

Welcome to Landmark Chambers' 'Remote Council Decision Making' webinar

The recording may be accessed [here](#).

Your speakers today are...



Chair

Reuben Taylor QC



Topic:

The practical implications for, and risks of, making decisions during the emergency period including the use of delegated powers.

Jenny Wigley



Topic: Decision Making & Discharge of Functions

Jacqueline Lean



Topic:

The Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020

Yaaser Vanderman

Decision Making & Discharge of Functions



Jacqueline Lean

The Framework

- Local Government Act 1972 (specifically, Parts VA & VI)
- Local Government Act 2000
- Constitution
- Scheme of Delegation
- Standing Orders

- **Part VA**

- Public access to meetings / information (s.100A – 100K + Public Bodies (Admission to Meetings) Act 1960)
- See now: The Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020

- **Part VI**

- Arrangement for discharge of functions (s.101)
- Committees (s.102)
- Standing Orders (s.106)

Discharge of functions and decision making (1)

- Starting point:
 - Council's Constitution
 - Scheme of Delegation

Discharge of functions and decision making (2)

- S.101(1) LGA 1971 – Subject to express provisions in LGA 1972 / other enactment, Council can arrange for discharge of “any” of its functions by Committee, Sub-Committee or Officer
- Does not apply to executive functions (s.101(2))
- Executive functions: s.9E – 9EB Local Government Act 2000
- Scheme of delegation required to be published: s.100G LGA 1972

Discharge of functions and decision making (3)

- Functions delegated to Committee:
 - Quorum
 - Scope for delegation to officers?
- Executive functions
 - Powers of the “senior executive member” to discharge / arrange for discharge of functions – s.9E LGA 2000
- Emergency powers?

Standing Orders

- Reg 5 of the 2020 Regulations provides for:
 - Meetings to be held remotely, despite any prohibition/restriction in standing orders (reg 5(5))
 - A local authority to make standing orders in respect of remote attendance, including (1) voting (2) access to documents (3) remote access by public/press
- Advisable to check – and where necessary/possible – amend Standing Orders to reflect changes in decision making in light of current situation

Some practical points to consider

- Scope for further delegation
 - What procedures have to be followed to authorise that?
 - What decisions can / can't be delegated and by/to whom?
- Changes to standing orders / new protocols
 - Who needs to approve?
 - What needs to be covered?
- 'Call in' powers

Specific decisions / functions (1)

- Deadline for local government finance audits to be delayed to November 2020
 - The Accounts and Audit (Coronavirus) (Amendment) Regulations 2020
 - In force: 30th April 2020

Specific decisions / functions (2)

- Licensing:
 - Note: Letter from Kit Malthouse MP to Chairs of Licensing Committees 8th April 2020
 - <https://files.constantcontact.com/809c3e67001/84f1e4be-8c86-44e9-be9d-c9a78949f174.pdf>*
 - But note: guidance on delegation of decisions in the statutory guidance issued under s.182 Licensing Act 2003

*Obtained via Institute of Licensing website – instituteoflicensing.org

Specific decisions / functions (2)

- Planning:
 - Virtual committees
 - RBKC Virtual Planning Committee: 9th April 2020
 - Greater exercise of delegation powers / emergency delegation powers
 - Manchester CC
 - Wychavon DC

The Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020



Yaaser Vanderman

Topics

- Scope and extent;
- Timing, frequency and notice of meetings
- Location of meetings
- Attendance requirements
- Public access (documents and meetings)
- Appointments

Scope and extent

- **Reg 2**
 - Local authority meetings (England only)
 - Police and crime panel meetings (England and Wales)
 - Until 7 May 2021
 - Wales and Northern Ireland?

Scope and extent

- **Reg 3**
 - “local authority meeting” means a meeting of:
 - a local authority
 - an executive of a local authority
 - a joint committee of two or more authorities
 - a committee or sub-committee of any of the above

Timing, frequency and notice of meetings

- **Reg 6**

- Disapplies requirement in LGA 1972 to have annual meeting at all and also at the prescribed times, e.g. in non-election year March-May (Principal Council) or May (Parish Council) and in election year 8-21 days (Principal Council) after or within 14 days (Parish Council) of elections: Reg 6(c);
- Allows Principal Councils to have meetings even if there has been no annual meeting that year: Reg 6(d).

- **Reg 4(1)**

- Local authority may hold meetings “*at such hour and on such days*” and “*alter the frequency, move or cancel such meetings... without requirement for further notice*”.

