

Confident, Capable Council Scrutiny Panel 27 September 2017

Report title	Legal Services	
Cabinet member with lead responsibility	Councillor Milkinderpal Jaspal Cabinet Member for Governance	
Corporate Plan outcome	Future Practice	
Wards affected	(All Wards);	
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Recommendation:

The Confident, Capable Council Scrutiny Panel is asked to consider should the Council extend its legal services to offer services to the third and public sector?

1.0 Purpose

The Confident, Capable Council Scrutiny Panel is asked to consider can the Council extend its legal services to offer services to the third and public sector?

The Panel is being asked to undertake a piece of policy development to explore this area of work and consider whether it is something that the Council should pursue. The Panel after hearing from the witnesses are requested to draw up some recommendations to go to the Council's cabinet on whether in principle the Council should take further action. If this is the case, it will be up to the Cabinet to determine whether to proceed and what the details might look like.

2.0 Future of Legal Services

There is a compelling need for Councils to explore more radical options for delivering legal services. Options may include greater partnership working (with both the private and public sector), shared services and alternative business structures.

- 2.1 In the last ten years, the market for delivery of legal service to local authorities has changed significantly reflecting changes in:
- The law: notably the Legal Services Act 2007 which opened the door for new suppliers by permitting non-solicitors to own and manage law firms through the creation of a variety of delivery models such as Alternative Business Structures (ABS) instead of the traditional legal firms which are based around partnership arrangements with the only investors being those who belong to the Solicitor profession
 - Financial pressure across local government requiring direct savings from the legal department:
 - How local authorities are providing services to the public which has a ripple effect on the demand profile for legal services
 - An increase in the supply of legal services from other local authorities nationally
- 2.2 'The Legal Department of the Future' produced by The Local Government Lawyer which is underpinned by a survey of 100 heads of local authority legal services in England and Wales in July and November, 2015 identified the top three management challenges to be:
- cost control/budgetary challenges,
 - lack of experience/resource in client departments (What this can mean in practice is that less experienced officers seek reassurance more frequently from the legal team before taking decisions, adding to the department's workload. Or they fail to obtain legal input in situations when they should do, leading to wrong decisions being taken and greater legal risk for the local authority), and
 - recruitment and retention (This reflects the fact that three years ago the private sector was just coming out of the other side of the recession; now it is buoyant, particularly when it comes to recruiting in-demand areas of property, planning and regeneration).
- 2.3 Some 44% expect the overall volume of work to increase 'significantly' with a further third (37%) expect demand to increase 'slightly' (by 5-10%), meaning that, overall, four in five heads of legal services (81%) expect an increased workload.
- 2.4 The most in-demand practice areas that heads of legal services suggest are currently procurement/contracts, planning, property and child protection.
- 2.5 Those authorities currently selling legal services report that they are principally selling to maintained schools (78%), academies and free schools (71%) and other local authorities (67%). These were followed by: charities and not-for profit organisations (35%); housing associations and ALMOs (33%); parish and town councils (31%); police and crime commissioners (18%); and blue light services (18%). Recently-established organisations such as combined authorities are also a source of work for some teams (14%).

2.6 The services that these local authority clients want to buy are: employment matters (50%); litigation and enforcement (42%); procurement and contracts (38%); property and asset management (38%); planning (27%); adult social services (27%); and child protection (27%).

3.0 Powers to charge or trade

3.1 Charging

Charging for services has been a feature of local government for a considerable time. For example:

- **Specific powers** to charge for services are contained in a variety of local government statutes. For example, section 19 of the Local Government (Miscellaneous Provisions) Act 1976 permits charging for the use of leisure and recreational facilities.
- The **Local Government Act 2003** introduced a general power to charge for the provision of any discretionary service. The charging powers do not apply to services which an authority is mandated or has a duty to provide. However, councils can charge for discretionary services (that is, services they have power to provide but are not obliged or have a duty to provide by law).

The recipient of the discretionary service must have agreed to pay for the provision of such services. The 2003 Act power cannot be used where charging is prohibited or where another specific charging regime applies. Charging is limited to cost recovery only.

