

APRIL 2018

LTN 1 | COUNCILS' POWERS TO DISCHARGE THEIR FUNCTIONS

Introduction

1. When statutory functions are conferred on a local council, they are given to the full council. This means that formal decisions (known as resolutions) about the discharge of the council's statutory functions and the related responsibilities must be made at meetings of the full council. It is often impractical for the full council to meet every time decisions need to be made. Therefore legislation permits a council to delegate the performance of its statutory and legal responsibilities to:
 - a committee; or
 - a sub-committee; or
 - an officer of the authority; or
 - another local authority.
2. When a council delegates its responsibilities to committee, sub-committee, officer or another local authority, they are acting for and on behalf of the council. The statutory authority for a delegation is found in section 101(1) of the Local Government Act 1972 ('the 1972 Act'). The different delegations options are explained later in this Note.
3. A council cannot delegate responsibility for the performance of all its statutory functions. A council should be alert to the existence of statutory prohibitions to the delegation of particular statutory functions of a council. For example, a council's functions with respect to levying or issuing a precept can only be discharged by the full council (s.101 (6) of the 1972 Act). In practice, it is common for a committee to consider the level of precept and to make recommendations to the full council who can then make a final decision. Using another example, only full council can decide to borrow money (paragraph 2(4)) of schedule 1 to Local Government Act 2003 or can adopt or revise the code of conduct applicable to its members (s.28(13) of the Localism Act 2011 and, in Wales, s.51(9) of the Local Government Act 2000).

Individual councillors

4. A council cannot delegate the performance of its statutory and legal responsibilities to an individual councillor. This rule does not impinge on the statutory authority of a councillor to make decisions that do not relate to the performance of the council's responsibilities. For example, a councillor who is chairman of the council has additional voting powers in the election of a new chairman of the council (see Legal Topic Note 2 - the Chairman of Local Councils). Using another example, individual councillors may call an extraordinary meeting of the council if, having requested to do so, the Chairman of Council does not call one. As a further example, the councillor chairing a meeting of the full council, a committee or a sub-committee has additional voting powers and can take decisions relation to the running of a meeting (see Legal Topic Note 5 -Parish and Community Council Meetings).
5. The procedures and standing orders of a council should not allow for decisions about the discharge of a council's functions to be made by individual councillors. Resolutions made at a meeting or occasionally the standing orders of a council may authorise a councillor to act on matters which the council, or as the case may be, a committee or sub-committee is ultimately responsible for. For example, a meeting may resolve a particular councillor to be the council's representative at an external meeting. A council's standing orders based on model standing order 19c authorises a councillor to review the work of an individual member of staff and to conduct his appraisal on behalf of the staffing committee or sub-committee that he is a member of. The procedures and standing orders of a council should not allow for decisions about the discharge of a council's functions to be made by individual councillors.

Leaders

6. A local council has no statutory authority to elect a leader. However some politically divided or larger local councils do so. The leader of the council is often chosen by the group of councillors that has the political majority on the council. The role of a leader of a local council is not intended to undermine the role of the Chairman of the council or the chairman of a meeting. However a leader may be instrumental in raising business for consideration at a meeting or lobbying other councillors on an issue. The leader has the same formal standing as any other councillor. Like other councillors, the leader has no authority to discharge a council's statutory functions.

The Discharge of Functions by a Committee or a Sub-Committee

7. The appointment of a committee by full council or the appointment of a sub-committee by a committee must be confirmed by resolution. A committee may appoint a sub-committee unless otherwise directed by full council (s.101(2) of the 1972 Act). The appointing body for a committee or sub-committee must also decide, by resolution, the nature and scope of the responsibilities that it is delegating. In other words such resolution will confirm the terms of reference for the committee or, as the case may be, the sub-committee.
8. In respect of the appointment of a committee by full council or the appointment of a sub-committee by a committee, s.102 of the 1972 Act requires them to determine:
 - the number of members;
 - the terms of office of those members; and
 - the area within which the committee is to exercise its authority (if restricted);

S.106 of the 1972 Act provides that subject to any standing orders that the council has made in respect of quorum, proceedings and the place of meeting of a committee or sub-committee, the committee or sub-committee can determine the standing orders for their quorum, proceedings and place of meeting.