Timing, frequency and notice of meetings

- **Reg 6(e)**
 - Principal Councils: notice of the time and place of the meeting can now be published on the authority’s website as well as at the authority’s offices: amendment of para 4(1A)(a) of Schedule 12 to LGA 1972. Also amendment of s1(4)(a) of Public Bodies (Admission to Meetings) Act 1960 by **Reg 13(a)**

- **Reg 13(a)**
 - Parish Council: NO amendment to equivalent provision for parish council meetings. Para 10(2)(a) of Schedule 12 to LGA 1972 requires notice to be fixed “*in some conspicuous place in the parish*”.
 - BUT amendment to s1(4)(a) of Public Bodies (Admission to Meetings) Act 1960 so that notice of the time and place can now be published on the Principal Council’s website

Location of meetings

- At the moment, e.g. Principal Council can only transact business if 25% of members are “*present*”: para 6 of Schedule 12 to LGA 1972.
- **Reg 5(1)**
 - Clarifies that any legislation referring to a meeting of a local authority is “*not limited to a meeting of persons all of whom, or any of whom, are present in the same place*”.
 - Any reference in legislation to a “*place*” includes “*reference to more than one place including electronic, digital or virtual locations such as internet locations, web addresses or conference call telephone numbers*”.

Location of meetings

- **Reg 5(5)**
 - “*The provision made in this regulation applies notwithstanding any prohibition or other restriction contained in the standing orders or any other rules of the authority governing the meeting and any such prohibition or restriction has no effect.*”
- **Reg 5(6)**
 - Standing orders and other rules may be created to make provision for:
 - Voting
 - Member and public access to documents; and,
 - Remote access of public and press to meetings by electronic means
- **Elmbridge BC:** “Unless this Constitution provides otherwise, any matter will be decided by a simple majority of those Councillors voting and present in the room at the time the question was put.”

Member attendance requirements

- Section 85(1) LGA 1972 requires members to “*attend*” a meeting at least every 6 months.
- **Reg 5(2)-(4):**
 - “Remote attendance” counts as long as the member can hear, and be heard by (and see/be seen by if practicable):
 - Other members;
 - Any members of the public entitled to (remotely) attend to speak; and,
 - Any other members of the public (remotely) attending.
- **Reg 5(5)** - anything to the contrary in standing orders or other rules of authority is of “*no effect*”

Public access - attendance

- Meetings are, generally, “*open to the public*”: see s1(1) Public Bodies (Admission to Meetings) Act 1960, s100A(1) LGA 1972, s9G Local Government Act 2000 and Regulation 3 Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012.
- **Regs 13(b), 14, 15 and 16(2)-(3)**
 - Definition of “*open to the public*” clarified to include:

“access to the meeting through remote means including (but not limited to) video conferencing, live webcast, and live interactive streaming and where a meeting is accessible to the public through such remote means the meeting is open to the public whether or not members of the public are able to attend the meeting in person”

Public access - attendance

- Meaning of “*access to the meeting through remote means*”?
- **Reg 3** – “*remote access*” in accordance with Reg 5(6)(c)

“remote access of public and press to a local authority meeting to enable them to attend or participate in that meeting by electronic means, including by telephone conference, video conference, live webcasts, and live interactive streaming.”

Public access - documents

- Provisions allowing the public to inspect meeting agendas and reports in advance of meetings and afterwards: see, e.g. s100B LGA 1972.
- **Reg 15**
 - For purposes of LGA 1972, “*open to inspection*” and “*publication, posting or making available of a document at offices of the council*” clarified to include being published on the Council’s website.

Public access - documents

- **Reg 16**

- Relates to Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012, which applies to executive decision-making;
- Reg 16(4)-(5) enables various types of notices, agendas, reports or other documents to be inspected/accessed through the authority's website.

- **Reg 17**

- Reg 7 of Openness of Local Government Bodies Regulations 2014 requires a written record of a delegated decision;
- Reg 8 deemed to be complied with following publication on authority's website.

Appointments

- **Reg 4(2):**

“Where an appointment would otherwise be made or require to be made at an annual meeting of a local authority, such appointment continues until the next annual meeting of the authority or until such time as that authority may determine.”

The practical implications for, and risks of, making decisions during the emergency period including the use of delegated powers.



Jenny Wigley

Key Legal Risks arising from....

