

APPENDIX 2

CONSTITUTION WORKING PARTY		
Report Title	LEGISLATION UPDATE	
Key Decision	N/A	Item No 4
Ward	All	
Contributors	Head of Law	
Class	Part 1	Date 6 June 2012

1. Summary

This report updates members on progress of the implementation of the Localism Act 2011 and other legislation, highlights actions taken to respond to date and poses questions to be addressed by the Council in future to ensure that its Constitution reflects compliance in future.

2. Purpose

The purpose of this report is to ensure that recommendations are made to Council at the appropriate time to ensure that the Constitution remains fit for purpose

3. Recommendations

That CWP note the constitutional issues which need attention and ask officers to bring a further report back to a subsequent meeting of this CWP at the appropriate time but in any event prior to the next meeting of the Council in September 2012.

4 Background

There has been a raft of recent legislative change which will require amendments to the Council's Constitution. These include:-

- The Localism Act 2011 (see Appendix 1 for presentation summary)
- Health and Social Care Act 2012 (see Appendix 2)
- Public Services (Social Value) Act 2012 (See Appendix 3)

5. The Localism Act 2011

- 5.1 This is a lengthy Act which makes huge changes to local government, which came into law in November 2011. It has 271 sections, 25

schedules and 142 regulation making powers and is being given practical force through a series of commencement orders, regulations and statutory guidance. Some of the key features and the state of implementation are very briefly listed below:-

- A new power of general competence – in force now
- Changes to the permissible models of political governance model – in force now
- Clarification of the law on pre-determination – in force now
- The introduction of a new ethical framework – to be effective from 1.7.12, some regulations still awaited.
- Provisions relating to pay accountability – in force now.
- Requirement for Council Tax referendum if Council Tax exceeds Secretary of State “principles”
- Community right to challenge through which community, voluntary or employee bodies have the right to express an interest in providing a local authority service. – sections in force with regulations to make operational laid on 21st May 2012 alongside draft statutory guidance to be effective from 27th June 2012.
- Assets of community value – a new duty to maintain a list of assets of community value, with a procedure to be implemented before a disposal may be effected – in force new but awaiting regulations to make operational.
- Neighbourhood planning – all in force now save provisions relating to referendums, with regulations in place.
- Housing – changes to allow local authorities to choose “qualifying persons for allocation policy; flexible tenancies; self financing – in force now.
- London – transfer of regeneration functions etc to Mayor of London – partly in force now.

5.2 The Council has already made some changes to comply with the Localism Act 2011. For example in March this year, the Council approved a pay policy statement for 2012/13, as it was bound by law to do before 1st April 2012. Also, there appears elsewhere on this agenda a report which sets out a proposal for a new ethical framework which is designed to comply with the requirement to have a new code of conduct and procedure for handling complaints of breach from 1st July 2012.

- 5.3 Other changes may require the Council to adopt new procedures but will not require major constitutional change. The new power of competence, the provisions on housing and on London exemplify this.
- 5.4 Some new provisions will need changes to the Council's Constitution, (or at least to be considered in relation to the schemes of delegation) but there are no regulations in place to allow this to happen yet. For example, the provisions relating to assets of community value require regulation and statutory guidance but at the time of writing these had not been published.
- 5.5 Included in the Council's Constitution are several provisions where the Council has anticipated the impact of the Localism Act. For example, the Act is explicit that there must be a Scrutiny Officer with functions defined by law and there are already provisions in the Council's Constitution for the councillor call for action.

6 **Localism Act Issues**

- 6.1 Some provisions will require changes to the Constitution and/or schemes of delegation.

Flood management

- 6.2 The Act requires that those authorities who are lead flood management authorities, like Lewisham, ensure that there is an overview and scrutiny body which has the function of reviewing and scrutinising the exercise by risk management authorities of flood risk management or coastal erosion risk management functions affecting the area. Council will need to decide which overview and scrutiny body is to fulfil this function and amend its terms of reference.

Petition scheme

- 6.3 The Act abolishes the requirement to have a petition scheme, which is currently reflected in the Council's Constitution. Members will need to decide whether they wish to continue with that petition scheme, discontinue it or modify it in some way.

Co-option scheme

- 6.4 The Localism Act 2011 allows for co-opted members to be allowed to vote on overview and scrutiny bodies if the Council has adopted a co-option scheme. The Council does not have such a scheme at present and may wish to consider whether it wishes this to remain the case.

