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CONSTITUTIONAL REVIEW WORKING PARTY

15 FEBRUARY 2012

A meeting of the Constitutional Review Working Party will be held at **9.30 am on Wednesday, 15 February 2012** in the Austen Room, Council Offices, Cecil Street, Margate, Kent.

Membership:

Independent Members: Mr R Hills (Chairman) and Mr B Hinchley (Vice-Chairman);

Councillors: Hayton, Nicholson, Watkins, Wright and K Gregory (as substitute at this meeting for Councillor Hayton),

SUPPLEMENTARY AGENDA

Item
No

Subject

5. **MOTIONS ON NOTICE** (Pages 1 - 6)

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MOTIONS ON NOTICE

To: **Constitutional Review Working Party**

Main Portfolio Area: Performance

By: **Corporate and Regulatory Services Manager**

Classification: **Unrestricted**

Summary: To consider amendments to the Council Procedure Rules regarding Notices of Motion.

For Recommendation

1.0 Introduction and Background

- 1.1 The purpose of Council Procedure Rule (CPR) 16 is to enable any two members to request full Council to consider debating and determining an issue that might not otherwise be debated and determined and it is for this reason that the Rule is drafted in very broad terms to encompass debates that engage not only the functions of the Council but also any matter affecting the district. The Motion on Notice Procedure framed by Rule 16 pre-dates the introduction of the Leader and Cabinet system and therefore would have represented one of the few opportunities in the old Committee system for opposition members to try to force a debate in Council on an important issue affecting the district or as a means of requesting the Council to reconsider a policy or decision it had made. In practice. The introduction of the Leader and Cabinet system where political power is centralised in a single party Cabinet held accountable by a politically balanced Overview & Scrutiny Committee, has resulted in a reduction in the use of the Notice of Motion Procedure as a tool for holding a ruling administration to account.
- 1.2 However, the Rule was never intended to permit the decision making processes and procedures that flow from a Cabinet/Scrutiny model, i.e. those prescribed by law and the Council's Constitution, to be circumvented. In other words a Motion on Notice should not ask the Council to take a decision in respect of a function that is an executive function because the discharge of an executive function is the sole responsibility of the Cabinet, nor should it ask Council to make or amend a policy which is not part of the Council's Policy Framework (as the approval or amendment of such a policy is also the responsibility of the Cabinet), nor for that matter should a Motion on Notice enable the Council to make or amend a policy that is within the Policy Framework unless a draft of the policy has been considered by the Cabinet and by the Overview & Scrutiny Panel. It also follows that a Motion on Notice should not enable the Council to take any decision without a full understanding the technical, legal and financial implications of that decision. Indeed, if Council did pass a Motion without a full understanding and due consideration of these implications, Members would be in breach of their fiduciary duty to the taxpayer and the Council would be at risk of judicial review.
- 1.3 Notwithstanding the limitations that the Leader and Cabinet model imposes on the scope of the Motion on Notice procedure, it appears likely that opposition party groups will from time to time seek to utilise a broadly drafted Motion on Notice procedure for party advantage to enable, for example, a controversial Cabinet decision in relation to the discharge of an executive function to be reviewed or overturned by Council or to enable

an opposition party group to have the opportunity of implementing a manifesto policy commitment without the policy being subjected to the normal decision making processes (described by the former Leader as 'policy making on the hoof'). This being so, the question arises why CPR 16 has managed to survive in its current form without amendment and the answer appears to lie in the fact that up until the last election the Council has always had a stable political majority as a result of which, any attempt by an opposition group to utilise the Motion on Notice procedure in this way would have been frustrated by the majority voting not to debate the motion in question. By way of example, in the municipal year preceding the May 2011 elections when the Council had a working Conservative majority, the Council received only one Motion on Notice - in respect of the Montefiore Tennis Courts - and in that case Council voted not to debate the motion. In contrast, from the date of the election to date of writing this report the Council received seven Motions on Notice; five of which were debated, including live animal exports, the 2012/13 grant settlement, Criminal Records Bureau checks for Members, parking charges in Birchington and the removal from office of the Leader of the Council. Moreover, another significant Motion in relation to night flying at Manston Airport was ruled inadmissible by the Chairman of the Council following receipt of external legal advice obtained by the Monitoring Officer. It therefore appears to be the case in a hung Council that opposition groups are significantly more likely to view the Motion on Notice procedure as an effective means of pursuing party advantage and highlighting policy differences.