- Ensuring compliance with the letter of the regulations, in new and difficult circumstances;
- Needing to correctly understand the extent to which the new regulations do and do not displace existing statutory requirements;
- Understanding the relationship between the regulations and their effect on the Council's existing standing orders and published procedures (regulation 5(5));
- Not forgetting the need to observe other public law duties, and particularly the common law requirement of fairness;

Specific areas of potential risk

- Public Notification;
- Technical Issues;
- Involvement of the Public (and excluding the Public);
- Public speaking at meetings;
- Lack of site visits;
- Availability of documents;
- Reliance on delegated powers;

Public Notification of Meetings

- Regulation 4(1) appears to be very permissive
“may hold, move or cancel meetings without requirement for further notice.”

BUT

- Take care to still meet requirements for notice (reg 6 Local Authorities (Executive Arrangements) (Meetings and Access) to England Regs 2012 and para 4(1A)(a) Sch 12 1972 Act (albeit now on website);
- Observe common law requirements of fairness and possible legitimate expectation (*R (Majed) v. LB Camden* [2009] EWCA Civ 1029);

Technical Issues

- Do Members have technical means and ability to access remotely?
- Effects of drops in connectivity – potential breach of reg 5(3);
- Need for training / dry run?
- Need for protocols and procedure to guard against breaches – recess or abandonment of meeting when technical glitches hit

Involvement of the Public

- More difficult to ascertain whether the public have the technical means and ability to access remotely;
- Is the meeting still ‘open to the public’ if it is not accessible to some members of the public by remote means?
- Fairness considerations, but note case law on considering all the circumstances and lack of need to be the ‘most fair’ procedure;
- But sensible to put in place basic protocols and procedures to ensure equal and fair access to meetings;
- Effect of drops in connectivity at a crucial moment? (reg 5(3))

Excluding the Public

- Need to think through the practical issues of potentially needing to exclude the public if confidential or exempt information crops up (s.100A 1972 Act)
- And how to re-provide public access when that discussion has concluded;
- Does a member cease to 'be in remote attendance' under reg 5(2) for the period when the public attending the meeting are then excluded (unintended consequence of reg 5(3)(c)?

Public Speaking at Meetings

- Be wary of over reliance on regulation 5(5);
- Unless amended, any existing Council procedures allowing public speaking at meetings will continue to apply albeit by remote means;
- Practical implications are that those currently entitled to speak in person need to be given necessary access to speak 'live', in real time, not by pre-record (reg 5(3)(b));
- Care to ensure technological tools are in place to allow this without disruption of the meeting overall and with ability to exclude as necessary.

Site Visits

- The Regulations do not deal with site visits so existing Council procedures and practices will continue to apply in terms of what is required.
- Arguably site visits are currently unlawful under the Health Protection (Coronavirus Restrictions) (England) Regulations 2020 (but may fall within Reg 6(f) or 6(h)).
- In any event, may be impractical and/or undesirable in current circumstances
- Potentially risky to proceed in the absence of a site visit for a complicated or very visually sensitive scheme – risk of Members misunderstanding the context or being inadvertently misled by the written material and risk of breaching existing procedures and/or legitimate expectations.

Availability of Documents

- Clear can now make documents available for inspection by posting on the Council's website;
- Observe fairness requirements and ensure documents are easily found in a logical place on the website (beware fairness caveats in *Kendall v. Rochford DC* [2015] Env LR 21, at paras 93 to 94) ;
- Do not forget to include 'background papers' – i.e internal or external documents, emails, reports that are materially relied on in officer's recommendation (see s.100D, *R (oao Joicey) v. Northumberland CC* [2014] EWHC 3657 (Admin) and *Hale Bank PC v. Halton BC* [2019] EWHC 2677 (Admin)).

Reliance on Delegated Powers

- Potentially attractive solution which avoids some practical problems and legal risks
- But beware bending or stretching powers beyond their limits – consider expressly amending if required
- Decision to amend must be made on proper considerations, taking into account relevant factors
- When using delegated powers more widely, crucial to ensure observe legal requirements
- Ensure actual decision maker is provided with all necessary information to determine the application
- Duty to publish record of reasons and note *R (Rogers) v. Wycombe DC* [2017] EWHC 3317 and *R (oao Gare) v. Babergh DC* [2019] EWHC 2041 (Admin) (at para 41) re standard of reasons.

Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Thank you for listening

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