

PART 1 - PUBLIC

Decision Maker: I&E Sub-committee

Date: April 2011

Decision Type: Non-Urgent Executive Non-Key

Title: ALIGNING POLICY & FINANCE FRAMEWORK

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Chief Officer: Doug Patterson: Chief Executive

Ward: All

1. Reason for report

- 1.1. In response to the extended period of financial austerity Members will be required to make difficult choices about the services the organisation provides and the levels to which these are provided.
 - 1.2. This report details the framework by which it is proposed Members identify areas for review and commission 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 I&E sub-committee notes the report and endorses the framework proposed.

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): 5
 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 Ultimately aligning policy & finance is about Members making decisions based on the knowledge 'you can do anything you want to, you just can't do everything'. It is about determining what services the council should be providing, and to what level, given the resources we have available.
- 3.2 To date we have successfully placed the organisation in a very strong financial position by generally using a range of strategies such as:
- Strong financial management, including cash limiting departments and forcing directors to meet financial pressures from within other budgets under their control.
 - A focus on improving operational efficiency, delivering savings through I & E Business plans, service reviews, and management and overheads savings.
 - Investing in improvement, e.g. in corporate systems to provide a platform for improved efficiency, such as the Customer Contact Centre (CCC) and electronic purchase and payment.
- 3.3 As significant further savings are required beyond that which can be absorbed through these traditional, mainly departmental approaches, alternative and fundamentally different strategies need to be employed. Most obviously Members and Officers need to review as an organisation what services the Council provides, both internally and externally, and to what level.

4. The Statutory and Discretionary Barrier

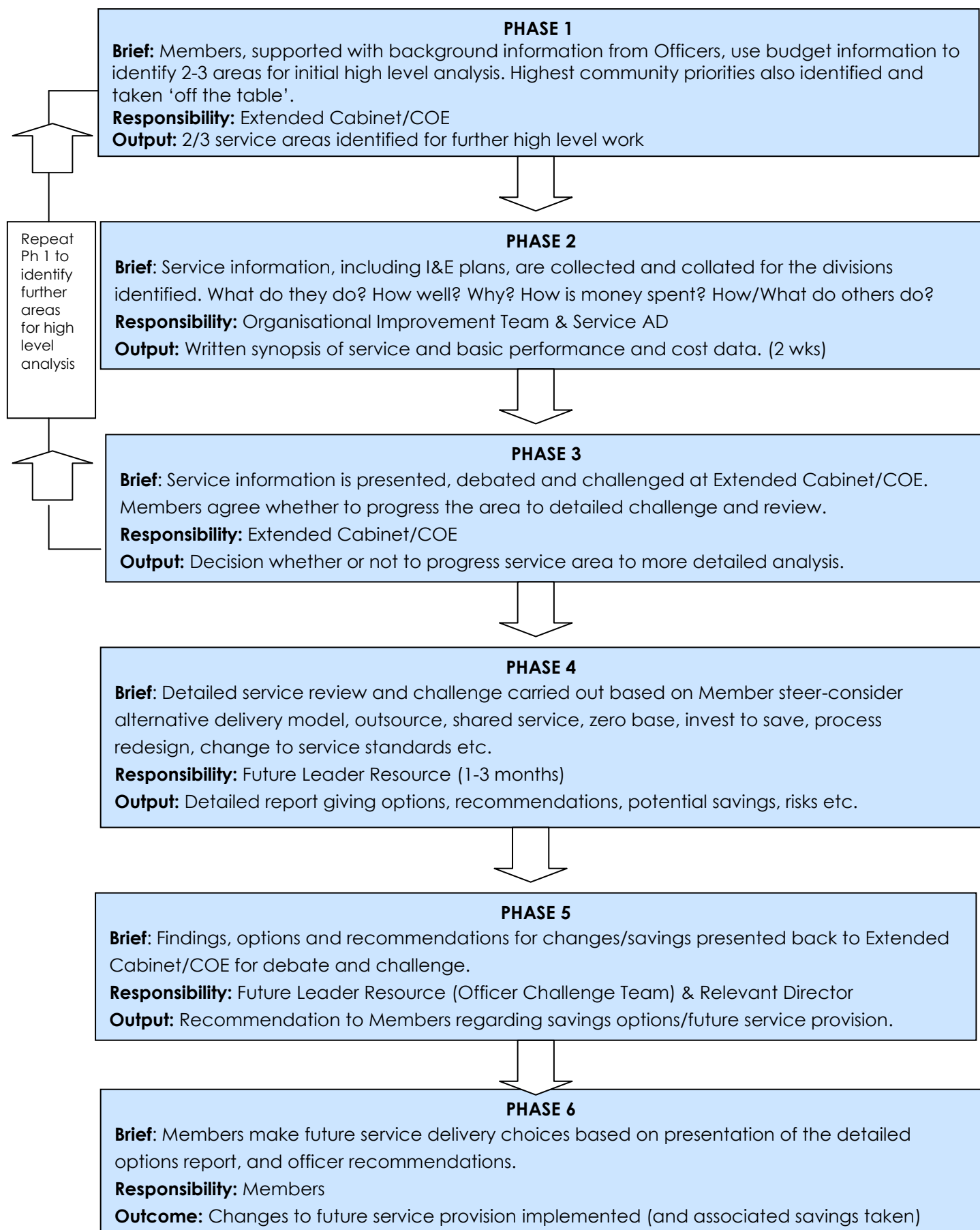
- 4.1 Guidance on the Council's Statutory and Discretionary Powers and Functions can be found in Appendix A. Prepared by the Director of Resources, the guidance highlights the considerations which must be taken into account and the importance of process and consultation in reaching decisions.
- 4.2 Rather than attempt to split service areas into categories such as 'core duty', 'partial duty' 'discretionary' or similar, this methodology suggests that for the first phase of this work Members are 'blind' to the legalities of the services we currently provide and instead debate and challenge, across portfolios, whether what we do accords with community priorities.
- 4.3 To categorise services in such a way at the outset and focus the debate on this basis risks the process not being as comprehensive and robust as it needs to be. Service areas are made up of numerous functions to which Members may afford different priorities, and indeed there may be more discretion to vary some functions over others within a single main service area. In order for this process to be manageable the level of granularity that could be applied would need to be relatively high level and therefore these subtleties would not be picked up.
- 4.4 Also, even for services and functions which we might legitimately include within the category of 'core duty' there may well be significant scope for variation as to the level and standards of service which could be provided whilst still satisfying the legislative requirement.
- 4.5 By way of example there is a statutory duty under the Environmental Protection Act 1990 for 'every local authority to cause its area to be inspected from time to time to detect any statutory nuisances [such as noise] and, where a complaint of a statutory nuisance is made to take such steps as are reasonably practicable to investigate the complaint'. The act does not define the frequency with which these inspections must be undertaken nor what steps are reasonably practicable when investigating. Therefore a local authority has substantial discretion when setting its policy in relation to this core statutory duty and hence the standard of service offered at different authorities across the country varies markedly.

