Local Authority Constitutions

RICHARD HARWOOD

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Constitutions

Prior to 2000 local authorities had a variety of constitutional documents which governed the way in which the authorities operated, but did not have a constitution. These documents included standing orders, contract standing orders, schemes of delegation, various codes of conduct and a scheme for usually modest members allowances. Section 37 of the Local Government Act 2000 required authorities to adopt constitutions containing their standing orders, code of conduct for members, any other information they considered appropriate and ‘such information as the Secretary of State may direct’. There was much information which the Secretary of State wished to direct. The Local Government Act 2000 (Constitutions) (England) Direction 2000 sets out 26 matters (a-z) which should be included, a number with their own subparagraphs. The matters are appended to this paper. The Secretary of State produced a modular constitution, with a proposed structure and on most points a suggested text. Guidance was also produced on the content of the constitutions and how the new executive arrangements should be operated.

There were a variety of variations in the initial constitutions adopted by local authorities. These included different principles of decision making and a range of scrutiny procedures. Authorities then found themselves changing the constitution as procedures were adjusted and structures changed. Constitutions were being issued in loose-leaf format, with frequent changes.

The effect of the model constitution is that constitutions are structured in the same way and are easier to navigate round. When a particular authority is being considered it is necessary to examine the particular constitution, at the relevant time, rather than rely on the model.

Effect of Principles of Decision-making

Article 13.02 of the model constitution for authorities with executive arrangements sets out principles of decision making. The model suggests that these should include:

“(a) proportionality (i.e. the action must be proportionate to the desired outcome);

(b) due consultation and the taking of professional advice from officers;

(c) respect for human rights;

(d) a presumption in favour of openness; and

(e) clarity of aims and desired outcomes”

1 This paper has benefited from discussions with colleagues at 39 Essex Street and Miss Grainne O’Rourke and Mrs Lynne Battersby of New Forest District Council.
Many authorities have added to these, including duties to give reasons or consider alternatives. In some constitutions the obligations are placed on the executive and in others on the whole council.

In R (GC and J Robinson and Roplas Limited) v Kingston upon Hull City Council\(^2\) a planning permission was challenged on grounds including that the Council had failed to give reasons contrary to Article 13.02 of its constitution which provided for ‘explanation of reasons for the decision’. In refusing permission to apply for judicial review, Mr Justice Harrison said:

“that the Council stated that this application was " determined as recommended" shows quite clearly that the Council agreed with the recommendation of the officer. That, in itself, was a reason for granting planning permission it is the overriding reason for granting planning permission. In my view, that is sufficient for the purposes. To suggest that the Council, under the terms of this constitution, has to go further and give detailed reasons for granting planning permission when they are not required to do so under the general law seems to me to be going too far.”

A public authority is able to adopt procedural rules which impose requirements going beyond those imposed by law. If so, it should be expected to follow them.

**Access to Information**

Access to reports to the full Council and to section 101 committees are still governed by section 100A et seq of the Local Government Act 1972 and Schedule 12A. Similar provisions apply to executive meetings under the Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2000. The principal difference is that private meetings of the executive are sanctioned in certain circumstances.

From 1 March 2006 the rules were changed by the Local Government (Access to Information) (Variation) Order 2006. Schedule 12A was substituted with new categories of exempt information and a public interest test.

The categories of exempt information have been streamlined and simplified, without very much practical difference to the type of information that may be covered by an exemption. However, all categories of exempt information are now also subject to a further “public interest” test.

**Changes to the categories of exempt information**

Previously, there were 7 separate paragraphs in Schedule 12A permitting information relating to particular categories of individual to be exempt from publication. These have

\(^2\) [2002] EWHC 2650 Admin.
been simplified and combined into new provisions specifying “information relating to any individual” or “information which is likely to reveal the identity of an individual”.

There were previously 4 separate provisions permitting information relating to financial or business affairs, contractual information etc to be exempt. These have been removed and replaced by a single provision that “information about the financial or business affairs of any person including the authority” may qualify for exemption.

There are some minor drafting changes, but no real difference, to the provisions allowing exemption of information which would reveal the Council proposed to serve a notice or order, and about action to prevent, investigate or prosecute a crime.

The ‘labour relations’ exemption is unchanged.

The previous provision concerning instructions to and opinions of counsel and the determination of any matter affecting the Council has been removed and replaced with a simpler provision that permits information in respect of which a claim to legal professional privilege could be maintained to be exempt.

