

Agenda Item	3
Report No	RDB 1/18

## HIGHLAND COUNCIL

**Committee:** Redesign Board

**Date:** 27 February, 2018

**Report Title:** Provision of External Legal Services

**Report By:** Karen Ralston, Area Care and Learning Manager (South)

### 1 Purpose/Executive Summary

1.1 This report outlines the work carried out by the Peer Review Team in reviewing the provision of commissioned external legal services. The report seeks to prevent future budget pressures through in-sourcing of some commissioned external legal services and by enhancing the conveyancing team so as to be more commercially-minded and is aligned to the Council's workforce planning objectives.

### 2 Recommendations

2.1 The Redesign Board is asked to recommend that:-

- To reduce dependency on and the cost of commissioned legal services by establishing a solicitor post at a cost of £45,000 (either on a full time or part time basis) which would at a minimum be cost neutral, to focus on employment and some procurement and litigation activity.
- To strengthen conveyancing capacity to deliver financial savings and additional income for the Council by establishing a Paralegal Apprenticeship post at a cost of £32,000 once qualified.

The Redesign Board is also asked to agree the following, which would be taken forward at an operational level:-

- That funding for the solicitor post would be achieved through top slicing service budgets on an agreed formula as approved by the Director of Corporate Resources;
- That subject to a business case a further Paralegal Apprenticeship post be considered should income levels exceed assumptions on a recurring basis;
- To improve the visibility of expenditure incurred in relation to commissioned external legal services through amending the subjective codes to provide greater clarity over this type of expenditure; and

- That exploratory work is undertaken to identify the issues that would need to be considered should the Council wish to proactively market the Conveyancing Team to other public sector organisations as well as third sector organisations such as Registered Social Landlords.

### **3 Background**

- 3.1 The purpose of this review was to examine the provision of external legal services to explore whether a more cost effective solution could be identified which would continue to meet service user requirements for specialist legal services.
- 3.2 The [project scope](#) was agreed by the Redesign Board in November 2017.
- 3.3 The Review Team comprised
- Karen Ralston, Area Care and Learning Manager (South)
  - Kenneth Forbes, Property Manager (Estates)
  - Gordon Morrison, Parliamentary Officer
  - Rikki Selkirk, Union Representative
  - Cllr Carolyn Caddick, Redesign Board Member
  - Cllr Callum Smith, Redesign Board Member

In addition Sandra Breach, Early Years Officer (South) was co-opted into the team.

- 3.4 The host Head of Service is Stewart Fraser, Head of Corporate Governance and the Team has been supported by colleagues in Corporate Resources, Development and Infrastructure and Care and Learning.

### **4 Methodology**

- 4.1 A number of approaches have been taken to obtain, understand and evaluate the provision of commissioned legal services, these included:-
- The review of expenditure on external legal services by type of activity and by service;
  - Meetings with Legal Services Team and other Council Stakeholders; and
  - Benchmarking provision in other local authorities.

### **5 The Council's Legal Team**

- 5.1 The Council's Legal Team led by the Head of Corporate Governance has a current establishment of 13.2 FTE members of staff based in Inverness and Dingwall and is divided into three teams:
- Litigation and Advice - 4 FTE
  - Regulatory and Licensing - 3.6 FTE
  - Conveyancing and Commercial – 4.6 FTE
- 5.2 In addition, individual Services have recognised the demand being placed upon the Legal Team and are supporting them directly through the funding of 3.2 FTE temporary posts on a year by year basis as follows:

- 1.6 FTE temporary solicitor positions funded by Estates Team (0.6 FTE) from property rental income and Asset Management (1FTE) funded from property sales income.
- Revenues Team within Finance Service (0.6 FTE).
- The Head of Housing is funding from the HRA a temporary one year solicitor post (1FTE) to deal exclusively with right to buy disposals. It is expected that this will be completed this financial year.

