

# LICENSING REGULATORY COMMITTEE

## Commencement of Prosecutions 5th June 2014

### Report of the Chief Officer (Governance)

#### PURPOSE OF REPORT

As requested at the last meeting, to enable the Committee to consider the practical, legal and financial implications of the Committee determining whether a prosecution should take place when recommended by officers.

**This report is public**

#### RECOMMENDATIONS

- (1) **That in view of the legal and practical risks identified in the report, the commencement of prosecution proceedings remain delegated to officers.**

##### 1.0 Introduction

- 1.1 At its meeting on the 9th January 2014, the Committee referred the Licensing Enforcement Policy and Scheme of Delegation to the Taxi Task Group. The Taxi Task Group at its meeting on the 11th February 2014 concluded that there was no need to amend the Enforcement Policy or Scheme of Delegation. This was reported back to the Committee on the 27th March 2014, when it resolved that the Committee receive a report detailing the practical, legal and financial implications of Committee determining whether a prosecution should take place when recommended by officers. Minute 105 refers.
- 1.2 Matters that may lead to prosecution arise in different ways; they may be observed by officers, reported by the police or another authority, or be the subject of a complaint from a passenger, other member of the public or from within the trade. Investigations will generally require the taking of statements by Licensing officers. If there is reasonable cause to suspect that a criminal offence has been committed, any interview of the individual responsible will need to be a recorded, PACE (Police and Criminal Evidence Act) interview. This stage is required whoever is to take the decision on the appropriate action.
- 1.3 Once all the evidence has been obtained, if prosecution is being considered, advice is obtained from Legal Services, and if appropriate, legal proceedings are currently issued by Legal Services in accordance with the Scheme of

Delegation to officers. Legal Services will consider the relevant offence that may have been committed, the elements of that offence which would need to be proved in court in order to secure a conviction, the evidence available, and any possible defence. A qualified solicitor will consider, in accordance with the Code for Crown Prosecutors, whether there is sufficient evidence to provide a realistic prospect of conviction, and will consider whether the evidence is admissible, reliable and credible. Where there is sufficient evidence to justify a prosecution, Legal Services will consider whether a prosecution is required in the public interest. In this respect, the principles set out in the Code for Crown Prosecutors are applied. The Licensing Enforcement Policy, approved by this Committee, also sets out the factors that will be relevant in considering whether to deal with a matter by way of prosecution or formal caution.

- 1.4 Consideration of the relevant offence, the evidence available and the prospects for success are a legal matter. Cases are referred to one of the Council's solicitors, who has the relevant knowledge and experience to form a view as to whether prosecution is appropriate. This is consistent with the approach taken by the Crown Prosecution Service, where the decision to prosecute is taken by legally qualified officers.
- 1.5 The Committee now wishes to consider the implications of a change to the current arrangements whereby the decision to prosecute would be made by the Committee, on the recommendation of officers. In preparing this report it has been assumed that the Committee would not wish to consider cases where the officer recommendation would be not to prosecute.

## **2.0 Detailed Implications**

- 2.1 A report would need to be prepared in each case, explaining the circumstances and presenting the available evidence and setting out the officer recommendation to prosecute. The draft report would need to be approved by the Chief Officer (Governance) and then be considered at a Committee meeting. Depending on the number of cases, this could considerably lengthen a scheduled Committee meeting, or might necessitate the calling of a special meeting, either because of the number of cases, or because there is no convenient scheduled meeting. Over the last two years, there have been 28 matters that would have had to be considered by Committee if this arrangement had been in place. Recently a Committee meeting overran because of two particularly complex individual matters that were on the agenda. This meant that other items had to be deferred. There is a risk that this situation could recur, which could delay the commencement of a prosecution. Detailed consideration of a prosecution at a meeting could equally result in the deferral of other items of business, causing delay to the consideration of those items or the need for additional meetings.
- 2.2 The financial implications of Committee considering prosecutions are difficult to quantify. It is impossible to quantify the cost of member time. The report writing, agenda preparation, servicing of the meeting and minute writing would all impose an added burden on officer time, (and the more so if additional meetings were required) which would mean that that time could not be spent on other work. The amount of that time would however depend on the number of cases referred, and the time taken to consider each. The estimated cost of preparing a report for a Committee meeting and discussing

an item such as this, with officer attendance to administer and advise is estimated in round terms at £800 per item. If bulky prosecution files had to be copied for each member of the Committee, there would be some additional paper and printing costs.

