

PART 1 - PUBLIC

Decision Maker: IE&E Sub-committee

Date: 1 June 2010

Decision Type: Non-Urgent Executive Non-Key

Title: ALIGNING POLICY & FINANCE

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Chief Officer: Doug Patterson: Chief Executive

Ward: All

1. Reason for report

- 1.1. In preparation for a potentially extended period of financial austerity Members of the Improvement & Efficiency Sub-Committee have requested that Officers investigate the flexibility that the organisation has in determining the services it provides and the levels to which these are provided.
 - 1.2. This report represents the first stage of this work and seeks to explain in broad terms the legal duties placed on a local authority whether by Statute or some other mechanism such as custom, practice, contracts or guidance.
 - 1.3. It is hoped that this information will assist Members in their thinking and the commissioning of further work by officers to explore the various possibilities available when considering how to most appropriately 'align policy and finance'.
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2. RECOMMENDATIONS

- 2.1 That IE&E sub-committee notes the work carried out on the first tranche of the Aligning Policy & Finance project, and comments, as appropriate, on how Officers should progress.

Corporate Policy

1. Policy Status: New policy.
 2. BBB Priority: Excellent Council.
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Financial

1. Cost of proposal: N/A
 2. Ongoing costs: Non-recurring cost.
 3. Budget head/performance centre: NA
 4. Total current budget for this head: £NA
 5. Source of funding:
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Staff

1. Number of staff (current and additional): NA
 2. If from existing staff resources, number of staff hours:
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Legal

1. Legal Requirement: No statutory requirement or Government guidance.
 2. Call-in: Call-in is not applicable.
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Customer Impact

1. Estimated number of users/beneficiaries (current and projected): N/A
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Ward Councillor Views

1. Have Ward Councillors been asked for comments? N/A.
2. Summary of Ward Councillors comments: N/A

3. COMMENTARY

- 3.1 Local authorities provide a wide range of services, some mandatory, others discretionary.
- 3.2 In an ideal world a quick check of the enabling provision would determine whether a service must be provided or is merely desirable. This isn't straight forward given the element of discretion as to the level of provision within some mandatory services, the increased willingness of the court and ombudsman to assert discretionary rights and the sheer volume of primary and secondary legislation which makes a definitive statement or list virtually impossible to achieve.
- 3.3 The Conservative Government in the mid-1980s promised such a list – it hadn't been completed when they left office in 1997 and the large amount of legislation since means it is unlikely to happen.

4. The Overall Legal Framework

- 4.1. The concept of mandatory functions and discretionary powers needs to be seen in the overall context of local authority decision making. London Boroughs are statutory corporations.
- 4.2. This means they are distinct legally from the Members who make them up and more significantly are dependent on statute to define the extent of their power and actions and can only do what is authorised by law.
- 4.3. Whilst an individual can do what they like unless the law says they can't, a statutory corporation can only do what the law says it can. This is the basis of the Ultra Vires doctrine. An Ultra Vires decision will be void.
- 4.4. As a consequence in all decision making a local authority must:
 - Understand the law that regulates the decision making power and give effect to it
 - Take into account all relevant matters, as required generally and by the particular law at issue.
 - Ignore irrelevant considerations.
 - Act for a proper purpose, exercising powers for the public good.
 - Not reach a decision no reasonable authority could reach.
 - Comply with the requirements of budget and council tax setting.
 - Act with procedural propriety in accordance with the rules of fairness.
 - Ensure all action taken is properly authorised.
- 4.5 The test will always be whether there is statutory authority for the action taken and not:
 - Whether it is sensible, reasonable, convenient, desirable or profitable.
 - Whether a private individual or organisation could do it.
 - Whether there are good moral motives for carrying it out.

