

PROTOCOL FOR THE USE OF REPORTS UNDER S.5 LOCAL GOVERNMENT & HOUSING ACT 1989

Background - Responsibility of the Monitoring Officer

The Monitoring Officer is responsible for overseeing the propriety and lawfulness of the Council and for taking action or ensuring action is taken to prevent or correct proposals or decisions which may be unlawful, which may contravene the constitutional requirements of the Council or amount to maladministration.

The Monitoring Officer's ability to discharge this role will be affected by the officer's position within the senior structure of the Council's management, the general culture of the Council and the extent to which the officer has access to information so as to have awareness of the Council's actions and ways of arriving at decisions.

The ability to discharge the role without additional assistance is helped when the Monitoring Officer is legally qualified and has experience of the legal and constitutional framework within which the Council operates.

The purpose of this protocol is to provide a reference for decision-making by the Monitoring Officer for use of the power available to the officer under s.5 of the 1989 Act in connection with potentially unlawful proposals or actions by the Council.

Arrangements for best practice internal arrangements

In order to better discharge their responsibilities the Monitoring Officer should operate in a Council where the arrangements mean the officer:

- is legally qualified and is responsible for the in house legal service
- is a member of the senior leadership team
- has direct access to and or regular scheduled meetings with the Chief Finance Officer and Chief executive/Head of Paid Service
- has direct access to the Council's political leaders
- has lead responsibility for the effective governance and constitutional arrangements of the Council
- operates within a corporate culture of compliance, propriety and transparency
- has direct input into or access to all significant policy proposals, decisions and commitments by the Council before they are finalised

Legislation – summary of duty to prepare reports on unlawfulness

The requirement for councils to appoint a Monitoring Officer and the principal responsibilities of the officer are set out in s.5 Local Government and Housing Act 1989. The relevant provisions are set out in the appendix.

This protocol deals with the exercise of the duty contained in ss 5(2) and 5A(2). These provide for the officer to prepare a report to the full Council or (5A) to the Council's executive when the matter concerns the actions of the executive. The decision to prepare a report arises when it appears to the officer that a proposal act or omission of the Council (including by any individual or committee) has given, is likely to give or would give rise to a contravention of any enactment or rule of law or give rise to maladministration.

The procedure for the use of s.5 and s.5A when it appears to the officer that a proposal act or omission of the Council (including by any individual or committee) is likely to give or would give rise to a contravention of any enactment or rule of law.

Should the MO consider a proposal, act or omission to meet the criteria set out in s.5 the officer should actively consider options to manage the risks associated with the matter, including giving advice, securing specialist advice and speaking to the officers responsible for the matter. The MO should clearly set out the basis of the concerns held and offer advice on how risks of unlawfulness or impropriety can be or should be avoided and the action required to do so.

Escalation in the event that advice is not heeded or actions not implemented should be considered as follows:

- The MO discusses the issue with the Chief Finance Officer and the most senior officer of the relevant service
- The MO discusses the issue with the Chief Executive
- The three statutory officers discuss the matter together and agree actions to address the problems to their collective satisfaction
- Where the MO is not satisfied the MO should make this clear to both the CFO and the CE.
- The MO, after advising the CE and CFO, may contact the leader of the Council and, if relevant, the appropriate executive member of the Council to advise them of the basis for the concerns and any action planned.

The writing of a s.5 report should be treated as a measure for use when other actions and measures have been used but not to satisfactory effect. The above engagement does not replace or constitute the discharge of a duty to consult on the proposal to issue a s.5 report. This should be done formally and recorded.

Considerations where the proposal act or omission is by a committee

Where the Council is operating a leader and executive model the issue is only likely to arise where:

- A Planning or Regulatory Committee is exercising a non-executive function.
- An Audit Committee has decision-making powers.
- A Scrutiny Committee is exercising powers under the Health and Social Care Act 2001.
- A scrutiny or non-executive committee is acting beyond its powers or constitutional remit or otherwise acting irrationally so as to propose or take a course of action which may be unlawful.

In all such cases the Monitoring Officer should give advice direct to the lead officer responsible for the relevant area of business and to the members of the Committee and ensure they have the opportunity to change their intended course of action. If need be the officer may call for additional technical or independent advice to assist

the decision of the Committee and may ask the Committee to postpone any decision to allow for such advice to be provided and considered.

