

Authority view spring 11

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Back to school for Education Secretary

Bevan Brittan LLP acted for Sandwell MBC, one of the six local authorities that challenged the Secretary of State's controversial decision to cancel funding for the Building Schools for the Future scheme. In this article we look at what the judgment means for the councils affected and for public bodies in the future making difficult decisions about spending.

The Community Right to Challenge and procurement

Susie Smith considers a number of procurement issues that are raised by the Localism Bill's Right to Challenge provisions that will give communities the right to bid to take over local state run services.

Crunch time for local authority credit

Are you loaning money to employees or other individuals? Are you sure that you are compliant? Are the agreements enforceable? Are you risking committing a criminal offence? Adam Finch and Fran Mussellwhite look at issues that local authorities should consider if they are providing any form of credit to anyone.

Looking after the Council's estate

In the present era of public spending cuts, reducing spends on repairs and maintenance is a popular first call to balance budgets. However, with capital to build new facilities even harder to obtain, a higher premium than ever should be placed upon managing and maintaining your estate. Martin Howe and Jonathan Turner discuss how to develop a maintenance plan.

Section 20 leaseholder consultation – not to be overlooked in the procurement process

Financial pressures are causing authorities across the country to review the way they procure and deliver repairs and maintenance works to their housing stock. This article focuses on the consultation regime that will apply when an authority intends to enter into a Qualifying Long Term Agreement for discharging its repair and maintenance obligations.

What future for Standards Committees?

Peter Keith-Lucas considers how local authorities may fulfil the new duty in the Localism Bill to promote and maintain high standards of conduct among elected and co-opted members of the authority.

The Stratford Taxis case – Licence to make policy decisions?

The Court of Appeal's judgment in the 007 Stratford Taxis case addresses the issue of whether the Cabinet of a local authority has the power to adopt a policy to direct the discharge of a non-executive function. In this article, Peter Keith-Lucas considers problems raised by the judgment, and its wider implications for local authority executive arrangements.

Defamation on the web

In these times of austerity, local authorities are fighting a daily battle against critical comments posted online, some of which stray into the realms of libel. Wesley O'Brien answers the ten most common questions we receive from our local authority clients about this issue.

Back to school for Education Secretary

On 11 February 2011 the High Court handed down judgment in the Building Schools for the Future judicial review. This was a challenge to the controversial decision of Michael Gove, Secretary of State for Education, to cancel funding for the Building Schools for the Future scheme.

Bevan Brittan LLP acted for Sandwell MBC, one of the six local authorities that challenged the decision. The councils succeeded in their claim and costs were awarded against the Secretary of State.

In this article we look at what the judgment means for the councils affected and for public bodies in the future making difficult decisions about spending.

Background

The national Building Schools for the Future (BSF) programme was launched in 2003 and aimed over a 15 year period to rebuild or refurbish every secondary school in England. Before coming to power the Conservative Party, and Mr Gove in particular, criticised the project as being unnecessarily bureaucratic and wasteful. In the week after its formation, the new Coalition Government announced the need to deliver £6bn in savings in 2010-2011 and to stop immediately any funding approvals made since the beginning of the year which were either not affordable or not consistent with the new Government's priorities. It was widely understood that the BSF programme would, in some way, be affected by the cuts.

On 5 July 2010 Mr Gove made a statement on education funding to the House of Commons and announced that, other than those BSF school projects specifically listed as being "saved", any future capital commitments would have to wait until the conclusion of the Government's review of capital expenditure, effectively ending the BSF programme. Mr Gove did say that he would take into account contractual commitments already entered into. In the ensuing debate there appeared to be some confusion over which schools were and were not affected and this confusion was not eradicated by the list of schools which was placed in the House of Commons library that day. Errors were contained on the list: most notably Sandwell's schools were all listed as unaffected whereas in fact the funding for all nine of Sandwell's schools had been stopped.

As the days went by the level of confusion did not dissipate. At first there was no reference to what would happen to councils which had schools to be delivered in a repeat wave of investment, there was only reference to schemes which had reached financial close and those which had not. It slowly emerged that for councils with repeat waves of funding, the repeat waves would not be allowed to continue if they had not got "Outline Business Case" approval before 1 January 2010. The stopped schools for all of the councils challenging this decision were in a repeat wave of funding, and none of those councils had reached Outline Business Case approval stage by 1 January 2010.

