

POWER OF SCRUTINY SUB-COMMITTEES TO MAKE ADDITIONAL RECOMMENDATIONS WHEN REVIEWING DECISIONS CALLED-IN**Purpose**

To address the request from the Commission's meeting held on 26 September 2018 (Minute CC10 refers), for a briefing note setting out the legal position, a theoretical example and potential options in relation to the power of scrutiny committees, when reviewing decisions called in, to make additional recommendations.

Legislation / Overview and Scrutiny Procedure Rules

The Local Government Act 2000, s21(3) provides:

- (3) The power of an overview and scrutiny committee under subsection (2)(a) to review or scrutinise a decision made but not implemented includes power—
 - (a) to recommend that the decision be reconsidered by the person who made it, or
 - (b) to arrange for its function under subsection (2)(a), so far as it relates to the decision, to be exercised by the authority.

For information subsection (2)(a) is set out below:

- (2) Executive arrangements by a local authority must ensure that their overview and scrutiny committee has power (or their overview and scrutiny committees have power between them):
 - (a) to review or scrutinise decisions made, or other action taken, in connection with the discharge of any functions which are the responsibility of the executive.

In summary the legislation gives the Council's scrutiny function the power to review a decision made by the executive, which has still to be implemented, and which has been called-in. Having conducted the review the scrutiny body may only take no action which means that the decision may be implemented unchanged, recommend that the decision be reconsidered by the decision maker, or referred to the Council which then assumes the powers of the scrutiny body. The Council then has the options to take no action which means that the decision may be implemented unchanged, or recommend that the decision be reconsidered by the decision maker, provided those recommendations do not put any caveats on a decision to not refer back.

The legislation does not give the scrutiny body, or the Council, when acting as the scrutiny body, the power to add any caveats to its decision.

Overview and Scrutiny Procedure Rule 16(e) references the scrutiny sub-committee referring a decision back to the decision maker or to the Council setting out the in writing the nature of its concerns, whereas Overview and Scrutiny Procedure Rule 16(f) makes reference to the scrutiny sub-committee not referring the decision back which suggests that the Procedure Rules do not envisage not referring back and making recommendations to the decision taker, it does not preclude it.

Recommendations from the Scrutiny Body

While the scrutiny body cannot caveat its decision to take no action, refer back to the decision maker, or refer to the Council it is not precluded from making separate recommendations as long as they do not add any conditions to the response to the decision on the actual call-in.

Theoretical Example

Cabinet Decision:	To demolish 5 flats at 18 Nowhere Street.
Call-in Reason:	That in coming to its decision to demolish the flats the Cabinet had not undertaken sufficient and appropriate consultation.
Scrutiny Body Finding:	That the consultation undertaken was in line with the Council's Consultation Policy.
Scrutiny Body Decision:	That the decision be not referred to either the Cabinet or to the Council for further decision.

The Scrutiny Body does however have concerns that the Council's Consultation Policy is not fit for purpose and therefore decides to make a separate recommendation to Cabinet as follows:

"That, in light of potential deficiencies in the Council's Consultation Policy, highlighted by the Cabinet's decision to demolish 5 flats at 18 Nowhere Street, the Cabinet be requested to undertake an in depth review of the Consultation Policy."

What the Scrutiny Body cannot do is to make a decision along the following lines:

"That the decision be not referred to either the in the Council's Consultation Policy Cabinet or to the Council for further decision, subject to the Cabinet agreeing to review and amend in the Council's Consultation Policy."

Putting caveats or even observations onto the decision to not refer back potentially raises expectations from the public that the decision maker will only make the decision on the basis of dealing with the observations when in fact the decision to not refer back means the decision stands immediately as of the date of the call in meeting [Overview and Scrutiny Procedure Rule 16(f)].

So the decision maker, under the Procedure Rules, could not take on board any of the caveats to the decision not to refer back made by the Scrutiny Sub-Committee, even if the decision maker agreed with the caveat as the decision stands as of the date of the call in meeting.

Recommendation

That the Scrutiny Management Committee be advised of the ability of scrutiny bodies, when reviewing decisions called in, to make additional recommendations.