In the event that the Committee proceeds to act in a way the officer considers unlawful the guidance set out below should be followed, including and up to the consideration of a report by the full Council, which shall, in so far as legally permissible, have the power to reverse or overrule the action or omission of the Committee.

The implementation of a proposal or decision to which a report under this section relates shall be suspended in consequence of the report until the end of the first business day after the day on which consideration of that report is concluded.

Decision to prepare a report under s.5

The officer must carry out the role personally although, in absence, the role may be discharged by the nominated deputy. The deputy may therefore not only issue the report but take the decision to issue it in accordance with this protocol. The MO should not delegate the task to the deputy if the MO is available to act.

The officer must consult both the Council's head of paid service and the chief finance officer. This consultation and any response should be recorded. This should relate to:

- the need for such a report
- the purpose of the report and any outcome sought
- other options available to address the concerns raised
- the scope and content of the report.
- The procedural consequences of issuing a report.

The Chief Finance Officer should give consideration to the need, in accordance with that officer's statutory responsibilities, to issue a report related to the same subject matter or related areas of concern.

The report must set out the proposal or omission and explain how it is considered to breach an enactment (primary legislation) or a rule of law.

The report, if under s.5 rather than s.5A, should be supplied to every member of the Council.

Consequential steps

Once issued the report will serve to cause the suspension of the decision or proposal which is the subject of the report. The MO should ensure that this suspension takes effect.

In the case of a report to the executive (cabinet or Lead member) under s.5A there must be a response to the report from the executive within 21 days of the report's

receipt. The MO should consider and confirm arrangements to enable the relevant executive members to receive and consider advice to inform their response.

Whilst there is no requirement for the full Council to provide a formal response to the officer's report under s.5 it may be that the Council considers and votes on a proposition by way of response to the report as a way of concluding any debate, but there is no requirement for the Council to come to any conclusion. It may simply receive or note the report. The MO should be available to advise the Chairman of the Council and the Chief Executive of the appropriateness of the report being formally considered or debated by the Council and how advice to the Council may be provided.

Publication

It should be assumed that the report will be available for publication and should be placed on the Council's website. The report is available to all elected members and may become the subject of a Council debate and transparency and openness will enable the matter to be aired fully.

There may be instances where the subject matter of the report is commercially sensitive and would qualify as exempt under the Freedom of Information Act. This would also trigger the exemption from open debate at the Council meeting or meeting of the executive under the Council's access to information rules.

The officer should apply the public interest test when deciding whether such exemption should be applied to the report.

The officer may wish to consider taking independent or external advice on the issue of publicity and the validity of any FoI exemption.

The procedure for the use of s.5 and s.5A when it appears to the officer that a proposal act or omission of the Council (including by any individual or committee) has given rise to a contravention of any enactment or rule of law

As a statutory body the Council is governed by numerous statutory requirements relating to a diverse and broad range of functions. Whilst the Council aims to comply with all the legal requirements it is unrealistic to expect that to be the case at all times.

There will be occasions when, for example, statutory timescales are missed. Such breaches will usually be technical or administrative in nature and have limited impact. Examples of this may include responses to Freedom of Information requests or subject access requests. While these may, on a strict analysis, constitute a contravention of an enactment or rule of law it is not proposed that such instances should trigger the requirement for a s5 report in the absence of evidence of a systemic issue highlighted by a statutory regulator or through other internal or external investigation.

There will also be occasions on which an investigation by the Local Government and Social Care Ombudsman makes a finding of unlawfulness or maladministration.

Such findings should be made available to relevant officers and elected members with responsibility for the affected area of service. Unless the Ombudsman has issued a formal report it will rarely, if ever, be necessary for this to trigger the need for a report in accordance with this protocol.

Alternative arrangements

The objective behind the requirement to report to Members of the authority is to ensure relevant or all Members are aware of the actions of the Council and to ensure democratic oversight and operational assurance. This may be achieved through a number of mechanisms other than the use of s5 reporting, making the issuing of a s.5 report unnecessary. Examples include:

- Summaries of decisions of the Local Government Ombudsman where there has been a finding of fault reported to Cabinet and Council through the Council's established performance monitoring and reporting framework
- The LGO's annual report reported to the Governance Committee and/or Standards Committee as well as performance data regarding compliance with timescales for the provision of information under statutory obligations.
- Where the LGO issues a report, this to be made available to all Members and be reported to the relevant Lead Member and Committee(s) (or Council if sufficiently significant).
- The outcomes of statutory inspections, such as those from Ofsted, CQC and HMI are made available to all Members and reported to Cabinet and relevant Scrutiny Committees.
- Reports on the outcome of internal complaint investigations, internal audit reports or other investigations undertaken internal or externally and which include findings of failings or non-compliance being reported to relevant senior management and elected member forums, including those meeting in public.
- The Council's Annual Governance Statement will set out the governance framework for the Council and any ongoing governance issues including those which may amount to non-compliance with requirements.
- Reports arising from specific court or tribunal proceedings involving the Council are reported to the relevant senior officers (and elected members if of particular significance) including the plans for necessary or advised corrective action.