5.3 The Review Team spoke with stakeholders in each of the Council's services and they commented positively on their experience of the Council's Legal Team in relation to the quality of advice, their professionalism and their willingness to support colleagues in resolving difficult circumstances. However some stakeholders have highlighted concerns over the lack of capacity and the resultant delays that occur.

5.4 In 2015/16 the Council's Legal Team saw the departure of six members of staff, two legal managers, three solicitors and the only paralegal post as a consequence of meeting the Corporate Development savings target and through the Voluntary Redundancy Scheme.

5.5 The Head of Corporate Governance has confirmed that these reductions have created additional pressures in areas such as conveyancing whilst pre-existing deficiencies in particular areas of activity such as employment, procurement, major commercial issues and construction contracts continue.

## **6 Commissioned External Legal Services**

6.1 Until December, 2017, the Council commissioned external legal services from the private sector through both a framework contract principally with Harper Macleod LLP as well as through a number of other legal firms for particularly specialist services such as ICT re-procurement and major commercial contracts which were procured separately. A re-procurement exercise for commissioned external legal services is currently underway.

6.2 It was established that the Head of Corporate Governance in association with the relevant client service had overall responsibility for determining whether the Council commissioned external legal services. This governance role is important in ensuring that such expenditure is appropriate and only incurred where it was necessary.

6.3 The reasons for commissioning external legal services were primarily because of the specialist nature of the issue or due to a lack of capacity internally to carry out such work.

6.4 Assessing the expenditure incurred in relation to commissioned external legal services proved to be more challenging than originally anticipated due to the way it was coded in the financial ledger. Commissioned external legal services expenditure was included in other legal expenditure such as fees to the Scottish Court Service, Sheriff Officers, Registers of Scotland as well as property search companies.

6.5 In order to improve the visibility of expenditure incurred in relation to commissioned external legal expenditure, it is suggested that consideration be given to amending the subjective codes to provide greater clarity as to this type of expenditure.

6.6 The following areas were excluded from the scope of this review as either they could not be undertaken internally in any circumstance or it was clearly more cost effective to

undertake externally:-

- Counsel's Opinion and Judicial Review;
- Fees such as Curator Ad Litem, Permanence Orders, Guardianship Orders; and
- Sheriff Court Appearances in geographical areas where there are no in house legal staff (Wick, Fort William and Portree).

6.7 The Peer Review Team subsequently analysed the expenditure incurred on commissioned external legal services for the last three financial years by service and by activity which is detailed in appendix two.

6.8 Expenditure on commissioned external legal services was £489,000 in 2016/17, £535,000 in 2015/16 and £339,000 in 2014/15.

6.9 In 2016/17 this expenditure has been broken down under the following activity headings:-

• Procurement (ICT contract)	£65,602
• Employment Advice (Including EERS)	£20,448
• Public Local Inquiries	£17,106
• Litigation	£15,713
• Construction Projects & Contractual Disputes	£306,169
• Appeal to Land Tribunal	£9,325
• Appeal against School Closure Decision	£41,968
• Other	£12,394
<b>Total</b>	<b>£488,725</b>

## **7. Legal Services Framework Contract**

7.1 The Council entered into a Framework Agreement for the provision of external legal services in 2013. The three year framework was extended for a further period of one year and came to an end in December 2017. The Framework divided the potential work from the Council into 16 Lots and five firms were selected and ranked in respect of each. In practical terms Harper Macleod were the first ranked firm across almost all of the Lots and only a limited amount of work has been sent to the second ranked firm, Morton Fraser.

7.2 As part of the Framework Agreement the Council has asked Harper MacLeod to offer training sessions for Council staff (and Members) and a 'friend down the corridor' service is available to staff for one-off calls and advice.

7.3 In addition there is a shared procurement framework between the Highland Council, Aberdeen and Aberdeenshire which came into effect in January, 2016. Within this shared procurement framework there is access to Aberdeen City Council's Legal Team who are available to provide advice in relation to shared procurement projects which involve the Council. However this resource is not available to procurement activity undertaken solely by the Highland Council as this would be chargeable and a barrier to progress would be the level of Professional Indemnity Insurance that the Highland Council would require Aberdeen City Council to hold.