- The charging provisions contained in the **Localism Act 2011** follow, very closely, the requirements of the 2003 Act to allow local authorities to charge up to full cost recovery for discretionary services. The general power to charge is subject to a duty to secure that, taking one financial year with another, the income from charges does not exceed the costs of provision.

As with the 2003 Act powers, charging for things done in exercise of the General Power of Competence within this Act is not a power to make a profit from those activities. So, authorities wishing to engage in commercial trading for profit will need to rely on other powers to trade.

3.2 Trading

The legislation relevant to local authority trading uses the term 'commercial purpose' to describe trading activities. Government guidance suggests 'commercial purpose' means having a primary objective to make a profit from the trading activities in question.

For councils considering a new trading venture it will be essential to first determine whether it is acting pursuant to a 'commercial purpose'. If so, the law requires councils to pursue that commercial purpose via a company. If not, alternative arrangements to establishing a company are also explored below.

4.0 So how can the Council extend its legal services to offer services to the third and public sector?

4.1 In House Provision

This is largely seen nationally by local authorities as the "norm", where most services are provided In House, but are supplemented by shared services providers and external law firms as required on specialist issues.

This will continue the practise at the Council and the main reasons for remaining in house is that the Council will retain control of an in-house team and expertise with the flexibility to deliver the service as needs arise. It also allows a clear line of responsibility, accountability and governance.

However, there may not be the resources or expertise currently in house to deliver the services that are required by the voluntary sector or other public sector bodies. Any new posts would need to pay for themselves in extra income or saved external costs.

There could also be prioritisation issues and conflicts of interest within the authority along with a lack of sales and marketing experience and the cost of any additional potential regulation and indemnity insurance.

Remaining in house would mean that should the Council extend its legal services to offer services to the third and public sector it would only be able to so on a cost recovery basis.

4.2 Shared Service Delivery

Shared legal services in certain circumstances can be beneficial in drawing on existing expertise, capacity and purchasing power, and in some cases even creating profit by turning the shared services into a commercial venture.

However, there are a number of disadvantages of shared legal services which are:

- Viability of the model, upfront cost, procedures (i.e. any procurement process required, Solicitors Regulatory Authority (SRA) compliance if applicable) and disruption cancelling out long-term savings. This will largely depend upon the size and type of the model chosen. independent legal function; and a shared service would lead to a disconnection between the legal team and internal client departments.
- Disconnect between legal teams and local authorities if they are not working exclusively and closely with their own authority.
- Conflict of interest between prioritising work for own authority versus partner local authority.
- Cultural fit and decision-making process issues.

The shared services model only really works successfully where there are willing partners to make it happen, as can be in the case in two tier areas. With little interest from potential

partners to the Council for a shared legal service it is considered not viable, at this stage, to pursue this option.

4.3 Alternative business structures (“ABS”), including joint ventures

Since the introduction of the Legal Services Act 2007 it has become possible for law firms to be owned by non-lawyers and businesses which are not law firms. These are known as ‘alternative business structures’ or ‘ABS’ and must be licensed by the SRA.

An ABS is a limited company regulated by Companies House and subject to the normal company regulations, however there is an additional requirement that they are licensed by the SRA to conduct legal business. The licensing procedure is designed to ensure that the owners of an ABS are fit and proper persons to own a legal business and that the procedures in place to fund the company mirror those of a conventional legal practice with the object of protecting clients and their money. This means that local authorities can now set up a wholly owned company offering legal services for a commercial purpose, which permits it to offer legal services to other parts of the public sector and indeed to commercial companies who are carrying out local authority or other public sector functions.

Prior to setting up an ABS, the Council would need to approve a business case and meet SRA requirements which would include robust conflict, financial and risk management procedures.

Four local authority legal departments have become an ABS. One of these is Essex County Council whose initial forecasting had suggested that an ABS would be one of the key enablers for a growth strategy that could deliver additional surplus of £165,000, £963,000 and £1.8m from 2017/18 through to 2019/20.

Essex County Council have said that the ABS would enable Essex Legal Service “to grow its client base and pursue business not currently permitted under the constraints of local authority trading and the Solicitors Regulation Authority”.