Principles guiding the approach

The provisions in s.5 will, in general, be used where there is a lacuna in the Council's governance reporting framework and where the issue is sufficiently significant, in the opinion of the Monitoring Officer to require a s5 report.

The Officer will have regard to the effect and impact of the of the breach or contravention.

The Officer will consider what other courses of action are available to address the issue and to both advise elected members. The officer should maintain an open and

frank dialogue with the Chief Finance Officer and Head of Paid Service to ensure areas of concern are fully understood and that the opportunity is taken at an early stage to decide what if any action would be helpful to allay concerns or address identified issues.

Approach to judging significance

The statutory provisions do not include any requirement for the unlawfulness to amount to anything of significance or importance nor to relate to a matter or solution over which the Council has direct control. The officer should however consider whether issuing a report under s.5 is advisable or helpful in all the presenting circumstances. This may not be the case for every instance of unlawfulness or in situations which may be seen as minor or inconsequential.. The officer would need to ensure however that arrangements are in place to ensure that unlawful acts are noted and brought to the attention of relevant officers and executive members and remedial or mitigating actions identified and followed through, using procedures such as those set out above under 'alternative arrangements'.

The use of s.5 should, provided the above arrangements are in place, be considered and necessary, having regard to a range of factors:

- Whether senior officers and relevant Members have been or will be made aware in other ways.
- Whether the action or omission is technical, administrative or purely procedural
- Whether the matter carries little or no monetary value and involves no harm or loss to any person
- Whether the matter is evidence of a more fundamental failure of governance or policy
- Whether the matters has no impact upon residents, service users, suppliers or any other third party
- Whether the issue could be a regular occurrence and evidence of a more fundamental failing

The Monitoring Officer should always be mindful in particular of the consequences of not issuing a report under s.5 in relation to the opportunity to correct or prevent a significant failing or error or potential harm to the standing and reputation of the Council or in ensuring member awareness and transparency.

Content of the report

The report should set out in straightforward terms

- the proposed action or omission
- how it has been arrived at or identified
- who is responsible for it and
- in what way it amounts to unlawfulness or maladministration
- what risks attach to the proposal act or omission if carried through

- Any potential legal action or similar challenge, penalty or financial remedies which may be applied
- Any referral to an external regulator or similar body and the powers available to that body
- Likely reputational damage for the Council or individual decision-makers, and any other consequences which can reasonably be envisaged.

Whilst the Act does not require or assume an ability of the Council or the executive to correct avoid or reverse the action or omission which is the subject of the report the report should explain what mitigation or corrective action may be available to address the issues of concern the report covers. If corrective action is available the report should make this clear and provide options or available courses of action for the executive or Council to consider.

Where the proposed decision or omission relates to a likelihood of maladministration the consideration of the use of a s.5 report may only arise after the relevant investigation and report by the office of the Local Government and Social Care Ombudsman. This will relate to a report directly linked to the subject matter causing concern. The officer will need to consider whether action taken by the Council in response to or on the recommendation of the Ombudsman's report sufficiently addresses the concerns which would otherwise need to be set out in a report under s.5.

Dealing with matters following the issuing of a report.

Preparing for a debate at Council

The officer will need to consider the timing of a debate at Council and what information will need to be provided and by whom in advance to inform and support such a debate.

Responding to member enquiries

The Officer may obtain responses from the other statutory or senior officers and should take these into account in deciding on any further action.

Giving advice

Consider whether another officer or an independent source of legal advice may be needed to give advice to members, to the executive or to be provided as a supplementary document in connection with any debate.

Managing the suspension of a decision or proposal

The proposal or planned decision should, if legally permissible, be suspended or held back from implementation pending the response of the Executive or the outcome of any debate at full Council or consideration by elected members.

Consideration will need to be given to the legal effect of the suspension and whether commitments to or expectations of third parties need to be managed.