## **8. Comparison between other Local Authorities**

8.1 Benchmarking arrangements with eight other Councils shows a range of practice and split between in-house and out-sourced legal services provision. Each local authority is different in terms of their geography, population and service delivery structures;

however the total legal staffing in Highland is the smallest of the authorities considered, including those with smaller populations. In other authorities the balance is more heavily weighted towards internal legal provision; whereas in Highland over a third of our expenditure is to external legal advisers.

- 8.2 The figures for the Highland Council reflect the diminished legal resource available to advise services. In this regard there are particular weaknesses internally in areas of activity such as employment, procurement, major commercial issues as well as construction contracts.

## **9. Balance between Internal and External Legal Advice**

- 9.1 The Council commissions a range of legal services from external providers, ranging from commercial, contractual, procurement, conveyancing, employment and litigation. As already stated, this is due either to the specialist nature of the services required or to a lack of capacity within the Council's Legal Team. An internal study undertaken a few years ago established that comparable internal costs were significantly lower than those procured both through a framework agreement and on the open market.
- 9.2 It is acknowledged that it will always be the case that some legal services will be commissioned from external providers either because of the very specialist nature of the services being required and/or the nature of the representation required. The question is not whether the provision of legal services is best delivered internally or externally, but rather does the Council have the right balance between in house provision and external provision. The comparison between local authorities would suggest that there could be merit in adjusting that balance.
- 9.3 Having reviewed the provision of externally commissioned legal services which was within the scope of this review, it was concluded that due to the requirement for specialist legal knowledge, the need for equality of arms and because of the irregular nature of the services required and expenditure incurred that areas relating to major construction contracts, contractual disputes and public local inquiries, that external commissioned legal services continue to deliver the best value for the Council.
- 9.4 Indeed in an adversarial context, the Council would wish to secure the services of the most effective legal team available in order to maximise their chance of a successful outcome. Not only does the Council win the legal argument, but this also improves the prospect of having some of its costs paid by the other litigant.
- 9.5 However there are other areas of externally commissioned legal services activity which could be more readily delivered internally as they tend to be integral functions of the Council. These areas primarily relate to employment and some areas of procurement and litigation.
- 9.6 However to be able to deliver these activities internally would require the provision of additional resource within the Council's Legal Team, which would enhance the Council's expertise.

## **10. Employment**

- 10.1 The Council as a large employer will always have a requirement for employment legal advice for a variety of reasons. Clearly the Council would wish to minimise that requirement to the greatest extent possible through the application of the Council's Human Resource Policies and obtaining advice from the Council's Corporate Human Resources Team.

- 10.2 Nevertheless there will be times when employment legal advice will be required either out of a need to react to a situation or in an attempt to prevent a situation occurring in the first place. Indeed obtaining such advice at the right time can help avoid problems and costs at a later stage. However the benefits of such preventative spend are much harder to evidence and quantify.
- 10.3 Expenditure on external employment legal advice within the Framework in 2014/15 has been £81,643, which equates to £27,000 per year. This has related principally to representing the Council's interests in employment tribunal claims.
- 10.4 While employment legal advice, as with legal advice more generally, is demand driven, irregular and varies from year to year there are some material considerations which are relevant to considering future arrangements. These include:-
- The Council being a large employer with teaching and non-teaching conditions of service for employees;
  - The Council having a wide and complex range of responsibilities and functions;
  - The Council will be undergoing significant and ongoing change;
  - Implementation of Workforce Planning Strategy 2017-23; and
  - Abolition of Employment Tribunal Fees.
- 10.5 Taking these considerations into account, it is reasonable to assume that expenditure on employment legal advice will increase beyond the amount that has previously been incurred over the past three years. However, it would be too speculative to assume that such an increase in expenditure would be sufficient to justify the recruitment of a solicitor post at £45,317 per annum (HC9 grade with on costs) dedicated to the provision of employment advice.
- 10.6 Consequently on the grounds of cost alone, it is not possible to recommend the establishment of a full time solicitor post to provide dedicated employment legal advice.