- 4.6 Functions are broadly divided into duties and powers. In the broadest sense we have to carry out functions where we are under a duty to do so but have a range of discretion where we are looking at a power – but even that isn't absolute.
- 4.7 From the 1998 case of *R v East Sussex County Council exp Tandy* the House of Lords said:
- “to permit a local authority to avoid performing a statutory duty on the grounds that it prefers to spend the money in other ways is to downgrade a statutory duty to a discretionary power ... Parliament has chosen to impose a statutory duty, as opposed to a power, requiring the local authority to do certain things. In my judgement the courts should be slow to downgrade such duties into what are , in effect mere discretions over which the court would have very little real control.”*
- 4.8 Matters will not always be clear cut. There may be a duty to provide a relevant service but in both personal and general services there is scope for interpretation on whether level or type of provision has discharged the duty or not. This occupies a significant amount of court time.
- 4.9 We also have a general fiduciary duty to residents of our area to use the resources wisely. There are some cases which indicate, contrary to the Tandy decision that resources can come into play even when dealing with a duty. However, the way the case is evolving it would be very difficult to rely on arguments around this when we spend on discretionary services and have our current balance of reserves.
- 4.10 Service provision duties are subject to general duties e.g. the need to comply with a range of provisions in the Human Rights Act 1998, the duty to consult in section Local Government and Public Involvement in Health Act 2007 or equalities duties.
- 4.11 Even when there isn't an absolute duty then the following need to be considered:
- 4.12 Policy and legitimate expectation
Even where we don't have a duty to do something, our previous behaviour through policies or promises given to service users shows we intend to provide or give access to a service or facility in a particular way. Whilst we can of course change our minds then this can usually only safely happen after consultation with a decision being based on the principles outlined previously. It has been held that a failure to undertake equality impact assessments will in some instances nullify a decision. Failure to follow sound decision making can lead to legal challenge or adverse finding from the Ombudsman.
- 4.13 Contracts
We may have entered into a contractual commitment for the provision of a discretionary service and would be liable in damages if we walked away without there being a breach justifying termination.
- 4.14 Government and other Guidance
Guidance can be general or statutory. Modern legislative practice increasingly looks to statutory powers/functions being subject to statutory guidance often from the relevant Secretary of State. Where this is the case then case law has established that we can only depart from that guidance only on the clearest and strongest reasoning. Differences of political opinion will not be sufficient. Guidance on practice not related to specific statutory provisions needs to be considered but can be departed from. The key is that there must be evidence of that consideration and the reasons for not following the guidance must be clear and satisfy the principles of decision making. Failure to do so can lead to legal challenge.

4.15 Funding and Resourcing

Government and other funding is sometimes targeted at discretionary service areas and through the LAA we will commit to deliver targets which relate to either voluntary services or a service provision above the statutory minimum in order to achieve reward funding.

- 4.16 There is an element of discretion in applying funds – however as is outlined in the case extract above funding shouldn't be applied in a way which demotes a duty to a power. Whilst Bromley is limited in revenue funding, our reserves will make decisions based on resources far harder than for authorities who do not have our level of reserves. In the majority of cases even where we can consider resources that should not be the only factor taken into account.

5. Key Functions

- 5.1 Appendix 1 sets out a commentary on 30 or so main function areas.

6. Decision Making

- 6.1 The decision making principles set out above need to be followed. There may be some things we must do but they will be subject to the supervision of the court we may still be able to take a local decision on whether a reduced provision is still compliant with an overall duty. A key in any service change will be consultation or engagement even where looking at a reduction in a discretionary service.

7. POLICY IMPLICATIONS

- 7.1 Scenario planning for how we would absorb various magnitudes of financial pressure which would require the organisation to invest/disinvest in services in order to best meet the needs of the community is in support of Building a Better Bromley, our 2020 vision and our Corporate Operating Principles. Financially targeting savings towards services which least reflect the organisation's policy priorities contribute towards Bromley being an Excellent Council in the eyes of local people.

8. FINANCIAL & PERSONNEL IMPLICATIONS

- 8.1 There are no financial or personnel implications arising directly from this information paper although evidently the consequences of pursuing this work to its ultimate conclusion could have significant and broad financial and personnel implications for the organisation.
- 8.2 Depending on the scope and impact of the proposals these decisions would be likely to be referred by the Chief Executive or to full Council.

Local Authority Major Functions

SERVICE	STATUTORY/ NON-STATUTORY	COMMENTS
Building Regulations	Duty to supervise certain works in return for a fee where person undertaking works so elects. Range of enforcement powers including powers to deal with dangerous structures/buildings.	Act and regulations set standards to be followed by local authorities.
Children's Social Services	Duties to establish children in need and provide support and take action. Duty to prevent children suffering neglect and ill-treatment and take appropriate action through the courts including removal if the child from their home. Duty to provide accommodation for the welfare of children. Duty to provide such family centres as we consider necessary. Duty to take reasonable steps to prevent children being placed in secure accommodation. .Duties on adoption services. Duty to discourage children to commit criminal offences	Subject to the jurisdiction of the courts which will impact on thresholds form time to time.
Consumer Protection	Duty to enforce a range of statues relating to weights and measures, trade descriptions, unfair trading and general consumer protection etc.	Framework of regulations, guidance and best practice – however some discretion on resource applied.
Council Tax Benefit	Mandatory with some discretionary elements for exceptional circumstances/hardship cases	Guidance on discretionary element.
Crime and Disorder and Antisocial Behaviour	Duties to co-operate with partners under Crime and Disorder Act 1998 and subsequent amending legislation. Enforcement powers to deal with anti-social behaviour- including proportionate ability to circulate publicity material following enforcement. Power to make/seek child safety and parenting orders.	
Democratic Support	Duties to produce agendas & minutes for member meetings or records of decision. Duty to have constitution, code of conduct and scheme of members allowances. Statutory member bodies – full council, standards committee, health scrutiny, crime and disorder scrutiny, executive where collective decision making.	Members only legally need to be given an agenda & summons for full council. Councillors can access other agendas in the same way as members of the public and it is sensible to ensure the decision-makers have all relevant information before them in any event.