- 1.4 It is important to stress that the pursuit of party advantage by a party group is a normal and expected part of the proper functioning of the Council as a political body and it can only be when that objective potentially comes into conflict with due process and considered policy and decision making that there is a case for the Council considering a review of CPR 16 to ensure that it operates in conformity with the law and the other parts of the Constitution
- 1.5 It is also the case that CPR 16.4(a) (ii) provides that any Motion on Notice must be capable of being passed by the Council as a 'lawful and valid' resolution. At first reading this seem like an entirely desirable provision which sets a sensible long stop limit on the broad scope of CPR 16,4 (a) (i) and which has the capacity to a prohibit any misuse of the Motion on Notice procedure to circumvent proper policy and decision making. In practice it may not have this effect as it can be argued that Council may validly debate and pass a resolution as long as it is within the powers of the Council as a corporate body regardless of the possible circumvention of due process. Consequently, CPR 16.4 requires further amending to make it clear that motions to Council may not circumvent due process.
- 1.6 Moreover, the application of CPR 16.4 (a) (ii) has proved controversial in practice. When, for example, the Chairman of the Council ruled as invalid the Motion on Notice on night flying at Manston Airport (based on the external advice commissioned by the Monitoring Officer), the Monitoring Officer was criticised for not advising the proposer of the motion before the meeting that the motion could be unlawful in order that the proposer could have considered withdrawing the motion and re-submitting a valid one. Then, when on receipt of the Notices of Motion on Criminal Records Bureau checks for Members and parking charges in Birchington, the Monitoring Officer advised the proposers that he considered both motions to be unlawful and provided advice on how they could be amended to be lawful, he also received Member criticism for doing so.
- 1.7 In reality it is untenable for the Monitoring Officer to withhold from the proposer of a Notice of Motion until the night of the Council meeting at which the Motion is to be considered, his opinion that the Motion is unlawful or invalid and it is equally untenable for the Monitoring Officer to advise the proposer in a timely manner that his motion is invalid, but then decline to advise him of the grounds for that opinion or how the motion can be amended so that it can be submitted as a valid motion. Nevertheless, the overtly political nature of some of the recent Notices of Motion proposed to Council, many of them a direct lift from the elections manifesto of the then main opposition party and the advisory role that the Monitoring Officer is expected to perform in relation to the interpretation and

application of such motions does have the potential to compromise his political impartiality in appearance if not in fact. That being so, CPR 16.4 also requires revision to ensure that the Monitoring Officer is no longer placed in a position where he may appear to be assisting one party group at the expense of another.

- 1.8 A final criticism of the Notice of Motion Procedure as currently drafted is the fact that although the default position is that a Motion is referred to the Cabinet or other appropriate Committee without debate, even where that happens the proposer of the motion is given an introductory speech to which there is no right of reply. Arguably, speaking rights should be excluded until such time as Council decides to debate a motion.

2.0 The Current Situation

2.1 Council Procedure Rule 16.3 – Putting the Motion at the Meeting

- 2.2 Council Procedure rule 16.3 states:

“The Member whose name appears first on the Notice will move the motion during **his or her speech** [my emphasis] and call for a seconder. If seconded, the motion shall then stand referred without discussion to the Cabinet or appropriate Committee for determination or report unless the Council decides to debate the motion in accordance with Rule 19.”

- 2.3 As mentioned above, this was perceived to be unfair to the Leader of the Council if the Motion was referred without discussion to Cabinet or an appropriate Committee, as the proposer of the motion on notice has 3 / 5 minutes in which to speak and propose the motion, yet all other Members including the Leader would be precluded from speaking.

