

Monitoring Officer Advice

1. The decision to proceed with a poll (referendum) is an important decision for Members and it is important that Members do so having the benefit of clear legal advice as to the implications and associated risks.

Secretary of State correspondence

2. To ensure the Secretary of State was kept informed of our thinking in relation to the conducting of a poll, the Leaders wrote to the Secretary of State on 6 April 2021 to inform him that we were intending to take a report to our Councils seeking authorisation to proceed with a poll (referendum). A response was received to that letter on 12 April 2021 and a copy is attached at Appendix (A).
3. That letter outlines that it is a matter for our council to decide whether they wish to proceed, having regard to all the circumstances including:
 - the council's powers to undertake the proposed exercise, its feasibility including any proposed use of the full electoral register and to whom it may be made available, and its value for money in the use of public funds;
 - the council's obligation to have regard to the publicity code, in particular during this time of sensitivity during the elections of the PCC and council by-elections; and
 - the process currently being undertaken in relation to the unitary proposals, particularly the recently completed consultation and the publicly announced timetable which it is expected all will adhere to.
4. The Secretary of State invited the councils to take our own legal advice on these issues and be satisfied as to the lawfulness and propriety of any actions we take.
5. In light of the important issues raised by the Secretary of State it was considered prudent by the Statutory Officers and Leaders to seek further external legal advice.

External Legal Advice

6. Advice was taken from external solicitors, Bevan Brittan, specialising in, amongst other things, Local Government law and Governance. A copy of that advice is attached at Appendix (B). Members attention is carefully drawn to that advice which confirms that Members have the power to conduct a poll but raises significant concerns about the risk involved in the Councils proceeding with a poll outside of the Secretary of State's consultation period particularly as regards value for money.
7. In light of the concerns raised in that advice, it was considered appropriate to take further advice from senior Counsel. In the circumstances James Goudie QC was invited to consider the concerns raised by the external lawyers.

8. James Goudie QC was called to the Bar in 1970 and was appointed as a QC in 1984. He is listed as a leading silk in Administrative and Public Law and Local Government Law in Chambers and Partners and the Legal 500. A copy of James advice is attached at Appendix (C) for Members perusal.
9. James Goudie, like Bevan Brittan, confirms that the Council has the power to conduct a poll under Section 116 of the Local Government Act 2003. In addition, the Districts have the very broad General Power of Competence under the Localism Act 2011. James Goudie considers that the decision to proceed or not with a poll (referendum) is one that Members can lawfully make provided that they are fully informed as to, and take full account of, the costs of the poll. In addition, Members should consider whether the Referendum might be counter-productive in relation to the SOS's eventual decision and/or any subsequent judicial review challenge to it. As with any decision, Members have to have regard to all relevant considerations and must not have regard to any irrelevant/improper purpose.
10. In terms of the specific points raised by the Secretary of State in their letter, the advice confirms as follows;

The Council's powers to undertake the proposed exercise, the feasibility and the use of the full electoral roll

As already covered above, the legal advice obtained from the external lawyers and Counsel has confirmed that the Councils have the necessary powers and ability to carry out the poll (referendum).

Value for money in the use of public funds

Counsel has referred to the Council's fiduciary duty to council tax payers and the public law principles in relation to the reasonable and proper exercise of power. Counsel has advised of the fact that we are a best value authority including with respect to economy, efficiency and effectiveness. These factors have therefore been considered by the S151 Officers in their Statement at Appendix F.

The Council's obligation to have regard to the publicity code, in particular during the PCC and council by-elections;

Counsel's opinion has confirmed that the Districts are subject to limitations on publicity pursuant to the Local Government Act 1986 and the Code of Recommended Practice and up until the 6th May are subject to the convention on pre-election purdah periods. In the circumstances, if Members are minded to proceed with the poll (referendum), we will need to ensure compliance with the relevant legislation, Codes and guidance. The poll (referendum) will, however, be conducted after the PCC elections.

The process currently being undertaken in relation to the unitary proposals, particularly the recently completed consultation and the publicly announced timetable

Whilst the consultation process has ended, the Counsel's advice states that this does not necessarily mean that it is without value. The focus needs to be on the eventual decision, not necessarily on the consultation element only. The Secretary of State is due to reach his decision by the summer recess and the final decision will not be made until the Structural Change Orders have been approved by the Houses of Parliament towards the end of this year. As Counsel's advice confirms, the Secretary of State must take into account all relevant considerations before reaching a decision which would include the result of a local poll or the fact that one is in progress.

Factors for Member consideration

11. Any decision that Members take must be made in accordance with Wednesbury principles and must take into account all relevant information and disregard irrelevant information.
12. The Secretary of State has stated that local support is one of the key criteria in his decision-making. The poll is an advisory poll only and it is important for members to have regard to the fact that the poll will be conducted outside of the Secretary of States formal consultation process.
13. However, it is important to note that the decision of the Secretary of State has not yet been taken and even once it has been taken, the final decision is not made until such time as the Structural Change orders have been approved by the House of Commons and House of Lords. The Secretary of State has confirmed that his decision will be made before the summer recess and the MHCLG have indicated that the Structural Change Orders are anticipated in the last quarter of this calendar year.
14. As outlined in the report the Somerset District Councils have made representations to the government outlining concerns with the consultation process and its ability to support the Secretary of State in determining how each of the proposals meets the second criteria around the level of local support. In the light of the above, this report recommends the holding of a Local Authority Poll (referendum) as a means of supporting the Secretary of State in making his decision, particularly in respect of criteria 2 of the decision making process, namely in determining the level of local support.
15. In the circumstances Members need to weigh up the value of the benefit of carrying out the poll outside of the formal consultation process versus the cost to council tax payers of conducting that poll (referendum). This is a judgment that members are legally entitled to make after considering all of the information outlined in this report and the accompanying appendices. There is risk of challenge in proceeding with a poll (referendum), however, the advice from Counsel is that the risk of successful challenge is low and that the decision as to whether to proceed with a poll (referendum) is one that members are legally entitled to make.