



COUNCIL

19TH OCTOBER 2017

AGENDA ITEM (9)

COUNCIL RETAINED OFFICER STRUCTURE AND DELEGATIONS AS A CONSEQUENCE OF ESTABLISHMENT OF SHARED SERVICES COMPANY

Accountable Members	Councillor Mark F Annett Leader of the Council Councillor C Hancock Cabinet Member for Enterprise and Partnerships
Accountable Officer	Frank Wilson Head of Paid Service 01285 623000 frank.wilson@cotswold.gov.uk

Purpose of Report	To set out the new arrangements to enable the Council to continue to discharge its functions once the Council enters into contracts with its own local authority company, Publica, for the delivery of services
Recommendation(s)	<p>(a) That the following Officers be designated to the specified Statutory Officer roles with effect from the date of transfer:-</p> <p>Nigel Adams - Head of Paid Service; Jenny Poole - Section 151 Officer; Bhavna Patel - Monitoring Officer;</p> <p>(b) that the structure in the report be approved, and the Head of Paid Service be authorised to determine the manner in which the discharge by the authority of its different functions is co-ordinated in conjunction with Publica, in line with paragraph 3.8 below;</p> <p>(c) that Officers employed either solely or partly by the Council be employed on the same basis as those Council employees who are transferring to Publica;</p> <p>(d) that the Head of the Paid Service be designated as the Council's Proper Officer for any functions or purposes where the matter does not fall within the specific authority of one of the statutory Officers or any of the roles where dual employment will apply;</p> <p>(e) that the Head of Paid Services be authorised to make any necessary changes to the Council's Constitution as a result of the changes approved pursuant to this report.</p>

Reason(s) for Recommendation(s)	<p>The recommendations reflect the outcome of the vires audit, which sought to ensure that the methods for future delivery are permitted by statute both in terms of a local authority's general ability to act in a certain way and in terms of specific statutory requirements for each service.</p> <p>There will be the need for these methods to be reflected in the Council's Constitution.</p>
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Ward(s) Affected	Not applicable
Key Decision	Not applicable
Recommendation to Council	Not applicable

Financial Implications	Relevant budgetary provision has been made to deal with any financial implications of the transfer, and the associated retained staffing arrangements.
Legal and Human Rights Implications	Detailed legal advice has been sought to assist with the vires audit, including from external sources.
Environmental and Sustainability Implications	Not applicable
Human Resource Implications	<p>The establishment of a company will result in an alternative employment model and a significant reduction in the number of directly-employed Council employees.</p> <p>Where services cannot be delegated, then the Council will use joint employment contracts to ensure they remain intra vires.</p>
Key Risks	Failure to comply with legal requirements for Council-employed roles could lead to legal challenge
Equalities Analysis	No effect on protected groups identified

Related Decisions	<p>(i) Council - 27th September 2016 - Approval to form local authority-owned Companies with 2020 Partner Councils - Minute CL.16</p> <p>(ii) Council - 13th June 2017 - Subject to consultation, approval of required changes following completion of vires audit - Minute CL.20</p>
Background Documents	<p>Company Articles of Association (available in Members' Room or on request)</p> <p>Publica Memorandum of Agreement (available in Members' Room or on request)</p>
Appendices	<p>Appendix A - Draft Service Agreement (excluding the Schedules)</p> <p>Appendix B - Draft Commissioning Framework</p> <p>Appendix C - Draft Communications Protocol</p> <p>Appendix D - Draft Performance Management Approach</p>

Performance Management Follow Up	Implement Council decision(s)
Options for Joint Working	The 2020 Partnership Company option provides for the provision of services through joint working.

Background Information

1. General

1.1 In June 2014, the four GO Shared Services Partner Councils approved a 'Report and Outline Business Case for a "2020 Vision for Joint Working'. The proposition agreed at that time was for:

"Four Independent Councils determining their own policies, priorities and decisions supported by a small number of expert advisors who commission and monitor services either from the private and voluntary sectors or from a jointly owned service delivery company"

1.2 This could effectively lead to councils that do not directly employ any of their own staff, but rather, Councils will jointly own a local authority company which would provide services and deliver outcomes in line with the wishes of each individual council.

