IN THE MATTER OF LOCAL GOVERNMENT REORGANISATION AND THE "FUTURE DORSET" PROPOSALS

AND IN THE MATTER OF CHRISTCHURCH BOROUGH COUNCIL

REVISED OPINION DATED 2 MARCH 2018

1. I am asked to advise Christchurch Borough Council ("Christchurch") in respect of the proposals for the reorganisation of local government in Dorset. On 7 November 2017 the Secretary of State for Communities and Local Government ("the SoS") announced in Parliament that he was minded to implement the locally led proposal to create two new unitary Councils in Dorset. He invited further submissions to be made by 8th January 2018 before he made a final decision. Christchurch requested that the SoS gave them more time to make further representations but he declined to do so. Christchurch therefore made further representations to the SoS in the form of a 36 page report. However, the assumption must be that the SoS will not depart from the minded to letter, and will approve the proposal.

2. The SoS on 26 February issued his final decision and as predicted above he followed his earlier minded to letter. His announcement does not set out any additional reasons, other than that he has taken into account the representations made. In those circumstances, rather than rewrite the Opinion I gave on 9 February I simply record the fact that the decision has now been made, and continue to have the views set out below. Given that the SoS has not given any further or different reasons, there is no reason to change any of the earlier advice.

3. The current structure of local government in Dorset is that there are two unitary authorities (Bournemouth and Poole) and the rest of the area has a two tier system with Dorset County Council and six second tier authorities. Christchurch BC is one of the second tier authorities.

4. Consideration of restructuring the Dorset authorities has been going on since at least 2015. There have been broadly two drivers for change, the need to ensure sustainable public services with significantly reduced funding, and how to realise the potential for prosperity in the County.

5. After discussion between the authorities in 2015 three reports were commissioned; a report on the Case for Change by PricewaterhouseCoopers; a financial analysis by Local Partnerships (joint owned by HM Treasury and the Local Government Association) and a public consultation exercise and report,

carried out by Opinion Research Services (ORS). This work was reported to Christchurch as well as the other authorities in January 2017. The PwC report set out three options, all based around creating two unitary authorities. The option they considered offered the most benefits was Option 2b, which entailed a unitary authority covering Bournemouth, Poole, Christchurch and a second unitary covering the rural areas (and Weymouth).

6. The consultation report showed strong support for moving to two authorities, with a clear preference for Option 2b. However, in Christchurch the majority of those who responded to the open questionnaire were opposed to the two council solution, although support for that option was recorded as being higher in the household survey, which involved more detailed information than the general consultation. This is described as the "more representative" survey presumably because it is less self-selecting than the questionnaire. It is noteworthy that the authors of the consultation report say that the outcome was "more consistent" than is usually the case with complex statutory consultations and that there was clear and emphatic support for two councils, although noting the difference in the local response in Christchurch.

7. At Christchurch's Extraordinary Full Council meeting on 13 December 2016 the Council resolved that in its view no change was in the best interests of the people of Christchurch, and to campaign for the new Dorset Combined Authority to facilitate and develop closer working with the other authorities across Dorset in respect of adult social care; to discuss Christchurch taking responsibility for services from the County Council and to have some agreement made on Council tax. It is apparent from the various reports that I have seen that by early 2017 Christchurch BC was out of step with most of the other Dorset authorities.

8. A standard report was drawn up for all the Dorset authorities in January 2017 setting out the conclusions of the three reports that had been commissioned. This cross Dorset report recommended that officers be instructed to draw up proposals for Option 2b.

9. On 9 February 2017 six other Dorset authorities made a submission to the SoS under the heading "Future Dorset", which was for Option 2b. My understanding is that at that stage both Purbeck and East Dorset Councils were not supporting the proposal. However, since the minded to support decision they have both withdrawn their objections to the proposal, and therefore Christchurch is now the only Dorset council opposed to the proposal.

10. It was this proposal which on 7 November 2017 the SoS said that he was minded to approve.

11. On 16 November the Council resolved to conduct a postal poll on whether residents would support the Council joining the new unitary. It appears that at around the same time the local MP, Christopher Chope, discussed with the SoS the possibly of an alternative proposal by which Christchurch would transfer to Hampshire. The Leader of the Council, Mr Flagg wrote to the SoS asking to extend time for responses to his letter to 29 January. The SoS responded declining to extend the time. He did say that if Christchurch wished to pursue the Hampshire option it would need to provide an outline of the proposal, including support from key partners. He said that if the Council came forward with a fully worked up Hampshire proposal supported by Hampshire County council "which was fully viable and gave a good deal for the residents of Christchurch and other areas involved, I would formally consider it".

