

Opportunities for changing the decision making powers of Council Assembly

Introduction

At the meeting of the Democracy Commission held on Monday 12 July 2010 Councillor Mohamed, Chair of the Commission, requested a paper outlining the following issues:-

- i) what decisions currently undertaken by Cabinet could possibly be undertaken by Council Assembly instead;
- ii) what decisions currently undertaken by Cabinet could be devolved down e.g. to community councils; and
- iii) are there any decisions which are presently undertaken by Council Assembly that could be devolved elsewhere e.g. to community councils.

Background

As outlined at the meeting of 12 July, the decisions Council Assembly can undertake is largely governed by what responsibilities the Cabinet are given under the Executive Arrangements.

Part II of the Local Government Act 2000 ('the 2000 Act') provides for the discharge of a local authority's functions by an executive (Cabinet) of the authority, unless those functions are specified as functions that are not to be the responsibility of the authority's executive.

Under section 13 (3) of the 2000 Act the Secretary of State was empowered to make provision for those functions that are not to be the responsibility of the authority's executive.

The Local Authorities (Functions and Responsibilities) (England) Regulations 2000

These are the detailed regulations which the Secretary of State made under section 13 of the 2000 Act.

Section 13(2) of the 2000 Act makes it clear that any function which is not specified in the regulations (which are the majority of functions) are the responsibility of the executive.

They divide functions into three categories:

A. Functions which are not to be the responsibility of an authority's executive (i.e. functions which the executive can not exercise).

B. Functions which may be the responsibility of an authority's executive (i.e. functions which can, but do not need to be exercised by it).

C. Functions which are not to be the sole responsibility of an authority's executive (i.e. functions which may be exercised by the executive subject to the limitations set out in the regulations).

A. Functions which are not to be the responsibility of an authority's executive (i.e. functions which the executive can not exercise). These are set out in Schedule 1 of the regulations.

The first set of functions referred to in the regulations (**those which cannot be exercised by the executive**) are excluded because they are either subject to a separate and specialised statutory regime (such as planning) or they require an evaluation (which may be quasi-judicial) of the merits of an application (as in licensing) or are functions which are exercised by the full council (council assembly) or would otherwise be constitutionally unsuitable for exercise by the executive. They fall into the following categories (under each category there are numerous specific functions):

- (a) functions relating to town and country planning and development control;
- (b) licensing and registration functions;
- (c) functions relating to health and safety at work;
- (d) functions relating to elections;
- (e) functions relating to name and status of areas and individuals (i.e. name changes, community governance reviews and conferring honorary titles);
- (f) powers to make, amend, revoke or re-enact by-laws;
- (g) powers to promote or oppose local or personal Bills;
- (h) functions relating to pensions of local government employees;
- (i) miscellaneous functions including appointment of staff, making standing orders, and various functions relating to highways and footways.
- (j) various consequential functions, such as imposing conditions or limits on licences granted in exercise of one of the functions specified in (a) to (i) above;
- (k) making arrangements for the discharge of functions by a committee or officer (under section 101 LGA 1972);
- (l) making appointments to committees under s.102 Local Government Act 1972 ('LGA 1972');
- (m) the function of making, amending, revoking or replacement of a members' allowances scheme;
- (n) the function of determining the amount of any allowances payable to members of the authority;
- (o) any other function which, under any public or local Act or any subordinate legislation, can only be discharged by an authority (i.e. which can only be discharged by the full council).

Under Southwark's Constitution these functions are already exercised by a combination of Council Assembly, committees e.g. the planning committee and the licensing committee, a Pensions Advisory Panel and the Electoral Registration Officer.

B. Functions which may be the responsibility of an authority's executive (i.e. functions which can, but do not need to be exercised by it). These are set out in Schedule 2.

The functions set out in Schedule 2 (**which may be the functions of an executive but do not have to be**) are a miscellaneous set of functions which relate to

education, police, and the environment. What they have in common is that they are viewed by the government as being the types of matter which a local authority could reasonably wish to make subject to arrangements other than being exercised by the executive. These are known as the 'local choice functions' and a local authority may decide that they are to be exercised by a committee with a degree of specialist expertise or by an officer.

The functions in Schedule 2 are as follows:-

Any function under a local Act other than a function specified or referred to in regulation 2 or Schedule 1 of the 2000 Regulations.

The determination of an appeal against any decision made by or on behalf of the authority.

The appointment of review boards under regulations under subsection (4) of section 34 (determination of claims and reviews) of the Social Security Act 1998.

The making of arrangements in relation to appeals against the exclusion of pupils from maintained schools.

The making of arrangements pursuant to sections 94(1), (1A) and (4) of the School Standards and Framework Act 1998 Act ('the 1998 Act') (admissions appeals).

The making of arrangements pursuant to section 95(2) of the 1998 Act (children to whom section 87 applies: appeals by governing bodies).