- 2.3 However, aside from the costs, the legal and practical implications of such a change are of more concern. Given that the decision whether or not to prosecute should be based on an assessment of the strength of the evidence, which is, as set out above, a matter for legal expertise, it is difficult to understand how the Committee would approach its consideration of an officer recommendation to prosecute. If this were to be simply a “rubber-stamping” exercise, there seems to be no point whatsoever in the referral to Committee. If the exercise is to be a genuine exercise to consider the evidence and decide whether to prosecute, it is difficult to understand in what circumstances the Committee would feel it appropriate to reject the recommendation of legally qualified officers. It would be necessary for the Committee to consider in detail all the evidence available, and take a view on the prospects of success at court. With all due respect, this is not something that lay members are qualified to do, and it is unfair to ask a Committee of Council to demonstrate the legal expertise required to undertake such a review of evidence.
- 2.4 In previous discussions on this subject, there has been some suggestion from some members that the potential “defendant” should be present when the decision whether to prosecute is made by the Committee. Officers are firmly of the view that this would be wholly inappropriate, as it would be improper for the evidence to be discussed with the defendant or in the defendant’s presence, or for the defendant to be asked to comment unless under caution. If Committee were to consider an officer recommendation to prosecute, such consideration should be based only on the papers. Even this approach would not be free from risk, as, if the Committee decided not to authorise prosecution, it would be open to claims of predetermination if, having already considered the evidence, it decided to ask to see the “defendant” at a future meeting for possible warning, or suspension or revocation of the licence. Further, it is not unusual following conviction for a driver to be referred to the Committee to enable members to consider whether, in the light of the conviction, the driver is a fit and proper person to hold a licence. If the Committee had made the initial decision to prosecute, there could be claims of predetermination if the same Committee considered the matter again following conviction. With these risks of legal challenge at all stages, and the possibility that such challenges might be pursued through the courts, there is an inherent risk of increasing legal costs to the Council quite substantially .
- 2.5 Another risk of the Committee approving prosecutions would be that some individuals would become aware of when their case was to be considered, and would contact some or all members by telephone, email or letter, seeking to influence the outcome. This would put undue pressure on members, might cause particular difficulties when an individual is known to some or all members, and might mean that all members might not be in possession of the same information and might take account of irrelevant or inaccurate information. The process might also prejudice those individuals who are less able to “lobby”. It is also likely that after taking any decision to prosecute, members would receive further contact and questions from the relevant individuals. This would be unfair to members, and there is a risk that any responses given could prejudice any proceedings Given that individual

members of the Committee have in the past attended court to give evidence on behalf of licence holders who have appeared before the Committee, the possibility of this happening in the context of a prosecution would also be a concern if the Committee were to discuss the merits of a case in full and take a majority decision to prosecute.

- 2.6 These legal and practical risks and difficulties are such that, as previously reported to the Committee and to the Task Group, officers remain firmly of the view that the decision to commence prosecutions for matters within the remit of the Licensing Regulatory Committee should remain delegated to officers, as it has been for at least the last 25 years, and as it is across the whole range of the Council's other enforcement functions, including Planning. There are close analogies between Planning and Licensing, with the relevant Committee determining applications, and enforcement being an operational matter delegated to officers.

### **3.0 Options and Options Analysis (including risk assessment)**

- 3.1 The Committee requested a report detailing the practical, legal and financial implications of the Committee determining whether a prosecution should take place when recommended by officers. These are set out in the report above, and, whilst it would be open to Committee to take on the role of determining whether a prosecution should be commenced, the clear recommendation from officers, in the light of the implications and risks set out in the report, is that that decision should remain delegated to officers.
- 3.2 Should the Committee decide otherwise, the Chief Executive has indicated that he will refer the matter to full Council.

#### **CONCLUSION OF IMPACT ASSESSMENT**

**(including Health & Safety, Equality & Diversity, Human Rights, Community Safety, Sustainability and Rural Proofing)**

None directly arising from this report.

#### **LEGAL IMPLICATIONS**

The legal implications are set out in the report.

#### **FINANCIAL IMPLICATIONS**

Referring prosecutions to Committee for consideration would place an additional burden on officer time through report writing, agenda preparation, minute writing and the servicing of meetings, estimated at a notional figure of around £800 per item. As this would be met from existing staff resources there would be no direct financial cost as such, but, rather, less time for officers to undertake other duties. There would be additional costs both in terms of officer time and possible legal costs as and when any decisions are tested in the courts. There would be additional direct costs in printing bulky prosecution files as part of the agenda, but it is impossible to quantify this cost, as it would depend on the number of cases to be considered.

**OTHER RESOURCE IMPLICATIONS****Human Resources:**

None

**Information Services:**

None

**Property:**

None

**Open Spaces:**

None

**SECTION 151 OFFICER'S COMMENTS**

The s151 Officer has been consulted; she is in support of the recommendation given the resource implications and risks associated with moving away from existing delegations to Officers.

**MONITORING OFFICER'S COMMENTS**

The Monitoring Officer has prepared this report in her capacity as Chief Officer (Governance). The Monitoring Officer would emphasise that the Council's role as licensing authority is a regulatory one, and that the principles of licensing enforcement are not, and should not be, any different from those which apply to all the other regulatory functions of the Council. The Monitoring Officer is firmly of the view that where there is evidence that a criminal offence has been committed, it is an operational matter for officers to determine how to proceed, and that it would be inappropriate for such cases to be referred to members for decision.

**BACKGROUND PAPERS**

None

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