

Legal advice & drafting of Revised Scheme for Stage 3

From: Charles Livingstone (Brodies Solicitors) [<mailto:charles.livingstone@brodies.com>]
Sent: 16 June 2015 11:28
To: Butler, Tracy
Subject: RE: East Renfrewshire Review of Scheme of Establishment [BRO-D.FID2686345]

CONFIDENTIAL MESSAGE - INTENDED RECIPIENT ONLY

Tracy

Further to this morning's discussion, I attach the report with further amendments noted to the recommendations, paragraphs 12 and 17, and Annex 1. They will hopefully show up in a different colour from yesterday's changes.

As discussed, please do let me know if you have any further queries today, in which case email is the best way to get hold of me.

Kind Regards

Charles

From: Charles Livingstone (Brodies Solicitors) [<mailto:charles.livingstone@brodies.com>]
Sent: 16 June 2015 11:28
To: Butler, Tracy
Subject: RE: East Renfrewshire Review of Scheme of Establishment [BRO-D.FID2686345]

CONFIDENTIAL MESSAGE - INTENDED RECIPIENT ONLY

Tracy

Further to this morning's discussion, I attach the report with further amendments noted to the recommendations, paragraphs 12 and 17, and Annex 1. They will hopefully show up in a different colour from yesterday's changes.

As discussed, please do let me know if you have any further queries today, in which case email is the best way to get hold of me.

Kind Regards

Charles

From: Charles Livingstone (Brodies Solicitors) [<mailto:charles.livingstone@brodies.com>]
Sent: 15 June 2015 15:04
To: Butler, Tracy
Cc: Reid, Jamie
Subject: RE: East Renfrewshire Review of Scheme of Establishment [BRO-D.FID2686345]

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Tracy

Thanks for sending me these papers.

In relation to the scheme, clause 7.2 in the model constitution is missing the word "elected" – as in, the number of elected members should not fall below half the total number, or an interim election is triggered (the change has been made at 5.13). The other clauses you mention are fine. I limited my review to those clauses as I have seen all the others before and assume they do not contain any new changes, but if there is anything else you want me to look at please let me know.

However, on the draft report I did have a number of comments and suggested revisions, which you'll see on the attached. Most of these are intended to reflect the statutory scheme as closely possible.

They cover the non-highlighted text too, which as you anticipated I had to review to advise on the highlighted parts (particularly the narration of what happened at each stage of the consultation).

The most important point may be my comment 9, as I think there may be an issue with the drafting on chair term limits. The clause was revised to allow a member to sit as chair on two occasions during a council term, but as drafted those cannot be consecutive (other than in relation to the first or last AGM). The way the change is described in the report suggests that that is not intended. It should be easily fixed, and given how you described the proposal in the '10 changes' summary document I think the consultation risk would be low. I would be happy to make the necessary changes, but it might be best to discuss the issue and confirm the policy intention first. I will be generally available for the rest of the afternoon if you want to call.

Otherwise, we had discussed Council agreeing the date for the amended scheme to come into force at its meeting of 24 June, and only delegating the authority to set the date for the elections. I see the report now asks the Council to delegate both. I don't necessarily see a problem with that, particularly if you don't yet know what the election date should be, but I do note that it is a change from what we discussed before.

There were a few issues with the election timetable not quite reflecting the terms of the Scheme, which I have attempted to explain in the relevant comments. Please do just let me know if it would help to discuss those.

Finally, just as a general reminder for dealing with the vote itself, the decision to amend the scheme must be "by resolution passed by not less than two-thirds of the members voting thereon at a local authority meeting specially convened for the purpose with notice of the object", per section 53(3) of the 1973 Act.

Kind Regards

Charles Livingstone

Partner

On behalf of Brodies LLP

Glasgow, UK

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Telephone: ++44 (0)141 248 4672

From: Butler, Tracy [<mailto:tracy.butler@eastrenfrewshire.gov.uk>]

Sent: 10 June 2015 12:31

To: Charles Livingstone (Brodies Solicitors)

Cc: Reid, Jamie

Subject: RE: East Renfrewshire Review of Scheme of Establishment [BRO-D.FID2686345]

Charles

I've just completed the committee papers (they remain in draft for one week).

Can I ask you to review the following:

The covering report (it is your view on the areas in yellow I require, around the legal basis for implementation and how I have noted the changes to the amended Scheme, but you may need to read the full report to be able to comment, it's not a long report fortunately)

The proposed amended scheme (clauses 5.12, 5.13 and 8.2.4 of Scheme and 7.1.1 and 7.2 of Constitution but again I appreciate you may need to read other sections to ensure clarity and consistency)

If you could come back to me by close of business Monday 15 June, that will allow me to address any final issues before the next deadline.

Thanks again

Tracy

From: Charles Livingstone (Brodies Solicitors) [<mailto:charles.livingstone@brodies.com>]
Sent: 10 June 2015 11:44
To: Butler, Tracy
Subject: RE: East Renfrewshire Review of Scheme of Establishment [BRO-D.FID2686345]

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Tracy

Further to our call just now, you will be reinstating the stage 2 and 3 approach at 5.13 so that an interim election is held where the number of elected members falls below half the total (i.e. disregarding co-opted members). To confirm, the election should be in respect of all vacant seats (per stage 2) rather than co-opted seats (per stage 3). 5.13 (and 7.2 of the model constitution) should therefore read as follows:

“Should circumstances arise that lead to the number of elected community council members falling below HALF of the total maximum number of seats on that community council, East Renfrewshire Council shall be informed and shall arrange for an interim election to be held in respect of all vacant seats, following the procedure set out in section 6 as modified so as to be only in respect of those seats.”

