



North Tyneside Council

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Briefing Note

To: Elected Mayor
All Members of the Council

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Introduction

This Briefing Note is provided to members in follow up to the extraordinary meeting of Overview and Scrutiny Committee held on 19 March 2012, to which all members were invited, where advice on the responsibility for delivery and implementation of the Council Plan and Budget was provided by Mr James Goudie QC. The content of the Briefing Note has been agreed by Mr Goudie.

1. Executive arrangements

A local authority which has adopted executive arrangements must ensure that its executive takes one of the forms specified in the Local Government Act 2000 (as amended). The form adopted by North Tyneside is that of a **Mayor and cabinet executive** (an elected mayor of the authority and two or more councillors of a local authority appointed by the elected mayor.)

The executive is responsible for certain functions of a local authority, and executive arrangements require a division between the making of a decision and the scrutiny of that decision.

2. Division of responsibilities between Council and the executive

The Local Government Act 2000 (as amended) sets out the functions of the executive, where executive arrangements are adopted. It is to be noted that the default position under the law (s.13 of the Act) is that **all local authority functions not specified in regulations** made by the Secretary of State **must be the responsibility of the executive, rather than the full council.**

This overarching principle is reflected in the Council's Constitution at Part 3.1 paragraph 4:

“All other functions that are not specified as Council functions under the regulations or as local choice functions are the responsibility of the executive/Cabinet.”

The relevant regulations made by the Secretary of State for this purpose are the Local Authorities (Function and Responsibilities) (England) Regulations 2000 (“the Functions and Responsibilities Regulations”). These specify:

1. those functions that **are not** the responsibility of the Cabinet, **and which are therefore the responsibility of Council** (Regulation 2 and Schedule 1 of the Regulations);
2. those functions which **may be** (but need not be) the responsibility of the Cabinet (the local choice functions – Regulation 3 and Schedule 2 of the Regulations); and
3. those functions that **are not to be wholly** the responsibility of the Cabinet (the budget, plans and strategies – Regulations 4 and 5 and Schedules 3 and 4 of the Regulations).

Under executive arrangements therefore, where **as a matter of law** each of Cabinet and Council have their separate areas of responsibility, it is not open to either to transfer to itself responsibilities which fall solely to the other.

There are however certain areas that both the Cabinet and full Council have responsibility for, namely the Budget and certain plans and strategies.

The Council's Constitution reflects the Functions and Responsibilities Regulations, as described below.

(a) Council functions

The Schedule 1 functions (those functions that are not to be the responsibility of the executive and are therefore the responsibility of full Council) relate to the following:

- Functions relating to town and country planning and development control;
- Licensing and registration functions;
- Functions relating to Health and Safety at work;
- Functions relating to elections;
- Functions relating to names and status of areas and individuals;
- Functions relating to community governance;
- Byelaws;
- Smoke free premises;
- Local or personal Bills;
- Pensions, etc; and
- Miscellaneous functions.

The miscellaneous functions in Schedule 1 are in two parts:

Part 1 - functions relating to public rights of way; and

Part 2 - other miscellaneous functions (paragraphs 35 - 53 inclusive), expressed by reference to specified statutory provisions, which include:

- power to make Standing Orders;
- power to appoint staff and to determine their terms and conditions;
- power to make Standing Orders as to contracts;
- duty to make arrangements for proper administration of financial affairs;
- duty to designate an officer as Head of Paid Service and to provide staff;
- duty to designate an officer as Monitoring Officer and to provide staff; and
- powers relating to Overview and Scrutiny Committees.

Reference in Constitution: Part 3 of the Council's Constitution entitled "Responsibility for Functions" reproduces Schedule 1 of the Functions and Responsibilities Regulations.

(b) Functions which may be (but need not be) the responsibility of Cabinet

These are referred to as the “local choice functions”, and relate to a wide range of miscellaneous functions including determination of appeals, contaminated land functions, and investigation of complaints of statutory nuisance.

Reference in Constitution: Part 3 of the Council’s Constitution entitled “Responsibility for Functions” reproduces Schedule 2 of the Functions and Responsibilities Regulations and, in relation to each function, indicates whether responsibility for the function rests with Cabinet or Council.

(c) Functions not to be the sole responsibility of an authority’s executive

Schedule 3 of the Functions and Responsibilities Regulations specifies those Plans and Strategies that are not to be the sole responsibility of the Council’s Cabinet. It includes the following:

- 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;
- Plans and alterations which together comprise the Development Plan;
- Sustainable Community Strategy; and
- Youth Justice Plan.

Reference in Constitution: The Schedule 3 plans comprise plans contained within the Council’s Budget and Policy Framework and are reflected in Article 4 of the Council’s Constitution.

(d) Schedule 4 Plans and Strategies

Schedule 4 of the Functions and Responsibilities Regulations specifies those Plans and Strategies, including the Budget, that are developed and approved by full Council (other than the Schedule 3 Plans and Strategies detailed above). The Schedule 4 Plans and Strategies relate to circumstances in

which functions are not to be the responsibility of the Cabinet. Where Council chooses to adopt plans and strategies (other than those listed in Schedule 3) these plans or strategies will be subject to the provisions of Schedule 4.

The Council's Budget and Council Plan arise under Schedule 4 and form part of the Council's Budget and Policy Framework. In its application, Schedule 4 operates as a constraint on the Cabinet. However, the extent of that constraint differs between (i) a Schedule 4 Plan or Strategy such as the Council Plan, and (ii) the Budget, as explained below.

