

From: **Gary Cooke, Cabinet Member for Corporate and Democratic Services**
Geoff Wild, Director of Governance and Law

To: **Selection and Member Services Committee**
4 September 2013

Subject: **CONSTITUTIONAL AMENDMENTS TO REFLECT THE LOCAL AUTHORITIES (EXECUTIVE ARRANGEMENTS) (MEETINGS AND ACCESS TO INFORMATION) (ENGLAND) REGULATIONS 2012**

Classification: **Unrestricted**

Future Pathway of Paper: County Council 19 September 2013.

Summary:

The purpose of this report is to appraise the Council of the impact of the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 (“the Regulations”) and to seek authority to amend the Constitution to reflect the provisions of the Regulations.

Recommendation:

That the Selection and Member Services Committee endorse the changes to the Constitution as detailed in the report and recommend their adoption by Council.

1. Introduction

- 1.1 Public access to Council and committee meetings, agendas, reports and background papers is provided for by the Local Government Act 1972 (as amended in 1985). When Executive Arrangements were required to be implemented under the Local Government Act 2000, similar provision was made for Executive meetings and decisions in the Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2000. This also introduced the concepts of the Forward Plan, as a means to advertise future decisions of the Executive and introduced and defined Key Decisions. The Council’s Constitution reflects these requirements.
- 1.2 Further regulations were issued in September 2012 to amend the provisions in the 1972 and 2000 Acts and revoking the 2000 Regulations. The 2012 Regulations were not the subject of any consultation with local authorities. Instead, the Department of Communities and Local Government (DCLG) conducted what it described as a “short, focused informal soundings exercise with partners”. One such partner was the Local Government Association, which responded that the changes

proposed by the Regulations were unnecessary.

- 1.3 The key differences introduced by the 2012 Regulations are described below. It is important to bear in mind that they relate only to Executive functions. Other non-executive, 'council-side' functions (relating to planning, employment, licensing and decisions taken by Council) are unaffected by these requirements.

2. Financial Implications

- 2.1 There are no financial implications to the constitutional changes as outlined in the report.

3. Bold Steps for Kent and Policy Framework

- 3.1 Maintaining and updating the Constitution, particularly in relation to Executive decision making, allows the Council to conduct business in a lawful, open and transparent manner. In particular, adherence to the access to information procedure rules 'puts the citizen in control' and encourages democratic participation.

4. Detail

Changes to be made to the Constitution as a result of the Regulations:

Key Decisions

- 4.1 Previously, a Key Decision (defined by the Council as any decision involving expenditure/savings of more than £1,000,000 or significantly affecting one or more electoral divisions) could only be taken after notice of it was included in the Forward Plan published at least 14 days in advance of the decision being taken (subject to urgency exceptions).
- 4.2 The Regulations effectively abolished the Forward Plan but broadened the requirement for the Council to publish information relating to proposed decisions to be taken by both Members and officers.
- 4.3 The Forthcoming Executive Decisions (FED) list has replaced the Forward Plan and is produced and published fortnightly. Except in cases of urgency, a Key Decision cannot be taken until at least 28 days clear notice has expired from publication of the proposed decision within the FED. This document must include the following:
- the subject matter of the decision
 - the name(s) of the decision maker(s)
 - the date of the decision
 - a list of documents submitted to the decision maker(s) for consideration in relation to the matter

Meetings to be held in Private

- 4.4 Previously, the public could be excluded from meetings when

“confidential” or “exempt” (e.g. commercially sensitive) information was likely to be disclosed. That capacity is retained but the Regulations prescribe additional requirements to be fulfilled before a meeting can move into closed session. Those requirements are:

- At least 28 clear days before the meeting, a notice must be published at the Council’s offices and on the Council’s web-site giving notice of the intention to hold the meeting, or part of the meeting, in private. This notice is published as part of the FED.
- At least 5 clear working days before the meeting, the Council must publish another similar notice, including a statement of:
 - the reasons for the meeting being held in private
 - any representations received requiring the meeting to be held in public and
 - the Council’s response to such representations

4.5 There is provision for occasions where this is not possible and the urgency procedure has been updated and included within the changed document to reflect the requirements of the provision.

Recording of Decisions by Officers

4.6 The Regulations extend the requirement to record all “Executive Decisions” made by Cabinet or Cabinet Members to those made by officers (previously reserved only for Key Decisions taken by officers, which are not permitted at KCC).

4.7 The term “Executive Decision” is defined extremely broadly and is not restricted by the Regulations, such that it arguably encompasses all decisions made by officers other than those relating to non-Executive functions such as planning, licensing and employment.

4.8 Under the Regulations, whenever an officer takes any Executive Decision they must produce a written statement including:

- a record of the decision and the date it was made
- the reasons for the decision
- details of any alternative options considered and rejected
- a record of any conflict of interest declared by any Executive Member consulted
- in respect of any declared conflict of interest, a note of dispensation granted by the Head of Paid Service

A record of the decision must be published on the Council’s website.