9. The collective decision-making responsibilities of the members of a committee or a sub-committee are limited by their terms of reference, Functions may be discharged by a committee or a sub-committee but not, as confirmed in paragraphs 4 and 5 above, by individual members of the committee (who may include the Chairman of a council or a chairman of a committee). Such practice was ruled by the High Court to be unlawful, in the case of *R v Secretary of State for the Environment ex parte London Borough of Hillingdon* [The Times 20 November 1985 also reported at greater length in the 'Local Government Review' on 4 January 1986].
10. The 1972 Act does not prescribe the minimum number of members for a committee or a sub-committee. In the Hillingdon case, the court confirmed that the minimum number of members should be more than one. If there were only two members, the person presiding could (but is not required to)

exercise his casting vote (by virtue of paragraph 39(2) of Schedule 12 to the 1972 Act). If he did exercise his casting vote, he could always secure a decision to his liking. In practice, the chairman of a committee comprised of only two members would have the sole power to take a decision which would conflict with the ruling in the Hillingdon case. It is NALC's position that the minimum number of members of a committee or sub-committee is three. Further commentary in support of NALC's position can be found on page 6 of the book 'Knowles on Local Authority Meetings - A Manual of Law and Practice, 8th Edition.'

11. Committee and sub-committee meetings can be held frequently and, arguably, these are easier to schedule than full council meetings because fewer councillors are involved. Such arrangements would, for example, enable local councils to respond to planning applications affecting their area within the timeframe allowed and, as another example, would enable councils to progress staffing matters without delay. This is further considered in Legal Topic Note 22 (Disciplinary and Grievance Arrangements).
12. Legal Topic Note 5 (Parish and Community Council Meetings) explains the statutory and other requirements relevant to committee and sub-committee meetings.

The Discharge of Functions by an Officer of the Authority

13. Functions may be delegated to an officer of the council by three bodies:
 - the full council;
 - a committee; or
 - a sub-committee.

It is open to the full council or a committee that it has appointed to decide when functions should be further delegated. A committee may delegate some of its responsibilities to a sub-committee or to an officer unless otherwise directed by full council. A sub-committee may delegate the discharge of functions to an officer unless otherwise directed by full council or its parent committee (s.101(2) of the 1972 Act). Further, it is always open to the council or a committee to undertake the work that it has delegated to a sub-committee or officer (s.101(4) of the 1972 Act).

14. It is prudent to ensure that the delegation of a council's statutory functions and related responsibilities is evidenced by a resolution. This rule does not apply to many of the routine administrative tasks such as raising invoices or sending correspondence or updating the council's website that staff are expected to undertake on a daily basis. A council's standing orders can usefully confirm specific or notable administrative responsibilities that particular officers are responsible for. Councils are referred to model standing orders s 15b and 18dv for England and 15b and 18cv for Wales and other relevant model standing orders.
15. If a council delegates the performance of statutory functions to its officers in the course of their normal duties or from time to time, their job descriptions should reflect this.
16. Councils should also take care to ensure that any statutory functions delegated to officers are not, in fact, performed by individual councillors. This is particularly important if officers and councillors work together closely. As set out in paragraphs 4 and 5 above, the performance of a council's statutory responsibilities cannot be delegated to individual councillors. They cannot make decisions in relation to the performance of a council's statutory powers and functions outside meetings.
17. In the Hillingdon case (see paragraphs 9 and 10 above), the Judge stated that it would be difficult to fault a procedure where decisions by a council are taken by a duly authorised officer pursuant to s.101 of the 1972 Act in consultation with the elected chairman as it would be a simple way of dealing with urgent matters which could not be decided at a meeting, but for which it was undesirable for a single officer to take sole responsibility. In some instances, it may be appropriate for consultation to be wider than solely with the Chairman of the council or the chairman of a relevant committee or sub-committee. Councils may incorporate such arrangements in their standing orders or other internal procedures and policies that require a course of action to be taken without delay e.g. responses to media queries, progressing some personnel matters, reporting incident(s) to the police, or to the auditor, arranging for the execution of urgent repair works on council premises.

The Discharge of Functions by Other Authorities

18. Unless prohibited by legislation, the 1972 Act allows an authority to arrange for any of its functions to be discharged by another authority. Two or more local authorities can also arrange that their functions are to be exercised jointly (s.101(5) of the 1972 Act) and can ensure that any such joint functions are delegated to a joint committee or to an officer of one of the authorities. If a joint committee is appointed, the appointing authorities decide its members and terms of reference (see paragraph 7 above). The local authorities that appoint a joint committee must share the expenses incurred by it in such proportions as they think fit (s.103 of the 1972 Act). Additionally, s.136 of the 1972 Act allows two or more local authorities to make arrangements for defraying any expenditure incurred by one of them in exercising any functions exercisable by both or all of them. This means that if two or more authorities have the power to exercise a function, they can arrange for one of the authorities to carry out that function on behalf of them both (or all) and both (or all) authorities can contribute towards the costs incurred by the authority actually carrying out that function. S.113 of the 1972 Act enables local authorities to place their staff 'at the disposal' of other authorities for the purpose of their functions but cannot do so without consulting the member of staff concerned.

Can a Local Council appoint itself as a Committee?