1.3 Subsequently, the four 2020 Partner Councils approved a 'Report on Options for Future Delivery Models and Interim Management Arrangements', which had prepared by Activist Ltd.

1.4 In August 2015, the full '2020 Vision for Joint Working Business Case' was prepared. This Business Case, based on the original proposition, forecast to return cumulative savings totalling £38m over a ten-year period with annual revenue savings of £5.7m. External funding of £3.8m towards the cost of the Programme was received from the Government's Transformation Challenge Funding.

1.5 Consequently, the Business Case was agreed and approved by the four Councils in September/October 2015. Subsequently, the 2020 Joint Committee was established and became operational in February 2016, with a number of shared services being established from April 2016. This has resulted in savings of £2,332,000 being delivered for the partner Councils to the end of 2016/17.

1.6 In June 2016, the Joint Committee agreed an updated Business Case and to consult with partner Councils about the proposal to implement a company model. In October 2016, the Councils all agreed a report recommending the creation of a company model comprising three Companies, then described as a Support Services Company, Co-Ordinating Company and a Regulatory Services Company. Cotswold District Council (CDC), Forest of Dean District Council (FoDDC) and West Oxfordshire District Council (WODC) agreed to become members of the three Companies. Cheltenham Borough Council (CBC) agreed to become a member of the Support Services Company and only to receive Finance, HR and ICT from that company.

1.7 It was recognised that the savings from moving to the company model would assist in filling the budget gap that has been identified in the financial strategy as further government grant is cut, New Homes Bonus is transferred to upper tier Councils and the business rates system is reset removing growth seen in recent years.

1.8 As part of the company formation process, work was done with CIPFA and Local Partnerships (together with the LGA) who carried out a peer review on behalf of the Councils which was instrumental in guiding some of the key principles of company governance.

1.9 As agreed, the Publica companies were formed early in 2017 and, over the intervening period, officers have been working to establish the companies to accept the transfer-in of approximately 650 employees. Recently, it has been determined that, to mitigate tax issues, ease complexity for employees, and keep running costs down, only one company is necessary, at least initially. To enable CBC to retain its involvement within the shared service company, this will need to be Publica Group (Support) Ltd., as this is the company of which CBC is a member. This move was welcomed by all partners.

1.10 As part of the arrangements, the Councils will be entering into contracts with Publica to deliver the current joint services, and the remainder of those Councils' services that can be delegated, from autumn 2017. CBC will contract with Publica to receive the services of Finance, HR and ICT services only (in line with the current contract arrangements). A draft of the service agreement is attached at **Appendix A**. Final amendments are being made to the agreement to meet the requirements of all partners including a 'termination by convenience clause'.

1.11 As a result of the creation of Publica and the consequent new contracting arrangements, it is necessary to agree new arrangements to enable the Council to continue to discharge its functions once the Council enters into contracts with Publica for the delivery of services and, therefore, complete the agreed delivery of the 2020 Vision of the partner Councils.

2. New Arrangements as Publica Becomes Operational

Company Governance

2.1 The company governance proposals and services to be included within the company were approved by Council in September 2016 - the key distinctive elements of this type of service delivery mechanism are set out below.

2.2 The company is a public body, wholly owned by the partner councils. Those councils exercise control over the company through the appointment of the Leaders of the Councils to act as the Member (Shareholder) Representatives and appointing Directors to the Company Board. It is up to each Council to determine how their Leader completes those obligations on behalf of the Council. This approach mirrors the approach used for Ubico, the other "Teckal" company of which this Council is a member.

2.3 A "Teckal" company is the most commonly used company structure in public services as it provides for Councils to give work to the company without the need to go through otherwise expensive procurement processes. It also allows for the company to trade up to 20% of its turnover. "Teckal" companies are often described as "in-house" companies - as the Council exercises clear control over the company. In many respects, they are just one step removed from the historic approach of Council DSOs (Direct Service Organisations).

2.4 The Board of Directors for the Company has been now been established by the Councils with an independent Non-Executive Chairman, three independent Non-Executive Directors and four Executive Directors. CBC has appointed a Councillor-nominated Non-Executive Director. The Board of Directors will manage the Company and ensure that the Councils' objectives and contractual requirements are fulfilled. The Board of Directors will seek approval and authority from the Member (Shareholder) Representatives when required by the Company's constitution on matters that are 'reserved' for the Councils approval (such as admitting new members). The Company will establish an executive management structure that will be responsible for the day-to-day operations and management of the company in much the same way as the current Councils do.