Preparing for a debate at Council or Cabinet (or relevant Cabinet Member(s))

The debate may take place at a scheduled meeting or may be dealt with at a special meeting of the Council. The Chairman may receive requests from members to call a special, extraordinary or urgent meeting of the Council and may need access to legal advice on whether to grant such a request.

The officer's report will be the primary document considered as part of the debate but the officer should consider what additional material to provide in order to support the debate. This may include advice notes from the officer colleagues. It may include an additional briefing note prepared by the officer to provide a fuller context to the report.

The Council's normal rules of debate will apply.

The Officer may be invited to speak to the meeting of members in order to explain the reasons for the report or to respond to questions or requests for clarification.

Any member may wish to propose a motion or proposition to form the basis of the debate or to form the subject of a vote by the Council. Other members may seek to propose amendments to a motion or proposition or present counter proposals. These should be managed by the Chairman of the Council in accordance with the Council's Standing Orders.

The officer will need to consider whether a different legal officer should provide advice to the Chairman in order to manage the business of the debate.

Assisting any response from Cabinet

The Executive will prepare a response. The officer should consider what advice the Executive may require in the preparation and distribution of the report.

Follow up and further action

The Monitoring Officer will need to make plans for taking action in the interests of the Council should the proposal action or omission be confirmed by the Council or relevant decision-maker. This could, for example, include notifying the Council's insurers or external auditors.

If the decision of the Council is to continue the suspension of the proposal or to cancel or require the cancellation of the proposal or to take action to remedy the omission the officer should ensure this decision is followed through and implemented without delay.

The officer should prepare a report in consultation with the Chief Finance Officer and head of paid service to record the actions following the s.5 report and how they have been carried out.

End

Prepared (v.1) June 2024

APPENDIX – LEGISLATION

5.— Designation and reports of monitoring officer.

- (1) It shall be the duty of every relevant authority—
- (a) to designate one of their officers (to be known as “*the monitoring officer*”) as the officer responsible for performing the duties imposed by this section and, where relevant, [section 5A](#) below; and
 - (b) to provide that officer with such staff, accommodation and other resources as are, in his opinion, sufficient to allow those duties and, where relevant, the duties under [section 5A](#) below to be performed;
- (2) Subject to subsection (2B), it shall be the duty of a relevant authority's monitoring officer, if it at any time appears to him that any proposal, decision or omission by the authority, by any committee, or sub-committee of the authority, by any person holding any office or employment under the authority or by any joint committee on which the authority are represented constitutes, has given rise to or is likely to or would give rise to—
- (a) a contravention by the authority, by any committee, or sub-committee of the authority, by any person holding any office or employment under the authority or by any such joint committee of any enactment or rule of law; or
 - (aa) any such maladministration or failure as is mentioned in [Part 3](#) of the Local Government Act 1974 (Local Commissioners),
- to prepare a report to the authority with respect to that proposal, decision or omission.
- (2A) No duty shall arise by virtue of subsection (2)(b) above unless a Local Commissioner (within the meaning of the Local Government Act 1974) has conducted an investigation under [Part III](#) of that Act in relation to the proposal, decision or omission concerned.
- (2B) Where a relevant authority are operating executive arrangements, the monitoring officer of the relevant authority shall not make a report under subsection (2) in respect of any proposal, decision or omission unless it is a proposal, decision or omission made otherwise than by or on behalf of the relevant authority's executive.
- (3) It shall be the duty of a relevant authority's monitoring officer
- (a) in preparing a report under this section to consult so far as practicable with—
 - (i) in the case of a relevant authority which is the council of a county, the person who is for the time being the authority's chief executive and with their chief finance officer;
- ...
- (b) as soon as practicable after such a report has been prepared by him or his deputy, to arrange for a copy of it to be sent
 - (a) ...
 - (b) in any other case, to each member of the authority and...

