

# TONBRIDGE & MALLING BOROUGH COUNCIL

## COUNCIL

27 April 2022

### Joint Report of the Leader and the Director of Central Services and Deputy Chief Executive

#### Part 1- Public

#### Matters For Information / Decision

### 1 CHANGES TO GOVERNANCE ARRANGEMENTS

#### Summary

This report asks Members to (a) note revisions to the Council's executive governance arrangements and (b) approve the creation of new Scrutiny Select Sub-Committees in light of the recommendations from the recent Peer Review by the Local Government Association (LGA) and the publication of the final recommendations of the Local Government Boundary Commission for England (LGBCE).

#### 1.1 Introduction

##### Recommendations from the Peer Review

- 1.1.1 On 12 April 2022, the Feedback Report from the LGA Corporate Peer Challenge was reported to Cabinet.
- 1.1.2 Paragraph 4.3 of the Feedback Report considered governance and culture within the Council. The passages relevant to the governance structure are reproduced below: -

*'TMBC's hybrid governance structure may have served the authority well historically, but it is resource intensive, and impedes the council's ability to respond to the changing landscape as governance requires many decisions go through the advisory boards prior to being considered by cabinet, with sometimes up to five months wait between meetings. The peer team heard from a number of sources that there were "far too many boards, meetings and committees." In addition, the peer team repeatedly heard that having three planning committees, is resource intensive with planners' time being used to generate lots of reports and attend meetings, limiting their capacity to focus on the day job and manage applications. Not only is this out of sync with other councils, it makes it hard to keep good planning officers and impedes TMBC's ability to accelerate its regeneration plans. The paperless reports have generally been welcomed by members.*

*The council's advisory boards also create a challenge around the scrutiny function which is devoid of having any real impact. The peer team observed that scrutiny is struggling to find a place and a role, and is disempowered by the advisory boards, evidenced by the lack of call ins over the last 20 years. There is no apparent scrutiny work programme where members can examine in greater depth a topic of interest or concern to the community bringing recommendations to the council and no pre-development work. As a result, scrutiny has become officer led who suggest what is discussed. Members do not see its value with very little debate or questions being asked. The peer team suggests increasing the status of scrutiny within the council and the role of the chair, to address this.*

*TMBC operates an inclusive structure and the new leader's collaborate cross party approach is welcomed across the groups. However, there is a concern that in the current structure, where everyone is involved in the decision making, it presents a risk of going to the lowest common denominator as that is the only option members can all agree on. Good governance is making effective and timely decisions that serve the local community's needs. Therefore, it is important to create a system where there's leadership and a clarity of roles, and those roles will be different across different members and officers. If TMBC is to move forward and make change at the pace required, it is recommended that the council reviews the current governance structure.*

*In reference to the boundary review and the 18 per cent proposed reduction in members, there is a real risk that the current advisory board system will become unsustainable with a source commenting that "lower numbers won't sustain the current format". There is an opportunity to reset before the next election and enable that administration to make a strong stride forward in the new direction it wants to take.*

*The peer team observed that TMBC has had fewer cabinet meetings than expected in the last 12 months. The expectation would usually be once a month. In not meeting regularly, cabinet is missing opportunities to demonstrate its leadership, to set the tone for the organisation and articulate its ambitions for TMBC. It would also be an opportunity to celebrate the council's achievements and promote any good work that is being done.*

- 1.1.3 Recommendation 10 of the report therefore advised that the Council should review its current governance structure –

*'Review the council's governance arrangements, with particular attention to area planning committees and the impact of advisory boards on decision making and the role of overview and scrutiny'*

### **Recommendations of the Local Government Boundary Commission for England (LGBCE)**

- 1.1.4 The recommendations from the LGBCE do not directly relate to the executive governance arrangements for the Borough Council. However, in light of the

recommendation from the LGBCE to reduce the number of councillors from 54 to 44 with effect from the 2023 local elections, it is appropriate to consider whether the existing governance arrangements will remain fit for purpose in the post 2023 landscape. Indeed, the necessity to review the Advisory Board system in light of the proposed reduction in councillor numbers was highlighted by the Peer Review team in their report submitted to Cabinet on 12 April 2022 (see 1.1.2 above).

1.1.5 This report brings forward proposals for reform of the council's governance arrangements, with specific reference to the role of (a) the overview and scrutiny committee and (b) Executive Members within the existing executive governance model. The role of Area Planning Committees will be dealt with in a separate report that will come to a future meeting of Council.