This will have the practical effect of preventing a council from ever dropping to a 50/50 split (or worse) of elected v co-opted members. Using your example, if Anywhere CC has a limit of 20 seats the closest the ratio could ever get would be 10:9, as at least half the total seats – 10 – must be filled at an election for a council to be formed per 6.5.1.3, and they could never then co-opt more than 9 because of 8.2.4. If the elected members then dropped below 10, an interim election would be triggered.

This approach actually reduces the legal risk in relation to the consultation obligation, as it is more consistent with the previous published drafts. Point 4 of the summary document will be incorrect (though the outcome it notes would still happen in practice), but it is likely that any court looking at this would say the revised draft scheme is the more important document in terms of giving notice of the proposed changes.

Kind Regards

Charles

From: Charles Livingstone (Brodies Solicitors)
Sent: 10 June 2015 10:45
To: 'Butler, Tracy'
Subject: RE: East Renfrewshire Review of Scheme of Establishment [BRO-D.FID2686345]

Tracy

As discussed, your scenario 2 would not actually result in a “breach” of 8.2.4 *per se*. That clause only restricts the act of co-option by reference to the total number of members – i.e. new members may not be co-opted where that would result in the number of co-opted members equalling or exceeding the number of elected members. Where that would be the case, no new members may be co-opted to the community council.

However, 8.2.4 does not actually prohibit the number of co-opted members equalling or exceeding the elected number simply because of changes in circumstance. Where the number of elected members drops to level with or below the number of co-opted, because of death or resignation, the result is simply that 8.2.4 will prevent new members from being co-opted (unless co-opted members also die or resign, and so bring the co-opted number down). However, the number of elected members could continue to decline until the total number of members fell below half the total, at which point an interim election would be held.

So the scheme as revised per last week’s discussion does actually work and is internally consistent, as long as that is an outcome you’re prepared to live with.

The preliminary question is therefore whether you are in fact prepared to live with that prospect. If so then you do not need to make any further changes beyond those discussed last week.

However, if you are not prepared to have that as a potential outcome then please let me know, and I can let you have my thoughts on the best way to prevent it (as well as the risks relating to the consultation requirement).

Kind Regards

Charles

From: Charles Livingstone (Brodies Solicitors) [mailto:charles.livingstone@brodies.com]
Sent: 10 June 2015 09:31
To: Butler, Tracy
Cc: Reid, Jamie
Subject: RE: East Renfrewshire Review of Scheme of Establishment [BRO-D.FID2686345]

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Tracy

I think it would be easier to discuss this over the phone than by email. Is there a time that would suit you for a call this morning?

Kind Regards

Charles

From: Charles Livingstone (Brodies Solicitors)
Sent: 09 June 2015 18:16
To: Butler, Tracy
Cc: Reid, Jamie
Subject: Re: East Renfrewshire Review of Scheme of Establishment [BRO-D.FID2686345]

Tracy

Sorry for the delay in replying. I note the deadline and will get back to you by noon.

Kind regards

Charles Livingstone
Partner
On behalf of Brodies LLP

Sent from my BlackBerry 10 smartphone on the EE network.

From: Butler, Tracy
Sent: Tuesday, 9 June 2015 12:29
To: Charles Livingstone (Brodies Solicitors)
Cc: Reid, Jamie
Subject: RE: East Renfrewshire Review of Scheme of Establishment [BRO-D.FID2686345]

Thank you Charles

I require your advice on a proposed change to the Scheme around co-option, filling vacancies and interim elections. This follows on from our discussion last week, I worked through a particular scenario as it might occur under the new scheme and it seems there is a scenario that the scheme doesn't cover.

In the attached document I outline the membership scenarios, then there is a table with three columns showing the relevant clauses from the scheme at different draft stages - as outlined in the Stage 2 consultative document, the Stage 3 consultative document, and the proposed final document.

My questions to you are:

1. Can you advise on/refine the wording in the third column regarding filling vacancies by interim election? Is this a valid clause addition to resolve the issue?
2. Is my assumption correct that in the final proposed version of the scheme we can make changes to 5.12, 5.13, 8.2.4 and the relevant clauses in the constitution, as these were in the scope of the Stage 3 consultation. And therefore we will not require to consult again.
3. I'm aware there is an issue of the proposed change not being accurately described in the consultation document listing the ten key changes. However the proposed final changes are aimed at resolving that confusion. Does this weaken the process of revising the scheme?

If any of this seems unclear, please give me a call. I have a committee paper deadline tomorrow at noon, is there any chance of you coming back to me by then?

Kind regards
Tracy

From: Charles Livingstone (Brodies Solicitors) [<mailto:charles.livingstone@brodies.com>]
Sent: 03 June 2015 16:11
To: Butler, Tracy
Subject: RE: East Renfrewshire Review of Scheme of Establishment [BRO-D.FID2686345]

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Tracy

To summarise our discussion just now:

- Clauses 5.12.1 of the scheme and 7.1.1 of the model constitution should not include the words "one half of".
- Clauses 5.13 of the scheme and 7.2 of the model constitution should be revised to the following:

"Should circumstances arise that lead to the number of community council members falling below HALF of the total maximum number of seats on that community council, East Renfrewshire Council shall be informed and shall arrange for an interim election to be held in respect of all vacant seats, following the procedure set out in section 6 as modified so as to be only in respect of those seats."
- Ideally you would not make further changes to the scheme having already consulted on the current version. However, I think you would have a good argument that the change to 5.13 is correcting a clause that would not otherwise have made sense, and that in any event you are reverting to what was in the previous version rather than introducing something new.