Reference in Constitution: Schedule 4 is reflected in Article 4 of the Council's Constitution.

3. The Budget

The Budget:

1. Is a high level, macro economic, process and outcome;
2. Its primary purpose and effect is to culminate in the setting of the Council Tax for the year;
3. It goes towards raising resources;
4. It operates as a constraint as to what can be done in-year, because whatever is done must be within what the level of Council Tax and other resources and the Council's statutory and contractual commitments permit; and
5. Whilst based on a framework, it does not otherwise pre-empt decisions that will fall to be made, either by the Cabinet or full Council, during the course of the year.

In addition, the Courts have described a local authority budget as:

(1) An *estimate* of planned expenditure; and

(2) A *projection* based upon foreseeable risks which includes a contingency for uncertainties.

It is vital that there is a balanced Budget. During a financial year the Council must live within the resources for which the Budget makes provision. However, how that is done during the course of a financial year will be subject to considerable flexibility, taking into account circumstances as they develop and all other relevant factors, such as responses to consultation undertaken or the effect of Equality Impact Assessments.

Cabinet must operate within the Budget approved by full Council. The constraint the Budget places upon Cabinet, under Schedule 4, is that Cabinet **cannot determine a matter contrary to, or not wholly in accordance with the Budget**. Where Cabinet is minded to do so, then the matter must be referred to full Council for determination.

There is however **no positive obligation** upon Cabinet to carry out individual proposals which appear as a line in the budget which are within its areas of responsibility. However, Cabinet must not make decisions that are contrary to or not wholly in accordance with the budget when taken as a whole.

Reference in Constitution: Part 4.7 The Budget and Policy Framework Rules of Procedure, Paragraphs 5 and 6.

4. The Council Plan

The Council Plan is a non-statutory plan, but rather is a plan adopted by full Council, under Schedule 4 of the Regulations. As a Schedule 4 Plan, the Council Plan again operates as a constraint on the Cabinet, however not to the same extent as the Budget. Instead under the provisions of Schedule 4 the constraint upon Cabinet is that Cabinet **cannot determine a matter contrary to the Council Plan**. Where Cabinet is minded to do so then, as with the Budget, the matter must be referred to full Council for determination. However, as with the Budget, there is **no positive obligation** upon Cabinet to carry out particular proposals within its areas of responsibility.

However, it should be noted that recent case law indicates that plans or strategies under Schedule 4 must comprise **a statement of policy**. Such plans or strategies must therefore be aspirational rather than prescriptive in operational or decision-making terms. Notwithstanding the label attached to it, any plan or strategy (or any component part of a plan or strategy) adopted by Council which is not a statement of policy, but rather is operational or decision-making, may fail to constitute a plan or strategy for the purpose of Schedule 4, and may therefore not operate as a constraint upon Cabinet in the manner indicated above.

It should be borne in mind that the power of Council to create plans under Schedule 4 cannot frustrate or thwart the law in relation to executive arrangements. The Council Plan must not attempt to or be exercised in such a way as to unduly hinder the Cabinet in the discharge of functions that are clearly its own to discharge.

Reference in Constitution: Part 4.7 The Budget and Policy Framework Rules of Procedure, Paragraphs 5 and 6.

NB in relation to paragraphs 3 and 4: Non-determination. Note that the constraints upon Cabinet described above will only operate where **determinations, i.e. decisions, are made.** It is open to Cabinet not to make a determination or decision in relation to any matter. If this happens the status quo would prevail.

5. Summary

1. The general scheme and legislative purpose in relation to executive arrangements provide for Cabinet to be responsible for all functions, except to the extent that provision is made to the contrary (for instance in Schedule 1 to the Regulations, which lists functions which are the responsibility of full Council).
2. The creation of the Budget and the Council Plan are matters where both Cabinet and Council have responsibilities and involvement. Once set, the Budget and Council Plan operate as a framework against which decisions are to be made, rather than constituting decisions in themselves.
3. In year, individual operational decisions to be made under the Budget and Council Plan will be taken forward in accordance with all relevant procedures and processes, and in the light of their particular circumstances, having regard to:
 - (i) the Cabinet's responsibilities under the Local Government Act 2000, the Functions and Responsibilities Regulations and the Council's Constitution;
 - (ii) Schedule 4 to the Functions and Responsibilities Regulations, in particular:
 - a. in relation to the Budget, the requirement upon Cabinet not to take a decision contrary to or not wholly in accordance with it; and
 - b. in relation to the Council Plan, the requirement upon Cabinet not to take a decision contrary to it;
 - (iii) the circumstances as they exist at the time of the respective operational decisions, including the outcome of consultation and Equality Impact Assessments, and the developing state of the Council's finances.

4. However, the Budget and Council Plan provide no more than a constraint upon Cabinet and cannot positively require the Cabinet to do something.
5. It is open to the Council to formulate and agree plans and strategies under Schedule 4 of the Regulations. However in order to constitute a plan or strategy for the purposes of Schedule 4, it must be a statement of policy and non-operational.
6. Under executive arrangements it is not open to Cabinet or Council to seek to transfer to itself responsibilities which by law fall solely to the other, whether by way of a plan or strategy or otherwise.
7. It is the responsibility of both Cabinet and full Council to ensure that the Council's Budget remains balanced. Where differences of view arise between full Council and Cabinet in relation to the discharge of the Council's functions it is incumbent upon both to work together to resolve those differences.