

**11 February 2015**

## **Finance and Resources Committee**

### **Review of Provision of Legal Services**

**Report of:** Christopher Potter, Monitoring Officer and Head of Support Services.

**Wards Affected:** All

**This report is:** Public

#### **1. Executive Summary**

- 1.1 Legal Services was reviewed in August 2013. Such review concluded at that time that the most effective service delivery model in order for the Council to re-establish its legal capabilities was that of a shared legal service. Wider benefits were outlined but the year 2013-14 was to concentrate on operational legal work only. It also outlined risks current at that time and emphasised the need for a business plan and direction of travel supported by the Council's corporate plan.
- 1.2 On 20 November 2013 the then Strategy and Policy Board considered the 'New Ways of Working – Back Office Review' which included legal services. The report stated that the arrangement current at that time of one Head of Service and 2 full time employees no longer fulfilled the requirements of legal support to the Council and went on as follows: "*To date, support has been largely in the areas of property law and general litigation and licensing. The Council also requires strong governance support to fulfil its corporate objectives*". The Board resolved: 'To continue the arrangement with BDT Legal with a view to a further review being undertaken in August 2014.'
- 1.3 The Corporate Plan aims to achieve a 25% reduction in back office costs by streamlining services and processes and exploring all options regarding alternative methods of service delivery, including shared services and outsourcing. The future delivery model for services including legal includes a mix of contracts, partnerships, shared services and new forms of organisations, with in-house provision only where it offers best value for money and improvement.
- 1.4 The purpose of this report is therefore to notify Members of the outcome of the requested review into the provision of Legal Services, and to seek

support to establish a better foundation upon which to commission, oversee, and evaluate the delivery of legal services and so demonstrate value for money and service improvement, and to deliver savings whilst maintaining the quality of service.

- 1.5 To do so, the report recommends the 'contract management' of the commissioning (and decommissioning) of legal services to be undertaken by the Council.

## **2. Recommendation(s)**

- 2.1 That the Council be recommended to secure the provision of their legal services requirement through the most economic, efficient and effective means (which may include through shared legal service arrangements of the type which redistributes any profit fairly amongst the bodies which are members of such shared legal service arrangements)**
- 2.2 That the Council be recommended that the current arrangements with BDT roll-forward for a three year period from 1 April 2015 to 31 March 2018 unless and until other options offer better value for money and improvement. .**
- 2.3 That a Business Plan be drawn up to procure legal services delivery.**

## **3. Introduction and Background**

- 3.1 Local government is regulated by statute. The Local Government Act 1972 created new areas administered by elected Councillors for their area. Section 112 of the 1972 Act provides that a local authority shall appoint such officers as they think necessary for the proper discharge by the authority of such of their or another authority's functions as fall to be discharged by them. Both under the 1972 Act and the Local Authorities (Goods and Services) Act 1970 there is scope for joint arrangements and competitive tendering subject to keeping a separate account of work not carried out by its own employees.
- 3.2 The Council is a smallish authority – 187<sup>th</sup> out of 326 English Districts in area and 298<sup>th</sup> out of 326 by population. There is less scope for specialist development of in-house staff in a small authority.
- 3.3 Local government is a multi-million pound operation. Its role includes, amongst other things, leadership of its local area as well as ensuring people receive certain services, whether by direct provision or through

other means. Government grant support since 2010 has reduced such that the total number of Local Government employees nationally has reduced by around 500,000 with a loss of experienced staff everywhere.