*The Public Interest Test*

The main change brought about by the new provisions is that information that falls into any of the above categories is only exempt “if and so long, as in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”. This is a separate question. That is, if information is to be exempted, it must both fulfill one of the criteria listed above, and must also qualify for exemption under the public interest test. The test applies to the judgment whether the information is exempt, rather than the exercise of discretion to release exempt information.

The “public interest” test appears elsewhere in administrative law, notably in Freedom of Information legislation, as a result of which case law on its interpretation is starting to develop. Put simply, the question is whether in any particular case it serves the public interest better to withhold or to disclose the information. This is the exercise of a judgment which is currently delegated to the Chief Executive and Monitoring Officer. Basic guidance on the test can be found on the Information Commissioner’s website – www.informationcommissioner.gov.uk.

Consequential changes to the Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2000 were made by the Local Authorities (Executive Arrangements) (Access to Information) (Amendment) (England) Regulations 2006.

Simultaneously, the Relevant Authorities (Standards Committee) (Amendment) Regulations 2006 modified Schedule 12A as it applies to meetings of standards committees. Three new paragraphs were inserted:
“7A Information which is subject to any obligation of confidentiality.
7B Information which relates in any way to matters concerning national security.
7C The deliberations of a standards committee or of a sub-committee of a standards committee established under the provisions of Part 3 of the Local Government Act 2000 in reaching any finding on a matter referred under the provisions of section 60(2) or (3), 64(2), 70(4) or (5) or 71(2) of that Act.”

These categories of exempt information, with respect to standards committees, are not subject to the public interest test introduced by the Access to Information Order. It has not been formally explained whether this was intentional. An ODPM email to one council has said that the the Order, with the public interest test, was intended to apply to Standards Committees and the Regulations do not reflect this. It suggested that an amendment to the regulations was being prepared, but this has not appeared.

As there is a discretion to release exempt information, or to meet in public if exempt information may be released, standards committees could as a matter of discretion apply a public interest test when deciding to exclude the public. This may be reflected in a constitution as a matter that will be considered although it cannot be determinative in the absence of legislative amendment.

The exclusion of the public, or the non-publication of potentially exempt reports, needs to be done with care. The resolution has to refer to the relevant category of exempt information in Schedule 12A. The public interest needs to be considered for each agenda item which is to be dealt with in closed session. It would be prudent for reports to advise members on the public interest aspects which arise so that members are able to agree, or not, with that assessment.

Functions and responsibilities

Local authorities, apart from some of the smaller districts, operate executive arrangements under Part 2 of the Local Government Act 2000. By section 13(2):

“Subject to any provision made by this Act or by any enactment which is passed or made after the day on which this Act is passed, any function of a local authority which is not specified in regulations under subsection (3) is to be the responsibility of an executive of the authority under executive arrangements.”

The Local Authorities (Functions and Responsibilities) (England) Regulations 2000 (as amended) provide for a division of responsibilities between, the Executive and the remainder of the Council, in particular full Council and the regulatory committees. These regulations are complex and have been amended, in England, eight times since. The most recent amendments are the Local Authorities (Functions and Responsibilities) (Amendment) (England) Regulations 2006 which deal with casino premises licences and education plans.
Local authorities should ensure that their constitutions keep up with these changing requirements. Care also needs to be taken to check that individual decisions are made by the right part of the Council. Otherwise the decision would be unlawful.

Executive functions are transferred to the full Council where the decision is not wholly in accordance with the authority’s budget, plans or strategies. The significance of these provisions, and the need for careful consideration, are perhaps under-appreciated by councillors and officers. Oppositions can be more effective if they force decisions to full Council.

Delegation

The constitution will set out the scheme of delegation to officers. A number of points arise:

(i) clarity is essential, both as to what the powers are and who exercises them.

(ii) there is debate as to whether an officer can sub-delegate powers delegated to him. This issue is being raised in *R(Lord and Lady Hart of Chilton) v Babergh District Council*. The prudent course is for a power to sub-delegate to be expressly provided in the constitution. Where chief officers or heads authorize other officers to exercise their powers, either as a general competence or in a particular case, it is prudent for that authorization to be in writing and to name the officer concerned. Clarity in the delegated arrangements is essential. For an example of an authority providing five different explanations of its delegation arrangements to the Court (but still winning) see *Younger Homes (Northern) Limited v First Secretary of State*.4

(iii) situations where the existence of the delegated power depends on an officer judgment about the compliance of the proposal with policy are subject to *Wednesbury* review and may be problematic: see *R(Carlton-Conway) v London Borough of Harrow*5 and *R(Springhall) v London Borough of Richmond upon Thames*.6

(iv) delegated powers ‘to deal with matters where a decision nominally to be made by the Council is governed substantially by matters of fact or technical factors so that there is no real discretion’ need to be considered with care. In *R(Rockware Glass) v Chester City Council*7 a decision of the Chief Executive to issue a Local Authority Pollution Prevention Control permit on the basis of that authority was quashed.