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What were the grounds for challenge?

- **Legitimate expectation:** The claimants argued that the Secretary of State had failed to take account of substantive legitimate expectations that funding would be granted. Although the BSF project documentation stated that funding was not guaranteed until a promissory note was received, it was argued by the claimants that the fact that they were encouraged to set up Local Education Partnerships (“LEPs”) and incur costs (and potential liabilities), created a legitimate expectation that, so long as the authorities stuck to their side of the bargain, the Government would do the same. The court accepted that public bodies enjoyed a wide discretion to change policies, and held that the Outline Business Case approval did not create a legitimate expectation that any given project would proceed.
- **Irrationality:** When the decision was first announced, the “financial close” date of the LEP procurement appeared to be the criterion Mr Gove used to decide which schemes should continue and which should stop. However, all of the claimants had reached financial close with their LEP and the argument was that Mr Gove’s decision was irrational because the basis on which it was made was not fully understood by him. The use of 1 January 2010 as the cut-off date and the rules-based approach adopted by the Secretary of State were also challenged on the ground of irrationality. The court held, however, that the decision was not open to challenge on a discrete rationality ground. The decision was a political and macro-economic one. If the Secretary of State had acted irrationally, that should be apparent without detailed enquiry, which, the judge found, was not the case here. The court was satisfied that the Secretary of State and his officials were not confused.
- **Fettering of discretion:** The Secretary of State admitted in his evidence that he adopted strict rules-based criteria. There would be “winners” and “losers” as a result of his decision, and he did not want to have to arbitrate between individual authorities or schools. He chose a rationale and he applied it strictly, admitting only few exceptions to his rule (specifically, sample schools in first wave schemes and Academies). The court held that the Secretary of State, even if making a one-off decision as opposed to creating a policy, had a duty not to fetter his discretion so as to preclude individual consideration of individual cases. The rules had been applied in an unlawful, hard-edged way.

In brief

The BSF case is important because it underlines that public bodies making difficult decisions about cuts have to consider the impact of those cuts on those who will be affected by them.

The way in which the Secretary of State abruptly stopped the claimants’ projects without any prior consultation with them, was so unfair as to amount to an abuse of power. There was no overriding public interest that precluded any consultation or justified the lack of consultation.

The Education Secretary must now take his decision again, with an open mind, and this time he must consult with the claimant authorities and have due regard to equalities impact.

- **Lack of consultation:** The claimants argued that there was a procedural legitimate expectation that, where the local authorities had been encouraged to pursue a particular path in the BSF programme (including establishing LEPs, tendering with contractors and incurring costs and potential liabilities), provided the authorities followed the steps that they had been told to, they would at least be consulted in a meaningful way before the Government decided that the path would no longer result in the funding the authorities expected. There had been no consultation with the authorities prior to the announcement being made. The court held that the BSF process had involved continuous and intense dialogue between the Department for Education and the local authorities, who, right up to the date of the decision, were acting and spending in reliance on that. The way in which the Secretary of State abruptly stopped the claimants’ projects without any prior consultation with them, was so unfair as to amount to an abuse of power. There was no overriding public interest that precluded any consultation or justified the lack of consultation.
- **Equalities Act duty:** All public bodies have a statutory duty to have due regard to equality issues. The Minister for Women and Equalities, Theresa May, had written to all Cabinet Ministers on 9 June 2010 reminding them of the need to have due regard during the context of the budget cuts. No equalities impact assessment was carried out prior to the decision being made to cut the funding. One was carried out after the decision and it showed that the decision to cut the funding would in fact have a disproportionate effect on disabled pupils and pupils with English as a second language. The Secretary of State commented, however, that even upon receipt of this, that factor did not change his mind. The court adopted the principles set out in the case of **R (Brown) v Secretary of State for Work and Pensions (2008)** and held that the duty to have due regard must be carried out before and at the time that the decision is taken, in substance, with rigour and with an open mind. The Secretary of State seemed to have had no regard to relevant duties at all, let alone rigorous regard.

