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Localism Bill – Call for Evidence

For the attention of Ms Michelle Edney, Senior Executive Officer

Dear Ms Edney

Further to the Bar Association's response with regard to Chapter 1, which was e-mailed to you on the 18 January 2011, please find attached a follow-up submission with regard to other clauses of the Localism Bill.

1. **Chapter 5: Standards**

(a) **Clause 15: Duty to promote High Standards of Conduct**: In addition to Members and Co-opted Members, it might be useful to include a reference to officers of the Authority, as officers should also be under a statutory duty to promote and maintain high standards of conduct.

(b) **Clause 16: Voluntary Codes of Conduct for Local Authority:** Whilst it is accepted that the Local Authority, once this Localism Bill becomes law, will not be required to have a Code of Conduct for Members, there is clear recognition within Clause 16(3) that the Authority "must" consider whether it is appropriate to investigate any allegation(s) made against Elected Members as it thinks fit.

(c) There is a clear recognition, therefore, that where an Authority has resolved to have a voluntary local Code of Conduct for Members, it must establish an appropriate committee or have the matter considered by a relevant officer. Accordingly, it would be far better to make an explicit reference to such mechanism within Clause 16(3) instead of leaving it to an implication. Furthermore, where a Local Authority chooses to maintain a Standards Committee or combine the ethical governance functions with, for example, a Governance and / or an Audit Committee, these should remain a matter for every Local Authority to consider and determine.

(d) Equally, it would be up to each Authority to consider whether or not a committee would be the most appropriate mechanism for dealing with such allegations. A Local Authority could, for example, put in place an 'initial filtering stage' by delegating to, say, the Monitoring Officer to consider, after appropriate consultation with designated Independent Member(s) of the Council, whether an

investigation needs to be carried out. Results of any actual investigation will, of course, be considered by an appropriate committee as opposed to just the Monitoring Officer or with relevant Independent Member(s) consulted at the "initial filtering stage". This would avoid the need for costly and time consuming organising of Sub-Committees for simple complaints against Members.

(e) **Clause 17: Disclosure and Registration of Members Interests:** There is a reference in Clause 17(2)(d) to the Authority granting dispensations and the relevant Schedule proposes to delegate such power to the Head of Paid Service. These are currently dealt with by Standards Committees or, as per my Clause 16 suggestions above, could be dealt with by the relevant Governance and / or Audit Committees of the Council. Equally, it should be a matter for the Local Authority to consider whether to delegate (or not) the granting of dispensations to the Monitoring Officer, in consultation with the relevant Independent Member(s) of the Council, or to the Head of Paid Service.

(f) **Clause 18: Offence of Breaching Regulations Under Section 17:** This Clause will undoubtedly be of great concern to Elected and Co-Opted Members, as it appears to be unduly draconian and wrong in principle. There are a number of examples of elected members, up and down the country, who have "forgotten" to either register a financial or other registerable interest, failed to disclose a registerable interest at a relevant meeting or taken part in some business of the Authority when they had a prejudicial interest in the matter being discussed at the meeting.

(g) Human nature, being what it is, a number of elected members do, from time to time, forget such matters and, since ignorance of the law is no defence, such forgetfulness (or repeated forgetfulness) – no matter how genuine and sincerely held - would not, if this Bill becomes law, be considered to be a "reasonable excuse".

(h) Accordingly, many decent, hardworking Elected and Co-Opted Members will find themselves, inadvertently, facing criminal sanctions and having criminal records, with fines up to the maximum level 5 on the Standard Scale. In addition, the courts will have the discretion to disqualify such elected members for up to five years, with associated costs of litigation and reputational harm. This may have the effect of discouraging Elected and Co-Opted prospective Members from serving on Local Authorities

(i) Criminalisation of elected members for a breach of Clause 17 requirements appears to be totally (i) unnecessary and (ii) disproportionate to the circumstances. It would not surprise me, therefore - if this Section comes into law, unamended - that a number of Elected and Co-Opted Members, who find themselves on the receiving end of such criminal proceedings, will challenge such provisions under the Human Rights Act and, ultimately, take matters to the European Court for determination.

(j) The Government could be asked, therefore, to urgently review the need for the criminalisation of such "basic" operational matters. A far better approach would be as per the current arrangements – i.e. where a failure to register, a failure to disclose a registerable interest at a meeting or taking part in a meeting relating to a prohibition or restriction in respect of a registerable interest, is the subject of a formal complaint under the Code of Conduct (Clause 16 above) and dealt with as

a local matter by the relevant investigation / enforcement procedure envisaged by Clause 16 and it does not become a criminalised matter.