- 2.4 Democratic Services have carried out desktop research on ten other local authorities including the three neighbouring authorities and Kent County Council. None of the ten authorities specifically refers within their constitutions to any right of the proposer of the motion to support their motion with a speech. Half of the local authorities researched had constitutions that specifically stated that a motion is proposed and seconded only.

- 2.5 It is therefore suggested that CPR 16.3 is suitably amended so that a Motion on Notice is moved without a speech and, if seconded, is referred to the Cabinet or appropriate Committee without debate unless Council agrees to debate the Motion. Should Council agree to debate the motion, the proposer will have the right to an opening and closing speech in the usual way and the seconder will be able to reserve the right to speak if they so wish. If Members are minded to support this suggestion, CPR 16.3 can be amended to read:

“The Member whose name appears first on the Notice will move the motion ~~during his or her speech~~ and call for a seconder. If seconded, the motion shall then stand referred without discussion to the Cabinet or appropriate Committee for determination or report unless the Council decides to debate the motion in accordance with Rule 19.”

3.0 Council Procedure Rule 16.4 - Scope of Motions

- 3.1 CPR 16.4 (a) currently provides that Motions must:

- (i) be about matters for which the Council has a responsibility or which affect the district.
- (ii) be expressed in such a form that it shall conform with the requirements of the Council Procedure Rules and be competent for the Council if it so desires to pass it as a **lawful and valid resolution**. [My emphasis] If it is not so expressed the Chairman shall rule it out of order.

3.2 Given the issues identified in Paragraph 1.2 to 1.7 above, the Monitoring Officer has suggested that the scope of CPR 16.4 (a) be amended to include the following:

- “(iii) Where a motion on notice would, if adopted, constitute the exercise of an executive function, that motion must be referred to the Cabinet (or relevant Cabinet portfolio holder as appropriate) for decision.
- (iv) The Chairman shall rule out of order any motion on notice that relates to the adoption of, or amendment to, a policy falling within the Council’s adopted Policy Framework if that policy or amendment (as the case may be) has not first been proposed by the Cabinet and considered by the Overview and Scrutiny Panel.
- (v) The Chairman shall rule out of order any motion on notice that proposes the adoption of, or amendment to, any policy outside the adopted Policy Framework which by law or this Constitution is the sole responsibility of the Cabinet.
- (vi) The Chairman shall also rule out of order any motion on notice that proposes the adoption of a policy or the taking of a decision where Council has not received a report from the officers setting out the technical legal and financial implications of adopting the policy or taking the decision in question. “

4.0 **Rejecting Motions on Notice**

4.1 There is currently nothing within the Council’s constitution that allows for motions on notice to be rejected if they contain defamatory or offensive language or are frivolous in nature.

4.2 The Monitoring Officer has suggested that a paragraph be included in the Council Procedure Rules as outlined below that would allow the Chairman of Council to reject motions on notice if he considers them to be defamatory, frivolous or offensive.

4.4 Such a paragraph would read:

“The Chairman of Council may rule out of order Motions on Notice that in his opinion:

- a) are defamatory in nature,
- b) are frivolous in nature, or
- c) contain offensive language.”

5.0 **Council Procedure Rule 20.2 – Motion similar to one previously rejected.**

5.1 Motion 20.2 of the Council Procedure Rules states:

“A motion or amendment in similar terms to one that has been rejected at a meeting of Council in the past six months cannot be moved unless the notice of motion or amendment is signed by more than 50% of the membership or supported by the Chairman (or in his/her absence the Vice-Chairman). Once the motion or amendment is dealt with, no one can propose a similar motion or amendment for six months.”

5.2 It has been suggested by the Monitoring Officer that Council Procedure Rule is amended to read

“A motion or amendment in similar terms to one that has been **considered** at a meeting of Council in the past six months cannot be moved unless the notice of motion or amendment is signed by more than 50% of the membership or supported by the Chairman (or in his/her absence the Vice-Chairman). Once the motion or amendment is dealt with, **the Council cannot consider** a similar motion or amendment for six months.”