Community right to challenge

6.5 The regulations and statutory guidance relating to the community right to challenge have been published as recently as 21 May and will be effective from 27th June, provided parliamentary approval is forthcoming before then as is expected. The community right to challenge allows community, voluntary and employee bodies to express an interest in providing relevant Council services. Though certain services are excluded by regulation, (mainly health services or those services provided to named persons with complex individual health or social care needs), the regulations and statutory guidance set out the criteria for rejection of an expression. These include Insufficient information to demonstrate that the organisation has:-

- Sufficient financial resources
- Capability to provide or assist in the provision of the service.
- Identified the service and the geographical area to which their expression of interest relates
- Identified the outcomes to be achieved and how they will promote the social environmental or economic wellbeing of the area, and
- How they will meet users' needs

6.6 An expression of interest may be made at any time unless the Council has published a period for expressions of interest outside which it may refuse to consider any expression. A decision will need to be made about whether this is appropriate and if so when, but this is not a constitutional matter.

6.7 The Council may only reject an expression of interest on grounds set out in the regulations or statutory guidance. This includes:-

- failure to comply with the Act or Guidance
- failure to provide adequate information in the expression
- unsuitability to provide the service (based on the requirements for information to be set out in the expression)
- where a decision has been made and evidenced in writing to stop the service provision
- the service is subject to a procurement exercise already
- negotiations are in train with a third party to provide the service
- the Council has published its intention to consider the provision of the service by an employee body
- the expression is vexatious or frivolous
- acceptance would be likely to lead to a breach of the law/statutory duty

6.8 If an expression of interest is accepted, then the Council has no choice but to conduct a procurement exercise in accordance with existing law even if there was no previous intention to externalise the service. This does not mean that the organisation submitting the expression of

interest will be successful in that exercise, merely that the Council must conduct it.

- 6.9 The statutory guidance sets out procedural matters for timescales and the procurement exercise, including consideration of social value in the decision whether to award, timing of decision notices etc.
- 6.10 These provisions and those contained in the Public Services (Social Value) Act 2012 (which is summarised at Appendix 2) mean that a new set of contract procedure rules will be required. Work has begun to revise the existing procedure now that the law is clear and the draft statutory guidance available. A report will be available for submission to the CWP in time for a detailed report to be submitted to full Council in September 2012.
- 6.11 In the meantime if an expression of interest is received it is proposed that decisions required to ensure compliance with the community right to challenge be delegated to the ED Resources and Regeneration on advice from the Head of Law. This is generally a matter for the Mayoral Scheme of Delegation.

Neighbourhood planning

- 6.12 The provisions relating to neighbourhood planning are summarised at Appendix 1. Regulations are in place save those which will relate to referenda in this context. The regulations relate to applications to become a neighbourhood area, designation as a neighbourhood forum and the procedures pertaining to both. They also relate to the procedure for the adoption of a neighbourhood development plan and orders. Officers are working up those procedures in detail but the most relevant point for members to consider at this juncture is who should be responsible for decisions in relation to neighbourhood planning.
- 6.13 There have been no new regulations relating to the responsibility for planning functions, so it appears that the responsibility for planning matters remains split between the Mayor and Council as now. Members are however asked to give consideration as to whether matters relating to neighbourhood planning should be reserved to members explicitly and not delegated to officers.

Assets of community value

- 6.14 There are very detailed provisions relating to the requirement to maintain a register of assets of community value and the procedures which must be followed before such an asset may be disposed of. These are summarised in Appendix 1. However operational regulations and guidance are awaited and these will be dealt with in a subsequent report to CWP. They may not be available until October 2012. In the meantime, officers are making preparations for

implementation of new procedures so far as is possible without the detailed regulations.

Joint committees

- 6.15 On 4th May 2012 regulations were published which deal with the power of Councils and their executives to form joint committees. They appear to offer more flexible arrangements for the discharge of functions by another authority and/or its executive. The implications of these regulations on the Council's current arrangements seems minimal at this stage, but a further report will deal with their impact in due course. They appear to accommodate the situation, previously not allowed, that an executive may wish to delegate the discharge of its functions to another authority which does not have executive arrangements.

7 Health and Social Care Act 2012

- 7.1 The main provisions of the Act are summarised in Appendix 2. In respect of constitutional matters, the two most significant elements of the Act are the requirement to establish Health and Wellbeing Boards and the transfer of public health functions to the Council.

