

Wiltshire Council

Cabinet

26 March 2019

Subject: SWLEP governance framework update

Cabinet Member: Councillor Pauline Church – Cabinet Member for Economic Development and South Wiltshire Recovery

Key Decision: Non Key

Executive Summary

The purpose of this report is to provide an update to Cabinet on the changes to the governance arrangements to the Swindon and Wiltshire Local Enterprise Partnership (SWLEP).

The Government undertook a review of Local Enterprise Partnerships (LEPs) in 2018. One of the key recommendations to come out of this review was that LEPs should have a legal personality. Another recommendation from the review is that LEPs should have a secretariat independent of local authorities and other organisations that is answerable to the LEP Board.

The SWLEP Board took the decision in September 2018 to establish the LEP as a company limited by guarantee with the objective of being fully incorporated by 1st April 2019. The SWLEP has since incorporated on 14 January 2019.

Wiltshire Council is the Accountable Body for the SWLEP and therefore prior to incorporation all budget, assets, contracts and staff came under the Council's authority and regulatory regime.

The changes to the SWLEP's legal status, in addition to updates to the Government's Assurance Framework for Local Enterprise Partnerships, will result in changes to the current agreements between the SWLEP and Wiltshire Council. The role of the Accountable Body will change so the budget, assets, contracts and staff will now be transferred to the incorporated SWLEP. These changes require an update to the Accountable Body Agreement, the Governance Framework, and the transfer of the SWLEP business activities to the new limited company.

The transfer of those business activities is a transfer to which the Transfer of Undertakings Protection of Employment (TUPE) applies and it is proposed that the staff working predominantly on LEP related and funded activity would be transferred to the new company. Wiltshire Council is currently the employer of those staff.

There will also be a change in the representation on the SWLEP Board of Directors by Wiltshire Council to manage the relationship between the Council, its role as the Accountable Body and the interests of the SWLEP. The role of the Accountable Body should be wholly separate from any formal participation in the Company.

Proposal(s)

Cabinet are recommended to:

1. Confirm the continuing role of the Council as Accountable Body to the SWLEP to be exercised in accordance a revised SWLEP Governance Framework and Accountable Body Agreement to reflect new guidance from Central Government and the SWLEP's incorporation as a company limited by guarantee.
2. Approve in principle the transfer of any assets pertaining to SWLEP activities to the new SWLEP Ltd company on terms to be agreed and set out in a Business Transfer Agreement.
3. Approve in principle the transfer of SWLEP staff to the incorporated SWLEP under TUPE and the commencement of formal consultation with the Unions and affected staff. [This meets the objectives of the SWLEP Board; it is in line with Government objectives of LEPs having their own identity; and the staff identified already operate at arm's length from the Council.]
4. To agree that the Cabinet Member for Economic Development, supported by the Corporate Director Growth, Investment and Place will represent the Council on the Board of Directors.
5. To authorise the Corporate Director for Growth, Investment and Place, after consultation with the Cabinet Member for Economic Development and Salisbury Recovery, the Director of Finance and Procurement and the Director of Legal and Democracy to finalise the terms of the Accountable Body Agreement and Business Transfer Agreement, to execute these documents on behalf of the Council, and to take such other action as is necessary to protect the interests of the Council; and the Council in its role as Accountable Body; and secure the transfer of business and staff to the new company.

Reason for Proposal(s)

The Swindon and Wiltshire Local Enterprise Partnership, as a result of guidance from central Government, took the decision in September to establish the LEP as a company limited by guarantee with the objective of being fully incorporated by 1st April 2019.

This change has implications for the Council in its role both as a partner of the SWLEP and as the Accountable Body for the SWLEP.

This includes updates to the formal agreements and documentation between the SWLEP and the Council, the requirement to transfer some assets and liabilities to the new SWLEP company and has potential implications for the employment status of staff employed to carry out SWLEP activity.

This report therefore requests Cabinet to approve in principle a set of actions relating to the transfer of responsibilities and to delegate authority to the Corporate Director for Growth, Investment and Place after consultation with the relevant Cabinet Member, Director of Finance and Procurement and Director of Legal and Democracy, to implement the necessary changes and authorise the formal agreements required.

Corporate Director, Alistair Cunningham

Wiltshire Council

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Key Decision: Non Key

Purpose of Report

1. The purpose of this report is to provide an update to Cabinet on the changes to the governance arrangements to the Swindon and Wiltshire Local Enterprise Partnership (SWLEP) and to seek approval to implement the necessary changes required.