You would not have the same argument for 5.12 as you would be modifying something that otherwise works, and (marginally) changing the requirements in a way that has not previously been consulted upon. However, the point is still extremely minor. It may give a disgruntled community council member the opportunity to challenge the amendment of the scheme, but I suspect that a court looking at that would consider the change as too minor to merit overturning the entire process. One can never be sure how litigation will turn out, however, so an element of risk will remain.
- We discussed the issues with clauses 12.4 and 12.13 that I noted below. Having considered that, and in light of ERC's residual power to investigate issues within the community council, my view is that the risk of further amending the scheme would outweigh the benefit of clearing up the issue. While I again suspect the prospects of a court overturning the new scheme based on such a minor change would be low, the issue is unlikely to ever affect more than a handful of complaints so it is probably not worth giving a potential challenger something on which to base an action.
- On timing, you advised that the Council will be meeting on 24 June to agree to amend the scheme. Per my suggestion below, the new scheme is to take effect 10 weeks before the community council election date, to let you give notice of the elections (under 6.2.1 of the new scheme) immediately after it comes into force.

If you want to have the elections on 2 September then the Council can set that as the date at the meeting on 24 June. Otherwise, the Council resolution should specify a later date on which the scheme is to come into force, being 10 weeks in advance of when you want the election to be. However, the date should not actually be specified until after the scheme (including clause 6.2.1) has come into force.

I therefore recommend that the Council, at the meeting of 24 June, delegate the power to specify the election date. The date can then be specified by the relevant officer on the day the new scheme comes into force.

Please let me know if you would like to discuss any of the above further, or if I can assist further.

Kind Regards

Charles Livingstone

Partner

On behalf of Brodies LLP

Glasgow, UK

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Telephone: ++44 (0)141 248 4672

From: Butler, Tracy [<mailto:tracy.butler@eastrenfrewshire.gov.uk>]

Sent: 03 June 2015 14:07

To: Charles Livingstone (Brodies Solicitors)

Subject: RE: East Renfrewshire Review of Scheme of Establishment [BRO-D.FID2686345]

Thought it would be useful ahead of our phone call to let you know – it seems para 5.13 should not have been in this version of the scheme. If you read the section again, without para 5.13, does that make sense? We can discuss when I call soon.

Tracy

From: Charles Livingstone (Brodies Solicitors) [<mailto:charles.livingstone@brodies.com>]

Sent: 28 May 2015 18:40

To: Butler, Tracy

Cc: Reid, Jamie

Subject: RE: East Renfrewshire Review of Scheme of Establishment [BRO-D.FID2686345]

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Tracy

I have interspersed my answers to your queries in your original email below. Please let me know if you would like to discuss any of those. I am conscious that 2, in particular, is quite complex.

I know this may be outside the remit of this exchange, but I noted a few points while reviewing the summary document that may be important:

- The change at 5.13 is not correctly described in the summary, not correctly drafted, or both. The summary says an interim election will be required if the number of co-opted members equals or exceeds half of the total permitted membership. However, what 5.13 actually says is that an interim election is required if the number of *elected* members falls *below* half that total. That will not mean that the other half is taken up with co-opted members, as some seats may have been left vacant.

A reference to clause 8.2.4 has been added to 5.13. I don't think I have seen that change before (apologies if I did, and particularly if I was responsible for it!), but I don't think 8.2.4 is relevant to whether an interim election is required – it simply prevents a person being co-opted if their co-option would result in half or more of the places being co-opted. Clause 5.12.1 has the same result. An interim election cannot therefore be triggered because of the co-option of a new member, as they cannot replace elected members. It can only be triggered by vacancies arising from the departure of an elected member for some reason (including death, which is not mentioned in 5.12 but perhaps should be!).

I therefore recommend that the summary document be revised, and that 5.13 be revised to remove the reference to 8.2.4 and to reinstate the previous wording (shown underlined): “arrange for an interim election to be held in respect of all vacant seats, following the procedure set out in section 6 as modified so as to be only in respect of those seats”.

- I’m conscious that some of section 6 has been revised to change some of the requirements (particularly on timing and voting) for elections. Should that be mentioned in the summary?
- I have some concerns about the new clauses 12.4 and 12.13.

As drafted, a complaint under 12.2.1 concerning the whole or at least half of the members could be declared vexatious via a simple majority vote (i.e. by half or even less than half of the members, all of whom could be the subjects of the complaint). Even a unanimous vote may not be appropriate, given that the complaint may concern the whole council.

That need not necessarily be a problem as long as that decision could still be appealed to the Panel, and 12.13 seems to acknowledge the possibility of the Panel considering an appeal against a decision to declare a complaint vexatious. However, the clauses do not quite fit together because, at the moment, a complaint under 12.2.3 could itself be declared vexatious. In that case the council would not have to refer it to the Panel and so the Panel would never have the opportunity to review it. Complaints under 12.2.3 should therefore be excluded from the scope of 12.4.

In 12.4, I would suggest that a complaint should only be declined on grounds of being substantially identical to another ongoing complaint if both complaints were made by the same person. At the moment that is not the case. Presentationally it may be better not to deprive any person of the ability to have their complaint heard, and in practice apparently identical complaints from different people could be dealt with together without adding to the council’s / Panel’s workload. If the substance of the complaint has already been dealt with, the subsequent one can be refused with an appropriate explanation to the applicant (that does not have to be specified in the scheme).

I would be happy to provide some revised wording on these points if you want to follow up either or both of them.

On a less technical point, it occurs to me that given the seriousness of essentially refusing to consider a complaint, it might be more appropriate to require a two-thirds majority for such a decision. That is, however, more of a policy question.

Please do let me know if you would like to discuss any of the above or the answers below, or would like any further input on any issues.

Kind Regards

Charles

From: Butler, Tracy [<mailto:tracy.butler@eastrenfrewshire.gov.uk>]

Sent: 20 May 2015 09:20

To: Charles Livingstone (Brodies Solicitors)

Subject: RE: East Renfrewshire Review of Scheme of Establishment [BRO-D.FID2686345]

Of course.