Commissioning Arrangements

2.5 The following commissioning arrangements have been agreed by this Council, FoDDC and WODC as part of the previous decisions:-

- the Councils will commit to transfer all functions and services that can be delegated to be provided by the Company;
- the Councils' Statutory Officers will be employed by the Council(s) with an agreement to provide some management activities for Publica;
- the non-delegable Decision-Making Officers will be employed by Publica and the Council under joint employment contracts;
- each Council will have a named Lead Commissioning Officer who will also undertake the statutory role of Head of Paid Service and receive commissioning support and advice;
- clear standards of behaviour, an ethical walls policy and an escalation procedure to deal with any potential conflicts of interest will be established.

2.6 The Company is committed to producing for the Councils a 'Commissioning Framework' as an early deliverable. This is necessary as currently the Council performs both the commissioning of services and is responsible for service management/delivery within its current structure. To avoid unnecessary duplication and take advantage of joint commissioning between the partners, a decision was taken by the Councils to include commissioning within the company. However, to provide a clarity of purpose and demonstrate an arms-length arrangement, it is desirable to have a clear approach to commissioning and subsequent contract monitoring. The framework aims to do this but it is recognised that some of the service specifications are merely descriptive at present.

2.7 An early outline of the commissioning approach is attached at **Appendix B**, together with a Communications Protocol (**Appendix C**) which sets out the key information that needs to be shared between Company and Council to enable Councillors to fulfil their roles in respect of overview and scrutiny.

2.8 **Appendix D** sets out a draft revised approach to performance management which will be adopted to ensure that the links between the councils and the company remain aligned to the outcomes desired by the Councillors and residents.

2.9 The key issues set out in the protocol are :-

- Annual service plans to be agreed by Cabinet after consideration by Scrutiny;
- Quarterly meetings between relevant Cabinet Member and Commissioning Director to review performance;
- Quarterly reports to Overview and Scrutiny Committee with presence of both Commissioning Director and other appropriate Publica Managers.

2.10 The following items are scheduled to be considered by Scrutiny and Cabinet over the coming months:

- Commissioning Framework and Outline Service Plan template;
- Draft Service Plans 2018/19 - February/March 2018;
- On-going Service Reviews - April 2018-April 2019.

2.11 It is further recommended that the Head of Paid Service brings forwards proposals on how the Leader exercises his role in relation to reserved matters decisions within the context the "Strong Leader" governance structure of the Council ensuring both appropriate transparency and scrutiny.

2.12 It has been previously agreed by the Council that the contract durations will be as follows:-

- Commissioning and Advisory Services - ten years plus opportunity to extend for ten years;
- Direct Service Provision - seven years plus opportunity to extend for seven years;
- Support Service Provision - five years plus opportunity to extend for two further periods, each of four years.

2.13 Notwithstanding these contract lengths, it is envisaged there will be a clause in the contract enabling early termination on grounds of 'convenience' on the basis that it would not be in the interest of any of the parties to be locked into an arrangement they were not comfortable with. This would support the spirit of partnership working.

2.14 Service delivery will be managed within the Company in accordance with the service contracts agreed by the Councils. It is proposed that Service Partnership Boards will be established by Publica to enable the relevant Council Cabinet Member, Commissioner and Publica Service Provider to monitor service performance, quality and improvement. Scrutiny Committees will continue to monitor performance across the partnership on a quarterly basis and hold Publica to account.

Delivery of the Remainder of the 2020 Vision Benefits

2.15 The delivery of the remainder on the 2020 Vision benefits will be carried out by Publica under contract to the Councils. The outstanding benefits are primarily related to operational service transformation, commercialisation, and company development that are better suited to being managed within the company. In addition, long-term pension cost savings will be delivered by the Company. As part of the contract with the Company, an element of already approved funding for completing the remainder of the planned transformation under the Company's control will be included. The new Company Board of Directors will be accountable for delivering the necessary changes within the Company to deliver further efficiencies on behalf of the Councils as owners of the Company.

