

**GLOUCESTERSHIRE COUNTY COUNCIL
CONSTITUTION COMMITTEE
17th OCTOBER 2012
THE ROLE OF THE MONITORING OFFICER
REPORT OF THE CHIEF EXECUTIVE**

Introduction

In March 2012, Graham Garbutt concluded his review into the Council's dealings past and present with Cotswold Water Park. His report, including recommendations, was considered by Audit Committee on 12th March. Those recommendations, which include Mr Garbutt's suggestions for the future course of the Council's relationship with CWP as well as matters concerning the general governance of the Council, have now been incorporated into an action plan that will be overseen by Audit Committee.

One of Graham Garbutt's recommendations was that the Council should review the role of the Monitoring Officer and the Chief Legal Adviser.

Recommendations

That the committee

- (1) considers the question of whether or not there should be a mandate for changing the current designation of the post of Director of Law & Administration as the Council's Monitoring Officer; and if so

- (2) recommends to the County Council that a different officer post is so designated as soon as is practicable.

The Original Role of the Monitoring Officer

The Monitoring Officer is a statutory appointment pursuant to section 5 of the Local Government and Housing Act 1989. The role was established to meet the recommendations of the Widdicombe Report that every principal local authority should be required to appoint one of their senior officers as MO, with an independent statutory duty to report to full Council on any action or proposal which would be unlawful, in breach of a statutory code, or give rise to maladministration or injustice. It is one of three statutory appointments that a Council must make in relation to its governance arrangements, the other two being the Head of Paid Service and the Chief Financial Officer. The current responsibilities of the role rest with the Council's Director of Law and Administration.

Since 1989, councils have tended to appoint one of the following as Monitoring Officer –

- their Chief Executive (no longer permissible at law);
- a senior corporate director; or
- their chief legal adviser.

There is no requirement that the post holder should be legally qualified, and although a legal qualification would be of assistance in identifying potential illegality, it is at least equally important to the performance of the duties of the post that the post holder should be in a position to know what the various parts of an authority are proposing to do, so that advice

can be given at an early stage (when it can be much more effective), and that the post holder should be an individual whose advice carries weight within the authority. If determined that a non-legal officer would be in a better position to identify and to resolve proposals that might give cause for concern, then the appointment to the post of a non-legal officer would be perfectly proper, subject to the proviso that the post holder has the independence, authority and budget to procure legal advice wherever and whenever he or she considers it to be appropriate.

Furthermore, whoever is appointed to act as MO, it has always been of paramount importance that the MO should –

- be one of a council's most senior officers
- have direct access to the Head of Paid Service

Developments

The Local Government Act 2000 introduced a new statutory regime for the conduct of members. The Act, subsequent Statutory Instruments and a range of guidance provided by the then Standards Board for England (later 'Standards for England' but now abolished) set down a number of detailed processes and procedures to be followed, with a number of roles allocated to the Monitoring Officer (for example, maintaining registers of interests, and of gifts and hospitality, overseeing the investigation of allegations of member misconduct and discharging the function of lead liaison and link officer with a council's standards committee). Although the standards functions provided by the 2000 Act have now been largely repealed, they have been replaced by the less onerous duties (but duties nonetheless) established by the Localism Act 2011.

These actual expansions of the role of the Monitoring Officer have seen a consequent presumption that MO duties extend beyond the original statutory role and the further role devolved by the standards regimes, to include a general duty to ensure full probity in everything that a council does or in which it becomes involved, and in every single area of its activity or influence; put another way, almost an independent arbiter, auditor, regulator and protector of the public interest.

Today, the role and purpose of local government is coming under increasing scrutiny, with a public policy debate being conducted as to what the functions of a local authority might be in today's world. Historically councils have been agencies of direct provision of a wide range of services. Increasingly, however, that role is becoming more of a procurement one, where councils are shrinking in size to a core function that oversees and facilitates the delivery and provision of services by a range of partner organisations operating in the public, private and third sectors.

Here at Gloucestershire, the Monitoring Officer is also responsible for monitoring and reviewing the operation of the Council's constitution.