12. Mr Flagg wrote again on 21 December asking for an extension because he had been seeking further financial information which had not been forthcoming. Christchurch sent its further representations on 4 January 2018. This is a detailed document which in essence seeks to make the following points – the strong sense of community and heritage in Christchurch; a critique of the Future Dorset proposals and in particular of the cost and benefit assumptions in those reports; criticism of the Future Dorset consultation process and comparison with the results of the local poll which Christchurch had carried out in late 2017 on the issue of a single unitary for Bournemouth, Christchurch and Poole; and an alternative option. The alternative option being proposed was for a single unitary for Bournemouth and Poole and an extended joint working approach across the rest of the County. This is my summary of what is set out at p.25 of the Further Representations. It was Christchurch's positon that this option would save £29.9m.

13. On 16 January 2018 the SoS wrote declining to give further time for an alternative proposal to be put forward. The SoS said that there was no realistic likelihood of this proposal being implemented as both Bournemouth and Poole had stated that they would not consider a single merged authority of their two areas. I have not seen the submission by Bournemouth and Poole Councils on this point, but given that they were both supporting the Future Dorset proposal their positon is hardly surprising, and the SoS was obliged to take it into account.

14. The general statutory scheme on the reorganisation of local government in England is set out in the Local Government and Public Involvement in Health Act 2007. However the critical statutory provisions in this case a contained in s.15 of the Cities and Local Government Devolution Act 2016. This provides for the SoS making provision through regulations for the governance arrangements for local authorities, including boundary arrangements. Sections 15(4), (5) and (8) state;

    (1) The Secretary of State may by regulations make provision about—
    …
    (c) the structural and boundary arrangements, or electoral arrangements, in relation to local authorities under Part 1 of the Local Government and Public Involvement in Health Act 2007 or under Part 3 of the Local Democracy, Economic Development and Construction Act 2009.
    ….

(3) Regulations under this section may in particular make provision—
(a) about how the enactments mentioned in subsection (1) or (2) are to apply in relation to particular cases (including by disapplying the application of any such enactment to a particular case or applying it subject to any variations that are specified in the regulations);
(b) about any of the matters listed in section 11(3) or (4) of the Local Government and Public Involvement in Health Act 2007 (including provision in relation to matters of a kind mentioned in section 12 of that Act).
Nothing in paragraph (a) limits the power to make provision under subsection (9)(d).
(4) Regulations under this section may be made only with the consent of the local authorities to whom the regulations apply (subject to subsection (5)).
(5) Regulations under this section, so far as including structural or boundary provision in relation to a non-unitary district council area, may be made if at least one relevant local authority consents.
(6) "Relevant local authority" means—
(a) a non-unitary district council whose area is, or forms part of, the non-unitary district council area;
(b) a county council whose area includes the whole or part of the non-unitary district council area.
(7) For the purposes of subsections (5) and (6)—
"non-unitary district council area" means the area or areas of one or more non-unitary district councils;
"non-unitary district council" means a district council for an area for which there is also a county council;
"structural or boundary provision" means provision about the structural or boundary arrangements of local authorities in regulations made by virtue of subsection (1)(c).
(8) Subsections (5) to (7) expire at the end of 31st March 2019 (but without affecting any regulations already made under this section by virtue of subsection (5)).
….
(11) A statutory instrument containing regulations under this section may be made only if a draft of the instrument has been laid before each House of Parliament and approved by a resolution of each House.
(12) At the same time as laying a draft of a statutory instrument containing regulations under this section before Parliament, the Secretary of State must lay before Parliament a report explaining the effect of the regulations and why the Secretary of State considers it appropriate to make the regulations.

15. It is therefore open to the SoS to make regulations reorganising local authorities even where a number of those authorities do not consent, as long as one of them does so consent. This power seems to have been introduced as a back bench amendment and the Government accepted the amendment, but only for a pilot period of 3 years, expiring on 31 March 2019. This is made clear in the Legislative Intention Note.

16. I am asked to advise on whether there are any possible grounds to challenge the SoS minded to approve decision on 7 November 2017, or prospectively his likely decision to actually approve. As far as the likely decision to approve is concerned, it will of course be critical to see what the SoS actually says, and the reasons the SoS sets out in the report he lays before Parliament. At this stage it is impossible to advise on whether any possible error of law, and arguable case for judicial review may arise in respect of that decision itself. However, it is possible to consider the process that has taken place so far.