## **11. Procurement and Litigation**

- 11.1 Expenditure on legal advice in relation to procurement and litigation has over the same period been £251,000. Inevitably there is a degree of overlap between the areas of activity as a procurement issue can readily become one of litigation.

## **12. Alternative Options**

- 12.1 While the financial case cannot be made for separate legal posts for employment and procurement, alternative options have been explored. These have centred on a shared employment post with other major public sector partners or an internal combined post which would specialise in employment but also undertake procurement and other generic litigation legal work which had previously been outsourced due to a lack of capacity within the Council's Legal Team.

## **13. Shared Employment Post**

- 13.1 The option of a shared employment post with other major public sector partners has been explored previously with Moray Council. Both authorities recognised the value in having access to in-house employment advice but to date neither has been in a position to progress recruitment due to financial pressures.
- 13.2 The proposal of a share post has not been raised directly with other partners. In relation to NHS Highland, Police Scotland and the Scottish Fire and Rescue Service,

they have their own central legal teams who would provide this service. It is understood that Highlands and Islands Enterprise contract out any employment legal advice they require, but given their small staffing complement the expenditure would likely be minimal. In any event, as noted above, in the context of procurement there are likely to be issues around Professional Indemnity Insurance and Law Society approval to be resolved before the Council could consider providing legal advice to another organisation.

13.3 In view of this it would seem that a shared post providing employment legal advice with other public sector partners would be unlikely to deliver sufficient work to be viable as a shared resource and would also have to overcome issues around indemnity and Law Society of Scotland rules. Consequently it is not possible to recommend this option.

#### **14. Combined Employment/Procurement Post**

14.1 While the financial case cannot be made for separate legal posts for employment and procurement, an alternative option that has been explored was the establishment of a single post which would specialise in employment but also undertake procurement and other generic litigation legal work which had been previously outsourced due to a lack of capacity within the Council's Legal Team.

14.2 There are clear synergies between employment and procurement advice, most notably compliance with the Transfer of Undertakings (Protection of Employment) Regulations 2006.

14.3 The Head of Corporate Governance has confirmed that such a post would be viable and sustainable in terms of the delivery of the requirements of employment and procurement advice as well as undertaking some other generic litigation legal work.

14.4 As stated above a post of solicitor at HC9 with on costs would be £45,000 per annum. While expenditure on employment, procurement and other relevant legal services would have been broadly equivalent to this figure over the last three years, it is not possible to guarantee that this expenditure will occur in the future due to the demand led nature of the work.

14.5 However because of the ongoing requirement for legal advice in these areas and for the reasons highlighted above, it is considered reasonable to assume this level of expenditure will either at a minimum continue or actually increase and therefore the establishment of such a post would at a minimum be cost neutral, but has the potential to deliver savings to the Council.

14.6 The establishment of such a post could:

- Reduce the potential increased need for external legal advice in these areas;
- Deliver preventative spend through accessible and timely advice, although it is acknowledged that this is difficult to quantify;
- Help address reputational risk issues; and
- Strengthens the capacity and expertise of the Council's Legal Team.

14.7 Funding for such a post could not be undertaken from within the existing budget for the Council's Legal Team, nor are there service budgets dedicated for the provision of this type of commissioned legal services. Consequently a possible option would be to consider top slicing service budgets on the basis of an agreed formula, such as number

of staff, size of budget or use of such services over the past three years.

14.8 This approach is consistent with growing the Council's own talent and reducing its reliance on external contractors.