- 5.3 By amending this rule it would bring the Council Procedure Rules on motions on notice in line with both the Council Procedure Rules for both questions from the public and from Members which are rejected if they are:

“substantially the same as a question which has been put at a meeting of the Council in the past six months;”

6.0 Options

- 6.1 Members can choose to recommend changes to Council Procedure Rule 16.3, the Scope of Motions, Rejecting Motions on Notice or Council Procedure Rule 20.2 if they wish or keep them the same.

7.0 Next Steps

- 7.1 The Standards Committee will consider any recommendations from the Constitutional Review Working Party; the Standards Committee can then make recommendations to Council.

8.0 Corporate Implications

8.1 Financial and VAT

- 8.1.1 There are no direct financial implications arising from this report.

8.2 Legal

- 8.2.1 There are no direct legal implications arising from this report.

8.3 Corporate

- 8.3.1 Council must approve all amendments to the Constitution.

8.4 Equity and Equalities

- 8.4.1 There are none apparent

9.0 Recommendations

- 9.1 That Members recommend changing the constitution as follows:

i) Council Procedure Rule 16.3 to read:

“The Member whose name appears first on the Notice will move the motion and call for a seconder. If seconded, the motion shall then stand referred without discussion to the Cabinet or appropriate Committee for determination or report unless the Council decides to debate the motion in accordance with Rule 19.”

ii) Council Procedure Rule 16.4(a) - to include the following paragraphs

- “(iii) Where a motion on notice would, if adopted, constitute the exercise of an executive function, that motion must be referred to the Cabinet (or relevant Cabinet portfolio holder as appropriate) for decision.
- (iv) The Chairman shall rule out of order any motion on notice that relates to the adoption of, or amendment to, a policy falling within the Council’s adopted Policy Framework if that policy or amendment (as the case may be) has not first been proposed by the Cabinet and considered by the Overview and Scrutiny Panel.
- (v) The Chairman shall rule out of order any motion on notice that proposes the adoption of, or amendment to, any policy outside the adopted Policy Framework which by law or this Constitution is the sole responsibility of the Cabinet.

- (vi) The Chairman shall also rule out of order any motion on notice that proposes the adoption of a policy or the taking of a decision where Council has not received a report from the officers setting out the technical legal and financial implications of adopting the policy or taking the decision in question. “

iii) Rejecting Motions on notice – to include the following paragraph:

“The Chairman of Council may rule of out order Motions on Notice that in his opinion:

- a) are defamatory in nature,
- b) are frivolous in nature, or
- c) contain offensive language.”

iv) Council Procedure Rule 20.2 to read:

“A motion or amendment in similar terms to one that has been **considered** at a meeting of Council in the past six months cannot be moved unless the notice of motion or amendment is signed by more than 50% of the membership or supported by the Chairman (or in his/her absence the Vice-Chairman). Once the motion or amendment is dealt with, **the Council cannot consider** a similar motion or amendment for six months.”

- 9.2 That the Corporate and Regulatory Services Manager be given delegated authority to amend the Council’s constitution in order to reflect any changes to it that are made as a result of Council’s decision on this matter.

10.0 Decision Making Process

- 10.1 Only the Council has the power to alter the Council’s constitution. Any recommendations from the Constitutional Review Working Party will be put to the Standards Committee, prior to presentation to Council.

Future Meetings: Standards Committee Council	Date: 1 March 2012 19 April 2012
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Contact Officer:	Harvey Patterson, Corporate and Regulatory Services Manager, Ext 7005
Reporting to:	Sue McGonigal, Chief Executive, Ext 7002

Annex List

None	
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Background Papers

Title	Details of where to access copy
None	

Corporate Consultation Undertaken

Finance	Sarah Martin, Financial Services Manager & Deputy S.151 Officer
Legal	Harvey Patterson, Corporate and Regulatory Services Manager
Communications	Hannah Thorpe, Corporate Communications officer