1.1.6 This report does not seek to review the operation of non-executive committees of the Borough Council i.e., Audit Committee/ General Purposes Committee/ Joint Standards Committee/ Joint Transportation Board.

## 1.2 Existing governance arrangements at Tonbridge & Malling Borough Council

1.2.1 The existing models of governance open to local authorities are prescribed in the Local Government Act 2000 (as amended by the Localism Act 2011). These are: -

- Executive arrangements (see 1.2.2 below).
- A committee system.
- Prescribed arrangements, as made by the Secretary of State in regulations.

1.2.2 An executive may be either

**A leader and cabinet executive** - a councillor of the authority (executive leader) elected as leader of the executive by a local authority (full council) and two or more councillors of the authority appointed by the executive leader; or

**Mayor and cabinet executive** - an elected mayor of the authority and two or more councillors of a local authority appointed by the elected mayor.

1.2.3 All local authority functions not specified in regulations made by the Secretary of State will be the responsibility of the executive, rather than the full council, where a local authority operates under executive arrangements. The Local Authorities (Functions and Responsibilities) (England) Regulations 2000 sets out the division of responsibility between the executive and full council for certain functions of a local authority.

1.2.4 Where a local authority operates under executive arrangements then it must also have at least one Overview and Scrutiny Committee, which will be responsible for overseeing and scrutinising the local authority's decisions, for example, scrutinising the financial arrangements and performance of the local authority including its budget and accounting processes. Members of the executive cannot

be members of a scrutiny committee. An Overview and Scrutiny Committee may be split into several select committees dealing with the scrutiny of different areas such as planning and housing etc.

1.2.5 The Local Government Act 2000 (as amended) specifies how executive functions may be discharged. It allows for the elected mayor or leader to determine how functions which are the responsibility of the executive should be carried out. In the case of a leader and cabinet executive, the Leader —

(a) may discharge any executive functions, or

(b) may arrange for the discharge of any executive functions—

(i) by the executive,

(ii) by another member of the executive,

(iii) by a committee of the executive,

(iv) by an area committee, or

(v) by an officer of the authority.

1.2.6 Since 2002 the Borough Council has operated under executive arrangements, with a leader and cabinet executive being the chosen form of such arrangements.

1.2.7 Given the wide discretion afforded to the Leader (as set out above), there is no prescribed way in which a leader and cabinet executive should perform its day-to-day functions and practice does vary from authority to authority. Typically, executive arrangements fall within one of the broad categories below: -

- Individual decision-making powers mainly reserved to executive leader.
- Individual decision-making powers available to all executive members.
- Decision-making reserved to whole executive.

1.2.8 Within Kent those authorities with executive arrangements generally fall within the latter 2 categories above, with the majority opting to provide for individual decision making by all executive members.

1.2.9 At Tonbridge & Malling Borough Council the existing arrangements within the Constitution may be summarised as follows: -

- The executive is comprised of 7 Councillors (Leader plus 6).
- Meetings of the executive (Cabinet) are ordinarily held on 8 occasions per municipal year. The Constitution provides that Cabinet shall meet on 'at

least' 5 occasions per year but in practice the frequency of meetings has been higher.

- Cabinet is supported by 5 Advisory Boards e.g., Communities & Housing Advisory Board and 2 Advisory Panels (Parish Partnership Panel/ Tonbridge Community Forum). These do not align directly with the Cabinet Portfolios and Cabinet Members are not appointed to the Boards.
- Individual members of the executive can take non-key decisions\* within their portfolios, but all such decisions are subject to specific conditions as set out in paragraph 4 of the Rules for making of decisions by executive members, as reproduced in italics below: -

*A decision made by an Executive Member shall not have effect unless*

- (a) there has been a written report circulated to all Members prior to the meeting of an Advisory Board or an Area Planning Committee from the appropriate Chief Officer(s) stating that the decision is in conformity with the Council's budget and policy framework and that any reports are not substantially altered by supplementary reports circulated at the meeting.*
- (b) the report has been considered by an Advisory Board or an Area Planning Committee, which has recommended that the decision be made.*
- (c) the decision has been recorded in writing in the manner specified by the Monitoring Officer; and*
- (d) the decision has been counter-signed by the Leader of the Council and the Chief Executive (save for a decision made by the Leader of the Council, which shall be counter-signed only by the Chief Executive).*

### Key Decisions

Key decisions of the Council are defined in Article 8 of the Constitution. These are decisions which are likely either

- to result in the Council incurring expenditure which is, or the making of savings which are, significant (i.e., in excess of £250,000) having regard to the local authority's budget for the service or function to which the decision relates; or
- to be significant in terms of its effects on communities living or working in an area comprising two or more wards in the area of the Borough.

