

WEST DUNBARTONSHIRE COUNCIL

Report by the Executive Director of Corporate Services

Council : 26 May 2010

Subject: Right First Time – A Practical Guide for Public Authorities in Scotland to Decision Making and the Law

1. Purpose

- 1.1 To advise Council of the terms of the recently published Scottish Government document entitled “Right First Time – A Practical Guide for Public Authorities in Scotland to Decision Making and the Law”.

2. Background

- 2.1 Local government is often referred to as “a creature of statute”. The UK Parliament delegates certain functions to the Scottish Parliament and in turn the Scottish Parliament delegates certain functions to Councils. Councils can only act within the limits of the powers delegated to them. There is also a plethora of legal rules on how these powers should be exercised. Add in the requirements of European law, human rights, best value, ethical standards (including Councillor’s Code of Conduct), standing orders and the multiplicity of legislation which relates to different local government functions, and the legal position of local authorities becomes ever more complex. Nor is the law static. It continues to evolve, both from legislation and court cases.
- 2.2 Nevertheless, the principles of local government constitutional and administrative law are the key component of a local authority’s governance. Essentially the principles of local government constitutional and administrative law are the often unseen hard wiring which determines how councils act. These rules determine how councils make decisions and try to channel decision making bodies into making the best possible decisions for their community.
- 2.3 The Scottish Government have now published a document entitled “Right First Time – A Practical Guide for Public Authorities in Scotland to Decision Making and the Law”. This attempts to guide all public authorities through the labyrinth of administrative law and explains the legal basis which underlies the various rules. As stated in the introduction by the Lord Advocate, Elish Angiolini, making the best possible decisions first time round will increase public confidence in the quality of decision making. A decision which has been properly made will also be better equipped to withstand scrutiny and challenge, whether by internal review or by external bodies such as the Ombudsman or the courts.

3. Main Issues

3.1 A copy of the document will be circulated to Members and is available from the Scottish Government's website at www.scotland.gov.uk/Publications/2010/02/23134246/0. It asks eighteen questions of those making decisions, describing the law which underlies each of these questions and why they are important. These are detailed in Appendix 1. They fall under four headings being:

- Step 1: Prepare: Getting ready to decide – understanding the law regulating your decision making power.
- Step 2 : Investigate : Investigation/evidence gathering process – the law relating to the procedure leading to the decision
- Step 3 : Decide : Taking the decision – ensuring that the decision can withstand challenge
- Step 4 : Notify : Notifying others of the decision – if this is required.

3.2 The document is an extremely good summary of the legal position and is commended to Members. If further information would prove helpful a further training session could be provided if required.

3.3 It needs to be born in mind that the document relates to all public authorities, not just local government. While the rules set out in the guide are correct, there are particular issues which effect only local government. These include:

- The distinction between policy and regulatory decisions. While regulatory decisions such as those on planning and licensing applications or appeals are covered by the rules of natural justice (the right to a fair hearing and the rule against bias) and sometimes covered by the Article 6 Human Right to a Fair Hearing, the full rigour of these rules does not apply to policy making decisions of Council.
- Best Value – the Council has a statutory duty to achieve best value.
- The breadth of functions handled by a council is so extensive that councils delegate certain functions to committees and officers. Council also makes its own Standing Orders and financial rules to govern procedure. Every committee or officer who makes a decision needs to ensure that they act within the powers delegated to them. Similarly the Standing Orders, including Contract Standing Orders and financial rules also need to be complied with.
- Power of wellbeing – while a council cannot act outwith its statutory powers it now has a power of wellbeing to do anything which it considers will promote or improve the wellbeing of West Dunbartonshire and persons within in.

- The Councillor’s Code of Conduct compliments “Right First Time” and many of the principles contained in both documents derive from the same legal sources.
- Remedies – it is worth noting that a bad decision is not immediately invalid. It is valid until a court determines otherwise.

3.4 “Right First Time” emphasises the fact that the document is intended to compliment, rather than act as a substitute for taking legal advice – particularly since the law can change quickly. This is also important for two reasons. Firstly, it is often the case that something which carries a legal risk can be done in another manner without such risk. A key role of the in-house legal team is to keep its ear to the ground to avert potential problems and use its cross cutting knowledge of council services to find legal ways to achieve the Council’s objectives. Indeed this added value is a key reason to have an in-house team, rather than simply use outside providers to attempt to resolve problems once they have occurred.

3.5 Secondly, the law is sometimes not black and white. Legal advice is needed to assess the risk of challenge, to assess the likely decision of a court in the event of challenge, and to assess the consequences of a successful challenge. For example an interim interdict can be granted against the Council merely by showing a legal argument for the claim and on the balance of convenience (usually to preserve the status quo). The mere grant of an interim interdict can be enough to significantly delay a decision, regardless of the eventual outcome of a case.

4. People Implications

4.1 There are no people issues.

5. Financial Implications

5.1 The guide is designed to ensure that decisions are taken on a sound legal footing and can withstand scrutiny and challenge. Inevitably this will result in less challenge and cost.

6. Risk Analysis

6.1 Local government constitutional and administrative law is the key component in the hard wiring or governance arrangements which determine how councils take decisions. Right First Time provides guidance both to councils and to those who might challenge them on the legal requirements of taking decisions. Good decisions which comply with all legal rules and processes will have less risk of challenge, and less chance of failure. Accordingly adherence to the principles contained in this document will lower the risk to the Council.

7. Equalities Impact

7.1 No significant issues were identified in a screening for potential equality impact of this report.

8. Conclusions and Recommendations

8.1 “Right First Time – A Practical Guide for Public Authorities in Scotland to Decision Making and the Law” is intended to summarise the key provisions of administrative law which effect the way that councils and other public authorities take decisions. It is intended to improve the quality of decision making within Scotland’s public authorities by ensuring that decisions are taken on a sound legal footing. As the document states it is intended to compliment rather than act as a substitute for taking legal advice.

8.2 Members are asked to note the report.

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Appendices: Questions

Background Papers: Right First Time – A Practical Guide for Public Authorities in Scotland to Decision Making and the Law

Wards Affected: All