The main reason for setting up an ABS are it creates an ability to work for anyone with a subsequent potential revenue income stream for the authority. As a separate company, it will have its own brand, keeps some risk away from the Council and could provide opportunities for third party investment in the service.

The main reasons for not setting up an ABS are the council will lose overall control of the service; whether there is a sufficient market for the services and the risk that entails and whether sufficient arrangements would be available to manage/monitor the ABS.

5.0 Approach

The Committee will hear from the following witnesses in evidence sessions to help the Panel answer the question – should the Council extend its legal services to offer services to the third and public sector?

The witnesses have been asked to answer the initial questions below and the Panel will have the opportunity to have further questions of the witnesses on their evidence. The witnesses are:

5.1 Legal Services ABS

At **18:05** representative(s) from a local authority ABs (Invicta Law (Kent Legal)) will attend to answer the following initial questions:

- What work is needed to set up a ABS?
- What sort of structure works best?
- How profitable can a ABS be?
- What volume of work is needed to make a ABS profitable?
- What is needed to make a ABS successful?
- What sort of services are provided for voluntary and public sector organisations?

5.2 Social Housing Market

At **18:35** social housing market representatives from registered social landlords will attend to answer the following initial questions:

- What sort of legal advice do social housing market providers require?
- Where do they get that advice from currently?
- Is the advice sufficient for the providers' purposes?
- How much could the providers afford to pay for legal advice?
- How many providers would be interested in getting legal advice from the council if it provided it?

5.3 Voluntary Sector

At **19:05** Citizens Advice will attend to answer the following initial questions:

- What sort of legal advice do voluntary groups/community groups require?
- Where do they get that advice from currently?
- Is the advice sufficient for the groups purposes?
- How much could groups afford to pay for legal advice?
- How many groups would be interested in getting legal advice from the council if it provided it?

5.4 Panel Recommendations

From **19:35** the Panel will consider the evidence heard and decide how it may wish to the answer the question should the Council extend its legal services to offer services to the third and public sector?

6.0 Financial implications

At this stage, Scrutiny Panel is requested to consider policy development in this area. Recommendations made by the Panel on review of the evidence may have associated financial implications. Those financial implications would be explored in a future report to Cabinet if required. [GE/07092017/O]

7.0 Legal implications

There are none at this stage as the Scrutiny Panel is looking at how the Council could develop its policy in this area. Any recommendations from the Panel's consideration of the evidence may have legal implications but these would be included, if needed, in a report to the Cabinet in response to those recommendations. (RB/1092017/O)

8.0 Equalities implications

There are none at this stage as the Scrutiny Panel is looking at how the Council could develop its policy in this area. Any recommendations from the Panel's consideration of the evidence may have equalities implications but these would be included, if needed, in a report to the Cabinet in response to those recommendations.

9.0 Environmental implications

There are none at this stage as the Scrutiny Panel is looking at how the Council could develop its policy in this area. Any recommendations from the Panel's consideration of the evidence may have environmental implications but these would be included, if needed, in a report to the Cabinet in response to those recommendations.

10.0 Human resources implications

There are none at this stage as the Scrutiny Panel is looking at how the Council could develop its policy in this area. Any recommendations from the Panel's consideration of the evidence may have human resources implications but these would be included, if needed, in a report to the Cabinet in response to those recommendations.

11.0 Risk implications

There are none at this stage as the Scrutiny Panel is looking at how the Council could develop its policy in this area. Any recommendations from the Panel's consideration of the evidence may have risk implications but these would be included, if needed, in a report to the Cabinet in response to those recommendations.

12.0 Corporate landlord implications

There are none at this stage as the Scrutiny Panel is looking at how the Council could develop its policy in this area. Any recommendations from the Panel's consideration of the evidence may have corporate landlord implications but these would be included, if needed, in a report to the Cabinet in response to those recommendations.

13.0 Schedule of background papers

The Law Society of England and Wales - [the Future of Legal Services](#)
Society of Local Authority Chief Executives 2014 report - [Are legal services special?](#)
Local Government Lawyer – [the legal department of the future](#)
Local Government Association - [Enterprising councils](#)
[Creation of alternative business structure](#) – Essex Legal Services