- 3.4 The financial climate within which the Council works is increasingly challenging and, as a result, there is a pressing need to use available resources to the best effect to achieve the Council's agreed vision and its corporate priorities. It is likely that the next Government will continue to reduce financial support to Local Government so that forward planning for all services is fluid.
- 3.5 As the provision of legal services is a 'support service', such services are, by definition, essential. It is not an optional extra that may be dispensed with for budgetary reasons. Such support services can be delivered through a range of service delivery mechanisms, whether in-house or external or shared/joint. A number of Local Government Officers have particular skills and training in legal matters relevant to their duties. There is scope for officers not in the Legal service to be authorised to appear in the Magistrates' or County Courts if they are and remain suitably trained
- 3.6 In-house legal staff should be expected to have a closer rapport to other services, but the range of work carried out directly has been limited and reduced. There has been no engagement of locums by the Council for several years and not the capacity to supervise locum or casual employees. External solicitors, counsel and other authorities have supplied the Council's specialist legal services with no in-house Business Plan other than budgetary consideration.
- 3.7 Whilst the scale of and amount of the legal spend is a factor (as the Council has finite resources), Members must not allow themselves to become solely focussed on the total legal budget. The Corporate Plan objective for increased efficiency requires a capacity for planned legal outputs and achievement of performance indicators. Not maximising the recovery of debts and not prosecuting offences in key areas is, for example, a false economy – yet this has been the position in the Council for several years.
- 3.8 Context is everything. Because the rationale of legal services is to assist the Council, the more active the Council is, the more likely that there will be a demand for legal services and a consequential legal cost.
- 3.9 Increased legal spend at any particular point in time is not necessarily a negative but rather part and parcel of the delivery of the Council's agreed projects in pursuit of the Council's vision, and therefore must be regarded

as an integral operating cost to be factored into the overall cost/benefit equation.

- 3.10 The legal spend must thus be equated to the level of activity required by the Council (as distinct from the level ideally desired). It cannot be regarded as a budget that can be cut without reference to the reason why legal services are required. It is a demand led service and as such is dependent upon its existing and future customer base. It cannot be divorced from the Council's corporate strategic planning.
- 3.11 The legal spend must, however, be money well spent, result in the provision of a good quality service and positively contribute to the outcome desired by the Council (through the client department(s) which request the provision of legal services from time to time). It is therefore not just about financial cost or the particular cost structure (hourly rates, differential rates, and cost for the completed task). See Appendix A to this report which is 'exempt information'.
- 3.12 At the present time the Council has a Memorandum of Understanding with BDT Legal Services (London Borough of Barking and Dagenham and Thurrock Council) and also a Memorandum of Understanding with the Public Law Partnership (an arrangement with all Essex authorities and beyond). The Council however remains free to instruct whosoever they please. Specialist counsel may also be instructed. The Corporate Plan requires best value for money and improvement for in-house services.
- 3.13 A Business Plan for 1 April 2015 – March 2018 needs to be drawn up in liaison with the Council's Heads of service to procure service delivery with Key Performance Indicators for the following:
- Housing
  - Planning
  - Asset Management
  - Debt Recovery
  - Licensing
  - Training
  - Employment
  - Criminal Prosecutions
  - Contracts and Procurement
- 3.14 Each of the elements of the Business Plan needs a basic Service Level Agreement with performance and corporate standards, financial cost information and audit provision, improvement plan and exit strategy i.e. decommissioning as well as commissioning. The preferred delivery of the

service should be stated. A contingency needs to be considered for any major risk areas. The Business Plan will need to be administered and monitored in-house.

#### **4. Issue, Options and Analysis of Options**

- 4.1 The issue for the Council is therefore not whether there should be a legal service but how should legal services be delivered, to what competent standard and at what cost (financial or otherwise).
- 4.2 Certain corporate governance advice and other legal advice delivered by the post of Monitoring Officer is excluded from the scope of this review of legal services. The Council (like any authority) needs access to professional legal advice independent of any service provider to avoid any conflicts of interest and there is a responsibility for ensuring that the Council receives an economic, efficient and an effective legal service provision.
- 4.3 Since the Legal Services Act 2007 and the Localism Act 2011, there are a plethora of service delivery models regarding the provision of legal services. The European procurement regime does not apply where the Council procures services “in-house” nor does it apply to informal pooling or informal joint arrangements between public bodies which are non-commercial arrangements.
- 4.4 Whilst there is no obligation, the Council may wish to voluntarily undertake limited procurement exercises periodically to better evidence compliance with its best value duties and to demonstrate greater transparency in commissioning.
- 4.5 If the Council chooses to obtain services from the commercial marketplace, the European procurement regime applies with the relevant current threshold figures. Attention is also drawn to the Council’s ‘Standing Orders relating to contracts’ set out in Part 4.6 of the Constitution including the procurement principles and the thresholds of up to £10,000, between £10,000 and £50,000, between £50,000 and the relevant current OJEU threshold, and the estimated contract value over the relevant current OJEU threshold.
- 4.6 There are a number of ways to deliver legal services. Appendix B to this report sets out the advantages and disadvantages. Currently the service delivery models include:-

(1) In-house provision

- (2) Private sector
- (3) Mixture of in-house provision and private sector commissioning
- (4) Staff mutual or other Community Right to Challenge;
- (5) Alternative Business Structures;
- (6) Shared service arrangements with public sector (with and without profit distribution).