19. Prior to the introduction of the Public Bodies (Admission to Meetings) Act 1960 as amended by s.100 (2) of the 1972 Act which confirmed the right of the public and the press to attend committee meetings, it was the practice of many councils to appoint itself as a committee to exclude the press and the public. The practice is not common in recent years but NALC is sometimes asked if it is lawful. There is no lawful reason why a local council should not appoint itself as a committee but in NALC's view, there is no cogent argument for this. NALC's view is supported in 'Knowles on Local Authority Meetings - A Manual of Law and Practice, 8th Edition.' Paragraph 9.68 on page 227 states that "a committee of the whole council cannot by definition be a committee of the parent body".

Non-Councillor Members of Committees

20. Legal Topic Note 7 (Non-Councillor Members of Committees) sets out the powers of local councils to appoint non-councillors to committees.

Advisory Committees

21. S.102(4) of the 1972 Act is in the following terms:

‘A local authority may appoint a committee, and two or more local authorities may join in appointing a committee, to advise the appointing authority or authorities... on any matter relating to the discharge of their functions, and any such committee—

- a) may consist of such persons (whether members of the appointing authority or authorities or not) appointed for such term as may be determined by the appointing authority or authorities; and
- b) may appoint one or more sub-committees to advise the committee with respect to any such matter.’

22. A person wishing to become a councillor has to satisfy the qualification requirements of s.79 of the 1972 Act but a non-councillor appointed to an advisory committee pursuant to s.102(4) does not. However, any person disqualified from being a councillor pursuant to s.80 of the 1972 Act is unable to be a member of any committee (including an advisory committee under s.102(4)) by virtue of s.104 of the 1972 Act. Further information in respect of the qualification and disqualification provisions is available in in Legal Topic Note 7 (Non-Councillor Members of Committees).

23. The wording of 102(4) is broad but it makes it clear that the role of committees and sub-committees appointed under s.102 (4) is restricted to advising the council (or committee) on ‘any matter relating to the discharge of their functions’. The key word is ‘advise’. Importantly, committees (or subcommittees) appointed under s.102(4) have no power to discharge the functions of a council,

24. Many councils make good use of the power contained in s.102(4) and often refer to committees (or sub-committees) appointed under it as ‘working parties’ or ‘working groups’ or ‘panels’ rather than advisory committees (or sub-committees). However councils should be aware that such parties/groups/panels are, in fact, committees or sub-committees within the meaning of the 1972 Act and are, accordingly, subject to the same legal provisions in the 1972 Act as other committees described in paragraph 2 above.

25. Sometimes councillors wish to attend meetings of committees (or sub-committees) to which they have not been appointed. This is a perfectly legitimate practice as councillors have the same rights to attend committee (or sub-committee) meetings as members of the public. However, where councillors attend meetings of committees (or sub-committees) to which they have not been appointed, they will not enjoy all the rights they enjoy as councillors. They will not have a right to participate in the meeting unless the meeting includes a public participation session. In England, a councillor (or non-councillor) member of a committee is not, without a dispensation, permitted to speak during a public participation session if he holds a disclosable pecuniary interest or another interest stipulated by his council's code of conduct in a matter that is being discussed during the public participation session of a meeting. In Wales, the code of conduct adopted by a council means that a councillor (or non-councillor) member of a committee with a prejudicial interest in a matter being considered at the committee meeting (without a dispensation) may make representations, answer questions or give evidence if the public have the same rights. He must leave the meeting room immediately after the period for making representations, answering questions or giving evidence relating to the business has ended and in any event before further consideration of the business begins, whether or not the public are allowed to remain in attendance for such consideration.

The 'Need to Know'

26. Councillors do not have a 'need to know' all aspects of council business and cannot claim an automatic right to see all council documentation and information. In other words, councillors are not permitted a fishing expedition in respect of council documentation and information simply because they are councillors, The following may prove helpful in establishing whether a councillor has a 'need to know':

- If a councillor is a member of a committee, he has the right to inspect documents or to obtain information relating to the business of that committee;
- If a councillor is not a member of a particular committee, he has to demonstrate why sight of the document(s)/or receipt of the information in question is necessary to enable him to perform his duties as a councillor;

- If the councillor's motive for seeing the documents/obtaining information is indirect, improper or ulterior, then the documentation or information should be withheld.

