

Emergency Committee	
Meeting Date	12 January 2022
Report Title	Constitution amendment: Delegation to Chief Executive
Cabinet Member	Cllr Mike Baldock – Deputy Leader
SMT Lead	David Clifford – Head of Policy, Governance and Customer Services (Monitoring Officer)
Head of Service	
Lead Officer	
Key Decision	No
Classification	Open
Recommendations	Emergency committee is asked to: 1. Agree to add the delegation in paragraph 3.1 of the report to the list of the chief executive’s delegations.

1 Purpose of Report and Executive Summary

- 1.1 This report proposes an addition to the chief executive’s delegations as a means of ensuring that council decision-making can continue safely during the pandemic in the absence of any legislative action to enable a return to remote council meetings.

2 Background

- 2.1 In response to the alarming spread of the omicron variant, the government announced in early December that ‘Plan B’ was to be implemented with immediate effect. While stopping short of anything more closely resembling the lockdown witnessed in earlier phases of the pandemic, Plan B does include advice to everyone to work from home whenever this is possible. Given the ongoing rise in transmissions nationally and the lack of clarity about whether and when this will translate into (further) increased hospital admissions, the situation clearly remains extremely fluid and uncertain.
- 2.2 At the start of the first lockdown, the government introduced the Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020. Among other flexibilities, these specified that references in primary legislation to ‘meetings’ of local authorities did not have to be interpreted as physical meetings held in a single place, and that decisions made by members meeting virtually using Teams, Skype or similar technology were valid.

- 2.3 Members will recall that Swale took full advantage of this, with a full schedule of meetings, including council and even annual council meetings, taking place during the time that the 2020 regulations were in force. However, the regulations included a sunset clause specifying that they would expire on 7 May 2021, after which date virtual meetings would no longer be able to make legally robust decisions.
- 2.4 Despite lobbying from across the sector, the government declined to extend these regulations, and a failed bid by Hertfordshire County Council and the Association of Democratic Services Officers to have a court reinterpret the Local Government Act 1972 ended what little legal flexibility might have remained by precipitating a judgment stating unambiguously that references to 'meetings' in legislation could only be interpreted as people physically gathered in a single place, and that changing this was properly a matter for parliament rather than the courts.
- 2.5 In common with most councils, Swale's response to the ending of virtual meetings prior to the ending of the pandemic has been pragmatic, with non-decision-making meetings continuing to be held mostly online but with members meeting physically in as safe a way as possible when critical decisions need to be taken, generally with the public, visiting members and officers able to participate in 'hybrid' meetings by dialling in remotely.
- 2.6 Government has advised councils also to consider other options for enabling decision-making to continue, including meeting with only a minimum quorum of members present and making greater use of delegations to enable decision-making by individuals. There are examples of councils utilising both of these options effectively. For Swale, there is also the option of continuing to transact necessary full council business through the emergency committee, whose terms of reference are precisely to substitute for council when it cannot meet.
- 2.7 The minimum quorum option could be a realistic one in authorities whose membership is split between a small number of relatively large political groups, but maintaining reasonable political balance in a council such as Swale, with a high number of small groups, would in practice mean that many more members would have to be present than the minimum number theoretically required for a quorate meeting. Some councils have experienced issues with members declining to absent themselves from meetings, which has the potential to cause real difficulties.
- 2.8 The option of providing delegated authority to the chief executive to be the formal decision-maker on matters is one which several authorities are using to enable decision-making to continue without requiring members to meet physically. Under this system, members (whether the full council or committees) meet virtually to debate matters in the usual way, and then hold an indicative vote to express their support or lack of it for the recommendations. Following this, the chief executive uses a delegation to take a formal decision, having regard to the members' discussion and vote.

- 2.9 Subject to members' agreement, it is considered that this approach could constitute a useful additional weapon in the council's arsenal for keeping decision-making going during the ongoing pandemic and in the absence of further action by government.