(k) **Clause 18(3):** The Magistrates Court will have the power to disqualify a Member for up to 5 years in relation to that local authority or any other relevant authority, i.e. – the disqualification may not be 'universal' and may "allow" a "disqualified Councillor" to stand at a neighbouring authority, unless the disqualification specifically prevented such behaviour. This is felt to be too uncertain and the Government should make any disqualification universally applicable.

2. **Clause 21: Senior Pay Statements:** There may be Data Protection Act issues in relation to the disclosure of what could be considered to be confidential information of employees – particularly with regard to actual pay of Chief Officers– including details relating to a Chief Officer who may have left during the year under a confidential Compromise Assessment.

3. **Clauses 30-34: EU Fines:**

(a) These provisions appear to be reasonable and appropriate as the Local Authority in question must have, according to Clause 32(1), "caused or contributed to the infraction of EU law for which that financial sanction was imposed". This is a high threshold test for obvious reasons. Simply, following Regulations established by Parliament - or targets established by Governments - without providing the necessary resources to meet such targets, should not be the subject of such fines mechanism and, as such, these points should be clearly stated in these Clauses or clarified by the Government.

(b) The "polluter pays principle", whilst appropriate, needs to recognise that the alleged polluter may be placed in an unacceptable position by the Government if it is not given the resources to perform such duties.

4. **Part 4, Chapter 1: Local Referendums:**

(a) **Clause 44 (Grounds for Determination of Local Referendums):** Only 4 grounds for not holding a referendum are being allowed under the Bill:-

(i) referendum question would contravene an enactment or a rule of law;
(ii) it was not on a 'local matter' as defined;
(iii) it relates to an Order of Secretary of State; and / or
(iv) it was vexatious or abusive.

(b) The fourth ground set out in Clause 44(7) is restricted to a petition being "vexatious or abusive". No definition of these words are given in the Bill and the Clause ought to be extended to include "frivolous or costly", as to do so otherwise may impose unnecessary cost and administrative burdens on Local Authorities.

(c) In addition, the Local Authority should be permitted to reject a request for referendum which has been the subject of a petition, during the past 12 months, "on the same, associated or similar matter", so as to avoid public funds being wasted on unnecessary referendums. Unless amended, as suggested, there is a danger of creating paralysis for Local Government through an industrious use of petitions, with little or no regard to the impact on Local Authority finances or in-house processes to support the work associated with the same.

(d) Local Authorities should also be allowed to reject petitions and requests for a referendum that might cause disharmony within the local community / area or otherwise detract from or work against (but do not quite contravene) the statutory requirements imposed upon the Local Authority. Such would, currently, be considered "appropriate" under the Bill as the current 4 grounds set out in Clause 44 are quite limited. Whilst some petitions may be clearly drafted so as not to lead to a contravention of an enactment or a rule of law, they may still cause untold harm to the social, economic and environmental well-being of a community and, otherwise, impact on the good governance of an area – including community relations / cohesion.

(e) Accordingly, the fourth (or a new fifth) ground should be sufficiently broad enough to allow a Local Authority to reject the request for a local referendum on matters that "may harm, be contrary to the public interest or otherwise adversely impact on a Local Authority's functions".

(f) The Local Authority should also be given a power to consider charging the petitioner a fee to cover a proportion, if not all, of the cost of a local referendum, if a Local Authority felt the petitioner's request was "without merit".

(g) **Clause 45 and 46:** Whilst it is appropriate for a Local Authority to give reasons for its determination, Clause 45(4)(b) makes it clear that the Authority "must" publish those reasons when it publishes the determination; whereas at Clause 45(5) it goes on to say that the Local Authority is not obliged to publish those reasons if it thinks that in all the circumstances it would be inappropriate to do so. As a point of legislative construction, it would be far better if Clause 45(4)(b) simply said the Authority "may" - as opposed to "must" - and then there would be no need to insert a negative stipulation of Clause 45(5). These comments on legislative construction apply equally to Clauses 46(5) and (6).