Written records of officers' decisions (England only)

27. The minutes of a meeting of the council, its committees, sub-committees or joint committees must record the decisions made at them and be made available to the public. The Openness of Local Government Bodies Regulations 2014 ("the 2014 Regulations"), issued under s.43 (2) of the Local Audit and Accountability Act 2014 require (i) certain decisions made by officers to be recorded in writing (ii) records of such decisions and any background papers to be made available for public inspection and (iii) such papers to be retained by the council for prescribed periods. Part 4 of the Government's guide to the 2014 Regulations considers the requirement to record and inspect decisions by officers and can be accessed via <https://www.gov.uk/government/publications/open-and-accountable-local-government-plain-english-guide>
28. Regulation 7 (2) of the 2014 Regulations requires a decision to be recorded if it would otherwise have been taken by a council, committee, sub-committee, or a joint committee but has been delegated to an officer under:
- (a) a specific express authorisation or
 - (b) under a general authorisation to officers to take decisions and the effect of the decision is to:
 - (i) grant a permission or licence (e.g. a permission to use a playing field for a school fete);
 - (ii) affect the legal rights of an individual (e.g. the termination of an allotment garden tenancy);
 - (iii) award a contract or incur expenditure which, in either case, materially affects the council's financial position (e.g. the award of a grounds maintenance contract or the payment of a grant). The Government's guide suggests that the "material threshold" is a judgement that would be made by individual councils).
29. Administrative and some operational decisions will not be caught by the 2014 Regulations and do not need to be recorded or made available for public inspection. The Government's guide gives other examples such as:

- A decision to sign an allotment tenancy agreement;
 - Decisions to allocate burial plots;
 - Decisions to book rooms or sports grounds.
30. The officer who makes a decision of the type described in paragraph 28 must produce a written record of his decision as soon as reasonably practicable after the decision has been made. The written record must include:
- the date the decision was taken;
 - a record of the decision taken with reasons for the decision;
 - details of alternative options, if any, considered and rejected and
 - if the decision was delegated to an officer under a specific express authorisation, the names of any councillor who had declared a conflict of interest in relation to the decision. The Government's guide does not provide information about what constitutes a conflict of interest. It is possible that this is a reference to an interest (meaning a disclosable pecuniary interest or an interest set out in the code of conduct adopted by the council) that a councillor is required to register with the monitoring officer.
31. Where there is a separate statutory requirement to produce a written record of a decision described in paragraph 28, a record of the decision (along with reasons for it) and the date the decision was taken will satisfy the requirement in the 2014 Regulations to record such a decision (Regulation 7(4) of the 2014 Regulations). For example, it is often the responsibility of an officer of a council to decide the council's response to requests for information under the Freedom of Information Act 2000 ("the 2000 Act") which must be communicated to the requester in writing.
32. The written record of an officer decision described in paragraph 28 together with any background papers must be made available for public inspection as soon as reasonably practicable after the record is made. It must be available for inspection at all reasonable hours at the council's offices, on the council's website if it has one and by such other means that the council considers appropriate (Regulation 8(1) of the 2014 Regulations). If requested and upon receipt of payment of postage, copying or other necessary charges for the

transmission of information requested, a council must provide a copy of the written record and any background papers (Regulation 8 (2) of the 2014 Regulations).

33. The written record of an officer decision must be made available for public inspection and retained by the council for a period of six years from the date the decision was made. In the case of background papers relating to the decision, these must be made available for public inspection and retained by the council for a period of four years from the date the decision was made.
34. A council is not authorised or required to disclose or make available for inspection document(s) or part of documents that contain or may contain confidential information (Regulation 9 of the 2014 Regulations). “Confidential information” is defined as (i) information provided to the council by a government department where public disclosure is forbidden or (ii) information which cannot be disclosed to the public because disclosure is prohibited by a court order or legislation (Regulation 6 of the 2014 Regulations). For example, the 2000 Act does not require a council to disclose personal data about an individual or communications between the council and its professional legal advisors.
35. A person with custody of a document which is required to be available for public inspection commits an offence if he, without reasonable excuse, (i) intentionally obstructs a person exercising a right to inspect written records and background papers or (ii) refuses a request to provide written records or background papers. A person convicted of one of these offences is liable to a fine not exceeding level 1 on the standard scale (currently £200). (Regulation 10 of the 2014 Regulations).

Other Legal Topic Notes (LTNs) relevant to this subject:

LTN	Title	Relevance
5	Parish and Community Council Meetings	Sets out the procedures and requirements of committees in further detail.
7	Non-Councillor Members of Committees	Sets out (i) the powers of councils to appoint non-councillors to sit on committees and (ii) qualification and disqualification provisions in respect of non-councillors.
8	Elections	Details the qualification and disqualification provisions for councillors.

LTN	Title	Relevance
9E	Handling Complaints	The 2014 Regulations apply if officers are authorised to make decisions about an individual's complaint against a council.
22	Disciplinary & Grievance Arrangements	Explains the role of committees and sub-committees in handling disciplinary and disciplinary matters.
80	Members' conduct and the registration and disclosure of their interests (England)	Explains councillors' obligations upon taking office.