*In-house completely*

- 4.7 The option of in-house provision on its own is dismissed as it is simply not viable given the size and resources of the Council. To have capacity on tap when needed, the Council would have to operate at less than full capacity and this is an inefficient use of tight resources. Indeed, the range of legal expertise needed in-house across the field on which the Council operates would be prohibitive in cost terms.
- 4.8 The Council currently employs one solicitor and one legal officer who are engaged undertaking legal services. (As per 4.2 above, the fact that the present post holder of the role of Monitoring Officer is also a solicitor is discounted).

*In-house unless more cost-effective externally*

- 4.9 The private sector is a possible option as is a mixture of public/private sector. Traditionally, a number of local authorities augmented their capacity through commissioning arrangements with a specific firm or chambers or with a panel of firms or chambers. Some local authorities have even increased their in-house provision rather than pay for more costly alternatives, thereby reducing the degree of dependency on the outside and associated costs. For example, Chelmsford City Council brought in-house its legal service and so has Somerset County Council. A number of others have too. The Council has not pursued this in the past due to the availability of reasonable alternatives. This 'blending' of service delivery has the advantage of using specialist lawyers to meet demand where capacity either does not exist or is exceeded. The key disadvantage is any profit generated by the external legal provider is retained by the private sector.

*Provider through exercise of a community right to challenge*

- 4.10 Since the Localism Act 2011 there is a community right to challenge i.e. a 'relevant body' (including a voluntary or community body, a body of persons or a trust which is established for charitable purposes only, a

parish council or two or more employees of the Council) may express an interest 'in providing or assisting in providing a relevant service'. Where an expression of interest is accepted, the Council must carry out a procurement exercise for the service. The main disadvantage is that this does not relate to the delegation of functions, merely the provision of services. In any event, there is no current expression of interest at all and so this is not an option at present. Expressions of interest are proactively triggered by the relevant body rather than the Council.

#### *Alternative Business Structures*

- 4.11 An increasing number of organisations are setting up 'Alternative Business Structures' (ABS) by means of separate legal entities. Non-lawyers are in effect now able to run legal practices. The ABS structure facilitates trading and enables the conduct of business over a wider client base (beyond that which can be delivered through existing means) to generate increased profit which is then paid over to its shareholders.
- 4.12 Last year saw a few vanguard local authorities obtain licences for Alternative Business Structures. Buckinghamshire Law Plus Limited (which consists of Buckinghamshire County Council and Buckinghamshire and Milton Keynes Fire Authority) was the first 'local authority ABS' company (registered no. 08792177) to be granted a licence in August 2014 (effective from 24 November 2014).
- 4.13 Whilst the main advantage of an 'ABS' is to generate increased profit for its shareholders, there are a number of disadvantages of diversification including loss of direct control, separation out from the *raison d'être* of being a public sector service provider, additional on-costs such as ABS insurance, and competitive risks of being undercut. The Council has not so far made a strategic decision to aggressively pursue an increased customer base across public, private and voluntary and community sectors and to tool up to do so (including setting up a wholly owned local authority company).

#### *Shared Service Arrangements*

- 4.14 Some local authorities are entering and remaining in shared service arrangements with other public bodies on the basis of "sticking to the knitting". Some distribute surplus profit to the members of the shared service. Some keep the profit made from other public sector bodies as the Local Authorities (Goods and Services) Act 1970 permits the generation of profits from other specified public bodies. There are a number of shared service models such as, for example, those which formally

delegate their legal functions to a host authority or those which retain their functions but which operate under a memorandum of understanding. Some indeed operate on a contractual basis rather than delegate functions.