Key Decisions may not be taken by individual executive members but must instead be referred to a meeting of Cabinet for a decision. **Members are asked to note that the threshold of £250,000 is a locally set figure.**

Whilst there is currently no statutory guidance in this regard, previous guidance issued under S38 of the Local Government Act 2000 makes clear that the local authority should agree as a full council, limits above which items are significant and publish these limits, which the Borough Council has done via its Constitution. A local authority can set different thresholds for different services or functions, bearing in mind the overall budget for those services and functions and the likely impact on communities of each service or function.

- If a Cabinet Member does not agree with a recommendation from an Advisory Board, then their only course of action is to refer the matter to Cabinet for a collective decision.
- The Council has a single Overview and Scrutiny Committee, scheduled to meet 5 times per municipal year.
- Certain non-key executive decisions are delegated to officers (Part 3 of the Constitution).
- Decisions of the executive (whether taken at meetings of Cabinet/ by individual executive members or by officers under delegated powers) may be called-in for scrutiny by the Overview & Scrutiny Committee.

1.2.10 The existing Executive Procedure Rules, together with the Rules for making of decisions by executive members are attached as **Annexes 1 & 2**, respectively.

1.2.11 The 'hybrid governance structure' referred to by the LGA Peer Review Team (see para 1.1 earlier) arises from the local constitutional requirement that any decision taken by the Cabinet Member must be the subject of a prior recommendation from the relevant Advisory Board. In other words, a Cabinet Member cannot exercise any delegated decision-making power unless and until the specific decision has been considered and approved by an Advisory Board. It is this aspect of the Borough Council's arrangements that creates a hybrid structure, with the Advisory Boards effectively exercising a 'pre-scrutiny' function prior to any decisions being taken by a Cabinet Member (or by Cabinet if the Cabinet Member disagrees with the recommendation).

### **1.3 Proposals for change**

1.3.1 The Leader welcomes the report of the LGA Peer Review team, which contains thoughtful and constructive reflections and recommendations. Underpinning these recommendations are several identified issues with the existing arrangements, which are summarised below: -

- The operation of the Advisory Board system disempowers the Overview and Scrutiny Committee, leaving the Committee with no clear sense of purpose and direction.

- Cabinet Members are not able to exercise any independent decision-making powers, with any decisions taken by them little more than a ‘rubber-stamping’ of an Advisory Board recommendation. This impedes Cabinet Members from making timely and effective decisions within their respective portfolios and from transforming key services within the Council.

1.3.2 To address these issues, the Leader has undertaken a review of our executive governance arrangements with the following principal aims and objectives: -

- To increase the scope, role, and responsibility of the Overview & Scrutiny Committee so that it can effectively discharge its functions
- To ensure that Cabinet members are empowered to take decisions within their portfolios
- To ensure that Cabinet meetings are held at an appropriate frequency

1.3.3 The Leader’s intended actions in response to the report of the Peer Review team/ the LGBCE’s recommendations are set out below.

### **Role of Overview and Scrutiny Committee**

1.3.4 Para 11(b) of the Statutory guidance on overview and scrutiny in local and combined authorities issued by the Ministry of Housing, Communities & Local Government in May 2019 advises that authorities can establish a strong organisational culture by taking steps to ensure ‘*scrutiny has a clear role and focus within the organisation i.e., a niche within which it can clearly demonstrate it adds value*’.

1.3.5 The observations of the Peer Review team in 1.1.2 above indicate that the Council needs to address the role and focus of our existing scrutiny arrangements. In particular, the operation of the Council’s Advisory Board system has been identified as a central issue with our existing executive arrangements, creating a tension with the effectiveness of the scrutiny function and disempowering Cabinet Members from leading within their respective portfolios

1.3.6 To address the recommendations of the Peer Review team, it is proposed by the Leader that the Council establishes 3 new scrutiny select committees, as follows

Housing & Planning Scrutiny Select Committee

Finance, Regeneration & Property Scrutiny Select Committee

Communities and Environment Scrutiny Select Committee

1.3.7 It is proposed that the above new scrutiny select committees will replace the existing Advisory Boards and will each meet 5 times per municipal year. Each scrutiny select committee will contain 15 Members. The existing Overview and Scrutiny Committee will remain with 18 Members. Members are asked to note that

Executive Members will not be permitted to serve as members of the Overview and Scrutiny Committee nor any of the Select Committees.