- 4.6 This example is purely illustrative and other local authority core duties will have a similarly broad statutory definition capable of interpretation when setting a lawful policy in relation to discharging that duty. Analysis of the underlying statute, guidance and in some cases expert legal opinion would be required in individual areas in order to make informed judgments about the scope to alter or cease service provision and even perhaps the risks of setting a policy where we may reasonably expect legal challenge.

5. Suggested Approach

- 5.1 In order to ensure we ever arrive at the point of making these extremely difficult and complex decisions it is suggested we first ignore the legal basis on which we provide a service and instead focus on identifying those functions which do (and don't) matter most to Members and the community.
- 5.2 In order that the Aligning Policy & Finance work contributes significantly towards closing our ultimate budget gap of £22 million it is suggested that Members, led by budget information, first debate and agree the initial areas that are suitable for more detailed review and analysis.
- 5.3 This initial discussion should involve Members debating and challenging across portfolios, supported with service information and context from Directors, in order to identify an initial work programme of 2 or 3 service areas for further quick (2 weeks) information gathering.
- 5.4 This process could also be used to identify any areas of protection or even where Members' wish additional investment to be considered.
- 5.5 Following the initial work programme being agreed by Members high level service information will be brought back in a short time scale. Officers from the Organisational Improvement Team would gather this information by working with the service to bring together a combination of published service data (both internal and external) and softer information from interviews with the relevant Director and Assistant Director about the service and what is happening elsewhere.
- 5.6 This service information and feedback will be presented back to Extended Cabinet/COE and form the basis of a discussion as to which areas should be progressed for further detailed work and what format that work should take.
- 5.7 In some instances Members may direct that on the basis of the high level service information they are satisfied that area does not require further, independent review and challenge.
- 5.8 Alternatively, Members may choose to commission a full Service Review. Examining how aligned the service is with our Corporate Operating Principles, exploring how costs could be reduced by changing the service delivery model, altering systems, processes, working practices, standards or taking a Zero Based position.
- 5.9 The exact methodology used for this detailed work would need to be determined on a case by case basis but would officers would be strictly limited to a maximum period of 3 months and the officer review team would be appropriately selected to provide the correct mix of skills, independence and challenge.
- 5.10 The review team would then report back with clear recommendations regarding future service delivery, savings and/or improvements and proposals for implementation.

6. Process Summary



7. POLICY IMPLICATIONS

- 7.1 Member decisions to align policy and finance by investing/disinvesting 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 will have financial and personnel implications for the organisation.

STATUTORY AND DISCRETIONARY POWERS AND FUNCTIONS

Introduction

Local authorities provide a wide range of services, some mandatory, others discretionary. 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. The Conservative Government in the mid-1980s promised such a list – it hadn't been completed when they left office in 1997 and the volume of legislation since means it is unlikely to happen.

The Overall Legal Framework

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. 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. 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.

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.

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.

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.

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.”

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.

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 law 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.

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 under the Local Government and Public Involvement in Health Act 2007 and equalities duties.

Even when there isn't an absolute duty then the following need to be considered

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.

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.

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.

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.

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.

Decision Making

The decision making principles set out above need to be followed. There may be some things we must do but 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 aspect of any service change will be consultation or engagement even where looking at a reduction in a discretionary service.