## **15. Conveyancing**

15.1 Although not strictly within the remit of this review one inevitable and identified consequence arising from the staffing reductions in the Council's Legal Team, in particular the Conveyancing and Commercial Team, was that delays would occur in concluding both land/property sales and the granting of leases. This has resulted in the Council continuing to incur costs in retaining land and buildings which had previously been declared to be surplus.

15.2 As an example, the Property Transactions Monitoring Report which was considered at the Environment Development and Infrastructure Committee on 8 November, 2017 indicated that 13 properties were with legal services. For a variety of reasons not all of them within the Council's control, several of these properties have been with legal for more than 12 months.

15.3 Before any property or land can be sold, Legal Services should be instructed to check there is good title, there are no burdens or restrictions and all consents and services are in place. Title checks on average now take several months and have to be dealt with by a solicitor. Previously such a check would have been carried out by a Paralegal under the supervision of a solicitor. If title checks were undertaken more quickly this would allow the property to be marketed and potentially sold sooner.

15.4 A large number of property transactions are for small industrial units, low value sales, assignments and sub leases. However the simple volume of these transactions means that some are incurring significant delays. Although some of the above may be classed as low priority, once vacated or declared surplus empty rates, running costs and security issues are ongoing. Currently there are a number of properties waiting to conclude and incurring running costs.

15.5 Running costs can include dealing with vandalism and carrying out extra security measures in some vacant properties while they are marketed or subject to conveyancing.

15.6 A stated aim of Council Redesign is to be more commercially minded and therefore it could be argued that there should be a greater emphasis given to the disposal of assets that have been declared surplus as quickly as possible and to ensure that commercial leases are signed with the minimum of delay to maximise income opportunities.

15.7 In addition, the Community Empowerment Act is encouraging communities to take forward asset transfers meaning there is likely to be an increase in demand for conveyancing. Again a number of these transactions are relatively small and low value, such as slipways, toilets or small parcels of land, however a community disposal can transfer a variety of costs such as maintenance and insurance producing a saving for the Council. This approach can also build capacity and resilience of community organisations to attract external funding and deliver shared outcomes with the Council.

15.8 If there was additional capacity the Council would potentially be able to achieve:

- Quicker disposal of surplus land and property (additional capital receipts);



- Reduced costs incurred for retaining surplus property (empty rates, running and security costs);
- Quicker conveyancing of leases and sub leases of industrial units (generates more income).

## 16. Options to Strengthen Conveyancing Capacity

16.1 The options that have been considered which would provide this additional capacity were:-

- Provision of a paralegal post;
- Provision of a Paralegal Apprenticeship post;
- Extension of temporary solicitor post currently dealing with backlog of Council house sales; or
- Outsourcing of outstanding conveyancing work

16.2 There are advantages/disadvantages to each of these options

Option	Advantages	Disadvantages
Paralegal	Can progress outstanding work and generate income and savings more quickly.	costs of funding post (£32k) time to recruit
Paralegal Apprenticeship	Cost less than paralegal (£20k) Promotes modern apprenticeship with some funding and support available via the modern apprentice scheme	time to train and support time to recruit Cost of funding post (32k once qualified)
Temporary solicitor	Already working for council and familiar with work. Could start generating income and savings more quickly	cost of funding post
Outsourcing	Progress outstanding work and start generating income and savings immediately	Cost of using private legal firms higher than in house. Also duplication of work. In house will undertake fact finding and supply info.

16.3 Having considered these options, it was felt that the provision of a Paralegal Apprenticeship post would offer the best combination of additional capacity, at least cost while delivering additional financial benefits to the Council. It also promotes the modern apprenticeship scheme which is a priority of the Council.

16.4 Initial discussions have taken place with the Head of Development and Regeneration who is supportive of this approach and confirmed that the costs of such a post (£32,000 including on costs for a qualified Paralegal) would be recovered on a recurring basis by the additional income generated.

16.5 Further discussions would require to be undertaken between the Head of Corporate Governance and the Head of Development and Regeneration to agree funding arrangements and a job description for the Paralegal Apprenticeship post.