17. The first point to make is that if Christchurch challenged the minded to approve decision now, it would be likely that the Court would say that we had acted

prematurely and should await the final decision. Therefore the operative date for any decision to judicially review will only arise when the SoS issues his final decision. Therefore to some degree this Opinion can only be provisional because we do not yet have the final decision. However, in reality it is highly likely that the SoS will follow his minded to decision, and that the reasoning and basis for that decision will be the material that the Council already has. Therefore it is sensible to consider any possible grounds for JR now.

18. A second preliminary point is that to the degree the Council has concerns about the three original reports referred to above, and in particular the consultation report drawn up by ORS, these are highly unlikely to give grounds for JR now. Any flaws in those reports, for example that it is alleged that the ORS consultation was insufficiently even handed, are matters that could and were raised with the SoS in 2017. It is extremely unlikely that a court would consider arguments that that much earlier consultation could be challenged now. It would only do so if the consultation was fundamentally flawed in some very obvious respect. In any event, as I set out below I do not think that the consultation process gives rise to any even arguable legal errors.

19. Thirdly, I have been sent a number of documents including the Further Representations, which set out the Council's general concerns. But I have not been pointed to any specific procedural or factual errors which it is suggested amount to errors of law. In those circumstances I have tried to review the material that I have been sent and see whether any obvious errors arise. However, I am obviously much less familiar with the factual background than officers in the Council, so if there are factual errors in the background material I would not be in a good position to find them. I am going to assume, given the lack of any suggested significant factual errors that there is nothing in that regard I should focus on. It is of course important that the Council did respond to the SoS's invitation for further representations and I assume that if there were any obvious factual errors the Council would have referred to them in those representations. I fully appreciate that the Council's representations did raise a number of issues over the financial conclusions and the accuracy of the forecasts. However, these are matters ultimately of judgment upon which reasonable people properly advised can, and often do, disagree. There is nothing obviously wrong in a factual sense with the proposal being advanced. Much of Christchurch's representations focus on the fact that Christchurch residents may have to pay more during the harmonisation period. However, it is I assume a necessary truth of local government reorganisation that some Council Tax payers will end up paying more for a period of time.

20. The principles of judicial review are well established. A decision will only be flawed if it is outside the legal powers in the Act (ultra vires) ; the SoS has taken into account an irrelevant consideration or the decision is so unreasonable that no SoS could have reasonably made it (what is known as the *Wednesbury* irrationality test). It is important to have closely in mind that the Courts will be very slow to intervene in any area such as local government reorganisation,

which is both technical but also necessarily political. It is an area where the Courts will normally take the view that the SoS rather than the Courts is in the best position to decide.

21. The most straightforward grounds for JR are usually procedural errors, for example braches of natural justice, failure to consult or failure to give adequate reasons. So far as I can see there are no obvious procedural errors in the process that has been adopted here by the SoS. The relevant material was submitted to the SoS and he has considered it in accordance with the statutory scheme. He has given Christchurch the opportunity to make representations on the Future Dorset proposals, which they took up. Christchurch might complain about the decision not to give them more time to submit alternative proposals. However, firstly in respect of the alternative set out in the representation it seems perfectly reasonable for the SoS to have refused more time to formulate the proposal involving a Bournemouth/Poole unitary. If these two authorities were opposed to that option then it is impossible to see how it could proceed or how the SoS could ultimately have approved it. Therefore to give more time would have only raised expectations, and potentially simply delayed the process.

22. In respect of the Hampshire possibility, I note that the further Representations do not rely on this proposal, and I have seen no further material upon it. The SoS has said he will consider any proposal that is forthcoming, although it seems likely that given the timescales any proposal will come too late in terms of the SoS's final decision on the Future Dorset proposal. It is very difficult to give any weight to the Hampshire possibility without a clear statement of support, at least in principle, from Hampshire County Council. Therefore I cannot see any possible error in that regard at this stage.