Conclusion on the points of law

This case is important because it underlines that public bodies making difficult decisions about cuts have to consider the impact of those cuts on those who will be affected by them. Contrary to what some commentators have said (including Michael Howard on the Radio 4 Today programme on the first morning of the trial), the courts are reluctant to interfere with discretionary decisions other than where there has been manifest error. Courts recognise that they do not have access to the full background which should equip those decision-makers to take the decision. Equally, however, the courts protect the rights of those who might be affected by the decision by ensuring that decision makers reach their decisions in a manner which is lawful.

So what could Mr Gove have done differently?

None of the claimants was saying that Mr Gove did not have the power or authority to make the cuts in question. It was recognised that savings had to be made and a balancing exercise had to be carried out. The claimants were all deprived boroughs with schools in various stages of dilapidation. The proposed cuts would have had a disproportionate effect on already disadvantaged pupils. Further, the authorities had incurred significant liabilities and costs in setting up LEPs to deliver projects. If the funding was stopped, that expenditure would be wasted.

It would have been possible for Mr Gove to have run a short consultation period during which these different factors could have been weighed up, and perhaps ways of delivering the projects on a cheaper basis could have been explored rather than stopping them altogether.

What next for the BSF Claimants?

The Secretary of State's decisions to cut funding for the claimants' schools was quashed. He must now take his decision again, with an open mind, and this time he must consult with the claimant authorities and have due regard to equalities impact.



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The Community Right to Challenge and procurement

Part 4 Chapter 3 of the Localism Bill sets out the framework for a new Community Right to Challenge that will give communities the right to bid to take over local state-run services currently delivered by or on behalf of local authorities.

This article considers a number of procurement issues that are raised by the Right to Challenge provisions.

The Right to Challenge is linked in with the Community Right to Buy which aims to assist “community” organisations to purchase assets of community value, and the Right to Provide under which public sector workers will be given the right to form employee owned cooperatives and bid to take over services they currently deliver.

Localism Bill framework

The Right to Challenge is available only to a “relevant body”: this includes voluntary and community bodies, charities, parish councils and two or more staff of a relevant authority. It relates only to a “relevant service” defined as “a service provided by, or on behalf of, a relevant authority in the exercise of its functions”.

The provisions give a relevant body the right to submit an Expression of Interest (EoI) in providing a service currently provided by a “relevant authority” (a county council, district council or London borough, or other authority specified in regulations). The EoI is submitted to the relevant authority providing that service and that authority is then obliged to consider the EoI. The authority is required as part of its assessment to consider how the EoI and procurement exercise might promote or improve the social, economic or environmental well being of the authority’s area. The authority must also have regard to any guidance issued on the Right to Challenge by the Secretary of State.

The authority must then either accept, or accept with modification (subject to the agreement of the submitting body) or decline the EoI. Where the local authority declines the EoI it must give written reasons for its decision. Where the local authority accepts the EoI it must then carry out a procurement exercise relating to the provision of the service, in line with relevant legal requirements.

The consultation paper

In February 2011 DCLG issued a consultation paper on the detailed workings of the Right to Challenge which will be set out in regulations, to come into effect in 2012.

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Key features are:

- the Right to Challenge will apply only to services which are provided by, or on behalf of relevant authorities and not to the functions of the relevant authorities. Where a service is jointly commissioned then the question of whether or not the Right to Challenge is available will depend on whether the service relates to the function of a relevant authority. So, for example, if a service is jointly commissioned by a London borough (which is a relevant authority) and an NHS Trust (which is not a relevant authority) and the service relates to a function of the NHS Trust then the Right to Challenge will not be available. There will also be statutory and other exemptions;
 - to limit the burden on relevant authorities, they can specify periods during which Eols may be submitted so that they fall within the authority's commissioning cycle. If relevant authorities opt to specify periods then they may refuse to consider Eols submitted outside the specified periods for the relevant services. If periods are not specified then an Eol can be submitted at any time.
- The Secretary of State may specify minimum periods which relevant authorities must comply with when setting periods during which Eols may be submitted. Where no periods are specified by a relevant authority then the consultation paper states that "it will be for the authority to decide how it will manage this in a fair and transparent way";
- the relevant body must show that it is capable of providing or being involved in providing the relevant service. Alternatively, bodies can demonstrate that they are taking steps to ensure that they will be in such a position ahead of the procurement exercise. This is intended to assist small or newly formed voluntary and community organisations and local authority employees who may need to take further steps in order to participate in a tender process;
 - the regulations will specify minimum and maximum periods that must elapse between the date of a decision to accept an Eol and the date on which a procurement exercise commences. The consultation paper acknowledges that where common periods are set then it is important to allow for a range of circumstances and that longer periods may be appropriate in certain cases;

In brief

The new Community Right to Challenge will give communities the right to bid to take over local state-run services currently delivered by or on behalf of local authorities.