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3 See Schedule 4.
7 [2005] EWHC 2250 (admin)
Urgency provisions

There are several situations where decisions might have to be made without complying with the normal processes because of their urgent nature. These include the making of key decisions which are not on the forward plan, adding items or further documents to agendas less than five clear working days before the meeting, preventing a call in of an executive decision and failing to comply with contract standing orders. These situations can be highly contentious, both inside and outside the council.

Certain aspects are covered by legislation, such as regulation 16 of the Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2000 which govern key decisions which are not on the forward plan. Constitutions do need to be clear about when urgency provisions can be used and how they are operated. Where consultation with members is required, such as the chair of the overview and scrutiny commission, this ought to be recorded in writing and provision made for appropriate publicity, even though this may be after the event.

Richard Harwood

39 Essex Street

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The matters directed under paragraph 3 of the Local Government Act 2000 (Constitutions) (England) Direction 2000 are:

The constitution prepared and kept up to date in accordance with section 37(1) of the Act by a local authority which is operating executive arrangements or, as the case may be, alternative arrangements must include:

a. a summary and explanation of the purpose and content of the constitution;
b. a description of the composition of the council, the scheme of ordinary elections for members of the council and their terms of office;
c. a description of the principal roles and functions of the members of the council under executive arrangements or, as the case may be, alternative arrangements including the rights and duties of those members;
d. the scheme of allowances for members of the authority drawn up in accordance with regulations made under section 18 of the Local Government and Housing Act 1989 (c.42);
e. a description of the rights and responsibilities of inhabitants of the authority's area including:
i. their rights to vote in elections for the return of members of the authority;

ii. their rights to access to information about the authority's activities;

iii. their rights of access to meetings of the council, its committees and sub-committees and any joint committees established with any other authority; and

iv. their rights of access to meetings of the executive and committees of the executive,
f. a description of the roles of the authority itself under executive arrangements or, as the case may be, alternative arrangements including:
i. the functions which may be exercised only by the authority itself or which may to some extent be exercised only by the authority itself (including, in the case of a local authority operating executive arrangements any plans and strategies which are subject to approval or adoption by the authority itself by virtue of regulation 5 of, and paragraph 1 of Schedule 4 to, the Local Authorities (Functions and Responsibilities) (England) Regulations 2000 (S.I. 2000/2853)); and

ii. any rules governing the conduct and proceedings of meetings of the authority itself whether specified in the authority's standing orders or otherwise,
g. a description of the roles and functions of the chairman of the council (including a chairman entitled to the style of mayor);
h. a description of the functions of the local authority executive which, for the time being, are exercisable by individual members of the local authority executive stating as respects each function, the name of the member by whom it is exercisable;
i. a description of the functions of the local authority executive which, for the time being, are exercisable by the executive collectively or a committee of the executive, stating as respects each function, the membership of the body by who it is exercisable;

j. a description of those powers of the executive which for the time being are exercisable by an officer of the local authority stating the title of the officer by whom each of the powers so specified is for the time being exercisable, other than any power exercisable by the officer for a specified period not exceeding six months;

k. a description of the arrangements for the operation of overview and scrutiny committees including:

i. the terms of reference and membership of those committees and any rules governing the exercise of their functions; and

ii. any rules governing the conduct and proceedings of meetings of those committees whether specified in the authority's standing orders or otherwise'

l. in the case of a local authority which is operating executive arrangements, a description of the roles of the executive, committees of the executive and members of the executive including:

i. the roles, functions, rights, responsibilities and duties of members of the executive;

ii. in the case of a local authority which is operating executive arrangements which include a leader and cabinet form of executive, any rules governing the election of the executive leader;

iii. any rules governing the appointment of members of the executive;

iv. any provisions in the local authority's executive arrangements with respect to the quorum, proceedings and location of meetings of the executive;

v. any provisions in the local authority's executive arrangements with respect to the quorum, proceedings and location of meetings of any committees of the executive;