3 Proposals

- 3.1 The proposal is therefore to provide the chief executive with the following delegation:

In emergencies or any other circumstance which makes it impractical for the council, cabinet or a committee to meet, to take any decision which could be taken by the council, cabinet or a committee (save for any decision expressly reserved to full council under statutory or regulatory provisions), having regard as fully as possible to the views of the members who would otherwise have made the decision.

- 3.2 It is important for members to be aware that in making use of a delegation of this nature, the chief executive would not be able simply to 'rubberstamp' whatever indicative decision had been agreed by members. As the sole legal decision-maker in a matter, she would be obliged – in the same way that members are when they are making decisions, or that officers are when utilising other delegations – to take account of all relevant considerations, of which the indicative decision by members would of course be a very weighty one.

- 3.3 The constitution as it stands offers a safeguard against the misuse of any delegation by officers, stating that:

Before deciding whether to exercise the delegation the officer concerned should ensure that the Director and/or Heads of Service have considered whether the matter is of a controversial nature, or involving significant changes in policy, to require consultation upon, with the relevant Committee Chairman or Cabinet Member, and recorded or agreement reached to report to the Cabinet, Council and Committee as appropriate.

- 3.4 In practice, with regard to controversial, high-profile or politically contested matters, it would probably be necessary to find an alternative means for having the decision made. In the absence of any other option, of course, this would probably have to involve a physical meeting, whether of a full committee or a minimum quorum of members. The purpose of providing this delegation to the chief executive is instead to enable routine but necessary decision-making to continue in a safe way in the event that either the covid rules or the covid situation continue to make physical meetings impossible or unadvisable.

- 3.5 The emergency committee is now **recommended** to agree to add the delegation in paragraph 3.1 above to the list of the chief executive's delegations.

4 Alternative Options

- 4.1 The alternative option to agreeing this new delegation is simply not to agree it. The intention behind the recommendation is to provide a further tool in the council's toolbox for coping with the ongoing public health crisis in the absence of government action to bring forward legislation enabling remote meetings. In the event that members do not agree the recommendation, the options open to the council would be to meet as full council or full committees in as safe a way as possible, or to attempt to implement the minimum quorum approach, however imperfectly that would have to happen given Swale's political composition.

5 Consultation Undertaken or Proposed

- 5.1 Group leaders have been consulted in preparing this report. The report is due to be considered by the general purposes committee immediately prior to the emergency committee meeting, and a verbal update on the outcome of that discussion will be given at the meeting.

6 Implications

Issue	Implications
Corporate Plan	Not applicable. This report is about how decisions are made rather than what decisions are made.
Financial, Resource and Property	No implications identified at this stage.
Legal, Statutory and Procurement	Section 101 of the Local Government Act 1972 sets out how councils can arrange for their functions to be discharged by committees or officers. Both the 1972 and other Acts specify particular functions which can only be discharged by either the full council or a specific committee; this point is covered by the text in brackets in the proposed delegation (§ 3.1). The legal team are confident that decisions made by the chief executive under the delegation will be legally robust as long as she takes all relevant considerations into account and is not seen to be simply rubberstamping the indicative decision made by members. The existing arrangements for recording officers' decisions under delegated authority and their reasons for those decisions would be used to ensure appropriate records are maintained.
Crime and Disorder	No implications identified at this stage.
Environment and Climate/Ecological Emergency	No implications identified at this stage.

Health and Wellbeing	Given the unpredictability of the pandemic and of councils' future roles in keeping people safe from it, it is conceivable that an ability to make decisions about Swale's covid response quickly, efficiently and safely could have a beneficial impact on health and wellbeing in the borough.
Safeguarding of Children, Young People and Vulnerable Adults	No implications identified at this stage.
Risk Management and Health and Safety	No implications identified at this stage, but see under 'Legal, Statutory and Procurement' for a discussion of legal risk.
Equality and Diversity	No implications identified at this stage.
Privacy and Data Protection	No implications identified at this stage.

7 Appendices

7.1 There are no appendices.

8 Background Papers

8.1 There are no background papers.