

OPTIONS FOR STRENGTHENING FUTURE GOVERNANCE ARRANGEMENTS

1. Introduction

1.1 The third of the terms of reference set for this investigation is:

‘ To make recommendations to strengthen future governance arrangements.’

This requires consideration of options available to Barnet for changes to the management arrangements of its governance functions as specified in paragraph 6.6 of the my initial report.

‘ That Barnet looks carefully at the options to strengthen its governance arrangements, including looking at the contract with HBPL, addressing the issue of professional clienting of the IAA, addressing the issue of lawyers not being on site at Barnet, considering the implications of having exercised s101 of the Local Government Act 1972 to delegate all its legal functions to Harrow.’

1.2 In this report I set out the options for Barnet to consider under the headings of the Monitoring Officer, Governance Support and the Shared Legal Service (HBPL).

1.3 In writing this report I have interviewed a number of people and examined a number of documents. These are set out in the Annex to this report. In general there has been considerable agreement amongst those I have interviewed:

- That Barnet needs to consider whether it should revert to appointing a legally qualified Monitoring Officer and/or ensure that the Monitoring Officer has quick and comprehensive access to strategic and confidential legal advice on behalf of the Council.
- Corporate legal advice could be procured by Barnet and delivered either by a small in-house team of qualified lawyers or by a small number of external legal providers through a panel run by the Monitoring Officer.
- The function of Governance Support needs greater management input in order to properly focus on Barnet’s strategic priorities as expressed through its newly enlarged committee structure and its full council.
- The clienting of the shared legal services contract should include some element of professional legal assessment.

1.4 Whichever options Barnet decides, there are likely to be amendments to be made to the Constitution to reflect those required changes to its governance arrangements.

2. The Role of the Monitoring Officer

- 2.1 The role of the Monitoring Officer (MO) in Barnet is defined in Barnet's Constitution and is allocated to the Director of Assurance. The Monitoring Officer is appointed under section 5 of the Local Government and Housing Act 1989 and has a number of statutory functions. The MO is the guardian of the Constitution and the member decision – making process. The MO is responsible for advising the Council on the legality of its decisions and providing guidance to Councillors on the Constitution and its powers. After consulting the Head of the Paid Service (Barnet's Chief Executive) and the section 151 officer (Barnet's Chief Operating Officer) the MO can report to full Council if s/he considers that unlawfulness or maladministration is likely to arise. This report prevents the proposal or decision being made until the MO's report is considered. The MO is also responsible for maintaining high ethical standards, conducting investigations and contributing to corporate management.
- 2.2 The MO post is assigned to the Director of Assurance who also manages governance services, internal audit, external audit, risk management and anti- fraud. The post is not held by a lawyer. There is no requirement for the Monitoring Officer to be a lawyer, although in practice most Local Authorities do appoint their most senior lawyer (eg Director of Legal and Governance Services) as MO. The reasons for doing so is that it is thought that the statutory requirement for the duties to be performed personally is best satisfied by a senior and experienced lawyer.
- 2.3 Where the MO is unable to act personally due to absence or illness section 5 (7) of the Act requires that s/he shall nominate a deputy from amongst her/his staff.
- 2.4 Barnet will also wish to consider the options available for legal support for the MO in discharging the function of providing legal advice in the most sensitive and high profile matters, which it wishes to control directly itself. The task of interpreting externally procured legal advice is best done by another qualified lawyer, as is the task of working out how to ask the right questions. This could be done by a small team (1,2 or 3) of in-house lawyer(s) with expertise in corporate law, and/or by Barnet appointing its own legal panel of specialist Barristers and Solicitors to be operated by the MO.
- 2.5 Barnet will also wish to consider how the MO functions can best be carried out given the commissioning structure now adopted by the Council. For the MO to carry out the role most effectively, there needs to be a proactive involvement with the future direction of all council services and activities. The MO needs to be 'in the loop', having early access to key issues, thereby enabling timely and well-planned advice to be taken, and so identifying and reducing risk.