The consultation paper highlights the need for relevant authorities to comply with the Procurement Regulations where they apply and to use appropriate competitive processes where they do not.

Where a service is jointly commissioned then the question of whether or not the Right to Challenge is available will depend on whether the service relates to the function of a relevant authority.

- the paper confirms that the option to accept an Eol with agreed modifications is not intended to permit wholesale changes. The consultation paper proposes an exhaustive list of grounds for rejecting an Eol;
- the Secretary of State will have power to specify in regulations the minimum and maximum periods which must elapse between acceptance of an Eol and starting the procurement process. The consultation paper explains that the start of the procurement process should be understood as meaning when the tender is publicised. The consultation paper refers specifically to the need to accommodate organisations which may need time to prepare to tender; supporting an argument in favour of a minimum time period. It also acknowledges the need to ensure that the procurement process is not delayed for an unnecessarily long time, supporting an argument in favour of specifying a maximum time period. The consultation paper highlights the need to comply with the Public Contracts Regulations 2006 (the "Procurement Regulations") where they apply;
- DCLG is aware that relevant bodies, particularly small and new voluntary and community sector organisations, may benefit from support to improve their skills and expertise to prepare effective Eols and compete successfully in a procurement exercise. DCLG is considering what more general support measures could be made available to assist understanding of the Right to Challenge and the other new rights being introduced under the wider localism agenda. Relevant authorities must have regard to guidance issued by the Secretary of State on the Right to Challenge.

Procurement issues

The consultation paper points out that the Right to Challenge is not a right to deliver the service and that one outcome of a procurement exercise may be that the relevant body which originally exercised its Right to Challenge may not end up as the provider of the service. It is also careful to highlight the need for relevant authorities to comply with the Procurement Regulations where they apply and to use appropriate competitive processes where they do not.

The explanation of when the Procurement Regulations apply is rather over simplified and does not, for example, refer to requirements to advertise and comply with other positive Treaty obligations flowing from the EU cases. Future guidance would do well to provide information on these issues.

Well-being considerations

The provisions on acceptance of an EoI require the relevant authority to take account of the economic, social and environmental benefits of accepting an expression of interest. It also requires a relevant authority, in carrying out the procurement exercise, to "consider how it might promote or improve the social, economic and environmental well-being of the authority's area by means of that exercise". This raises the spectre of significant discussion around the issue of the extent to which social and environmental issues can legitimately be taken into account in a tender process. It also raises linked concerns about how far these provisions will be interpreted by the relevant authorities as legitimising the selection of tenderers and the acceptance of a tender using criteria linked to the location and local nature of a tendering organisation thus, potentially, resulting in discriminatory behaviour.

Transparency

A further area for concern is the extent to which transparency, non-discrimination and equal treatment can be maintained where a procurement process has been prompted by an EoI received from one of the tendering organisations. Relevant authorities will need to act with care to ensure that there is no actual or perceived bias resulting from pre-procurement links with the body, or bodies, submitting an EoI.

Careful records will need to be kept so that relevant authorities are able to demonstrate that pre-tender discussions have not tainted the process. Checks will need to be made to ensure that the tendered specification is not inappropriately influenced by the proposals in the original EoI and that the procurement process is not skewed in favour of a particular provider.

The dangers are even greater where the relevant authority accepts an EoI with modifications as in order to comply with the primary legislation the modifications will need to be agreed, and therefore presumably discussed, with the relevant body submitting the expression of interest.



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The consultation paper highlights the need for relevant authorities to comply with the Procurement Regulations where they apply and to use appropriate competitive processes where they do not.

Crunch time for local authority credit

Are you loaning money to employees or other individuals? Are you sure that you are compliant? Are the agreements enforceable? Are you risking committing a criminal offence? Adam Finch and Fran Mussellwhite look at issues that local authorities should consider if they are providing any form of credit to anyone.