(h) In addition, Clauses 46(2) and (3) should be reviewed by the Government as it is highly unlikely that a Council would want to have a "second meeting" to determine a resolution for the Local Referendum. Experience shows that such matters can usually be dealt with in the build up to a Council Meeting and it is highly ineffective and inappropriate to build into legislation any unnecessary bureaucracy or "delaying mechanism" of one Council Meeting to facilitate the determination of "a resolution".

(i) **Clause 48 – Question to be asked in Local Referendum:** The whole of this section could have been easily drafted along the following lines:-

"The Local Authority must, after appropriate consultation with the petitioner, organiser or member(s) who made the request, determine the appropriate question to be asked in the referendum".

Save for Clause 48(5), the other sub-clauses would not, then, be needed.

5. **Chapter 4: Assets of Community Value (Clauses 71-88):**

(a) The purpose for having such "Lists of assets of community value" and "lists of land nominated by unsuccessful community nominations", appear to be most unclear on the face of the Bill and the value of having the same appears to be questionable. This aspect of the Localism Bill, therefore, is hardly robust or likely to encourage localism.

(b) The Government should, therefore, revisit the purpose and need for the same so as to ensure the Bill correctly addresses what it intends so that when the legislation is in place the value to be added through such provisions are clear for all to see. The interaction of such lists with, for example, village green applications should also be made clearer, if 'double' opportunities and jurisdictions to delay the development of community assets are to be avoided.

(c) From a general reading of the proposed provisions, it could be argued that places of worship, community halls, bingo halls and other entertainment establishments – whether owned by the Council or not – could find themselves on the "lists" for five years and thereby serve only to restrict the ability of private owners to deal with the same without first obtaining consents for removal from the relevant Authority. It is doubted if the intention of the Government was to frustrate private enterprise in this way and, as such, it is important that these aspects are reconsidered, clarified and the Bill amended accordingly so as to avoid uncertainty in application.

(d) As these provisions currently stand, there is a real danger of stifling local innovation, building in inertia / local bureaucracy into the system and, as such, the provisions would appear to run counter to the Government's stated objectives of reforming public services provision.

6. **Schedule 2, Part 1, Chapter 1, Paragraph 9B and 9BA:** It is difficult to see the need for there to be provision in the Bill for the Secretary of State to "prescribe arrangements" which were in addition to the "Executive Arrangements" or the "Committee System", as these two models will more than adequately cover most, if not all, eventualities in Local Government.

7. **Schedule 2, Part 1, Chapter 2, Paragraph 9C(5):**

(a) The Government should take the opportunity to remove the prescription of the Local Government Act 2000 and leave it to Local Authorities to determine the size of their Executives. A maximum of ten Executive Members has been artificially restricted by the 2000 Act and felt to be inappropriate for the larger, more complex local authorities, such as Birmingham City Council. Under localism, the number of Executive Members should be a matter for local determination and not central prescription.

(b) Likewise, the operational usefulness of Forward Plans is questionable and, as such, the Government could be encouraged to remove the statutory requirement placed on Leaders of Councils, to maintain the same.

8. **Schedule 2, Part 1, Chapter 2, Paragraph F Overview and Scrutiny Committees: Functions:-**

(a) The Government could take the opportunity to extend the powers of Overview & Scrutiny Committees (at paragraph 9F(2)(e) and 9FA(9)) so that other public bodies in a locality comply with its recommendations, as currently required of Members and Officers of the Local Authority. This extension of Overview and Scrutiny powers will be of great help to local authorities working in local partnerships, and help to further the shared services and the Government's Public Services Reform Agenda. If such a provision was included, this would assist with the community based budgeting aspects and would obviate the need for Paragraph 9F(2)(f) and Paragraph 9F(3) and (5).

(b) Paragraph 9FA(8)(a) may also be extended to require Members of the Executive and "those in positions of managerial control in any of the relevant Local Authority or Public Body in relation to matters which affect the Authority's area or the inhabitants of that area" to attend before Overview and Scrutiny Committees to answer questions.

(c) Likewise, Paragraph 9FA(9) could be amended to include those in positions of managerial control in other relevant Local Authority or Public Body in relation to matters which affect the Authority's area or the inhabitants of that area.

(d) "Public Body" could mirror the definition for a "Local Public Service Function" or "Public Service" definition contained in Paragraph 9HF(9). Accordingly, Paragraph 9FA(9) would read as follows:

"It is the duty of any Member or Officer or those in positions of managerial control mentioned in Paragraph (a) or (b) of Sub-Section (8) to comply with any requirement mentioned in that paragraph and have regard to the recommendations of the relevant Overview and Scrutiny Committee."