The Risk of Conflict

As Graham Garbutt observes in paragraph 21 of his *Cotswold Water Park Review* –
"The combination, in one person, of the roles of monitoring officer, chief legal adviser and line manager of key service areas involves risk of role conflict. It will be increasingly difficult to sustain as more widespread outsourcing and other changes to council services creates a

growing need for demonstrably independent investigation and reporting. Urgent review is needed.”

Local government now finds itself on the cusp of hugely significant change in terms of its role and relevance. No longer the provider of first resort of public services, the future will involve an increasing role for *commissioning* services from elsewhere, as recognised by this Council’s move to its *New Operating Model* in strategic terms; and moving forward, the need in the public interest for the delivery of overt systems of due diligence as part of the structure of corporate governance to overlay that commissioning role will be of increasing significance and importance. In a sense, therefore, there is an argument for saying that to expect this role to be performed by a council’s chief legal adviser is to ask for a function to be performed that at times may not actually be capable of being so performed. Indeed, this is a view that the Council’s own Director of Law and Administration has expressed on occasions in the past.

Relevant Issues

In general terms, the ability of an MO to discharge the duties and responsibilities of the role will depend to a significant extent upon members and officers –

- complying with the provisions of all laws and statutory guidance (including any relevant code of conduct);
- complying with any other guidance that is issued from any relevant source;
- observing minimum standards of good governance and administration;
- making lawful and proportionate decisions; and
- not acting in any way that would bring the Council into disrepute.

Conclusions

There are no wrong or right answers as to which officer is best placed to discharge the functions of the Monitoring Officer, subject to the key considerations identified in this report. Graham Garbutt has recommended that the Council should urgently review the combination in one person of the roles of Monitoring Officer, Chief Legal Adviser and Line Manager of key services, and this report is intended to stimulate such a debate. I have deliberately not made any specific recommendations as to the post within the officer structure best suited to be designated as MO, because I wanted to ensure that no parameters are placed on the debate. There are, however, a number of non-negotiable considerations that I advise are in the best interests of good governance, such that the most appropriate post for designation is likely to have the following features –

- it should be selected from posts within the top two tiers of the officer structure, to ensure that the role has the appropriate significance and *gravitas*;
- the post holder should be a member of the officer corporate management team, to ensure sufficient proximity to the development of policy and strategy; and
- it cannot at law be one of two other statutory officer posts (the head of paid service and chief financial officer) and should not one of the remaining two (the directors of children services or adult social services) to eliminate the risk of conflicts of interest

If there is a mandate for change, this report is the medium for that change to be delivered. Further, the Monitoring Officer debate is a timely one, given that the time is right generally for

the future role of the Council to be the subject of wide-ranging review, for a number of significant reasons as follows –

- the ambitious *Meeting the Challenge* programme is delivering fundamental changes to the provision of services;
- with the dismantling of a traditional directorate structure, the Council's *New Operating Model* has changed the emphasis at strategic level from direct service delivery to a commissioning role;
- all of the Council's support services are currently federated into an *Enabling and Transition* function, with the proviso that there will be significant change in the short to medium term;
- the Council's Democratic Services function has been substantially overhauled to bring the service into direct line with new operating arrangements; and
- with full elections to be held next May, the current Council is in the final year of its life, such that an opportunity now presents itself to design a blueprint for the future that aligns the function and relevance of the Council directly to community need.

This report, with its conclusion and recommendations, was submitted to the members of the council's audit committee on 27th September for their comments, which were as follows:

- members recognised that this was one of the more significant recommendations emerging from Mr Garbutt's report
- members noted that whichever senior officer takes on the MO role might find themselves faced with a conflict of interest as they too will be a service manager. Any such conflict must be articulated and resolved, for example by liaising with the Chief Executive or even the MO of another authority
- members were unanimous in their view that the MO role and that of the chief legal adviser should be split.

The recommendations from this the Constitution Committee will be taken to the full Council meeting on 21st November 2012 for approval. If such approval is given the matter will then be referred to the Appointments Committee whose terms of reference include the appointment of the Monitoring Officer.

Peter Bungard, Chief Executive