- 1.3.8 It is further proposed that the position of Chair of the Overview and Scrutiny Committee would be offered to the Leader of the largest minority group within the Council. If there were 2 (or more) minority groups with equal number of Members, then it is proposed that the Leaders of these groups would alternate on an annual basis as Chair of the Overview and Scrutiny Committee. This will assist in maintaining the independence of the Scrutiny function.
- 1.3.9 Proposed revisions to the Overview and Scrutiny Procedure Rules to bring the above into effect are attached as **Annex 3**. Terms of reference for the new Scrutiny Select Committees are attached as **Annex 8**.
- 1.3.10 To ensure that there is a constructive relationship between the executive and the Overview and Scrutiny Committee it is also proposed to introduce in due course an Executive-Scrutiny Protocol. In accordance with the 2019 statutory guidance on overview and scrutiny this will be the subject of initial dialogue between the Leader and the Chair of the Overview and Scrutiny Committee before coming to Members for approval.

#### **Call-in of executive decisions**

- 1.3.11 The existing provisions relating to call-in of executive decisions are set out in Rule 15 of the Overview and Scrutiny Procedure Rules. An executive decision may be called in within 5 working days of publication of the decision if a request is made to the Chief Executive by the Chair of the Overview and Scrutiny Committee or any 3 members of the Overview and Scrutiny Committee.
- 1.3.12 It is proposed by the Leader to amend the existing provisions so that at least 5 members of the Overview and Scrutiny Committee are required to trigger a valid request for call-in. All call-ins will be referred to the Overview and Scrutiny Committee for consideration.

#### **Role of Cabinet Members**

- 1.3.13 The inability of Cabinet Members to take decisions within their portfolios without a prior recommendation from an Advisory Board effectively leaves them disempowered and impedes their ability to effectively lead the key services for which they are responsible.
- 1.3.14 It is proposed by the Leader that Cabinet Members should be able to take decisions within their respective portfolios except for: -
- Key Decisions
  - Decisions which are outside the Budget and Policy Framework i.e., are recommended to Council for approval
  - Decisions which cut across 2 or more portfolios

- Proposals for new or amended policies or strategies

Individual Cabinet Members can ask for a decision to be referred to the full Cabinet e.g., if potentially controversial.

- 1.3.15 In respect of Key Decisions, it is proposed that the current financial threshold of £250,000 is reduced to £100,000. Any key decisions which are likely to result in the Council incurring expenditure which is, or the making of savings which are, more than £100,000 will therefore need to be taken by Cabinet. This will require a consequential change to Article 8 of the Constitution, shown at **Annex 4**.
- 1.3.16 It is further proposed that the Executive Procedure Rules are amended so that Cabinet will be scheduled to meet at least 8 times per municipal year.
- 1.3.17 Revised rules for making decisions by Executive Members and to the Executive Procedure Rules are attached as **Annexes 5 & 6**. Members are asked to note that the changes to these rules may be authorised by the Leader alone.
- 1.3.18 The abolition of the Advisory Boards will require consequential changes to Part 3 of the Constitution. Revisions to Part 3 (Panels and Boards to advise the Executive) are attached as **Annex 7**.

## 1.4 Legal Implications

- 1.4.1 The appropriate legal references are set out within the body of the report.
- 1.4.2 Section 9E of the Local Government Act 2000 sets out how executive functions are to be discharged. The Executive Leader (referred to as the ‘Senior Executive Member’) has responsibility for the discharge of all executive functions and under Section(2)(e) may delegate any or all of these functions to:
- (i) the Executive as a whole.
  - (ii) a committee of the Executive.
  - (iii) an individual member of the Executive.
  - (iv) an officer.
  - (v) an area committee.
  - (vi) joint arrangements or
  - (vii) another local authority.
- 1.4.3 Whether the Leader has power to discharge a function under section 9E(2)(a) depends on whether it is a function which, under executive arrangements, is the responsibility of the executive. The default position under Section 9D of the 2000

Act is that if a function is not specified in regulations made by the Secretary of State under subsection (3) of that section then (subject to other legislative provision), it is to be the responsibility of an executive under executive arrangements. The regulations made by the Secretary of State under subsection (3) are the Local Authorities (Functions and Responsibilities) (England) Regulations 2000 (“the Regulations”).