From: Charles Livingstone (Brodies Solicitors) [<mailto:charles.livingstone@brodies.com>]

Sent: 19 May 2015 19:22

To: Butler, Tracy

Subject: Re: East Renfrewshire Review of Scheme of Establishment [BRO-D.FID2686345]

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Tracy

That timescale should be fine.

When I mentioned the previous scheme I actually meant the one that's currently in force, and which will be replaced if and when the new scheme is approved. Could you send me that as well please?

Kind regards

Charles Livingstone
Partner
On behalf of Brodies LLP

Sent from my BlackBerry 10 smartphone on the EE network.

From: Butler, Tracy
Sent: Tuesday, 19 May 2015 14:58
To: Charles Livingstone (Brodies Solicitors)
Subject: RE: East Renfrewshire Review of Scheme of Establishment [BRO-D.FID2686345]

Hi Charles

That's no problem re invoice amount, you can just let us know once work completed. You'll get a purchase order number anyway to use on the invoice.

I've attached the docs you need. The earlier scheme (which we consulted on at Stage 2, this is the one that you helped us draft initially last year) is the one dated 240914. The finalised Scheme that we are asking elected members to now approve is the one dated 310315 (this is the one that you advised us on most recently). In hindsight it would have been better to have a date in the footer of the documents to keep track. I might get that done now!

I have also attached the list of ten key material changes from the September version to the latest one.

I didn't mention timescales in my earlier email. It would be most helpful if we could have your advice on these matters by Wednesday 27 May, is that ok?

Kind regards
Tracy

From: Charles Livingstone (Brodies Solicitors) [<mailto:charles.livingstone@brodies.com>]
Sent: 19 May 2015 10:41
To: Butler, Tracy
Cc: Reid, Jamie
Subject: RE: East Renfrewshire Review of Scheme of Establishment [BRO-D.FID2686345]

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Tracy

Thanks for these queries. I would be happy to assist. It's a little difficult to estimate the time required in advance, as complexities may arise once I start considering the questions in detail. However, from a quick initial review I would estimate that there may be a few hours' work here, and so I would guess that we may end up with a fee of around £500 plus VAT.

If you are content with that, please can you send me the scheme as it was revised and published, just so I know I'm working from the correct version? A couple of your questions relate to changes from the previous scheme so could you also send me that please?

Kind Regards
Charles Livingstone
Partner
On behalf of Brodies LLP
Glasgow, UK
[mailto: charles.livingstone@brodies.com](mailto:charles.livingstone@brodies.com)
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From: Butler, Tracy [<mailto:tracy.butler@eastrenfrewshire.gov.uk>]

Sent: 19 May 2015 09:54

To: Charles Livingstone (Brodiess Solicitors)

Cc: Reid, Jamie

Subject: East Renfrewshire Review of Scheme of Establishment

Hi Charles

We are nearing the end of the scheme review. Would you be happy to assist us with a small number of final considerations, set out below? If so, I will raise a purchase order which will give you the number to send the invoice when complete (can you let me know approximate value of this work?).

- 1) One community council has responded to the final consultation stating that the proposal to put term limits on the position of Chair of a Community Council, is a breach of human rights. Their specific comments are below. Can you confirm whether this sort of legal challenge could be expected and would it be legitimate?

“The first is the proposal for a two year rotating Chair. The Chair of Busby CC has spoken to a lawyer friend on this issue and the advice he received was if a person is legally elected to a CC and then attends the first meeting after said election and is legally proposed, seconded and is duly elected as Chair, then it doesn't matter if it is the first, second or subsequent years, that person is the Chair of that CC. If ERC should try to change it, then that could be challenged in court and the lawyer is absolutely confident that ERC would lose. He is confident this proposed change to the rules is illegal.”

I don't see a reference to any Convention rights in the quoted paragraph, but in any event do not see a basis for any human rights challenge to placing term limits on community council chairs. I also do not see any obvious judicial review ground on which the change could be challenged.

The chair of any community council serves as such by virtue of the council's constitution, which will in turn reflect the current scheme. The 1973 Act empowers the Council to amend that scheme, subject to the prescribed process, and there is no obvious limitation that would prevent that amendment power from extending to council constitutions, or specifically to the election and eligibility of office-holders. Indeed, section 52(2)(c) of the Act provides for a scheme to contain (among other things) provisions about the composition and meetings of community councils, which in my view would include the chairing of community councils.

In short, the chair is currently eligible for re-election because the current constitution provides for that. The Council is authorised by the Act to make changes to the scheme. If the scheme is lawfully changed to require the (initial) adoption of a constitution prohibiting re-election (other than in limited circumstances), the members of the community council will be bound by that.

I therefore find it difficult to see the basis for any argument that it would be ultra vires for the Council to make the proposed change. I see no basis for claiming that the chairmanship of a community council should be regarded as a possession, such as would engage Article 1 of Protocol 1 to the European Convention on Human Rights. The fact that the Council has consulted on the change as required by the Act should defeat any claim based on procedural fairness or legitimate expectations. That would leave any challenge relying on an argument that it was unreasonable to set a term limit on community council chairs. I consider that the prospects of such an argument would be very poor, but it couldn't hurt to make sure the reasons for making the change have been properly documented.

- 2) Can you please outline for us the legal basis for ending the current scheme and terms for community councils and establishing the new Scheme? For community councils who will have amended boundaries and sub-divisions it is clear there will need to be fresh elections. What is the legal view on re-establishing CCs under a new Scheme, where boundaries are unchanged, with or without elections?