- 4.15 The main disadvantage of shared service arrangements is perhaps the loss of direct control (including the problem of having to contend with any feeling of remoteness and detachment perceived by Members and client officers). The key advantage of shared service arrangements is the creation and maintenance of a pool of lawyers with local authority experience at favourable charging rates and other resulting economies of scale. The Council has already delivered savings through, for example, not having to have its own case management system (such as 'IKEN' in the case of BDT Legal Services).

#### *Monitoring of Service Provision*

- 4.16 Whatever method of provision of legal services, there however is still a requirement to monitor and evaluate service delivery. There are supervision costs to be incurred by the Council. These need to be quantified.
- 4.17 Where external providers are commissioned, there is an inescapable good corporate governance need to have a client officer role independent of the service provider to avoid conflicts of interest.
- 4.18 The National Audit Office in a report by the Comptroller and Auditor General entitled 'Conflicts of interest' defined a conflict of interest as 'a set of circumstances that creates a risk that an individual's ability to apply judgment or act in one role is, or could be, impaired or influenced by a secondary interest. It can occur in any situation where an individual or organisation (private or government) can exploit a professional or official role for personal or other benefit' (para.1.1 on page 6 of that report).
- 4.19 It continues: 'Conflicts can exist if the circumstances create a risk that decisions *may* be influenced, regardless of whether the individual actually benefits. The perception of competing interests, impaired judgment or undue influence can also be a conflict of interest' (para.1.2 on page 6 of the report). The National Audit Office then acknowledges that conflicts of interest can take many forms including 'in the delivery of public services, where individuals or organisations assess service needs as well as providing the services' (para. 1.4 on page 6). In other words, decision-makers may have 'competing loyalties between an organisation they owe a primary duty to and some other person or entity'.



- 4.20 The National Audit Office sets out the consequences of not recognising the risks of conflicts and of not properly addressing such risks. It stresses that organisations should manage the risk of conflicts ‘by putting in place appropriate safeguards’. Conflicts ‘can lead to reputational damage and undermine public confidence in the integrity of institutions’.
- 4.21 Such costs of having an ‘intelligent client’ should be borne in mind when commissioning and during the operation of any arrangement. The Council needs to consider at what level such supervision ought to occur and the required experience and expertise.
- 4.22 There is therefore a continuing requirement for ‘contract management’ capacity to oversee -independent of the service provider(s) - the commissioning arrangements. This requirement can be met from existing budgets .
- 4.23 Paragraph 4.39 of the report to the Strategy and Policy Board meeting held on 20 November 2013 noted that ‘the current cost of the BDT Legal arrangement is £5,000 per month for the provision of a Head of Legal and a part time Business Manager. The Monitoring Officer and any other ad-hoc legal advice are provided at a standard rate of £85.00 per hour’. Monitoring Officer advice is now being given in-house following last year’s recruitment exercise.
- 4.24 Looking at the legal service provision supplied to the Council by BDT Legal since 2013, the BDT arrangements have overall worked well in terms of quality. With regard to the cost element, the BDT arrangements have resulted in savings.
- 4.25 The financial cost to the Council of BDT Legal Services is set out in Appendix A contain exempt information.
- 4.26 As the Council is committed to securing best value for money, the Council must compare and contrast the proposed future BDT arrangements with those available from other providers in the future. Whilst there are different charging mechanisms and the different hourly rates, Members need to bear in mind that cheaper providers may or may not compare in terms of quality. Members also should note that not all legal services are currently supplied by just BDT and the Council receives satisfactory legal provision from elsewhere.

Discussions have taken place with both existing legal service providers, BDT Legal and the Public Law Partnership. Further discussions are due to take place with BDT and the Council's two employees within Legal Services to see what can be delivered through a future shared services arrangement. Other contacts have also been made with a number of Essex District Councils too and these discussions are ongoing in order to place before Members the information upon which to make a more informed decision, both strategically and operationally.