2.6 As there is a shared legal service provided by HBPL, there is also an opportunity to consider a shared MO. This arrangement has proved successful in some London Boroughs. Another option would be to consider a shared Head of HBPL. A shared post of this kind does give some 'ownership' of the arrangements to each party. Harrow would need to agree to either of these options.

2.7 Options:

2.7.1 To leave all arrangements as currently described in Barnet's Constitution

2.7.2 To appoint an experienced, legally qualified Monitoring Officer

2.7.3 To review the arrangements for the appointment of the Deputy Monitoring Officer as currently decided by Remuneration Committee on 29th January 2013

2.7.4 To appoint a small team (1, 2 or 3) of in-house lawyer(s) to support the MO (from whom the DMO could be appointed)

2.7.5 To appoint a panel of specialist external barristers and Solicitors, to be operated by the MO, to provide advice on sensitive and high-profile legal matters.

2.7.6 To consider a shared MO, or shared Head of HBPL jointly with Harrow.

3. Governance support

3.1 The function of governance support includes responsibility for all committee and council papers and reports, ensuring all relevant contributions, including legal contributions are made, and that all protocols and legal requirements are followed, in order that councillors are properly prepared before meetings start, and that members of the public can access documents in advance of meetings.

3.2 It is vital in this process that staff in the team can access speedy and correct advice, including legal advice, often at short notice.

3.3 Members of the team will also be the focal point for members enquiries and constitutional queries including declarations, exemptions etc. It is imperative that the Governance staff receive proper updates and training to ensure that a high calibre service is delivered.

3.4 It is vital, particularly with the increase in workload as a result of the move from the Cabinet system to the Committee system, that there is

a clear line of sight from ideas to committee reports. A senior management focus is required to ensure consistent high performance by this team. The team forms part of the Assurance section, along with a number of other functions, and it is an option open to Barnet to narrow the focus of the Monitoring Officer to ensure that other calls on the MOs time are minimised.

3.5 Options:

3.5.1 To leave the current arrangements intact

3.5.2 To ensure that sufficient senior management focus is given to this function to enable consistent high performance.

4. Shared Legal Service (HBPL)

4.1 The Shared Legal Services arrangement between Barnet and Harrow came into effect from 1st September 2012, a little over two years ago. The issues raised with me during the course of my investigations are:

- The visibility of lawyer from HBPL on site in Barnet
- The provision of Corporate legal work
- Support for the Monitoring Officer
- The clienting by Barnet of the contract
- Delegating legal functions to Harrow by Barnet under section 101 of the Local Government Act 1972

I deal with these in turn and set out the options for change at the end of this section.

4.2 The 5 year contract between Barnet and Harrow is contained in the Inter Authority Agreement. At the time of its drafting, Barnet had in post a legally qualified MO, the Director of Corporate Governance. The IAA provides that work done by the MO is excluded from the IAA unless a further agreement is made. The IAA defines the category of corporate governance as including 'Advice to Council, Cabinet, Committees.....to the extent that it is not excluded by being MO work. The MO was also to be the legally qualified professional client in Barnet for the purposes of monitoring the IAA.

4.3 The side agreement drafted to cover legal support to Barnet's new non-legally qualified MO, albeit unsigned by both parties, is being used for charging and monitoring purposes. Between April and August 2014 200 hours were charged under the side agreement as opposed to 16,000 hours charged under the main agreement.

