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To: County Council – 28 March 2013

Subject: Authority to participate in legal proceedings and Rights of Audience

Summary: This report invites the County Council to approve a change to Article 13.3 to the County Council's Constitution to clarify that the Monitoring Officer may authorise others to participate in legal proceedings on behalf of the Authority, as recommended by the Selection and Member Services Committee.

1. Legal Background

(1) The power for the Council to bring and defend legal proceedings has a statutory basis, which is reflected in the Council's Constitution. Without arrangements giving authority to various officers, the Council could not bring or defend legal proceedings or appear before a court. In order to do this, there needs to be two specific levels of authorisation:

- (a) Authority to institute, defend or participate in and settle any legal proceedings; and
- (b) Authority to appear in court

(2) Under the Council's Constitution, these authorisations are currently only given to the Monitoring Officer, without provision for other Council officers to be duly authorised. A number of directorates and divisions, for reasons related to the functions of their business, have been instituting, defending, participating, or settling legal proceedings and appearing in court without being clear as to whether the two specific levels of authorisation above are in place. The relevant divisions are:

- Waste management: to carry out statutory functions, directed surveillance under the Regulation of Investigatory Powers Act 2000 and to make applications before a Magistrates' Court;
- Insurance: to bring small claims related to their business operations and to appear in the County Court;
- Countryside Access Service: to carry out statutory functions and appear before Public Enquiries;
- Integrated Youth Services: to carry out statutory functions and appear before Magistrates' Courts to make applications on behalf of the Council; and
- Trading Standards: to carry out statutory functions and to appear before Magistrates' Courts to make applications on behalf of the Council.

The functions for these divisions and officer details can be found at **Appendices 1 and 2**.

(3) Section 222 of the Local Government Act 1972 ('LGA 1972') provides a power for the Council to prosecute or defend legal proceedings:

"Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area

(a) they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name, and

(b) they may, in their own name, make representations in the interests of the inhabitants at any public inquiry held by or on behalf of any Minister or public body under any enactment."

(4) The Legal Services Act 2007 ('LSA 2007') sets out a regulatory framework for the provision of legal services and prescribes how 'rights of audience' to appear in court are granted. Sections 12, 18 and 19 make clear that a person shall only have a right of audience before a court in relation to any proceedings where that person is either an 'exempt person' or an 'authorised person'. The LSA 2007 at paragraph 1(3), Schedule 3, provides that an 'exempt person' includes a person who has a right of audience before a court granted under any enactment. An 'authorised person' is a solicitor, barrister or legal executive who is a member of their relevant professional regulatory body. As long as an authorised person remains a member of such a body and complies with their rules and restrictions, they may exercise rights of audience and conduct litigation in all proceedings in all courts.

(5) Section 223 of the LGA 1972 is an enactment relevant to 'exempt persons' and provides that:

"Any Member or officer of a local authority who is authorised by that authority to prosecute or defend on their behalf, or to appear on their behalf in, proceedings before a Magistrates' Court shall be entitled to prosecute or defend or to appear in any such proceedings, and, to conduct any such proceedings."

(6) Article 13.3 of the Council's Constitution gives effect to the legislative provisions above by:

(a) delegating the power to prosecute or defend legal proceedings in s.222 of the LGA 1972 to the Monitoring Officer, and

(b) authorising the Monitoring Officer to appear in any court proceedings:

"The Monitoring Officer is authorised to institute, defend or participate in and settle any legal proceedings in any case where such action is necessary to give effect to decisions of the Council or in any case where he considers that such action necessary to protect or pursue the Council's interests or where he considers it expedient for the promotion or protection of the interests of the inhabitants of Kent."

It is important that the Monitoring Officer should remain an 'authorised person', as detailed above, in order to be able to, represent the Council in any court.

(7) The combination of the legislative provisions above and Article 13.3 gives the Monitoring Officer authority to conduct and appear in any legal proceedings on behalf of the Council, whether they are civil or criminal in nature. However, the Monitoring Officer does not have specific delegated authority to authorise other officers, whether within Legal Services or outside Legal Services, pursuant to the statutory provisions above. Recommendations to correct this are made below.

2. Authority to Appear in Court

(1) Any officer who represents the Council in a civil or criminal court for a hearing or trial must (a) have a right of audience and (b) be duly authorised, in accordance with the provisions above. A right of audience is the right to appear before and address a court, without which a party cannot appear before a court. There is no common law right of audience and a right of audience cannot be granted by consent of other parties to the case.