- 4.27 In terms of the analysis of the financial cost to the Council of BDT Legal and the Public Law Partnership existing arrangements, there are differences in that the Public Law Partnership offers differential rates rather than flat hourly rates, and the rates of BDT Legal are higher so the relative merits in terms of cost and quality must be considered. It is also important to note that membership of the Public Law Partnership does not preclude lower rates being specially negotiated between local authorities, either on an hourly rate (flat rate or differential) or on a unit job cost basis. BDT have agreed certain different flat rates for certain limited areas of work.

## **5. Reasons for Recommendations**

- 5.1 The Council needs to always seek to have economic, efficient and effective legal service provision.
- 5.2 The reasons why shared service arrangements with profit redistribution has been recommended for continued inclusion in the range of service models used is that it provides the Council with a quality service at an affordable cost for those areas of work which the Council cannot do better and cheaper in-house. The redistribution of such surplus enables the Council to be a beneficiary of its own investment rather than to subsidise some other body.
- 5.3 Moreover, the reason why the Council is recommended to retain its flexibility as regards its legal service provision is that this enables the Council to properly exploit and exercise its real "buying power" in the market place to drive the best deal for the Borough of Brentwood, especially at a time when things are fast evolving. This will also enable the Council to dovetail in its legal service arrangements with any strategic decisions as regards client department shared arrangements and any other such decisions. This recognises that legal services are a support service and that support can be given in whole or in part in different ways to the various sections of the Council, according to business requirement.

- 5.4 To deliver cost-effective legal services requires the proper deployment of resources to enable expert assessment of the options, entry into appropriate arrangements, effective monitoring and evaluation and re-evaluation and implementation of improvements in legal service provision.
- 5.5 In conclusion, it is recommended that the Council keeps its options open during a state of considerable flux and yet continues to actively engage with other local authorities through negotiated share service arrangements for the provision of legal services.

## **6. Consultation**

- 6.1 Client departments have been consulted on the provision of legal services and the two officers engaged in legal services have also been consulted.
- 6.2 Discussions have taken place with BDT Legal Services and Essex Legal Services.
- 6.3 Contact has also recently been made with three District Councils within Essex with preliminary exploratory discussions. The most recent discussion was with a District Council that had brought its legal service in-house as the business case was established to do so to that Council's satisfaction.
- 6.4 Further discussions are also contemplated as the Council reviews its establishment needs and its services corporately.

## **7. References to Corporate Plan**

- 7.1 As legal service provision is a support service it covers all aspects of the Corporate Plan including the priority 'A Modern Council'.

## **8. Implications**

### **Financial Implications**

**Name & Title: Jo-Anne Ireland, Acting Chief Executive and Section 151 Officer**

**Tel & Email 01277 312712 / Jo-Anne.Ireland@brentwood.gov.uk**

- 8.1 Financial details of the legal spend for legal services are set out in Appendix A to this report which is 'exempt information'.

## **Legal Implications**

**Name & Title: Christopher Potter, Monitoring Officer and Head of Support Services**

**Tel & Email 01277 312860 christopher.potter@brentwood.gov.uk**

8.2 The Council is already under a specific statutory obligation under section 3(1) of the Local Government Act 1999 to make arrangements to secure 'continuous improvement' in the way their functions are exercised, having regard to a combination of 'economy, efficiency and effectiveness'. It also must have regard to its fiduciary duty to council tax payers.

8.3 The provision of competent legal services is a prerequisite in order to ensure effective and lawful decision-making and the report makes this clear.

**Other Implications** (where significant) – i.e. Health and Safety, Asset Management, Equality and Diversity, Risk Management, Section 17 – Crime & Disorder, Sustainability, ICT.

8.4 Competent legal service provision enables the Council to better comply with its obligations as regards health & safety, asset management, equality and diversity, risk management, the prevention of crime and disorder and so on. Contingency arrangements can be put in place, if needed, through targeted use of cost-effective locums to ensure continuity of service.

**9. Background Papers** (include their location and identify whether any are exempt or protected by copyright)

9.1 The National Audit Office Report 'Conflicts of interest' – 27 January 2015.

**10. Appendices to this report**

- Appendices A (exempt information) and B

## **Report Author Contact Details:**

**Name:** Christopher Potter

**Telephone:** 01277 312860

**E-mail:** christopher.potter@brentwood.gov.uk