditions, in order to maintain a valued and committed workforce.

One of the most significant changes to the Best Value regime in England is the dissolution of the Audit Commission. Previously the Audit Commission carried out Best Value Inspections and audited local authorities to assess compliance with the Duty. This no longer happens. This change is significant because it means there is no longer any external body checking whether a local authority is doing what it is meant to do when it comes to the Duty. We believe this has led to local authorities abandoning attempts to comply with the Duty.

The obligation on local authorities to carry out 'Best Value reviews'¹¹ was abolished a few years ago¹². This, combined with the demise of the Audit Commission has led, in some authorities, to the end of recording robust performance data. It will become increasingly difficult to ascertain the cost, and value, of an in-house service if performance data is not kept.

The other major change in England was the abolition of the 'Handling of workforce

matters' and the 'Code of practice on workforce matters' (commonly known as the 'two-tier' code) guidance. In addition Best Value guidance on commissioning in the document 'Creating Strong, Safe and Prosperous Communities' has been repealed alongside the rest of that guidance.

Overall therefore the underpinning of the Best Value duty has been weakened and watered down, leaving us with 'Best Value-lite'. Section 4 will look at how you can still use the duty.

11 s5 Local Government Act 1999

12 s140 Sch. 18 Pt. 8, Local Government and Public Involvement in Health Act 2007

3. Wales Programme for Improvement

As in England, the Best Value Duty under the 1999 Act still applies. However the Welsh government has replaced the guidance that sets out how Welsh councils should meet the statutory requirement. The original Best Value regime was replaced in Wales by the Wales Programme for Improvement (“WPI”). The aim of the WPI was to provide Welsh local authorities with a locally owned approach to improvement, where councils ‘assess and seek to improve the corporate health of the organisation and the performance of services’.¹³

In turn the Local Government (Wales) Measure 2009¹⁴ reformed the WPI. The Measure seeks to link councils’ shorter-term, annual improvement planning (through the WPI) with their longer term strategic planning (the community strategy).¹⁵

So authorities within Wales have the general duty to make arrangements to secure continuous improvement in the exercise of their functions. Improvement is defined within statutory guidance as meaning ‘...more than just quantifiable gains in service output or efficiency, or the internal effectiveness of an organisation. Rather it should mean anything that enhances the sustainable quality of life and environment for local citizens and communities.’¹⁶

There are seven aspects of improvement outlined in the Measure:

1. Strategic effectiveness
2. Service quality
3. Service availability
4. Fairness
5. Sustainability
6. Efficiency
7. Innovation

Local authorities are required to publish improvement objectives annually reflecting the seven aspects outlined above.

Other duties and powers are also placed on Welsh local authorities. These are:

- Powers to collaborate
- Duty to consider collaborating ‘from time to time’ as a means of assisting improvement and a duty to publish ‘details of the way the authority has exercised its powers of collaboration’
- Duty to consult on Improvement Objectives
- Duty to compare and publish performance information¹⁷

However in recent discussions the Welsh Assembly Government ministers have indicated that if collaboration is not led on a voluntary basis they may seek to reorganise services, or, in other words enforce collaboration on Welsh local authorities.

13 <http://www.wlga.gov.uk/wales-programme-for-improvement>

14 <http://www.legislation.gov.uk/mwa/2009/2/contents>

15 <http://www.wlga.gov.uk/wales-programme-for-improvement>

16 <http://www.wlga.gov.uk/publications-briefings3/wales-programme-for-improvement-part-1-local-government-improvement>

17 <http://www.wlga.gov.uk/wales-programme-for-improvement>

4. Using the Best Value Duty

With ever-increasing privatisation, and in England the enactment of the Community Right to Challenge, it is important to be well equipped. Best Value requirements are increasingly overlooked but have the potential to be an effective weapon for branches in the fight against privatisation.

Local authorities have to be able to demonstrate or evidence their compliance with statutory duties. This applies to the Duty of Best Value. With a decline in the recording of performance data local authorities are going to have increasing difficulty in doing this.

The paragraphs below outline questions you should ask, and actions you can take, particularly if a service is under threat. This includes a threat from a community right to challenge¹⁸, service review, or it being targeted for a procurement exercise.

4.1 Performance data

Find out what performance data your local authority records. You need to know if, and to what extent, they are measuring the performance of in-house services. If your local authority is considering stopping the recording of performance data you should lobby against this. Likewise, if your authority has already stopped keeping performance data you should push for a reversal of that.

4.2 Comparing a privatisation option to in-house services

If a local authority is considering privatisation, or even going through the procurement process itself, questions should be asked about their compliance with the Duty.