Relevance to the Council's Business Plan

2. The Wiltshire Council Business Plan 2017 – 2027 sets out the vision to create strong communities, with priorities for growing the economy, strong communities and protecting the vulnerable. The SWLEP is one of the key partnerships with a responsibility for delivering economic growth.
3. The amendments to the SWLEP Governance arrangements are in line with the Government's objectives for Local Enterprise Partnerships.

Background

4. The Swindon and Wiltshire Local Enterprise Partnership Limited (SWLEP) is a non-statutory partnering arrangement between the public and private sectors, established to play a central role in determining local economic priorities and undertaking activities to drive economic growth and the creation of local jobs. The SWLEP partners include Swindon Borough Council, Wiltshire Council, businesses in the area and the Military, with representatives from all these organisations on its Board. The SWLEP can access government funding to channel investment into the area and to support its strategic objectives in skills and talent, transport infrastructure, digital capability, place-shaping and business development.
5. Central government has requested that all Local Enterprise Partnerships ("LEPs") develop a single assurance framework to cover all devolved government funding received by LEPs. SWLEP has been allocated local growth deal monies from central government which can only be paid to a local authority nominated as an Accountable Body. Wiltshire has agreed that it will act as the Accountable Body in respect of local growth deal funding received by SWLEP.

6. As part of the Strengthening Local Enterprise Partnerships review, every LEP and Mayoral Combined Authority has had to submit a two-part implementation plan to Government setting out how it will respond to the recommendations in the report.

7. The Government published a formal review of LEPs in July 2018 which included the statement:

“Government will support all Local Enterprise Partnerships to have a legal personality. Where they are not already incorporated as companies, Local Enterprise Partnerships that are not in mayoral combined authorities or combined authorities should take steps to become companies. This new legal structure should be in place by April 2019, ahead of any release of further local growth funding. Ensuring that all Local Enterprise Partnerships have a legal personality reflects their more prominent role in local growth, that they are their own business-led organisations and will allow them to enter into legal commitments to take on further responsibilities in the future.”
(p20-21, Strengthened Local Enterprise Partnerships, HMG, July 2018).

8. On 19th September 2018, the SWLEP Board approved the proposal to establish the Swindon and Wiltshire Local Enterprise Partnership as a company limited by guarantee and authorised the LEP Director to implement the activities identified which would enable the SWLEP to attain a legal personality by becoming a company limited by guarantee on or before 1st April 2019. The SWLEP incorporated on 14 January 2019.

9. The change in status has an impact on the responsibilities of Directors, and the implications for public officials assuming the role of Directors of the company. The move to incorporation has involved work on governance, SWLEP operating costs and implications on SWLEP becoming a direct employer of staff.

10. Work was undertaken by SWLEP to develop a draft governance structure setting out how the Board could operate with a number of committees, groups and task groups including an overview and scrutiny function as well as a number of indirect reporting relationships.

11. There were several issues to be resolved:

- Articles of Association for the new company;
- Protection to minimise personal liability for SWLEP Board members acting as Directors of an incorporated company limited by guarantee;
- Advice on pension liability if the SWLEP became the employer of staff;
- Advice on the roles and responsibilities of company staff and the reporting requirements within the Companies Act 2006;
 - Transfer of the business of SWLEP to the new limited company;
- Changes in the role of the Accountable Body;
- The new business model including VAT advice;
- Revised Governance Framework.

12. The SWLEP Board has been advised by commercial solicitors Clark Holt. Work is ongoing to complete and finalise the Governance Framework,

Business Transfer agreement and Accountable Body agreement. Otherwise the Council understands that the remaining issues have been completed by the SWLEP.

Main Considerations for the Council

Accountable Body

13. SWLEP has been allocated Funding from central government which can only be paid to a local authority nominated as an Accountable Body. This remains the case even after incorporation. Wiltshire has agreed that it will act as the Accountable Body in respect of funding received by SWLEP.
14. The Accountable Body Agreement sets out the respective roles and responsibilities of Wiltshire acting as the Accountable Body for the SWLEP and Swindon and associated matters in relation to the application and allocation of devolved Funding by government to relevant projects and programmes.