The making of arrangements under section 20 (questions on police matters at council meetings) of the Police Act 1996 for enabling questions to be put on the discharge of the functions of a police authority.

The making of appointments under paragraphs 2 to 4 (appointment of members by relevant councils) of Schedule 2 (police authorities established under section 3) to the Police Act 1996.

Any function relating to contaminated land.

The discharge of any function relating to the control of pollution or the management of air quality.

The service of an abatement notice in respect of a statutory nuisance.

The passing of a resolution that Schedule 2 to the Noise and Statutory Nuisance Act 1993 should apply in the authority's area.

The inspection of the authority's area to detect any statutory nuisance.

The investigation of any complaint as to the existence of a statutory nuisance.

The obtaining of information under section 330 of the Town and Country Planning Act 1990 as to interests in land.

The obtaining of particulars of persons interested in land under section 16 of the Local Government (Miscellaneous Provisions) Act 1976.

The making of agreements for the execution of highways works.

The appointment of any individual—

(a) to any office other than an office in which he is employed by the authority;

(b) to any body other than—

(i) the authority;

(ii) a joint committee of two or more authorities; or

*(c) to any committee or sub-committee of such a body,
and the revocation of any such appointment*

The making of agreements with other local authorities for the placing of staff at the disposal of those other authorities.

Any function of a local authority in their capacity as a harbour authority (to the extent that the function does not fall within paragraph 1 of this Schedule.

Functions under sections 106, 110, 111 and 113 of the Local Government and Public Involvement in Health Act 2007 relating to local area agreements.

C. Functions which are not to be the sole responsibility of an authority's executive (i.e. functions which may be exercised by the executive subject to the limitations set out in the regulations). These are set out in Schedule 3.

The functions set out in Schedule 3 **are not to be the sole responsibility of an authority's executive**. These are the various plans and strategies which the council now has to produce i.e. the Annual Library Plan, Best Value Performance Plan, Children and Young People's Plan, Crime and Disorder Reduction Strategy, Development plan documents, Licensing Authority Policy Statement, Local Transport Plan, Sustainable Community Strategy and Youth Justice Plan.

Certain actions in respect of these plans or strategies are excluded from being the responsibility of the executive. This applies to:

(a) formulating or preparing the plans or strategies listed in Schedule 3;

(b) formulating plans or strategies for the control of the authority's borrowing or capital expenditure;

(c) formulating or preparing any other plan or strategy whose adoption or approval is, by virtue of the 2000 Regulations to be determined by the authority.

Point (c) is a reference to Schedule 4 of the Regulations which contains another list of functions which would normally be the responsibility of the executive and provides that in the circumstances listed in the schedule these functions must be exercised by the authority itself and not the executive.

The actions excluded from being the responsibility of the executive are as follows:

(a) the giving of instructions requiring the executive to reconsider any draft plan or strategy submitted by the executive for the authority's consideration;

(b) the amendment of any draft plan or strategy submitted by the executive for the authority's consideration;

(c) the approval, for the purpose of its submission to the Secretary of State or any Minister of the Crown for approval, of any plan or strategy (including those in draft) where any part of the same is required to be submitted; and

(d) the adoption (with or without modification) of the plan or strategy.

Although the provision prevents the executive having sole responsibility for these plans, the way in which responsibility is shared between the executive and the authority is very much a matter for each individual authority. There could, for

example, be a process whereby, once the detailed plan is formulated by the executive, it is accepted by the authority with a minimum of scrutiny. Equally, it is open to the authority to set up a system which involves detailed examination and amendment where necessary of every aspect of the plan. In addition section 101 LGA 1972 does not apply to the functions which an authority has to assume as a consequence of the 2000 Regulations. In other words, the council cannot delegate the responsibility of discharging these functions to a committee, sub-committee, or an officer.

An executive has the responsibility of amending, modifying, varying or revoking a plan of the type referred to in the preceding paragraph where this is:

- (a) required for giving effect to requirements of the Secretary of State or a Minister of the Crown in relation to a plan or strategy (or part of the same) submitted for their approval; or
- (b) authorised by a determination of the authority when approving or adopting the plan or strategy.

The effect of this is that the executive is responsible for changing a plan to comply with a Minister's requirements or if specifically authorised by the authority to do this, when approving or adopting the plan.

The function of applying for permission to dispose of housing land under the Housing Act 1985 or the Leasehold Reform, Housing and Urban Development Act 1993 is a function of the executive but the function of authorising the making of the application is not.

Some actions relating to the calculations required for setting an authority's council tax are the responsibility of the executive:

- (a) the preparation, for submission to the authority for their consideration, of – estimates of the amounts to be aggregated in making the calculation or of other amounts to be used for the purposes of the calculation and estimates of the calculation.
- (b) the reconsideration of those estimates and amounts in accordance with the authority's requirements;
- (c) the submission for the authority's consideration of revised estimates and amounts.