Education – Early Years	Duty to undertake annual review of childcare and produce early years development and childcare plans and promote co-operation between partners.	
Education – Further & Higher	Primarily a power rather than a duty.	
Education & Schools - Mainstream	Principle planning responsibility for schools and school places.. Duty to produce children and young people’s plans. Duty to provide secretary of state with information on school capacity, pupil numbers etc. Duty to ensure sufficient school places. Duty to have regard so far as practicable of wishes of parents in providing education. Power to establish pupil referral units for excluded children. Duty to ensure governing bodies of maintained schools properly established and to provide free of charge information and training for governors. Budget allocation duties and need to maintain a funding scheme and duty to establish schools forum. Duties to have admission arrangements in compliance with Code of Practice. Obligations to provide certain cross borough support services. Duties to enforce school, attendance. Duty to secure adequate provision for recreation and social and physical training. Duty to provide career advice.	Subject to extensive statutory and non-statutory guidance and inspection regime. There are also a range of powers around providing school uniforms, meals etc., which in some instances tip into duties. Range of residual employment and tortious liabilities.
Education - Special Needs	Statutory/regulatory duties and obligation to have regard to code of practice. Responsibility non- delegable. Duties to provide advice and information as well as to assess and secure provision.	Some ability to take account of resources but also a duty on parental engagement consultation and preference and subject to appeal rights.
Education – Transport	Duty to make such arrangements as consider necessary or directed by secretary of state. Powers to provide such assistance for attendance at nursery schools and for sixth formers.	
Environmental Health - Food	Statutory food authority – Food Safety Act 1990. Duty to enforce act and related legislation and regulations and comply with directions from secretary of state to control quality of food sold and relevant businesses.	

Environmental Health – Public Nuisance, etc.	Duty to inspect area for statutory nuisances. and deal with noise etc. Special powers to deal with alarms. Duty to inspect area from time to time to identify contaminated land. Duty to review air quality. Duties to deal with notifiable diseases. Duties to so far as practicable keep the area free from rats and mice. Duties to deal with stray & dangerous dogs and dog fouling. Wide range of enforcement powers.	Whilst an element of discretion around enforcement poor practice often leads to adverse Ombudsman finding/compensation.
Emergency Planning	Civil Contingencies Act 2004 – duties to prepare for and respond to “emergencies”.	Discretion on resources applied.
Health and Safety	Health and Safety at Work Act 1974 and voluminous subsequent regulations. Duty to enforce statutory provisions locally and comply with duties in carrying out our operations. Duties in respect of safety of sports grounds.	Failure to comply with the legislation in the way we run our operations can lead to personal criminal and civil liability for members and officers as well as corporate liability.
Highways	Statutory duties to maintain highways and protect highway rights stemming from Highways Act 1980. Range of miscellaneous duties, e.g. duty to keep a register of street works. Wide range of licences and consents granted.	Civil liability through accidents etc arising from failure to maintain – however negligence must be proven. Licensing etc should at least cover costs.
Housing Benefit	Mandatory with some discretionary elements for exceptional circumstances/hardship cases . Housing Act 1996 and related regulations.	Guidance on discretionary element.
Housing - Public	Principle statute Housing Acts 1989 and 1996. No duty to hold housing stock. However duties to have a housing allocation scheme and to secure accommodation for homeless people in compliance with statutory guidance. Duties to provide housing advice in particular to prevent homelessness.	Homeless guidance is statutory guidance and courts will only accept deviation in exceptional circumstances. Wide range of discretionary powers to provide assistance to people in housing need.
Housing - Private	Housing Act 1988 – duties to protect individuals from eviction, Housing Act 2004 duties to deal with unfit housing. Mandatory disabled facilities grant. Other assistance in accordance with local scheme (Regulatory Reform (Housing Assistance) etc order 2002. Mandatory and discretionary licensing schemes for Housing in Multiple occupation. Discretionary provisions to manage compulsorily purchase /empty dwellings.	Some discretion on remedies pursued in discharge of duty. Disabled facilities grant means tested and capped. Degree of discretion of local grant schemes. Mandatory HMO licensing scheme 3+ stories 5+ occupants in 2+ households