Business Transfer

15. SWLEP proposes that in future the activities and business of the SWLEP will be conducted through the new SWLEP limited company and to that end it proposes a formalised transfer of any assets pertaining to SWLEP activities to the new company. Wiltshire Council, as the Accountable Body, has had responsibility for any such assets to date (contracts, equipment purchased, intellectual property rights, records and marketing information etc). A formal agreement has been drafted by lawyers acting for the new company to facilitate that transfer.
16. To complete this transfer clarity is required on the future split of functions between Wiltshire Council, Swindon Borough Council and the SWLEP. This is set out in the Accountable Body Agreement and the updated Governance Framework.
17. The details of the transfer agreement are currently being negotiated between Wiltshire Council and Clark Holt, lawyers for the SWLEP.

SWLEP Governance

18. SWLEP has updated its Governance Framework to reflect the changes both to its incorporated status and in line with the latest Government requirements. The Governance Framework document is an agreement between the LEP and central government that provides assurance on the SWLEP's decision-making process.
19. Changing the status of the SWLEP to a limited company has a bearing on the appropriate representation on the SWLEP Board by Wiltshire Council. Currently the Leader of the Council represents the authority's interests. This arrangement is proposed to change as the Leader would have to represent the limited company's best interests as well as the Council with the added

complexity of the Council providing the accountability as Accountable Body for all funding managed by the SWLEP. In the future the Cabinet Member for Economic Development, supported by the Corporate Director Growth, Investment and Place would represent the authority on the Board of Directors.

20. Democratic Accountability for the SWLEP is currently provided through the Joint Strategic Economic Committee. As all the SWLEP meetings are held in public and all minutes and decisions are published most of the main purpose of this Committee is no longer necessary. The SWLEP proposes to change the structure and form a Joint Scrutiny Task Group comprising four elected Councillors from each of the two Unitary Authorities to perform all overview and scrutiny functions on behalf of both Councils and the SWLEP.
21. The responsibilities are set out in the attached draft Governance Framework.

TUPE

22. The intent of the SWLEP is to become an entity that can enter into contracts and hold assets. The transfer of those business activities is a transfer to which the Transfer of Undertakings Protection of Employment (TUPE) applies and it is proposed that the staff working predominantly on SWLEP related and funded activity would be transferred to the new company. Wiltshire Council is currently the employer of those staff.
23. All TUPE transfers need to be approved by either Cabinet if it involves the transfer of 50 or more employees, or relates to a matter which is commercially, politically or strategically sensitive. If, however, the number of staff affected is lower and the impact of the TUPE transfer to the council and service area is minimal, approval can be given by the relevant Director under their delegated authority in conjunction with their Corporate Director and with support from HR.
24. The number of staff affected in this case is 16 and it is considered that in this instance the transfer arrangements may be agreed by the Corporate Director for Growth, Investment and Place under the delegated authority sought from Cabinet in this report.
25. Any roles that are deemed to be more than 50% within scope will be highlighted for potential transfer.
26. A preliminary scoping exercise for contracting out has been conducted to determine the extent of the review and what positions may be affected and assigned to the transfer and the cost implications.
27. The posts identified as being within scope are currently fully funded from the SWLEP's own budget which it receives from central government. Staff time from a number of Wiltshire Council and Swindon Borough Council posts is allocated as match to enable the cash funding to be drawn down. The SWLEP would therefore continue to fund those posts post transfer.
28. Staff assigned to the service, unwilling to become employees will have the right to object to the transfer. The effect of the refusal to transfer, would be that

their contracts of employment would be terminated without a dismissal and without the need for notice. However, the Council would make efforts to find suitable alternative employment within the Council prior to that transfer date.