Other aspects of the function, such as the setting of an amount of council tax for a financial year, are however the responsibility of the authority.

Regulation 5 (1) and Schedule 4 specify the circumstances in which certain functions, that would otherwise be the responsibility of an authority's executive are not to be their responsibility. The circumstances the functions to which they relate are listed in Schedule 4 of the Regulations. An exception is however provided in regulation 5(2) for certain determinations that need to be made as a matter of urgency. In those cases, the determination can be made by the authority's executive only with the prior written agreement of a relevant overview and security committee or, in specified circumstances, of the chairman or vice-chairman of the authority.

Community Councils

Section 18 of the 2000 Act enabled the Secretary of State to make regulations to allow for discharge of functions which would normally be exercisable by the executive to be discharged by an area committee. An area committee is defined as a 'committee or sub-committee of the authority' which satisfies the following conditions:

(a) the committee or sub-committee is established to discharge functions in respect of part of the area of the authority,

(b) the members of the committee or sub-committee who are members of the authority are elected for electoral divisions or wards which fall wholly or partly within that part, and

(c) either or both of the conditions in subsection (5) are satisfied in relation to that part.

The conditions referred to in (c) are:

(a) that the area of that part does not exceed two-fifths of the total area of the authority.

(b) that the population of that part, as estimated by the authority, does not exceed two-fifths of the total population of the authority's area.

In Southwark 'area committees' are known as community councils. At present decisions on the following have been delegated in part to community councils; local planning applications, the cleaner, greener, safer capital programme, the community fund programme, traffic management, appointment of local education authority governors to local nursery and primary schools and community project banks. Community councils therefore take decisions which affect a relatively small area.

Delegation to officers

Statutory guidance (New Constitutions) states that delegation to officers "is a way of ensuring more efficient decision making and preventing the executive from becoming overwhelmed by a large volume of detailed managerial, operational and professional matters." The guidance states members should consider delegation carefully to ensure they have time to focus on broad strategic issues.

Conclusions

i) What decisions currently undertaken by Cabinet could possibly be undertaken by Council Assembly instead

The functions set out in Schedule 2 of the 2000 Regulations as detailed above might be areas for consideration. As indicated in the body of the paper where the executive does not currently discharge those functions they are instead exercised by a committee or an officer. However most of these matters relate to issues of requiring appeals, and operational or technical requirements. An example is control of pollution or management of air quality which previously was reserved to council assembly but then required council to receive an annual air quality report. This is now designated as an executive function to allow more efficient decision making. The functions in question are very specific in nature and not necessarily the kind of matters ordinarily reserved to Council Assembly.

Part 3B of the Constitution sets out the roles and functions of the cabinet. This list includes some of the plans and strategies that are currently the responsibility of the cabinet. These include:

- Asset management plan
- Employment strategy
- Enterprise strategy

- Food law enforcement plan
- Green travel plan
- Housing investment programme
- Housing renewal policy
- Housing strategy
- Local area agreement (LAA)
- Medium term resources strategy (including the housing revenue account)
- Renewal areas strategies
- Road safety plan
- Schemes for financing schools
- Special education needs action plan
- Statement of community involvement
- Supplementary planning documents
- Waste strategy
- Youth strategy.

As reported to the last meeting of the commission, Council Assembly can make additions to the policy framework and has done so in the past. Regulations allow a local authority to choose that other plans or strategies (statutory or non-statutory) are included in addition to those that must be adopted or approved by Council Assembly and are specified by the Secretary of State.

ii) What decisions currently undertaken by Cabinet could be devolved down e.g. to community councils

In short Cabinet has the power to delegate any of its functions to another forum, including community councils. However it would be necessary for the Cabinet to consider delegating those additional functions and whether the matter was appropriate for the local decision making role of community councils. The delegation of significant additional Cabinet functions would not necessarily fit in with the advantages identified in relation to executive arrangements i.e.

- Efficiency – in that a small executive can act quickly;
- Transparency – the executive arrangements enable the public to ascertain from the outset who is making decisions; and
- Accountability – the executive can be judged by whether it has implemented the policies on which it was elected.

However these advantages need to be balanced against the desire to increase democratic engagement.

iii) Are there any decisions which are presently undertaken by Council Assembly that could be devolved elsewhere e.g. to community councils.

Council Assembly has a number of statutory functions which were identified, with an asterisk, in the paper entitled 'Background information on the Council Assembly's role and scope for change' which accompanied Item 4 on the Agenda at the meeting held on 12 July 2010. It will not be possible to devolve those functions to a committee, sub-committee or officer.

However Council Assembly could for example consider delegating the following functions to community councils:-

- A greater responsibility for local planning matters;
- Responsibility for non-alcohol related licensing matters; and
- Responsibility for local street trading matters.

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