4.9 This Council and other local authorities have made vigorous representations to the Secretary of State and the DCLG in order that the Regulations might be constrained or at least clarified to prevent the bureaucratically burdensome task of recording the many officer decisions taken each day. In response to the concerns expressed, DCLG indicated that the Regulations should not apply to “operational

decisions” taken by officers. That view is not supported by the wording of the Regulations, nor is it supported in any of the commentaries which have been issued on the Regulations. Counsel instructed by the Association of Council Secretaries and Solicitors advised that the term “Executive Decision” does cover operational decisions, although it is unlikely to be interpreted to apply to purely administrative tasks (for example, ordering paper clips).

- 4.10 To require officers to make records of all their operational decisions and to publish those decisions on the Council’s website would be enormously inefficient, expensive and unproductive. It is likely that if the Council had to publish a record of all “operational decisions” for Executive functions it would entail publishing particulars in relation to many hundreds of routine decisions per month.
- 4.11 Therefore it is proposed that an alternative way be created. Although not consistent with the wording of the Regulations and therefore potentially open to legal challenge, it is deemed to be the only realistic and practical way of conforming to the intention of the Regulations and the DCLG Guidance, and reflects practice in other local authorities.
- 4.12 It is proposed that the recording of officer decisions be defined as follows:
- “A record must be made of decisions taken by an officer under the Executive Scheme of Delegation to Officers in the following circumstances:
- (a) A management decision regarding the day-to-day running of the Council, where the financial implications for the Council are between £100,000 and £999,999 (officers should ensure that they act within the financial limits agreed by Council and included at Appendix 5 of the Constitution)
 - (b) A decision taken to implement a specific Cabinet or Cabinet Member decision, where the financial implications for the council are above £100,000

Members’ Right to Access to Documents

- 4.13 The Regulations include a right for Members to access documents containing material to be transacted at a public meeting from 5 clear working days before the meeting and includes all reports which relate to the agenda for a meeting or to a decision to be taken. There is also a general right of access to any document which “contains material relating to any business to be transacted at a private meeting” or to decisions made by individuals (Members or officers) under Executive Arrangements. The documents are required to be available no later than 24 hours after the decision is taken.

Reporting Meetings

- 4.14 Under the previous regulations, “reasonable facilities for journalists” were required to be provided. The 2012 Regulations now provide that

“any person attending the meeting for the purpose of reporting the proceedings is, so far as practicable, to be afforded reasonable facilities for taking their report”

- 4.15 The Council is currently assessing its webcasting and filming policies to reflect the regulations and the more recent guidance from the DCLG on the matter [“Your council’s cabinet – going to its meetings, seeing how it works”](#), in respect of which a separate report will be submitted to this Committee for decision.

Alternative Options Considered

- 4.16 That the Regulations be applied to all officer decisions, including those of an administrative nature. This was not considered to be viable in terms of the time and resources required.
- 4.17 To not implement the recording of officer decisions was considered but would expose the council to a high risk of legal challenge.

5. Further changes to be made to the Constitution

- 5.1 Amending Appendix 4 Parts 6 and 7 of the Constitution to reflect the Regulations was an opportunity to assess other areas of the Access to Information Procedure Rules and Decision Making Procedure Rules that were not currently providing sufficiently rigorous guidance for Members, officer and the public. As a result further proposed changes are listed below:

Call-in

- 5.2 The call-in requirement at present is not clear and does not provide sufficient guidance for Members as to when and why a call-in might be used. New wording and criteria are suggested to address this.
- 5.3 In addition, and in line with other County Councils in England, under the new paragraph a call-in must be requested by at least two Members not of the same political group. Members will still have the right to require consideration of any matter not exempted, such as planning decisions, as part of the Scrutiny Committee agenda.

Local Procedures for Urgency

- 5.4 It is proposed that the procedures for urgency be updated to reflect current legislation and that as such only the Scrutiny Chairman and Senior Manager be required to agree that a decision should be taken as urgent.
- 5.5 However in order that the council continue to promote inclusive decision making it will continue to be a requirement of the urgency procedure that the Group Spokesmen of Scrutiny Committee and the Chairman and Group Spokesmen of the relevant Cabinet Committee be consulted and their views recorded on the Record of Decision

- 5.6 Furthermore, it is proposed that in addition to those Members already required to be consulted, officers now be required to seek the views of Local Members affected and their views also be recorded on the Record of Decision.

Decision making Flow Chart

- 5.7 A decision-making flow chart has been created as a step by step guide for decision makers, Members, officers and the public and it is suggested that this be included in the Constitution as an annex to Appendix 4 part 6.

Minor amendments

- 5.8 Some further minor amendments have also been made to Parts 6 and 7 of Appendix 4 which are not material to the democratic processes at the Council, for example deletions where new requirements have superseded the need for the inclusion of a particular rule.

6. Conclusions

- 6.1 The changes detailed in this report are required to reflect current legislative requirements and to strengthen the Constitution and decision making procedures at the Council. In addition they will simplify a sometimes complicated process, allowing officers to understand more clearly their governance responsibilities and therefore reducing the need for unnecessary and/or urgent Member decisions to be taken.
- 6.2 The document will be more accessible to elected Members and members of the public, thereby helping to achieve the continued drive toward openness, transparency and accountability at the heart of Kent County Council's democratic processes.

Recommendation:

That the Selection and Member Services Committee endorse the changes to the Constitution as detailed in the report and recommend their adoption by Council.

7. Background Documents

7.1 None

8. Contact details

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