vi. any provisions in the local authority's executive arrangements with respect to the appointment of committees of the executive; and

vii. in the case of a local authority which is operating executive arrangements which include a mayor and council manager form of executive, any rules of committees appointed by the elected mayor to advise the executive in accordance with paragraphs 3(14) and (15) of Schedule 1 to the Act,

m. in the case of a local authority which is operating executive arrangements which include a mayor and council manager form of executive, a description of the roles, functions, rights, responsibilities and duties of the deputy mayor appointed in accordance with paragraph 3(3) of Schedule 1 to the Act;

n. a description of the roles of any committees or sub-committees appointed by the authority in accordance with section 101 of the Local Government Act 1972 (c.70) including:

i. the membership, terms of reference and functions of such committees or sub-committees; and
ii. any rules governing the conduct and proceedings of meetings of those committees or sub-committees whether specified in the authority's standing orders or otherwise,

o. a description of those powers of the council which for the time being are exercisable by an officer of the local authority stating the title of the officer by whom each of the powers so specified is for the time being exercisable, other than any power exercisable by the officer for a specified period not exceeding six months;

p. a description of the roles of the local authority's Standards Committee and any parish council sub-committee of the Standards Committee appointed in accordance with sections 53 or 55 of the Act including:

i. the membership, terms of reference and functions of that committee or sub-committee;

ii. any rules governing the conduct and proceedings of meetings of that committee or sub-committee whether specified in the authority's standing orders or otherwise;

q. a description of the roles of any area committees appointed by the authority to exercise functions in accordance with regulations 16A of the Local Government (Committees and Political Groups) Regulations 1990 (SI 1990/1553) or, as the case may be, section 18 of the Act and the Local Authorities (Arrangements for the Discharge of Functions) (England) Regulations 2000 (SI 2000/2851) including:

i. the membership, terms of reference and functions of such committees; and

ii. any rules governing the conduct and proceedings of meetings of those committees whether specified in the authority's standing orders or otherwise,

r. a description of any joint arrangements made with any other local authorities under section 101(5) of the Local Government Act 1972 including:

i. the terms of those arrangements;

ii. the membership, terms of reference and functions of any joint committees established under those arrangements; and

iii. any rules governing the conduct and proceedings of meetings of those joint committees whether specified in the authority's standing orders or otherwise,

s. a description of any arrangements made with another local authority for the discharge of functions by that other local authority or the executive of that other local authority in accordance with section 101(1)(b) of the Local Government Act 1972 or, as the case may be, Local Authorities (Arrangements for the Discharge of Functions) (England) Regulations 2000;

t. a description of the roles of officers of the local authority including:

i. the management structure for officers of the authority;

ii. any arrangements made under section 101 of the Local Government Act 1972 or, as the case may be, section 14, 15 or 16 of the Act for the discharge of functions by officers of the authority;

iii. the roles and functions of the head of paid service, monitoring officer and chief finance officer;
iv. the code of conduct for local government employees issued by the Secretary of State in accordance with section 82 of the Act;

v. any rules governing the recruitment, appointment, dismissal and disciplinary action for officers of the authority;

vi. any protocol established by the authority in respect of relationships between members of the authority and officers of the authority;

u. a description of the arrangements the authority has in place for access of the public, members of the authority and officers of the authority to meetings of the authority, committees and sub-committees of the authority, joint committees established with any other local authority, the executive and committees of the executive.

v. a description of the arrangements the authority has in place for access of the public, members of the authority and officers of the authority to information about the decisions made or to be made by in respect of local authority's functions and activities.

w. a register stating

i. the name and address of every member of the local authority executive for the time being and the ward or division (if any) which he represents; and

ii. the name of every member of each committee of the local authority's executive for the time being.

x. a description of the rules and procedures for the management of its financial, contractual and legal affairs including:

i. procedures for auditing of the local authority;

ii. the local authority's financial rules or regulations or such equivalent provisions as the local authority may have in place whether specified in the authority's standing orders or otherwise;

iii. rules, regulations and procedures in respect of contracts and procurement including authentication of documents whether specified in the authority's standing orders or otherwise; and

iv. rules and procedures in respect of legal proceedings brought by and against the local authority, and

y. a description of the register of interests of members and co-opted members of the authority required under section 81 of the Act, together with the procedures for publicising, maintaining and updating that register.

z. a description of the rules and procedures for review and revision of the authority's constitution and executive arrangements or, as the case may be, alternative arrangements.