

SOMERSET

FUTURE LOCAL GOVERNMENT

REFERENDUMS

OPINION

INTRODUCTION

1. Part 1 of the Local Government etc Act 2007 (the 2007 Act), and in particular Chapter 1 thereof, relates to: Structural (and boundary) changes in England. Sections 1-7 inclusive are concerned with changes from two tiers to single tier of local government. That is what is currently under consideration in Somerset.

2. However, there is an issue whether there should be one unitary, favoured by the upper tier County Council, or two unitaries. The latter is favoured by Districts, four (out of five) of which I am instructed to advise.

3. Sections 11-19 of the 2007 Act are concerned with implementation of changes. That stage has not yet been reached. Sections 20-23 inclusive contain supplementary provision, including definitions.

4. Section 7 of the 2007 Act is at the heart of the matter for present purposes. Any change will be implemented by Order made by the Secretary of State (the SoS) and subject to Parliamentary process.

5. However, before deciding to make the change the SoS must consult. He has been consulting. The consultation opened on 22 February 2021. The period for consultation responses closed on 19 April 2021. All four Districts have responded.

6. The decision by the SoS is yet to be made. It will have to take into account the consultation responses, the last stage of the consultation process. That however will not be the only information capable of being taken into account, or being required to be taken into account, by the SoS. Moreover, it is necessary that the consultation should have been lawful,

which was not the case in respect of Devon and Norfolk, (2010) EWHC 1456 (Admin), (2011) LGR 64, in which I appeared for Exeter and Norwich City Councils.

7. Section 3 of the 2007 Act gives Guidance from the SoS a significant place in the skeletal legislative scheme. It is a central feature of this Guidance that there are key criteria. These key criteria prominently include the question whether there is “local support”.

8. There are other relevant aspects of the overall legal framework, including that :-

(1) The Districts owe a fiduciary duty to their respective council tax payers, reaffirmed in *Charles Terence Estates v Cornwall Council* (2012) EWCA Civ 1439, (2013) 1 WLR 466, in which I appeared for Cornwall Council, and all public law principles in relation to the reasonable and proper exercise of power;

(2) The Districts are each a “best value” authority under the Local Government Act 1999, including with respect to economy, efficiency and effectiveness;

(3) The Districts each have the specific power to conduct a Poll, or local Referendum, under Section 116 of the Local Government Act 2003 (the 2003 Act), which is expressly without prejudice to any other power;

(4) The Districts each has the very broad General Power of Competence under the Localism Act 2011, which is not excluded by there being an overlapping power;

(5) The Districts are subject to limitations on publicity, pursuant to the Local Government Act 1986 and the Code of Recommended Practice; and

(6) Until 6 May 2021 the SoS, the County and the Districts are subject to the Convention on pre-election purdah periods.

9. The power under Section 116 of LGA 2003 is broad, in that :-

(1) It can be exercised in order to ascertain views on any matter relating to the well-being of an authority's area; and

(2) It is for the authority itself to decide not only who to poll, but also how a Referendum is to be conducted; and

(3) It's purpose is to be advisory.

10. The Districts have been advised that they have power to conduct and/or commission a Survey of local residents with respect to local support. I agree.

11. The main question before me is whether such a Survey can be by way of a Referendum under Section 116 of the 2003 Act. I see no reason in principle why not. On that basis, any issue is as to the reasonable and proper exercise of that power, in all the present circumstances, a matter with respect to which the Districts are the primary decision-makers.

REFERENDUMS

12. The Districts have recently received “ strong advice “ not to go ahead with Referendums, on the basis that would be an unreasonable exercise of (an undoubted) power. I do not agree.

13. This advice appears to be for two reasons.

14. The first is that the result would be “ without value”. If that were indeed so, it would be a compelling argument against lawfulness.

15. However, I consider that argument is based on an incorrect premise. The premise is that the result will be too late to be submitted as part of the consultation (true) and will not be taken into account by the SoS as part of THAT process (true).