16.6 A prudent and cautious approach has been taken in determining the potential for additional income. However, if income levels exceed assumptions on a recurring basis, then subject to a business case, consideration could be given to creating a further Paralegal Apprenticeship post.

16.7 During discussions with colleagues, the suggestion was made that if the Council wished to adopt a truly commercial approach to conveyancing work; it would be

seeking to proactively market the Conveyancing Team to other public sector organisations as well as third sector organisations such as Registered Housing Associations.

16.8 The Review Team have not had the opportunity to consider the feasibility of such an approach and therefore would suggest that if Members felt this was an approach that they wish to consider, that further exploratory work be undertaken to identify the issues that would need to be considered.

## **17. Conclusions**

17.1 The aim of this review had been to consider the provision of commissioned legal services and explore whether a more cost effective solution could be found which continued to meet service user requirements for specialist legal services.

17.2 The review found that the Council's legal team was well respected, but was the smallest compared with other local authorities and lacked capacity and expertise in specific areas.

17.3 It considered whether the Council had the right balance between internal and external provision and found that commissioned legal services continued to deliver best value in relation to major construction contracts, contractual disputes and for public local inquiries, however there was a case to adjust that balance in the areas of employment and some procurement and litigation activity and consequently reduce the dependency on and cost of commissioned legal services.

17.4 The review concluded that a case could be made for a combined post that specialised in employment but also undertook procurement and other generic litigation work. It is anticipated that the cost of this post would be recovered from reduced spend on external commissioned legal services.

17.5 Not directly part of the remit, the review found there was an opportunity to strengthen the conveyancing capacity of the legal team through the provision of a Paralegal apprenticeship. This would help deliver quicker disposal of surplus land and property, reduced costs incurred for retaining surplus property and the quicker assignation of leases and sub leases of industrial units.

17.6 Finally the review highlighted the possibility of adopting a more commercial approach to conveyancing work through proactively seeking to market the Conveyancing Team to other public sector organisations.

17.7 The shift to in-house provision where a case can be made supports the Council's workforce and financial planning.

## **18. Implementation**

18.1 If the recommendations are approved, the Head of Corporate Governance would:-

- Prepare job descriptions for both posts in consultation with relevant colleagues and adhere to Council procedures for authorising the recruitment of staff;
- Liaise and agree with the Director of Corporate Resources on an agreed formula for top slicing service budgets to fund the Solicitor post;
- Liaise and agree with the Head of Development and Regeneration on funding arrangements for the Para-Legal Apprenticeship post;
- Liaise and agree with the Head of Corporate Finance on arrangements to improve the visibility of expenditure incurred in relation to commissioned legal

services; and

- Liaise with relevant colleagues to identify the issues that would need to be considered should the Council wish to proactively market its Conveyancing Team to other public sector organisations as well as third sector organisations.

## **19. Implications**

- 19.1 Resource – Cost of these two posts would be £77,000 per annum which would be offset by increased income and reduced expenditure on external commissioned legal services. This will help avoid future costs and prevent a budget pressure.
- 19.2 Legal – The recommendations support building capacity within the legal team to support the Council's operations better and more affordably. The recruitment to new posts, if agreed would comply with all legal and policy requirements.
- 19.3 Community (Equality, Poverty and Rural) – The only community impact would be positive and in relation to improving conveyancing timescales associated with community asset transfer.
- 19.4 Climate Change/Carbon Clever - There are no climate change/carbon clever implications from the conclusions of this report.
- 19.5 Risk – The Board identified a risk to recruiting suitably qualified candidates and recommended the option of part-time arrangements for different specialisms to be included. There may be a risk that the assumptions made over increased conveyancing income and activity levels around employment, litigation and procurement do not occur. However in-sourcing legal advice even at current levels of demand is still more cost-effective than procuring it given comparative costs.
- 19.6 Gaelic – There are no Gaelic implications from the conclusions of this report.

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Date: 16 February, 2018

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