UNISON argues that to comply with the Best Value Duty an in-house option with a service improvement plan should always be considered in any options appraisal. If it can meet the objectives for the service there should not be a procurement exercise. Even where a council does trigger an active procurement process, the in-house option should be considered and evaluated alongside any external bids – to ensure that there is full consideration of value for money, social value and outcomes. External bidders should be told in the invitation to tender that there will be an in-house ‘bid’ (see Branch guide to securing in-house services)

Questions which should be asked of the authority:

- Does the local authority consider the proposed contract will offer better value than the in-house service?
- What is the value of the in-house service?
- How did they assess the value of the in-house service?
- What assumptions were used in the assessments?
- What performance data was used?
- What is the social value of the proposed contract?
- How does the social value of the proposed contract compare to that of the in-house service?

The above is a non-exhaustive list of the sort of questions you may want to ask your local authority. The local authority must consider the Duty. If they have considered the Duty then you will want to know on what basis they have reached the conclusion that the in-house service, with an improvement plan,

¹⁸ See UNISON's Branch Guide to the Community Right to Challenge for further information.

will not offer Best Value. (For more on social value see Branch guide to social value.)

4.3 Components of Best Value

Below is a list of some of the things that you will want to check to see if the local authority has factored them into their assessment of Best Value:

- The cost of the procurement exercise itself
- The continued cost of contract management, for the life of the contract
- Any transaction costs
- Additional charges from the contractor for changes to the specification, volume or delivery requirements
- Macro-economic impact of reduction of staff on local authority pay and conditions. This is particularly important where most local authority staff live within the local authority area as the local spending power will be reduced due to an increased number of unemployed or lower paid local residents who have less disposable income
- Costs of interest on any capital that needs to be acquired by the private provider if that is being charged to the local authority, as the local authority can borrow at a lower rate of interest.

4.4 Consultation

As outlined in section 1 of this document, local authorities are under a Duty to Consult for the purposes of deciding how to fulfil the Duty of Best Value. Firstly, check whether the local authority has consulted:

- Representatives of tax payers
- Non-domestic rate payers (businesses)
- Representatives of service users
- Representatives of people with an interest in the area where the local authority carries out its functions
- Community and voluntary sector organisations
- Small businesses

You should argue that UNISON and other trade unions should be consulted. The local authority should be challenged if it has failed to consult. A word of warning however: the local authority should consult those ‘who appear to the authority’¹⁹ to fall into one of the categories above. Therefore it is not an objective test, but a subjective test for the local authority. However the usual requirements of reasonableness and proportionality still apply.

Branches in England can also refer to the statutory guidance which says authorities should make provision for service users and the wider community (which we say should include the workforce) to put forward alternative options on how to reshape the service. ²⁰.

You should consider working closely with user groups and other local organisations as

¹⁹ s3(3) Local Government Act 1999

²⁰ Best Value Statutory Guidance (Sept 2011); and quoted in section 1 of this document.

appropriate to put forward options which would better meet users' needs.

4.5 Enforcement: what to do if the council does not comply with the Duty

The first port of call will always be to formally challenge the local authority directly over possible breaches of the above duties. Occasionally this in itself may prompt a re-think from the local authority if they are struggling to answer your questions. You should ensure that you copy any challenge to the council's monitoring officer.

Next there is the Local Government Ombudsman²¹ (LGO). Previously we have seen very little relating to Best Value in decisions of the LGO. However more recently²² the LGO ordered a local authority to compensate an individual after they failed to consider Best Value when making a decision affecting that person.

It is unlikely UNISON would have 'standing' to bring a claim for judicial review. It is an option that would generally be better pursued by a service user affected by the decision. Each instance will depend on the specific circumstances, so specific advice should be sought from your regional organiser if this course of action is considered. Strict time limits apply to the bringing of judicial review proceedings – currently three months from the date of the decision (although the government is planning to cut this to one month). And it's important to note that the clock normally starts ticking as soon as there is a decision to pursue privatisation, not from when

procurement commences or the contract is awarded.

4.6 Scrutiny

Make sure you use your council Scrutiny Committees to challenge decisions. Scrutiny Committees are often overlooked, but they have the ability to call in certain decisions and can question the decisions being made. Where there are multiple political parties there will be representation from a number of parties on each committee. A well briefed member of a Scrutiny Committee may be able to ask the sort of questions detailed earlier in this section and add pressure (see Branch guide to council decision-making).

21 <http://www.lgo.org.uk>

22 <http://s.coop/13s8h> Norwich City Council, August 2012

Published and printed by UNISON, The UNISON Centre, 130 Euston Road London NW1 2AY.
CU/MAY 2013/21281/3268/UNP12997.