Health and Wellbeing Boards (HWBs)

- 7.2 There is to be a new duty on local authorities to establish a Health and Wellbeing Board for its area. It comes into effect in April 2013. The Act provides that the HWB consist of :-
1. At least one councillor of the authority who is nominated by the Mayor (and may include the Mayor)
 2. The Council's director of adult services
 3. The Council's director of children's services
 4. The Council's director of public health
 5. A representative of the Local Healthwatch organisation for the area
 6. A representative of each relevant clinical commissioning group and
 7. Such other persons or representatives of such other persons as the Council thinks appropriate
- 7.3 This means that the Mayor can nominate whichever councillors he chooses (under (1) above) and the Council must appoint them; and the Council can appoint whichever people, councillors or otherwise, it chooses under (7), subject only to the Council's own constitutional requirements, which the Council is free to specify.
- 7.4 In addition the Board can appoint such other persons as it considers appropriate and a person may represent more than one clinical commissioning group on the Board if the Board agree.

- 7.5 After the Board is established the local authority must consult the HWB before the Council may make another appointment. This does not apply to Mayoral nominations.
- 7.6 The HWB is to be a committee of the Council as if established under Section 102 Local Government Act 1972 unless there are regulations disapplying provisions that would apply to other committees.
- 7.7 There is a great deal of flexibility in these provisions, and members will need to make a decision about the constitution of the HWB.

Functions of the HWB

7.8 The HWB:-

- Must encourage persons who arrange for the provision of any health or social services in the area to work in an integrated manner, for the purpose of advancing the health and wellbeing of the area
- Must provide such advice, assistance or other support as it thinks appropriate for the purpose of encouraging the making of arrangements under Section 75 NHS Act 2006 in connection with the provision of such services
- May encourage persons who arrange for the provision of health related services in its area to work closely with the HWB
- Must prepare joint strategic needs assessments (as set out in Section 116 Local Government Public Involvement in Health Act 2007), in respect of which the Council and each partner clinical commissioning group will prepare a strategy for meeting the needs included in the assessment by the exercise of the functions of the Council, the NHS Commissioning Board or the clinical commissioning groups
- May give its opinion to the Council on whether the Council is discharging its duty to have regard to any joint strategic needs assessment (under Section 116 Local Government Public Involvement in Health Act 2007) and any joint health and wellbeing strategy prepared (under Section 116A Local Government and Public Involvement in Health Act 2007) in the exercise of its functions
- May exercise any functions that are exercisable by the Council, and the Council may arrange for the exercise of such functions by the HWB, save that the HWB may not exercise the Council's functions under Section 244 NHS Act 2006 (statutory consultee in relation to substantial variations in service etc)

NHS Commissioning Board participation in HWB

- 7.9 Where the HWB is preparing a joint strategic needs assessment or a joint health and wellbeing strategy, the NHS Commissioning Board must appoint a representative to join the HWB to participate in its preparation. If the HWB is considering a matter that relates to the exercise or proposed exercise of the commissioning functions of the NHS Commissioning Board, the NHS Commissioning Board will appoint a representative to participate in consideration of that matter if the HWB so requests.

Joint arrangements

- 7.10 Two or more HWBs may make arrangements to exercise any of their functions jointly, or by a joint sub-committee, or may appoint a joint sub-committee to advise them on any matter.

Supply of information to HWB

- 7.11 For the purposes of assisting it in the performance of its functions, a HWB may request such information as may be specified in the request from the following people who must comply with the request:-

- The Council
- Any representative of the Local Healthwatch organisation on the HWB
- Any representative of a clinical commissioning group on the HWB
- Any person appointed by the Council other than by Mayoral nomination
- Any other person appointed to the Board by the Board

- 7.12 Such information may only be used by the HWB to enable or assist it to perform its functions and must relate to a function of the person of whom the request is made, or a person in respect of whom that person exercises a function.

A Shadow Health and Wellbeing Board

- 7.13 The Council already operates a shadow health and wellbeing board on which sit those people set out in Appendix 2. This accords with best practice in preparations for the implementation of the Act. The Council will have to decide whether to formalise these arrangements in its constitution, both in the interim until implementation of the Health and Social Care Act, and after. The Healthier Communities Select Committee is considering a report on the work of the Shadow Health and Wellbeing Board on 30th May and any views will be available for the meeting of CWP.