(e) Paragraph 9FE would then need to be amended to reflect the insertions made at Paragraph 9F(2)(e), 9FA(8) and (9). Paragraph 9FE(1)(a) and (b) could then be deleted as there would be no need to make a specific reference to the Crime and Disorder matters as those would be covered within the proposed public body insertion for Paragraph 9F(2)(e), 9FA(8) and (9). Likewise, Paragraph 9FE(3), (4) and (5) could then be amended to reflect the insertion of the Public Body requirements.

(f) Paragraph 9FF would also appear to be unnecessary if the 'Public Body' insertion is accepted for Paragraph 9FE. Paragraph 9FG(1)(b)(ii) could also be deleted if Paragraph 9FF was deleted.

(g) Paragraphs 9FH and 9FI could also be deleted if the 'Public Body' insertion is accepted with regard to Paragraph 9FA and the definition of Public Body extended to include Risk Management Authority. Paragraph 9FJ could likewise be deleted.

9. **Paragraph 9HA Mayoral Management Arrangements: Mayor to be Chief Executive Officer:** Whilst the arrangements make it clear that the Authority's Head of Paid Service would report to the Elected Mayor and that the Elected Mayor holds Office on such reasonable terms and conditions, including conditions as to remuneration, as the Authority thinks fit, it is unclear why the Elected Mayor would become "the most Senior Officer of the Local Authority" or what would be the legal impact of such a provision as the Mayor would still not be an 'employee of the Council". Accordingly, this particular requirement could well be void for uncertainty, as a matter of legislative construction.

10. **Paragraph 9HE Mayoral Management Arrangements: Advice etc for Members:** This Clause will require a Local Authority to designate one of its officers to provide guidance and support to Members of the Authority. It is unclear whether such an officer would be the Head of Paid Service or some other to avoid potential conflicts of advice to the Elected Mayor and to the Council. The Government should be asked to clarify this point.

11. **Paragraph 9HI Mayoral Management Arrangements: Failing Councils:** This provision would permit the Secretary of State to give a direction requiring the Local Authority, if it was failing, to make alternative arrangements as the Secretary of State

considers appropriate. Whilst this might be a useful one in theory, it is difficult to see how any Secretary of State would prescribe an "alternative arrangement" which was not an "Executive Arrangement" or a "Committee System" mentioned earlier. This provision may, therefore, be of little or no effect in practice.

12. **Chapter 3 – The Committee System:** Under these provisions, the Secretary of State has the power to prohibit delegation of functions. This is not felt to be necessary under Localism and each Local Authority should determine its own objectives with regard to the Committee System. Likewise, it should be a matter for those Authorities to determine the type of Overview and Scrutiny arrangements that they want and it should be left to those Local Authorities to determine within the broad parameters of the powers prescribed to Overview and Scrutiny Committees under the Executive - Leader and Cabinet and Elected Mayor and Cabinet - Models.

13 **Chapter 4 – Changing Governance Arrangements:**

(a) These provisions require the Local Authority to publish in one or more newspapers circulating in its area an appropriate notice. Publication should be left to the determination of the Local Authorities and not prescribed with regard to local newspapers as adverts in the same are quite costly and do not reach all sections of the local community.

(b) Where a referendum for an Elected Mayor is held, the Council must pass a resolution to implement the new governance arrangements within a period of 28 days of a referendum outcome. In terms of the petition and threshold for a referendum, it remains, for the time being, at 5% of the number of Local Government electors. However, the Impact Assessment "creating Executive Mayors in the 12 largest English cities" on page 9 at sub-paragraph (h) gives a clear steer that the Government "now proposes to reduce, by regulations, the petition threshold for instigating mayoral referendums from 5% to 1% of the electorate". The Government is asked to resist such a move, as the 5% limit has stood the test of time and continues to be appropriate to avoid unnecessary expenditure.

I hope the above contributions are of some assistance to your Committee and confirm that our Bar Association has no objection to the publication of this submission.

The Bar Association represents barristers employed in Local Government and the Public Services. The Bar Association is a direct successor of the Society of Local Government Barristers, which had been in existence since 1945, and of the Bar Association of Local Government, which had been formed in 1977. We currently have a membership database that exceeds 110 members.

Yours sincerely

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Chairman