We are increasingly seeing examples of local authorities offering forms of flexible credit agreements, especially to employees. While many entities are required to obtain a consumer credit licence from the Office of Fair Trading (OFT) in order to be able to offer loans of this type, local authorities are exempt from this requirement. However, they are still required to comply with all other provisions of the Consumer Credit Act 1974 (the CCA). There is a real risk that credit agreements will be deemed unenforceable without a court order if the agreements fail to adhere to the stringent and complex provisions in the CCA.

We are also seeing examples of local authorities requiring the debtor under these credit agreements to take out payment protection insurance (PPI) policies to cover the repayment of the loan in the event of the borrower being unable to repay the loan as a result of, for example, sickness or unemployment. In some cases, we have seen local authorities “self insuring” the loans by underwriting the insurance policies themselves rather than using a third party insurer. There is a risk that in doing so without authorisation by the Financial Services Authority, you will be committing a criminal offence.

Consumer credit agreements

A consumer credit agreement is an agreement between a creditor and an individual by which the creditor provides credit to the individual. Credit means a cash loan or any other form of financial accommodation where the debtor is allowed time to pay.

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Is it regulated?

The starting point is that where credit is made available to an individual, the agreement is likely to amount to a consumer credit agreement and will therefore be regulated by the CCA. There are exemptions from regulation under the CCA, however these are very limited in number and scope.

An example of an exemption from regulation under the CCA would be where the loan is for an amount of £25,000 or more and where the facility is entered into wholly or predominantly for the purposes of a business carried on by the borrower. To fall under this exemption, the loan agreement must include a declaration in the prescribed statutory form.

A more likely exemption is where the local authority makes a loan available to a particular class of individuals, for example employees, and not to the public generally. However, such loans must adhere to a number of rules, including those relating to charges and interest.

Compliance with the CCA

Despite the fact that local authorities are not required to obtain a licence from the OFT, they must comply with all other provisions of the CCA. The CCA contains stringent requirements as to, for example, the means of execution of a regulated consumer credit agreement. Failure to comply with these requirements will render the agreement unenforceable save upon an order of the court. We have increasingly seen examples of local authorities falling at this hurdle, causing additional cost to be incurred to have the agreements enforced.

What happens if the agreement is unfair?

Under the Consumer Credit Act 2006, if a court considers that an agreement between the creditor and the debtor gives rise to “unfairness” which is detrimental to the debtor, the court has a number of options available to it.

These include:

- refusing to enforce an agreement;
- requiring the return of monies paid; or
- altering the terms of an agreement in such manner as the court sees fit.

In brief

There is a real risk that credit agreements will be deemed unenforceable without a court order if the agreements fail to adhere to the stringent and complex provisions in the Consumer Credit Act.

Local authorities must take special care to ensure that the terms of any agreement are risk assessed to reduce the likelihood of an agreement being considered unfair.

Where local authorities have funded PPI policies to individuals, there are significant regulatory risks if it were determined that the local authority had undertaken a regulated activity for the purposes of FSMA without being an authorised person.

Unfortunately, there is little guidance from the courts on what they would treat as unfair. The obvious culprits are excessive interest rates and default charges. As such, local authorities must take special care to ensure that the terms of any agreement are risk assessed to reduce the likelihood of an agreement being considered unfair.

Payment Protection Insurance

By funding PPI policies for debtors, the local authority may be deemed to be arranging and underwriting contracts of insurance. These activities are regulated activities by the Financial Services Authority under the Financial Services and Markets Act 2000 (FSMA). In order to carry out a regulated activity in the United Kingdom, the provider of that regulated activity would need to be authorised under FSMA (unless any exemption was available).

Where local authorities have funded PPI policies to individuals, there are significant regulatory risks if it were determined that the local authority had undertaken a regulated activity for the purposes of FSMA without being an authorised person. The local authority will in this case be in breach of the “general prohibition” as set out in FSMA, and will have committed an offence. In addition, any insurance policies between the local authority and the individuals will be unenforceable.

It may be possible for a local authority providing PPI to argue that it is not undertaking such activity by way of business and therefore, that it is not undertaking a regulated activity under FSMA. Whether this is the case or not will vary significantly depending on the facts and circumstances and we would generally recommend that a local authority outsource the underwriting, effecting and administration of insurance policies to authorised, regulated third party insurers.