- (5) It shall be the duty of a relevant authority
- (a) to consider any report under this section by a monitoring officer or his deputy
 - (ii) at a meeting held not more than twenty-one days after copies of the report are first sent to members of the authority; and
 - (b) without prejudice to any duty imposed by virtue of [section 115](#) of the [Local Government Finance Act 1988](#) (duties in respect of conduct involving contraventions of financial obligations) or otherwise, to ensure that no step is taken for giving effect to any proposal or decision to which such a report relates at any time while the implementation of the proposal or decision is suspended in consequence of the report;
and nothing in [section 101](#) of the [Local Government Act 1972](#) shall apply to the duty imposed by virtue of paragraph (a) above.
- (6) For the purposes of paragraph (b) of subsection (5) above the implementation of a proposal or decision to which a report under this section relates shall be suspended in consequence of the report until the end of the first business day after the day on which consideration of that report under paragraph (a) of that subsection is concluded.
- (7) The duties of a relevant authority's monitoring officer under this section shall be performed by him personally or, where he is unable to act owing to absence or illness, personally by such member of his staff as he has for the time being nominated as his deputy for the purposes of this section.
- (7A) Subsection (7) above shall have effect subject to [section 82A](#) of the Local Government Act 2000 (monitoring officers: delegation of functions under [Part 3](#) of that Act).
- (8) In this section and in [section 5A](#)—
“business day”, in relation to a relevant authority, means any day which is not a Saturday or Sunday, Christmas Day, Good Friday or any day which is a bank holiday under the Banking and Financial Dealings Act 1971 in the part of Great Britain where the area of the authority is situated;
- (8A) Any reference in this section to the duties of a monitoring officer imposed by this section, or to the duties of a monitoring officer under this section, shall include a reference to the functions which are conferred on a monitoring officer by virtue of [Part III](#) of the Local Government Act 2000.

5A.— Reports of monitoring officer—local authorities operating executive arrangements

- (1) Where a relevant authority are operating executive arrangements, the monitoring officer of that authority shall be responsible for performing the duties imposed by this section.
- (2) It shall be the duty of the monitoring officer of a relevant authority that is referred to in subsection (1) above, if at any time it appears to him that any proposal, decision or omission, in the course of the discharge of functions of the relevant authority, by or on behalf of the relevant authority's executive, constitutes, has given rise to or is likely to or would give rise to any of the events referred to in subsection (3), to prepare a report to the executive of the authority with respect to that proposal, decision or omission.
- (3) The events referred to for the purposes of subsection (2) are—

- (a) a contravention, by the relevant authority's executive or any person on behalf of the executive, of any enactment or rule of law; or
- (b) any such maladministration or failure as is mentioned in [Part III](#) of the Local Government Act 1974 (Local commissioners); ..
- (4) No duty shall arise by virtue of subsection (3)(b) above unless a Local Commissioner (within the meaning of the Local Government Act 1974) has conducted an investigation under [Part III](#) of that Act in relation to the proposal, decision or omission concerned.
- (5) It shall be the duty of an authority's monitoring officer—
- (a) in preparing a report under subsection (2) to consult so far as practicable with the person who is for the time being designated as the head of the authority's paid service under section 4 above and with their chief finance officer; and
- (b) as soon as practicable after such a report has been prepared by him or his deputy, to arrange for a copy of it to be sent to each member of the authority and, where the authority has a mayor and council manager executive, the council manager.
- (6) It shall be the duty of the authority's executive—
- (a) to consider any report under this section by a monitoring officer or his deputy at a meeting held not more than twenty-one days after copies of the report are first sent to members of the executive; and
- (b) without prejudice to any duty imposed by virtue of [section 115B](#) of the [Local Government Finance Act 1988](#) (duties of executive as regards reports) or otherwise, to ensure that no step is taken for giving effect to any proposal or decision to which such a report relates at any time while the implementation of the proposal or decision is suspended in consequence of the report.
- (7) For the purposes of paragraph (b) of subsection (6) above the implementation of a proposal or decision to which a report under this section, by a monitoring officer or his deputy, relates shall be suspended in consequence of the report until the end of the first business day after the day on which consideration of that report under paragraph (a) of that subsection is concluded.
- (8) As soon as practicable after the executive has concluded its consideration of the report of the monitoring officer or his deputy, the executive shall prepare a report which specifies—
- (a) what action (if any) the executive has taken in response to the report of the monitoring officer or his deputy;
- (b) what action (if any) the executive proposes to take in response to that report and when it proposes to take that action; and
- (c) the reasons for taking the action specified in the executive's report or, as the case may be, for taking no action.
- (9) As soon as practicable after the executive has prepared a report under subsection (8), the executive shall arrange for a copy of it to be sent to each member of the authority and the authority's monitoring officer.
- (10) The duties of an authority's monitoring officer under this section shall be performed by him personally or, where he is unable to act owing to absence or illness, personally by such member of his staff as he has for the time being nominated as his deputy for the purposes of this section