Section 53 of the 1973 Act sets out the authority and the procedure for amending schemes. Where a local authority considers that a scheme ought to be amended, it must give public notice of its proposals inviting any community council concerned and the public to make representations. It must consider any such representations and either amend the scheme either (a) as proposed or (b) as amended to take account of the representations – see below re the position concerning further

amendments. The local authority's decision to amend the scheme must be made "by a resolution passed by not less than two-thirds of the members voting thereon at a local authority meeting specially convened for the purpose with notice of the object" (section 53(3)).

The logic of amending the scheme is that its former terms will simply cease to have effect and will be replaced by the new terms. That means that the community councils established under the old scheme will be replaced by the councils established under the new scheme.

Because the scheme is drafted on a 'fresh start' basis (i.e. it entirely replaces the old scheme), elections will be required for all community councils, even those where the name and boundaries remain the same.

Unlike the new scheme, the old scheme did not provide for community councils to be dissolved and re-established at each election. It also does not give the Council the power simply to dissolve community councils. With hindsight it might have been appropriate to include an express provision in the new scheme to dissolve the old councils as soon as the new scheme came into effect, but given what I say below it may be better not to add that in at this stage. If there is a dispute on that point you may be able to rely on clause 13.3 of the new scheme to say that the old councils (all of which are still named in the list at 4.1) are dissolved at the opening of nominations for the new elections.

In terms of timing, there is no obvious 'break' in the existence of the current councils at which it would be convenient to bring the scheme into force. Ideally you would time it to coincide with the next community council election, but I am conscious from clause 17 of the old scheme that that may not be until 2017 or even 2018 (to avoid a clash with the next local government elections).

Assuming you do not want to wait that long, I think the best approach is to choose the date on which you want the elections to the new councils to take place, and work backwards from there so that the Council's decision to amend the scheme takes effect as at the date you want nominations to open (i.e. 10 weeks in advance of your chosen election date). Ideally the Council's decision would itself be taken on that date, but if that is not convenient then the resolution should specify the future date on which the amendment of the scheme is to take place.

Related to this is the question of any assets and liabilities that current community councils have. Both the old and new schemes provide for assets to be transferred to the Council, following the satisfaction of debts and liabilities, to be held in trust for a future council representing that area (and this will be the case at each election, per 13.3 of the new scheme). As a practical matter, therefore, the Council will want to get a clear picture of the assets and liabilities of community councils in advance of them being dissolved when the new scheme is adopted.

- 3) East Renfrewshire Council elected members will be asked to approve the revised Scheme. The report will make clear that the only potential changes in scope at this point, are the ten changes put out for consultation at Stage 3. What is the legal position if elected members try to change any other element of the proposed scheme at this stage, would another consultation be required? This is quite unlikely, I hope, however we just wanted to see what the position would be.

See above re the terms of section 53 of the 1973 Act. Where (b) applies (i.e. the scheme has been amended to take account of representations), it may not be further amended unless further notice and a further opportunity to make representations has been given.

Although the Act could be clearer, my view is that after that further notice and opportunity has been given, as here, the Council only has the same two options – either amend the scheme as 'advertised' or, if a further set of changes is to be made, give further notice and another opportunity for representations on those changes. Essentially, the Council may not make an amendment to the scheme unless it has consulted on the final version. Where the proposed scheme no longer matches what was consulted on, because it has been further amended, my view is that it would be ultra vires for the Council to implement the scheme with those new amendments. In those circumstances a party opposed to the adoption of the new scheme would in my view be likely to succeed with a legal challenge to a Council decision to adopt it.

Kind regards
Tracy

Tracy Butler
Community Planning Team Leader

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From: Butler, Tracy [<mailto:tracy.butler@eastrenfrewshire.gov.uk>]

Sent: 18 March 2015 16:20

To: Charles Livingstone (Brodies Solicitors)

Subject: RE: Clause 6.1.1 [BRO-D.FID2686345]

Many thanks again for the quick turnaround. We've taken on board the wording you suggest, and I do feel much more comfortable that these elements have been worked into the Scheme, and papers are all submitted.

Kind regards

Tracy

From: Charles Livingstone (Brodies Solicitors) [<mailto:charles.livingstone@brodies.com>]

Sent: 18 March 2015 14:48

To: Butler, Tracy

Subject: RE: Clause 6.1.1 [BRO-D.FID2686345]

Tracy

There are a couple of preliminary issues to consider here. The first, which I think I may have discussed with Jamie last year, is that making changes to the scheme does not 'open up' the entire scheme for consultation. The obligation to consult only concerns the proposed change to the scheme, so you could change the provisions relating to the areas without allowing consultation on anything else.

The second issue is that I am not sure about setting mechanisms out in guidance rather than in the scheme. I think it would be neater, and legally safer, to have a mechanism in the scheme.

I have therefore amended the wording below to provide a mechanism for proposing and consulting on changes to council and neighbourhood areas. I have borrowed the consultation wording from section 53 of the Act, just to limit the prospect of complaints that the Council did not follow the statutory scheme (though it wouldn't comply with the need in section 53(3) for any review or amendment to have two-thirds approval in the Council).

Please do just let me know if you want to discuss the below.

Kind Regards

Charles

From: Butler, Tracy [<mailto:tracy.butler@eastrenfrewshire.gov.uk>]

Sent: 18 March 2015 13:03

To: Charles Livingstone (Brodies Solicitors)

Subject: RE: Clause 6.1.1 [BRO-D.FID2686345]

Thanks Charles. On the one hand the change seemed straightforward, but I suspected there was something I wasn't seeing, and you've explained it very well below. We'll revert to the old wording. I'll need to look at the other issues you've flagged up about the nomination form.