Magistrates' Courts

(2) As regards legal proceedings in the Magistrates' Court, s.223 LGA 1972 has the effect of giving local authority officers that right of audience after the officer is duly authorised by the Council. Otherwise, only an admitted solicitor or barrister may normally exercise a right of audience before a Magistrates' Court. Section 223 LGA 1972 only permits Council officers to appear in a Magistrates' Court and not any other court (e.g. Crown Court, County Court, High Court or any Appeal Court). Therefore, the Council (whether by delegated authority or otherwise) may only properly authorise officers who are not legally qualified with rights of audience to appear in the Magistrates' Court and not any other court.

(3) The proposed amendment to Article 13.3 below, allows the Monitoring Officer to delegate authority to other officers so that they may be duly authorised to appear in the Magistrates' Court as required by s.223 LGA 1972.

All other courts

(4) Only solicitors or barristers and certain regulated legal executives with rights of audience under the LSA 2007 are permitted to appear in criminal or civil proceedings in all courts. This is because they normally have rights of audience as 'authorised persons' under the LSA 2007 (as detailed above at paragraph 1(4)) without needing prior authorisation under s.223 of the LGA 1972. It is not possible for other Council officers to appear in any legal proceedings (apart from in a Magistrates' Court when duly authorised as an 'exempt person', described in paragraph 2(3) above).

3. Authority to institute, defend or participate in and settle any legal proceedings

Legal Officers

(1) As a part of their job and in furtherance of the Council's interests, Qualified Lawyers within Legal Services are regularly required to institute, defend or participate in and settle any legal proceedings. In order to give the Monitoring Officer delegated authority to authorise Qualified Lawyers, it is necessary to amend Article 13.3 as recommended below. This recommendation ensures that the Monitoring Officer has

delegated authority to authorise Qualified Lawyers to give effect to s.222 of the LGA 1972. The recommendation also permits the Monitoring Officer to authorise Non-Qualified Legal Services' officers to appear in the Magistrates' Court (but not any other court).

(2) It shall be the responsibility of the Monitoring Officer to hold a list of authorised officers pursuant to the proposed amendment to Article 13.3 and to review the list periodically or as appropriate.

Non-Legal Officers

(3) As mentioned above, Council officers who are not Qualified Lawyers may only appear in a Magistrates' Court after being duly authorised by the Council. In some cases, officers have been working under the impression that they have already been duly authorised to bring proceedings and appear before a Magistrates' Court (see **Appendix 2** and paragraph 1(2) above). However, on a closer review of the authorities presented by relevant divisions, this does not appear to be the case.

(4) As a result, it is unwise for the Council to rely on existing authorities that may not be sufficient and necessary for the purposes of s.222 and s.223 of the LGA 1972. The proposed amendments to Article 13.3 below, would permit the Monitoring Officer to oversee and regularise the position with the necessary ability to give the required levels of authorisation described above.

(5) The proposed amendment to Article 13.3 would make it more efficient and cost effective for the Monitoring Officer to delegate authority to officers pursuant to s.222 and s.223 of the LGA 1972, rather than bringing a report to the full Council for decision on each occasion.

(6) The recommendation will provide resilience to court action brought by or against the Council, will serve to increase efficiency and reduce both costs and the risk of acting ultra vires.

PROPOSED AMENDMENT

4. Proposed Amendment to Article 13.3

(1) In order to give effect to the recommendations above, a simple amendment to Article 13.3 is proposed, as underlined below:

“The Monitoring Officer is authorised to institute, defend or participate in and settle any legal proceedings, or authorise others to do so, in any case where such action is necessary to give effect to decisions of the Council or in any case where he considers that such action necessary to protect or pursue the Council’s interests or where he considers it expedient for the promotion or protection of the interests of the inhabitants of Kent.”

(2) At its meeting on Thursday 14 March, this report was considered and approved by the Selection and Member Services Committee for onward submission to the County Council.

5. Recommendations

1. That the County Council approves the following amendment to Article 13.3, as underlined below:

“The Monitoring Officer is authorised to institute, defend or participate in and settle any legal proceedings, or authorise others to do so, in any case where such action is necessary to give effect to decisions of the Council or in any case where he considers that such action necessary to protect or pursue the Council’s interests or where he considers it expedient for the promotion or protection of the interests of the inhabitants of Kent.”

2. That the Monitoring Officer be authorised to hold a list of authorised officers pursuant to Article 13.3 and that the Monitoring Officer be authorised to make additions, removals or amendments to the list as appropriate in his opinion.

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