The transfer of public health functions

- 7.14 Public health functions which were previously the responsibility of Primary Care Trusts will transfer to the local authority in April 2013. The Act provides that a local authority, acting jointly with the Secretary of State must appoint an officer to be known as the director of public health. Among the responsibilities of the director of public health will be a requirement to produce an annual report on the health of the people in the area. The report must be published by the Council. There is likely to be guidance to which the Council must have regard in relation to the appointment of the director and the discharge of their public health functions.
- 7.15 Constitutional arrangements will need to be drafted dealing with such matters as:-
- (1) the composition, terms of reference and rules of procedure for the HWB
 - (2) the appointment and dismissal procedures for the director of public health recognising him/her as a statutory officer with statutory functions
 - (3) schemes of delegation in relation to public health matters
 - (4) arrangements for the scrutiny of health functions, and the relationship of scrutiny bodies with the HWB

8 Effecting changes

- 8.1 This report brings together some strands of constitutional change which will need to be made over the next few months. Some, like those relating to the community right to challenge and the new ethical framework, are more imminent than others. Given the scale and pace of change, this report is not exhaustive. It simply sets out some of the key areas that are known now and urges members to give consideration to them. Officers propose that a report be submitted to full Council in June to effect changes to the ethical framework and to facilitate decision making in respect of the community right to challenge on a temporary basis from 27th June
- 8.2 Thereafter it is proposed that a much fuller report be prepared for the September meeting of Council to move constitutional changes on to reflect the changing legislative landscape. At that point new contract procedure rules to implement the community right to challenge should have been finalised for submission to Council and other matters referred to in this report may be dealt with.
- 8.3 It may also be that the regulations and guidance about other elements requiring constitutional change will be available in time for that meeting,

but if not, it may be that there will need to be a series of reports to CWP and full Council over the coming year requesting piecemeal amendment to the Council's constitutional arrangements as regulations and statutory guidance come into effect.

9 Legal implications

- 9.1 Changes to the Council's constitution are a matter for full Council through the role of the CWP is to advise the Council on any amendments.
- 9.2 The main legal implications are contained in the body of the report.
- 9.3 The Constitution must comply with the provisions of the Local Government Act 2000 as amended by the Localism Act and contain statutory elements set out in primary and secondary legislation. The report is designed to ensure compliance.
- 9.4 Where changes are necessary to schemes of delegation to reflect new law, the responsibility for amending them will rest either with the Mayor or the Council depending on whether the matter is an executive or non-executive function. Save for regulations dealing with joint arrangements between Councils, there are no new functions regulations amending executive and non-executive responsibilities, and the procedures for amending schemes of delegation set out in the constitution currently will apply unless and until any further regulations are made..

10 Financial implications

There are no specific financial implications arising from this report

11 Equalities implications

- 11.1 The Equality Act 2010 (the Act) brings together all previous equality legislation in England, Scotland and Wales. The Act includes a new public sector equality duty (the equality duty or the duty), replacing the separate duties relating to race, disability and gender equality. The duty covers the following nine protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.
- 11.2 In summary, the Council must, in the exercise of its functions, have due regard to the need to:
 - eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.
 - advance equality of opportunity between people who share a protected characteristic and those who do not.

- foster good relations between people who share a protected characteristic and those who do not.
- 11.3 As was the case for the original separate duties, the new duty continues to be a “have regard duty”, and the weight to be attached to it is a matter for the Mayor, bearing in mind the issues of relevance and proportionality. It is not an absolute requirement to eliminate unlawful discrimination, advance equality of opportunity or foster good relations.
- 11.4 The Equality and Human Rights Commission issued guides in January 2011 providing an overview of the new equality duty, including the general equality duty, the specific duties and who they apply to. The guides cover what public authorities should do to meet the duty. This includes steps that are legally required, as well as recommended actions. The guides were based on the then draft specific duties so are no longer fully up-to-date, although regard may still be had to them until the revised guides are produced. The guides do not have legal standing unlike the statutory Code of Practice on the public sector equality duty, However, that Code is not due to be published until April 2012. The guides can be found at:
<http://www.equalityhumanrights.com/advice-and-guidance/public-sector-duties/new-public-sector-equality-duty-guidance/>
- 11.5 Members must be mindful of this duty in considering any proposed amendments to the Constitution.

12 **Crime and Disorder and Environmental implications**

There are no specific crime and disorder or environmental implications, save that the Constitution will still retain overview and scrutiny bodies with responsibility for these functions.

Background Papers

None reported

If there are any queries on this report please contact Kath Nicholson: tel 020 8314 7648.