Would you mind taking a look at another addition/amendment today? We have had to add in the criteria for splitting a community council (if the pop grows to more than 20,000), or introducing

neighbourhoods (if population exceeds 10,000). We hadn't picked this up before and suspect we need to add in a mechanism to consult on such a change (but without opening up the whole scheme). I don't go into too much detail here and would prefer that any consultation mechanisms could be contained in supplementary guidance of some kind?

1 Community Council Areas within East Renfrewshire

1.1 Community Councils shall have a maximum population of 20,000. In the first instance, East Renfrewshire shall be divided into the following 11 community council areas:

- Barrhead Community Council
- Broom, Kirkhill and Mearnskirk Community Council
- Busby Community Council
- Clarkston Community Council
- Crookfur, Greenfarm and Mearns Village Community Council
- Eaglesham and Waterfoot Community Council
- Giffnock Community Council
- Neilston Community Council
- Netherlee and Stamperland Community Council
- Thornliebank Community Council
- Uplawmoor Community Council

1.2 Maps showing the boundaries of each community council area are attached as Appendix IV.

1.3 In the event that the population of a community council area exceeds 20,000, East Renfrewshire Council shall propose an alternative division of East Renfrewshire in terms of which the population of no community council area will exceed 20,000. The Council shall give public notice of their proposals, inviting those community councils whose areas would be amended and the populations of those areas to make representations to the Council on the proposed alternative division. The Council shall consider any representations made and may either:

1.3.1 divide East Renfrewshire as proposed; or

1.3.2 propose a different division in light of the representations received, in which case public notice of that different division must be given, with a further invitation to make representations under this clause [4.3].

1.4 Community council areas with populations greater than 10,000 shall be further divided into neighbourhoods. In the first instance, the following community councils shall be further divided into the following neighbourhoods:

Community Council	Neighbourhoods

Barrhead	Boylestone & West Arthurlie
	Dunterlie & Grahamston Park
	Arthurlie & Springhill
	Auchenback
Broom, Kirkhill and Mearnskirk	Broom
	Kirkhill
	Mearnskirk
Crookfur, Greenfarm and Mearns Village	Mearns Village & Westacres
	Crookfur
	Greenfarm
Giffnock	Orchard Park
	Merrylea and Braidbar
	Giffnock South

1.5 Maps showing the boundaries of those neighbourhoods are attached as Appendix [V].

1.6 In the event that the population of a community council not named in clause [4.4] above exceeds 10,000, East Renfrewshire Council shall propose a division of the community council area into neighbourhoods. East Renfrewshire Council may also propose a re-division of any community council area already divided into neighbourhoods where it believes the existing neighbourhoods no longer represent the best division of the community council area. The Council shall give public notice of their proposals, inviting both the community council in question and the population of that community council's area to make representations to the Council on the proposed division (or re-division, as the case may be). The Council shall consider any representations made and may either:

1.6.1 divide the community council area as proposed; or

1.6.2 propose a different division (or re-division, as the case may be) in light of the representations received, in which case public notice of that different division (or re-division) must be given, with a further invitation to make representations under this clause [4.6].

Your advice would be appreciated.

Tracy

From: Charles Livingstone (Brodies Solicitors) [<mailto:charles.livingstone@brodies.com>]
Sent: 18 March 2015 11:19
To: Butler, Tracy
Subject: RE: Clause 6.1.1 [BRO-D.FID2686345]

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Tracy

Thanks for sending this to me. I can see the benefit in simplifying the nomination eligibility clause, but I can also see an issue with changing it as noted below.

5.3.3 and 5.3.4 says a person is eligible for election if they “are” over 16 years of age or “are” disqualified from being a community council member – i.e. those requirements are phrased in the present tense. Because of that tense (and even though those clauses refer to “at the time of the election”), if 6.1.1 refers only to 5.3 and 5.4, there is a question mark over the timing – i.e. does the person have to be over 16 years of age at the time of the nomination, or could a 15 year old be nominated as long as they will turn 16 before the election? Likewise, can a person who is disqualified be nominated, as long as their disqualification will expire by the time of the election? I had therefore dealt with those issues expressly in relation to nomination, rather than just referring back to 5.3.

The alternative of saying in 6.1.1 that the person “will” meet all the eligibility criteria at the time of the election (i.e. future tense) would be tricky, as that would imply that a non-resident could be nominated on the basis that they will be moving into the area, and be added to the Electoral Register, between nomination and election. I therefore think 6.1.1 needs to refer to those two criteria in the present tense – i.e. they must be met at the time of nomination.

The drafting therefore depends on what the policy decision is on the age and disqualification issues – are we concerned with a person’s status at the time of nomination, or only at the time of the election? If the intention is that a person must be 16 and not disqualified at the time they are nominated, we can use your revised 6.1.1 and simply delete the words “at the time of the relevant election or co-option” from 5.3.3 and 5.3.4. Otherwise I think 5.3.1 and .2 need to be treated differently from 5.3.3 and .4 for the purposes of nomination. I can still simplify 6.1.1 a little though, and have suggested some simpler wording in the text below.

On a related point, looking at the issue in detail I now see that the nomination form in Appendix VI asks the person nominated to declare: “I... am at least 16 years of age”, which is again present tense so suggests age at the time of nomination is relevant. However, the form then says “I would not be prevented from taking office by virtue of being suspended or disqualified from serving as a community councillor”, and so that suggests they could be disqualified at the time of nomination as long as that will expire by the election. There is obviously a different approach taken to each criterion there, and if that is the policy preference then the Scheme will need further revised. Otherwise, the form will need to be changed to reflect whatever the policy preference is.

If you can confirm what the policy is for the age and the disqualification criteria, I will confirm the drafting.