23. The Future Dorset proposal was submitted to the SoS by the six Councils in accordance with the statutory scheme and with relevant supporting material. I have read the three supporting reports and there is again no obvious error in terms of using legally irrelevant material. The Council set up a Local Government Reorganisation Working Party to consider the evidence submitted in support of reorganisation. The Chairman of the Working Party, Mr Jones drew up a memorandum on Concerns relating to the Consultation Process (I.e. the ORS process and report). This Memorandum makes a number of criticisms of the ORS process. These criticisms stem from an overall view that the consultation document was biased in its approach to reorganisation by assuming from the outset that a reshaped council structure would be an improvement. There are a number of detailed criticisms as to how the options were presented and the bias in the document towards Option 2b. I can certainly see that there are some valid criticisms of the balance of the consultation document and it could certainly be described as a document which leads to the respondent towards a certain conclusion. It is premised on the assumption that changed structures would be beneficial, and it is of course Christchurch's position that no change, certainly for Christchurch is the best option. But the kind of criticisms being made of the report do not begin to amount to a legally flawed consultation. It may be

somewhat biased, but it does not set out fundamentally flawed material in an objective sense, and it certainly leaves open the range of responses. The general principles of a fair consultation were endorsed by the Supreme Court in *Regina (Moseley) v Haringey London Borough Council* [2014] 1 W.L.R. 3947 where the following well known summary from an earlier case was set out;

> *"Mr Sedley submits that these basic requirements are essential if the consultation process is to have a sensible content. First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third … that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals."*

The Supreme Court also referred *R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213* , which concerned the closure of a home for the disabled, the Court of Appeal, in a judgment delivered by Lord Woolf MR, elaborated, at para 112:

"It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good ****3958*** *deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."*

24. In practice the case law on consultation shows that much depends on the specific factual context. As is explained in *Moseley* a higher level of requirement is likely to be imposed where the decision is one to take away existing rights, such as Mrs Coughlan's right to live in the care home, or an individual's right to remain in the UK. This consultation does not involve impacts on individual rights and therefore that higher scrutiny would not apply. Further, although the public view was important it was not determinative of the outcome. So even if the consultation document was illegitimately biased towards a different outcome, I think it would be exceptionally different that that could or would have been a critical factor in the ultimate decision. This is not least because the consultation was across the whole of Dorset, and there was a range of other material the SoS took into account. I have not the slightest doubt that the type of criticisms made of the ORS report would not give rise to any, even arguable, error of law.

25. My instructions refer in the most general terms to a range of possible causes of action, but I cannot see that any of them have a reasonable chance of success. In terms of impact on equalities law, the only impact that I can see is on the elderly and disabled. However, the impact of the proposal on adult social care is one of the justifications being advanced for the entire proposal. I have seen no suggestion of an argument that there is any unlawful, as opposed to objected to, impact on elderly or disabled people in Christchurch. Those instructing me have asked as to whether a tax harmonisation plan which means tax payers in one council will pay more than those in another would itself be in breach of equalities law. The simple answer to this is no. Firstly, the fact of where you live is not a protected characteristic within the Equalities Act 2010. Secondly, it is very unlikely to be a "status" within article 14 of the ECHR. Thirdly, and in any

event, it is almost certainly a necessary consequence of local government reorganisation there were will be times where people in one area pay more than another. That is extremely likely to be justified.

26. I have not seen an Equalities Impact Assessment (EqIA) of the proposal, and I do not know if one was drawn up. However, even if it was not I do not see how there would be an arguable breach of the Public Sector Equalities Duty (PSED) contained in s.149 of the Equalities Act 2010, given the consideration in the various reports submitted to the SoS of the impacts on adult social care. The case law on PSED, which is very extensive is clear that a breach of s.149 would only be found if there was substantively no proper consideration of the impacts on protected groups, rather than a tick box by which the failure simply to produce and EqIA would itself be an error of law.

27. The only tort I can see might be in play is a breach of statutory duty, but again no arguable breach has been advanced. On vires, the SoS undoubtedly has the vires to make the decision referred to in the minded to decision.

28. In principle a decision such as is likely to be made can be challenged on the grounds that it is Wednesbury irrational. As I have explained above, this is a high test particularly in the field of local government reorganisation and finance, which the Courts will not feel they are well placed to intervene in. In this case I think it is extremely unlikely that any irrationality argument would even be arguable. The Future Dorset proposal has come out of years of consideration; all the councils seemed to have started from the position that some change was needed; the overall need in terms of an ageing population and a squeeze on local authority budgets is extremely well known; the proposal is supported by detailed reports and all the councils except Christchurch are now supporting or have withdrawn their opposition to the proposals.

29. It is possible that there might be an argument that the SoS took into account an irrelevant consideration or failed to take into account a relevant matter, but it is impossible to reach any view on this until we have the SoS's decision and the report which he must make to Parliament.

30. For all these reasons I am afraid that I can at this stage see absolutely no arguable error of law, and thus any arguable cause of action. I am of course more than happy to reconsider the position once we have the SoS's final decision.

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BLACKSTONE CHAMBERS

9 FEBRUARY 2018