- 1.4.4 None of the functions that the Leader seeks to exercise in this report are specified in the Regulations. Nor are we aware of any provision in the Local Government Act 2000 or any other enactment providing that they may not be exercised by the executive. That means, by virtue of section 9D(2) of the 2000 Act that they are each functions which are “to be the responsibility of [the] executive [...] under executive arrangements” and are each functions which the Leader has the power to discharge himself.
- 1.4.5 Members are asked to note that the changes proposed by the Leader are, in so far as he seeks to make the changes himself without the approval of Council, inconsistent with Article 4.02(a) of the Constitution. This states that only the Council (i.e., Full Council) will exercise the function of changing the Constitution (except where the Monitoring Officer exercises delegated authority to do so). On the face of the Constitution therefore, most (at least) of the changes proposed cannot be made by the Leader alone. However, this provision must be read together with Article 1.05 of the Constitution, which provides that in the event of any conflict between the provisions of the Constitution and the statutory position the latter will prevail. The extent of the Leader’s statutory powers cannot therefore be restricted by the Constitution. Consequential changes to the Constitution will be required to address this inconsistency.
- 1.4.6 A local authority which operates executive arrangements may vary those arrangements so that they—
- (a) differ from the existing arrangements in any respect, but
  - (b) still provide for the same form of executive.
- (Section 9KB Local Government Act 2000).*
- 1.4.7 Statutory guidance on overview and scrutiny in local and combined authorities was issued by the Ministry of Housing, Communities & Local Government in May 2019 - [Overview and scrutiny: statutory guidance for councils and combined authorities - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/803222/Overview_and_scrutiny_statutory_guidance_for_councils_and_combined_authorities_-_GOV.UK.pdf)

## 1.5 Financial and Value for Money Considerations

- 1.5.1 The creation of 3 new Scrutiny Select Committees and abolition of the existing Advisory Boards will have an impact upon the total allowances paid to Members.

The special responsibility allowance paid to each of the 5 Chairs of the Advisory Boards (currently £1656 pa) will cease to be paid. No special responsibility allowance is currently paid to Vice-Chairs of the Advisory Boards. Special responsibility allowances are currently payable to the Chair (currently £2589 pa) and Vice-Chairs (currently £648 pa) of the Overview & Scrutiny Committee. The proposed creation of 3 new Select Committees will need to be considered by the Independent Remuneration Panel in due course.

- 1.5.2 The changes set out in this report will reduce the number of Council meetings (8 fewer scheduled meetings overall per municipal year), which will have a positive impact upon the costs associated with delivery of the democratic function e.g., costs of producing agendas/ utility costs associated with meetings.

## 1.6 Risk Assessment

- 1.6.1 The Peer Review report identifies the risks associated with continuing with the existing governance arrangements. The risks of taking no action in advance of the changes recommended by the Boundary Commission are explicitly considered by the Peer Review Team, who commented as follows

*In reference to the boundary review and the 18 per cent proposed reduction in members, there is a real risk that the current advisory board system will become unsustainable with a source commenting that "lower numbers won't sustain the current format".*

### 1.6.2 Equality Impact Assessment

- 1.6.3 The decisions recommended through this paper have a remote or low relevance to the substance of the Equality Act. There is no perceived impact on end users.

## 1.7 Recommendations

### 1.7.1 **RECOMMENDED** that Members

- (a) **NOTE** the changes to the Rules for making decisions by Executive Members set out at **Annex 5**.
- (b) **NOTE** the changes to the Executive Procedure Rules at **Annex 6**.
- (c) **NOTE** the changes to Part 3 of the Constitution (Panels and Boards to advise the Executive) set out at **Annex 7**.
- (d) **NOTE** the reduction of the financial threshold for Key Decisions from £250,000 to £100,000 as set out in **Annex 4**.
- (e) **NOTE** the creation of 3 new Scrutiny Select Committees as set out at paragraph 1.3.6 of the report, each being programmed to meet on 5 occasions per municipal year and each containing 15 members.

- (f) **NOTE** the changes to the Overview & Scrutiny Procedure Rules set out at **Annex 3** and the terms of reference for the Scrutiny Select Committees at **Annex 8**.
- (g) **NOTE** that the arrangements in paragraphs (a) to (f) will come into effect on 10<sup>th</sup> May 2022.
- (h) **AUTHORISE** the Monitoring Officer to make any consequential amendments to the Council's constitution to reflect the changes set out in this report and to ensure that it is consistent with the current legislative position.

Background papers:

contact:

Nil

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