This reminds me of a related point, which is that one of the eligibility criteria is that the person be named on the Electoral Register. However, 15 and 16 year olds, and many 17 year olds, will not be named on the electoral register. A previous version of the scheme provided for the Council to run a supplementary register of 16 and 17 year olds (as well as new residents). I can see that that would be impractical, but at present I don’t think it will even be possible for 16 year olds to meet the eligibility criteria. That may change if the Scottish Parliament gets the power to expand the franchise for its own elections to include 16 and 17 year olds, but nothing is yet guaranteed on that. There may be nothing that can realistically be done on this point, but I thought I should flag it up.

Kind Regards

Charles Livingstone
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From: Butler, Tracy [<mailto:tracy.butler@eastrenfrewshire.gov.uk>]
Sent: 17 March 2015 17:09
To: Charles Livingstone (Brodies Solicitors)
Subject: Clause 6.1.1

Thank you very much for your concise comments on the Scheme last week, much appreciated.

I made a change to 6.1.1 if you wouldn't mind checking it over in the context of the Scheme. I thought it could be simplified this way but please let me know if I have missed anything. Would you be able to come back to me tomorrow by late morning as another report deadline looms?

From:

6.1.1 Eligibility

1.6.3 Candidates may only be nominated for election to a community council if they meet the eligibility criteria set out at clauses [5.3.1, 5.3.2] and [5.4] above, and will at the time of the relevant election [meet the eligibility criteria set out at clauses \[5.3.3 and 5.3.4\] above.](#)

To:

6.1.1 Eligibility

1.6.4 Candidates may only be nominated for election to a community council if they meet the eligibility criteria set out at clauses [5.3] and [5.4] above.

Tracy Butler
Community Planning Team Leader
Corporate and Community Services Department
Tel: 0141 577 3167

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From: Charles Livingstone (Brodies Solicitors) [<mailto:charles.livingstone@brodies.com>]
Sent: 12 March 2015 15:19

To: Reid, Jamie

Subject: RE: Community Council scheme - notice of amendments [BRO-D.FID2686345]

Jamie

Thanks for confirming. On that basis I read Stage 1 as being the process of reviewing the existing scheme under section 53(1), as part of which you decided to consult the public, and Stage 2 as the point at which you actually engaged the obligation in 53(1) to publish your proposals and seek representations on them.

Where we are now (Stage 3) is therefore that you have considered the representations made to you, and have amended your proposals to take account of those per 53(2)(b). You therefore now engage the proviso to 53(2), requiring you to give public notice of the amendments to your proposals, with a further opportunity to make representations.

You asked what form that public notice is required to take, and in particular whether you need to publish the scheme as amended.

The obligation under 53(1) is simply to give notice of "the proposals". I interpret that as meaning that you had to make clear what changes you intend to make, but did not necessarily have to publish in its entirety the scheme as you proposed to amend it. Similarly, under 53(2), you are required to give notice of "the amendments to the proposals", rather than any actual amendments to the scheme itself.

I therefore consider that you are not obliged to publish the scheme as further amended. You could comply with the legislation simply by publishing an explanation of how your proposals for amending the scheme have changed, and invite representations on those changes. You therefore do not need to give a detailed line-by-line comparison showing how the scheme has changed from the previously published version.

However, if you published the proposed new scheme at 'Stage 2' then there may be an expectation that you should publish the further amended scheme at Stage 3. Nevertheless, that would not require you to publish a version showing every amendment made from Stage 2 to Stage 3 (e.g. in tracked changes). Given the concerns you expressed about that being as likely to confuse the public as to enlighten them, I am content that you do not need to take that approach.

I hope that answers your question, but please do just let me know if I can be of any further assistance with this.

Kind Regards

Charles

From: Reid, Jamie [<mailto:jamie.reid@eastrenfrewshire.gov.uk>]

Sent: 12 March 2015 13:24

To: Charles Livingstone (Brodies Solicitors)

Subject: RE: Community Council scheme - notice of amendments [BRO-D.FID2686345]

Charles

We're at Stage 3.

In stage 1 we published the current scheme and under took a wide-ranging consultation.

In Stage 2 we published the draft revised scheme and in Stage 3 we're making changes to the draft revised scheme based on feedback from stage 2 while taking account of the stage 1 feedback.

Jamie Reid
Community Resources Manager
Corporate & Community Services
Phone: 0141 577 8557

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From: Charles Livingstone (Brodies Solicitors) [<mailto:charles.livingstone@brodies.com>]

Sent: 12 March 2015 11:08

To: Reid, Jamie

Subject: Community Council scheme - notice of amendments [BRO-D.FID2686345]

Importance: High

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Jamie

Further to our call on Tuesday, please can I just check what stage of the process it is the scheme is now at? Section 55 is in the following terms:

“53.— Amendment of schemes.

(1) Having regard to changing circumstances and to any representations made to them, every local authority shall from time to time review schemes made and approved under section 52 of this Act and, where they consider that such a scheme ought to be amended, they shall give public notice of their proposals, inviting any community council concerned and the public to make to the local authority representations as respects the proposals.

(2) The local authority shall consider any representations made under subsection (1) above and may amend the scheme in accordance with—

(a) the notified proposals; or

(b) those proposals as amended to take account of any such representations:

Provided that the scheme shall not be amended under paragraph (b) of this Subsection unless public notice of the amendments to the proposals has been given with a further invitation to make representations under subsection (1) above.

(3) A decision of the local authority—

(a) to review, under subsection (1) above; or

(b) to amend, under subsection (2) above,

a scheme, shall be by resolution passed by not less than two-thirds of the members voting thereon at a local authority meeting specially convened for the purpose with notice of the object.”

The reason I'm asking is that you said you're at "stage 3" of the process. I assume that's the stage I've highlighted above, but please can you confirm? I only ask because I can only see one consultation stage before that so am not sure what stages 1 and 2 would be! It might be that 1 is publication of the proposals and 2 is the receipt of responses and consideration of amendments.