2.16 For avoidance of doubt, existing employees will retain access to the current pension scheme as long as they remain employees of the company or member councils.

3. Impact on Council Structure

Legal Requirements

3.1 Local authorities, as creatures of statute, have to act within the express and reasonably implicit powers granted to them by Parliament. If they do not do so, then their act(s) can be deemed to be ultra vires and, therefore, vulnerable to challenge by way of judicial review or auditor challenge.

3.2 In restructuring any local authority-provided service, it is therefore necessary to ensure that the methods for future delivery are permitted by statute both in terms of a local authority's general ability to act in a certain way, and in terms of specific statutory requirements for each service.

3.3 To provide this assurance, the Council has undertaken a vires audit to ensure all anticipated services can be delegated to Publica. Where delegation is not permitted, the vires audit has identified which parts of the relevant functions must be carried out by the relevant Council's employees. This has been used to determine the scope of any joint employment arrangements and the allocation of tasks carried out by an employee between the joint employers.

Vires Audit and Council Retained Employment

3.4 The Vires Audit identified the principal areas of focus and key principles that have been incorporated into the legal agreements between the Councils and Publica. The vires audit has identified the non-delegable functions and these will be dealt with by retaining some Council employment, making any necessary changes to the Councils' Constitutions and the inclusion of appropriate wording in the contracts to ensure legal compliance.

3.5 Statutory functions are duties or powers given to a local authority to do something or provide something. These functions will always lie with the local authority, and cannot be delegated or contracted out unless otherwise expressly provided for in law. Unless there is an Act or Order permitting delegation (or the relevant statute itself expressly allows the functions to be

exercised/contracted out to a third party), then the exercise of relevant functions cannot be delegated or contracted out.

3.6 A function or decision able to be delegated can be carried out by a third party - this would include Publica Company employees. A function or decision that cannot be delegated has to be carried out by a Council or a Council Officer (i.e. Officer having an employment contractual relationship with the Council).

3.7 There are a number of matters where legislation requires a Council to designate an Officer as the 'Proper Officer' for a specified purpose or function. Recommendation 0 above is intended to cover this aspect.

3.8 The outcome from the vires audit has identified the following functions that are non-delegable, along with some specific statutory roles. These primarily relate to the Councils' delegated decision-making within regulatory functions. In addition, there are some further roles which, whilst they are able to be delegated, it may be appropriate to retain as Council employees for probity reasons, such as commissioning decisions (albeit that ultimately those decisions rest with Councillors). The list below shows the proposed functions to be retained by the Councils which would therefore require some Council employees to undertake them.

Retained Non-Delegable Functions

The following positions will be employed by the Council:-

- Head of Paid Service (and Locality Lead);
- Section 151 Officer;
- Monitoring Officer;
- Electoral Registration and Returning Officer;
- Legal Advisors;
- Counter Fraud Investigators

The following positions will be employed jointly by the Council and Publica:-

- posts with delegated authority for Planning decisions;
- posts with delegated authority for Licensing decisions;
- posts dealing with Car Parking appeals;
- posts with delegated authority for Environmental Regulatory decisions;
- posts designated as deputy Section 151 Officers.

3.9 It is proposed to appoint the majority of these roles on joint employment contracts between the Councils and Publica, with the statutory posts and Legal Officers/Counter Fraud remaining solely Council employees (although they will potentially carry out some work for Publica under a contract between the Council and Publica).

3.10 The Publica Director for Commissioning will both support the Head of Paid Service (Lead Commissioner) and the Publica-dedicated commissioning team to provide appropriate commissioning advice for the Council.

3.11 To enable the Council to discharge these non-delegable functions, it is necessary therefore for each Council to confirm the designation of the key roles and adoption of its retained Officer structure. It is also recommended that the Councils agree that Officers employed either solely or partly by the Council be employed on the same basis as those Council employees who are transferring to Publica, to ensure consistent employment practice across the partnership to ensure equity and fairness of staff.

4. Alternatives/Options

The options have previously been covered in the detailed Business Case reports presented to the Council. The Council could choose to transfer a smaller number of officers to Publica but this would have an adverse impact on the savings for both this Council and its partners.

(END)