

Audit Committee

Meeting to be held on 25 June 2012

Electoral Division affected: None

Legislative Compliance

Contact for further information:

Ian Young, Deputy County Secretary & Solicitor, OCE, ext 33531

ian.young@lancashire.gov.uk

Executive Summary

This report considers the arrangements currently in place across the Council to ensure that existing and emerging legislation is identified, considered, implemented and reviewed. It also reviews the processes in place to ensure that the legal implications of decisions taken by the Council, its committees and members are appropriately considered in advance.

Recommendation

The Committee are recommended to note the report.

Background and Advice

Existing Arrangements

Local authorities are subject to the requirements of myriad pieces of legislation, either specific to local government (relating to its functions or governance - "public law" issues in the widest sense) or law of more general effect – whether civil or criminal, relevant as an employer, a property owner, a purchaser of goods and services, as a corporate body and so on.

The Council's functions are diverse – adult social care, education, waste disposal, highways, child protection to name but a few key areas of activity. The functions largely find a natural "home" within the Council's current directorate structure which therefore provide a "client" to whom the lawyer can relate. However, legal issues that are *incidental* to the function, for example the employment of staff to deliver the particular service, are more disparate as they will apply across all directorates. In relation to such generic issues, absent a specific case, the "client" is more difficult to identify.

As regards compliance with legislation focussed specifically on local government, from a governance perspective (as opposed to service specific) legislation of this nature is well-trailed by government and related organisations (for example LGA and ACSes) and is constantly monitored within Democratic Services as part of their role

in ensuring that the Council's constitution is up to date and meets legislative requirements. As the "ownership" is clear, sitting squarely within Democratic Services, there is little scope for confusion or error and a high degree of assurance can be provided.

A lesser degree of assurance can be provided in relation to legislation that is local government-specific but relates to *functions*, for example the Council's role as highways authority, its new responsibilities for public health and so on. Typically the "lead" on the implications of legislation of this nature will usually be within the directorate delivering the function and the input of legal advice in relation to any given issue will usually depend upon the significance of the legislation – major changes in planning law would certainly prompt close liaison and discussions between planning officers and lawyers, minor changes would probably not involve the same degree of involvement.

The degree of assurance in relation to "generic" legal issues such as employment, contract or personal injury is far more variable as a "client" is less readily identified although the potential problem is of a lower order where a co-ordinating role is undertaken by a central or corporate service, for example HR.

There are also a number of areas of legal activity undertaken within the Council, for example Trading Standards and Welfare Rights, where there are clearly significant aspects of their work which are "legal" but where that function is managed within the service and legal advice/support is only rarely sought from the Legal Services Team.

Whilst some legal functions are reserved to Legal Services via the Scheme of Delegation to Chief Officers, broadly speaking the extent to which legal advice is provided on any given matter is largely a matter of chance, depending primarily upon the discretion of the officer based in the directorate in question, hence possibly more work is reactive than might perhaps need be the case. It is no criticism to say that an officer who is not a lawyer will probably be unfamiliar with the potential legal implications of a decision.

The Legal Implications of Decisions

Decisions taken by the Council fall broadly into two categories, those taken by officers (essentially under the Scheme of Delegation) and those taken by members. In relation to the latter, legislation is fairly prescriptive and sets a framework of rules that local authorities must comply with – for example the Council must have a Forward Plan, Access to Information rules apply, the role of Scrutiny is statutory and so on.

As regards officer decisions, the "bureaucracy" is far less prescriptive than for member decisions and varies widely between directorates. The role of Democratic Services is therefore variable against a background of providing advice on "best practice". In this context it is important to note that at its meeting on 24 May the Full Council approved the key principles on which a revised Scheme of Delegation to Chief Officers would be based. Whilst the existing Scheme is regularly updated, it has become increasingly complex and unwieldy and it is considered that a change of approach will make decision-making more efficient.

The revised approach would in effect mean that chief officers can take all decisions (relevant to their functional area) except where decisions are specifically reserved to Full Council, a committee, the Cabinet or a Cabinet Member. However, whilst there are considered to be significant advantages to this approach, it potentially carries a greater risk that decisions will be taken by officers without proper consideration of the legal implications or based on a misunderstanding of legislation and some decisions may therefore be flawed. Work is currently in hand to identify ways in which risks of this nature can be minimised without creating a significant bureaucratic burden.

In relation to Cabinet Member decisions, the current system requires a series of "checks", including advice on the implications of a decision, including financial, legal and HR implications. The guidance issued by Democratic Services is clear, that the responsibility for identifying the implications of a decision rest in the first instance with the author of the report. However, a common problem is that authors do not recognise possible legal implications and therefore do not take advice at an early stage, instead seeking to rely on a notion of "legal clearance" at what is virtually the final stage, just before a decision is to be taken. However, at this stage it is only intended that the clearance relates to ensuring that a decision meets the procedural requirements of standing orders.

This approach can lead to problems, not least the last minute pressure to then "clear" a report by identifying the legal issues that should have been considered from the outset. Where there is a time imperative to proceed with a decision so that it must be taken this will often increase the risk of successful legal challenge.

How the Council might achieve greater assurance

It is simply not practicable, nor is there the resource, to scan all new legislation and cascade summaries and advice throughout the Council. For practical purposes the assumption is that the responsibility for seeking legal advice lies with directorates and in most cases directorates will not routinely be provided with advice on the implications of new legislation unless they ask for advice and assistance.

In relation to the proposed new Scheme of Delegation, the advantages of giving more autonomy to chief officers must be balanced against a possible increased risk. However, to reduce this risk the principles approved by Full Council explicitly reserve a range of legal functions to the County Secretary & Solicitor so that functions which clearly call for legal knowledge, for example the service of statutory notices, cannot be undertaken by a chief officer.

Revised decision-making templates and protocols, both for delegated and member/committee decisions, will also emphasise the need for officers to expressly consider whether they need to take legal advice on a proposed decision and, if so, require that they do so at an early stage.

Consultations

N/A

Implications:

This item has the following implications, as indicated:

Risk management

The risk management implications are referred to in the body of the report.

**Local Government (Access to Information) Act 1985
List of Background Papers**

Paper	Date	Contact/Directorate/Tel
-------	------	-------------------------

N/A		
-----	--	--

Reason for inclusion in Part II, if appropriate

N/A