Information Management	Statutory – Data Protection Act 1989, Freedom of Information Act 2000 plus statutory and general guidance.	Data Protection duties to protect and release personal data. Criminal and civil sanctions including personal liability for individual officers/members. FOIA duties to disclose a wide range of information on request failure ultimately enforced by committal.
Leisure and Recreation	Discretionary s 19 Local Government Miscellaneous Provisions Act 1976.	Contractual funding obligations with My-Time
Libraries, Museums and Art Galleries	Library – statutory – Public Libraries and Museums Act 1968 others discretionary.	Library duty to provide a comprehensive and efficient service. Charges can't be made for lending books but charges can be made for help in research assistance with computers, use of "cubicles" selling items which become the property of the person and services which go beyond those ordinarily provided as part of a library service.
Licensing Functions	Wide range of licensing functions major function licensing under Licensing Act 2003. Fees can be charged.	Objective to be self funding. Some fees licences fixed by act/regulation others are discretionary.
Local Land Charges	Duty to maintain register and respond to enquiries in return for a fee.	Should at least break even.
Parking	Discretionary powers to provide parking places. Statutory procedures/regulations to be followed in establishing, charging and carrying out enforcement.	Contractual arrangements in place and income generating services.
Parks & Open Spaces and Allotments	Discretionary powers stemming from Public Health Act 1875 and London Government Act 1963 to provide parks, recreation facilities etc. Powers to provide allotments under allotment acts 1908-1950.	Contractual arrangements in place for maintenance etc. Covenants etc can limit alternative uses – although can be released/relaxed in appropriate circumstances. Some charging powers. Rigorous statutory regime on changing use form allotments.

Planning	Duties to deal with planning applications, powers to give pre-planning advice. Powers to undertake planning enforcement. Duty to produce strategic planning policy documents.	Fees chargeable for planning applications. Whilst an element of discretion around planning enforcement poor practice often leads to adverse Ombudsman finding/compensation.
Property Management	No duty to hold land or property but where we do, we need to comply with a range of prescriptive duties relating to health and safety at work, occupiers liability, disability discrimination, etc,	
Registration	Duties to register births, deaths, notices of marriages, carry out civil partnerships provide basic wedding facility and carry out citizenship ceremonies.	Discretionary element generates most income.
Social Services - Accommodation	Where statutory need criteria met duty to secure but not directly provide accommodation.	Charges can be levied subject to means test and some regard can be had to resources over type of provision but not obligation to provide once need is established.
Social Services – Domiciliary Care and Community Care	Extensive provisions in statute, regulation, case law etc. Overriding duty but with power to set eligibility criteria and set charges.	Resources can be taken into account if setting eligibility criteria for community care (but not as the sole factor)- but once a need is established resources can no longer be taken into account. Scope for judicial review and intervention by the Ombudsman.
Social Services – General	Requirement to act in accordance with statute, regulations or written direction from Secretary of State. Distinction between statutory and general guidance – the former should be followed but regard must also be had to the latter. Requirements for a statutory complaints procedure for some aspects.	
Social services – Mental Health	Duty to appoint sufficient approved social workers to fulfil obligations. Powers to represent some rights of individuals.	

Street cleaning, Graffiti & Litter & Public Conveniences	Duty to ensure land is as far as practicable kept free of litter and refuse. Duty to consult with other local authorities and partners on litter abatement. Power to provide litter bins etc but duty to empty if provided. Discretionary enforcement powers. Powers to deal with graffiti and recover associated costs. Power to provide public conveniences but of provided must be maintained and in conformity with disability discrimination act requirements.	Codes produced by SoS deal with standards of cleanliness.
Theatres & Entertainments	Discretionary – Theatres Act 1968 and Local Government Act 1972.	Discretionary only however significant provision subject locally to contractual arrangements. However services could stop on expiry of contract.
Waste/Refuse Collection and Disposal.	Duties to collect and dispose of waste. Obligations to produce certain strategies and plans. Enforcement powers to deal with unlawful waste disposal flu tipping, etc.	Discretion on frequency and nature of collection. Land fill tax has cost impact on disposal. Power to charge for collection/disposal of controlled non domestic and commercial waste.
Wellbeing and Related Powers	Section 2 of the Local Government Act 2000 gives a general power to carry out activities for the economic, social or environmental wellbeing of our area. To a large extent this has replaced the economic development powers contained in the Local Government & Housing Act 1989. There are also general charging and trading powers in the Local Government Act 2003.	The wellbeing powers cannot override any statutory prohibitions and the same is true for the charging powers. We can only trade through a company. We need to carefully consider the contents of our community strategy as that is the key document in influencing the use of wellbeing powers and an unrevised document could lead to arguments that we should spend on areas which are no longer priorities.