This might sound like an obtuse question but it's obviously important to know where you are in order to advise on what your obligations are. I'll revert with that advice as soon as you can confirm that.

Kind Regards

Charles Livingstone

Associate

On behalf of Brodies LLP

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From: Charles Livingstone (Brodies Solicitors) [mailto:charles.livingstone@brodies.com]
Sent: 11 March 2015 11:49
To: Butler, Tracy; Reid, Jamie
Subject: RE: CC Scheme (proposed stage 3 amendments) v3 [BRO-D.FID2686345]

Tracy

I just realised I neglected to deal with your query about section 12, and avoiding spurious or repeated complaints. I would suggest adding a new clause between 12.3 and 12.4 along the following lines:

“The community council need not consider the substance of a complaint, nor refer a complaint to the Conduct Review Panel, if the community council decides (by a simple majority of those voting and present at a meeting) that the complaint is vexatious, or that the subject-matter of the complaint is substantially identical to that of a previous complaint that has been or is being dealt with by either the community council or the Conduct Review Panel.”

You could potentially attempt to define vexatious, but that might be better being the subject of separate guidance if necessary (e.g. as has been issued by the Scottish Information Commissioner re the undefined use of vexatious in FOISA).

I recommend that the complainer be able to appeal decisions under that new clause to the Panel, to prevent abuse of the power by the community council. I suggest the following wording (the numbering takes account of a new clause 12.4 having been added):

“Where a complaint referred to the Panel under clauses [12.2.3] and [12.3] concerns a community council’s decision under clause [insert number of new clause re vexatious / repeated complaints], the Panel shall decide by a simple majority whether to confirm the community council’s decision. If it does not confirm the community council’s decision, it shall either:

 direct the community council to consider the original complaint in accordance with clauses [12.2 to 12.6 (excluding 12.4)]; or
 consider the original complaint itself in accordance with clauses [12.10 to 12.12].”

Please let me know if I can assist further on this point. Apologies for not picking it up when revising the draft document.

Kind regards

Charles

From: Charles Livingstone (Brodies Solicitors)
Sent: 11 March 2015 10:16
To: 'Butler, Tracy'; Jamie Reid (jamie.reid@eastrenfrewshire.gov.uk)
Subject: RE: CC Scheme (proposed stage 3 amendments) v3 [BRO-D.FID2686345]

Tracy / Jamie

Please find attached the revised scheme etc, with a number of recommended revisions shown tracked and a number of comments.

Apologies for not getting this to you sooner, but I had what I think they call a “catastrophic” IT failure last night that set me back several hours. I appreciate that you are short of time, but if it would be easier to discuss the attached please do feel free to give me a call. I am working from home today so you can get me on 07792 662 859.

I will revert separately on Jamie’s question about consultation requirements.

Kind Regards

Charles

From: Butler, Tracy [<mailto:tracy.butler@eastrenfrewshire.gov.uk>]
Sent: 10 March 2015 13:41
To: Charles Livingstone (Brodies Solicitors)

Subject: RE: CC Scheme (proposed stage 3 amendments) v3 [BRO-D.FID2686345]
Importance: High

Hi Charles

We have received these further tracked changes from a colleague who has significant expertise in the running of elections etc. and will be responsible for community council elections, and elements such as the Conduct Review Panel, following implementation of this scheme. A lot of the comments are wording changes etc. which don't materially affect procedures however there are some more substantial comments.

When you review the document we would appreciate a view on whether these will have any positive/negative effect on the robustness of the scheme.

It would have been preferable if these comments were built into the version sent to you yesterday but timing has not been on our side on this.

Kind regards
Tracy

From: Charles Livingstone (Brodies Solicitors) [<mailto:charles.livingstone@brodies.com>]
Sent: 09 March 2015 12:29
To: Butler, Tracy
Subject: RE: CC Scheme (proposed stage 3 amendments) v3 [BRO-D.FID2686345]

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Tracy

Thanks for confirming, I note the timescale. I will aim to revert to you by close of business tomorrow, failing which as early as possible on Wednesday. If significant questions arise I will let you know as soon as possible.

Kind Regards

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From: Butler, Tracy [<mailto:tracy.butler@eastrenfrewshire.gov.uk>]
Sent: 09 March 2015 11:29
To: Charles Livingstone (Brodies Solicitors)
Subject: FW: CC Scheme (proposed stage 3 amendments) v3

As you'll see, my boss has sent you through our current document.

We just had a chat there about it and we are looking for a form of words in section 12 to somehow prevent spurious/repetitive complaints clogging up the system. So I wondered if you could have a think about that as you work through the document.

Re timescales, I apologise I probably wasn't clear enough when we spoke last week. There is a committee report deadline for this which is Wednesday lunchtime. Do you think it is possible for you to come to us sometime Wednesday morning or before? Or perhaps an early indication of whether you have a lot of questions/comments for us?

Kind regards
Tracy

From: Reid, Jamie
Sent: 09 March 2015 10:32
To: Butler, Tracy; Daly, Eamonn
Subject: FW: CC Scheme (proposed stage 3 amendments) v3

Copy of current version with changes made.

Jamie Reid
Community Resources Manager
Corporate & Community Services
Phone: 0141 577 8557

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From: Reid, Jamie
Sent: 09 March 2015 10:31
To: 'Charles Livingstone (Brodies Solicitors)'
Subject: CC Scheme (proposed stage 3 amendments) v3

Charles

As per you discussion last week with Tracy Butler please find attached the current draft of the CC Scheme for review.

Regards

Jamie Reid
Community Resources Manager
Corporate & Community Services
Phone: 0141 577 8557

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