29. In addition, any contract variations will be void if the reason for them is solely or principally the transfer itself or a reason connected with the transfer which is not an Economic, Technical or Organisational (ETO) reason. The pay and pension rights of staff will be preserved on transfer and SWLEP will be expected to offer a comparable pension scheme.
30. Legal advice has concluded that the Best Value Authorities Staff Transfer (Pensions) Direction 2007 does not apply to this transfer. The services involved are not Wiltshire Council services and Wiltshire Council will not require or carry on the relevant functions once the TUPE transfer has taken place.
31. If the SWLEP wishes to offer Local Government Pension Scheme (LGPS) benefits - either to former Wiltshire Council TUPE transferred staff only (a closed admission agreement) or to all its staff (an open admission agreement), it must apply to Wiltshire Pension Fund for admission as a community admission body via an admission agreement. This will mean that SWLEP employees could continue to participate in the Wiltshire Pension Fund and the SWLEP will making employer contributions every month.
32. Once Cabinet has approved the transfer in principle a letter of intent to Wiltshire Council recognised unions regarding the potential TUPE transfer of Wiltshire Council staff will be sent out.
33. Following that affected employees will be advised that TUPE is being considered and the indicative timeframe for the process.
34. For this exercise, Transfer of Undertakings Protection of Employment Regulations (2006) (TUPE) principles have been applied to the scoping exercise to ensure consistency, fairness and objectivity of process.
35. This scoping exercise is aimed at identifying the 'economic entity' (an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary) that will transfer and retain its identity post transfer. Employees within the economic entity should be 'wholly or mainly' assigned to activities and services.

Timeframe:

36. It is proposed that Wiltshire Council employees involved in SWLEP services/ activities would be transferred to SWLEP on 1st July 2019.
37. At this stage, it is not possible to identify the measures that the Council or SWLEP will take in relation to affected staff. However, these will be clearly identified to the Trade Unions and staff following discussions with the Project Group and receipt of due diligence information

Overview and Scrutiny Engagement

38. The proposed arrangements for future scrutiny of the SWLEP are set out in the attached Governance Framework.

Safeguarding Implications

39. Not applicable

Public Health Implications

40. Not applicable -

Procurement Implications

41. The SWLEP would continue to be governed by national procurement guidance as it is funded by public monies. Wiltshire Council would have a responsibility as the Accountable Body to ensure that funding is spent in accordance with that guidance however in future the SWLEP would have to seek its own advice on procurement processes.

Equalities Impact of the Proposal

42. Not applicable

Environmental and Climate Change Considerations

43. Not applicable

Risks that may arise if the proposed decision and related work is not taken

44. If the changes to the Accountable Body and business operation arrangements are not implemented, then the SWLEP will be in breach of its assurance agreement with central government and could be subject to sanctions. This could affect the delivery of current projects and affect the future ability to draw down Government funding.

Risks that may arise if the proposed decision is taken and actions that will be taken to manage these risks

45. The proposals support the move towards increased independence of the SWLEP (in accordance with Government guidance). This could lead to a lessening of control and influence by the Council. There are implications for Councillors becoming members of the Board of Directors of the new limited company with potential conflicts in seeking to represent both the best interests of the company and the Council. It is therefore suggested that a Cabinet Member other than the Leader represents the Council on the Board. Local Enterprise Partnerships are bound by an agreement with central government and subject to regular review by government. SWLEP will also be subject to formal scrutiny by both local authorities and are required to carry out its decision-making process in public.

Financial Implications

Accountable Body

46. The respective roles and responsibilities of Wiltshire Council and the SWLEP are set out in the Accountable Body agreement. This agreement will be approved by the Director of Legal and Democracy and the Director of Finance and Procurement / S151 Officer before being signed. A copy of the draft agreement is attached as Appendix 2.

Legal Implications

47. The Accountable Body Agreement, Governance Framework, Business Transfer Agreement and TUPE transfer of staff are all currently being reviewed by Wiltshire Council's legal, financial and HR teams.

Options Considered

48. Agree to continue as Accountable Body and transfer business assets to the new SWLEP limited company in line with decision of the SWLEP Board and Governments objectives for Local Enterprise Partnerships.

49. Delay the decision to approve continuing Accountable Body role and transfer of business assets.

This could have some operational implications for the SWLEP and existing projects currently in delivery. Temporary arrangements could be put in place, but the disruption and uncertainty could have a negative impact on the partnership and relations with Government.

50. Refuse to continue as Accountable Body or to allow transfer of assets. Grounds for refusal should be stated to the SWLEP as such an action would go against the decision of SWLEP Board and Government objectives. The current arrangements could continue until the issue is resolved with the SWLEP. There may be impacts on staff regarding uncertainty of their future employment status. An alternative Accountable Body would have to be found and the transfer of assets would still be required however the transfer would include that new body. This could have significant negative impacts.

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Appendices

- **Appendix 1 Draft Governance Framework**
- **Appendix 2 Draft Accountable Body Agreement**

Background Papers

The following documents have been relied on in the preparation of this report:

None