4.4 The provision of routine and transactional work under the contract comprises the vast majority of work done by HBPL, and the monitoring information demonstrates that it is being done to a high standard. The Quarter 1 2014/15 performance report states:

*“HB Public Law – 100% of targets met
13 of the 13 performance targets were met, successes include:
The Dollis valley Compulsory Purchase Order initially made in January that covers over a thousand property interests on the estate was confirmed by the secretary of state in June and the two remaining objections have been withdrawn.
Satisfaction of Barnet employees with the service provided by Public Law was 100% across all categories”.*

4.5 Corporate Legal work comprises the most high profile and sensitive legal issues, which may concern vires, difficult constitutional issues with significant impact, or which may be commercially confidential, or which may concern sensitive litigation. It is legal work that the Chief Officers and Leading politicians will want to be kept regularly informed about. It is usually legal work that the MO would handle personally, or be personally involved in the selection of outside lawyers and supervise instructions. Barnet will wish to review how this work is undertaken in future so that it has direct control of those legal issues that matter most to the Council. The issue of direct control is not just an issue of direct contact, but also one which avoids any potential conflict of interest.

4.6 Support for the MO is important and will continue to be important in future. The work is often unpredictable and often is required to be done at speed. Whilst under some options the MO will instruct external lawyers direct, there will be many circumstances where the MO will require HBPL to assist. The opportunity must therefore be taken to review the side agreement to the IAA in the light of whichever options Barnet chooses for its governance arrangements so that it reflects the legal requirements Barnet will need in future.

4.7 The issue of visibility of HBPL lawyers on site in Barnet has been raised as an issue in this investigation, however, I believe this is best dealt with as part of the contract monitoring arrangements.

4.8 The clienting of the HBPL service has had no professional legal input looking at the quality of legal advice given for 18 months. A number of people I spoke to commented on the difference between contract management, which is carried out by the commercial team, and clienting. Clienting includes taking ownership of the service delivered overall, and is not just looking at outputs and performance indicators but also at the quality and effectiveness of legal advice and legal work. If Barnet chooses the option of a legally qualified MO then this would form part of her/his responsibilities. Alternatively, if Barnet

chooses to establish its own legal panel, it could use one of those external providers to perform this function, albeit at some cost.

- 4.9 I am aware that Barnet's procurement model is to use a thin client, however it was the original intention of the IAA that the then legally qualified MO should also be the client for the contract, and it is clear from those to whom I have spoken that this remains a preferred option. Without a legally qualified client, it is difficult to challenge whether the legal advice given is wrong.
- 4.10 Finally, the issue of the use of s101 of the Local Government Act 1972 to delegate Barnet's legal functions to Harrow. This seems to have been done because HBPL is delivered by Harrow, not jointly with Barnet. The IAA 'carves out' MO work and functions and it was agreed that section 101 would not apply to that legal work, and therefore Barnet would be able to exercise its own legal functions in relation to MO work. This needs clarifying. It is highly unusual to have used section 101 in this manner in any event, when a contractual arrangement would suffice.
- 4.11 Options:
- 4.11.1 To leave current arrangements intact.
- 4.11.2 To require the MO to be the client for the shared legal service.
- 4.11.3 To review the side agreement to the IAA and the IAA to ensure they fulfill the current requirements of Barnet and reflect the options chosen from this report.
- 4.11.4 To ensure that Corporate legal issues are dealt with direct by Barnet.
- 4.11.5 To revoke the section 101 delegations of all legal functions to Harrow
- 4.11.6 To replace the current decision to delegate all legal functions to Harrow under section 101 and to limit the delegation of functions to routine and transactional legal work under the contract, excluding all corporate legal work and that carried out by or under the direction of the MO.

Annex

I have interviewed:
Councillor Richard Cornelius
Councillor Alison Moore
Andrew Travers

Chris Naylor
Claire Symonds
Paul Najsarek (Head of the paid Service at Harrow)
Tom Whiting (Corporate Director of Resources at Harrow)
Hugh Peart (Director of Legal and Governance Services)

I have read the following documents:

Quarter 1 Quarterly performance report to Performance and Contract
Monitoring Committee
Barnet Cabinet Resources Committee – 4th April 2012- set up of Joint
Legal Services with Harrow
Barnet Remuneration Committee 29th January 2013 – Deputy Monitoring
Officer functions to HBPL
Inter Authority Agreement- HBPL
Constitution of London Borough of Barnet