16. It does not however to my mind follow that the result would be without value. Consultation, including the requirement conscientiously to consider consultation responses, is a necessary condition for the SoS to make a lawful decision. It is NOT a sufficient condition. He must consult lawfully and he must act lawfully in all other respects. His decision, in order to be lawful, must also comply with the Wednesbury principles. They are that the decision-maker must give consideration to all relevant factors, must disregard irrelevant considerations, and must come to a decision to which a reasonable decision maker could come, that is a decision that is not so unreasonable that no reasonable decision maker could make it. Wednesbury principles are concerned with the substance of the decision. Consultation is concerned with procedural propriety.

17. This will include taking account of all relevant considerations. Prominent among these will be ALL evidence bearing on the key criterion

of local support, including the result of a Poll, or the fact that a Poll is in progress.

18. The second argument advanced against the Referendums relates to “value for money”. Again, if there was a lack of value for money that would be a compelling argument against lawfulness.

19. However, I consider that argument also appears to be based on an incorrect premise, that the outcome will be without argument. I regard the second value as being tainted by the first. Moreover, within the parameters of reasonableness and fiduciary duty, it is for the Districts to judge cost/benefit.

20. Of course :-

(1) The Districts must be fully informed as to and take full account of the costs”

(2) They 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; and

(3) Not only must the Districts have regard to all relevant considerations, also they must not have regard to any irrelevant/improper purpose, such as being seen to go down fighting or to be doing something.

ADVICE SOUGHT

21. I am asked six questions. I address them in the order in which they are raised in my helpful Instructions, and having had the benefit of a Teams Conference on 20 April 2021.

FIRST QUESTION

22. I am asked whether I agree with the advice provided by Bevan Brittan in an email dated 13 April 2021.

23. I agree with much of it. However :-

(1) Whereas consultation is normally concerned with the quality of responses, quantity is material in relation to the express criterion of local support;

(2) The focus should be on the SoS' eventual decision under the 2007 Act, not merely on the consultation element;

(3) The focus should also be on the important constitutional fact that the SOS's decision in order to be effective and implemented is subject to approval by both Houses of Parliament, and the outcome of the Polls would precede, and be capable of influencing, Parliamentary debate and decision;

(4) For these reasons, I do not agree that the result would necessarily be without value; and

(5) I do not agree that lack of value for money is demonstrated.

SECOND QUESTION

24. I am asked whether I consider that the Districts can lawfully hold the Referendums as a reasonable and proper exercise of power in compliance with fiduciary and other duties.

25. My answer is : " Yes ". This is of course provided that the decision is arrived at in a lawful manner

THIRD QUESTION

26. I am asked as to the risks to the Districts and their respective Members and Officers should they resolve to proceed with a Poll.

27. There may be a challenge; but I regard any risk of personal liability as being very low. This is of course provided that there is no improper behaviour such as having an improper purpose.

FOURTH QUESTION

28. I am asked how the Districts should deal with the Bevan Brittan advice.

29. Members should be made aware of it.

FIFTH QUESTION

30. I am asked how the Districts may conduct and manage any Poll in a way that avoids any suggestion of bias as alleged in the letter from the SoS dated 12 April 2021 and also demonstrates that value for money is achieved.

31. In order for the result of the Referendum to have credibility, it, and any publicity accompanying it, must be framed in a way that is consistent with it being a matter of seeking of views as a matter of information and advice in accordance with the Section 116 power, on whether to have one or two unitaries, not in a way that might suggest that it is an exercise in salesmanship, slanted in favour of, and/or against, a particular outcome.

32. However, I do not believe that reference to “ Stronger Somerset” gives an appearance of bias. That is the (legitimate) title of one of the proposals. It is by now very well established. It is no more objectionable than the title “One Somerset” for the alternative proposal.

SIXTH QUESTION

33. I am asked finally as to any general issues that may assist in process terms remitting the Districts to hold Polls in a manner that will avoid potential challenge.

34. I have nothing to add, but will be happy to advise further as may be required.

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JAMES GOUDIE QC
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