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New requirements from 1 February 2011

Finally, to add an additional layer of complexity, the Consumer Credit Directive came into force on 1 February 2011. The effects of the Directive are wide ranging on those consumer agreements that are not exempted. The main points include:

- a duty on the lender to provide an adequate explanation about the credit on offer;
- a duty on the lender to check the credit worthiness of the borrower prior to lending;
- a right of the borrower to cancel the agreement within 14 days without giving a reason;
- a right for the borrower to make partial early repayments;
- a change in how the APR is calculated; and
- a duty on credit intermediaries to disclose their status to the borrower in advertising and other materials and details of any fees charged.

What should I do?

If you are providing any form of credit, you should immediately review all credit and loan agreement schemes in place. Carefully check that you are compliant with the CCA legislation and that you are not carrying out any regulated activities unless authorised by the FSA.



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Looking after the Council's estate

In the present era of public spending cuts, reducing spends on repairs and maintenance is a popular first call to balance budgets. However, with capital to build new facilities even harder to obtain, a higher premium than ever should be placed upon managing and maintaining your estate, because it is likely to be the only one you will get for a number of years to come.

The cost of doing nothing to keep your estate properly maintained is the increased risk of catastrophic failure where a whole building and the services provided from it may need to be closed down for a period of time.

Starting with a plan

The starting point is to understand the present state of your estate, the scale of repairs and maintenance necessary to preserve its functionality and over what period the maintenance programme needs to be carried out. Does the existing use of buildings represent the most efficient use of space? Do you need all your current office or depot space? Can you reconfigure offices and create surplus space that can be sold off or mothballed pending better budgetary times? Can you create improvements in productivity and through life costs by refurbishment. What minimum spend is required to keep the estate safe and functional?

Following consideration of these issues, you can start to develop your plan for maintenance.

Basic models for repairs and maintenance

- **In-house provision:** an in-house direct service organisation may be responsible for repairs to some or all of the elements of the estate. This may be the most efficient approach, provided the internal resource is working efficiently and is it fully utilised.
- **Commissioning external contractors:** an in-house team may commission private sector contractors either on ad hoc arrangements, from framework arrangements or on simple term service arrangements. In all cases, care must be taken to ensure that, in aggregate, works and services do not exceed current EU thresholds and contracts are procured in compliance with the EU Procurement Regulations. Consideration also needs to be given to the extent of any overlap between the internal and external functions – make sure that large internal teams are not spending the majority of their time man-marking external contractors.
- **Strategic outsourcing arrangements:** the provision of the repairs and maintenance may be outsourced to a private sector contractor, usually involving a TUPE transfer of any existing in-house staff presently providing similar services. This approach should, as a minimum, involve a term maintenance arrangement with the contractor taking the lead in advising on necessary maintenance based on anticipated budgets and an asset management approach.

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- **Joint ventures:** outsourcing arrangements may also take the form of joint ventures with private sector organisations. These may be informal or delivered by means of a formal joint venture company. Specific types of joint venture presently being developed and used include:

Local Asset Based Vehicles (LABVs): where the public sector partner provides land and property to the joint venture, and the private sector matches the value of the land with a capital contribution to secure finance and kickstart the regeneration programme, with both parties sharing the proceeds from the sale or letting of the completed development.

Strategic Estates Partnerships: where the public sector partner seeks to make a step-change in service provision by utilising private sector investment and innovations for the strategic repair and maintenance of its estate.

- **PFI or similar:** the Private Finance Initiative may have had its day but other arrangements are already starting to emerge to allow private sector investment. These may be in the form of initial pump priming in an “invest to save” programme in return for control over the planning and delivery of the initial investment and a minimum period of contract. Simple models are already being used in highways maintenance and more developed models are likely to emerge to address maintenance backlogs.

Payment

There are a number of potential approaches to payment, although the most common starting points are:

- lump sums for specific groups of activities;
- tendered rates and prices for specified activities, possibly subject to some form of inflation indexation;
- payment of costs on an open book basis, usually subject to some form of target cost arrangement; or
- cost reimbursement (probably limited to circumstances where it is not practical to agree costs on one of the above bases).

In brief

The cost of a council doing nothing to keep its estate properly maintained is the increased risk of catastrophic failure.

Under any contractual arrangement lasting for a couple of years or more, some form of performance management will probably be helpful as a means of encouraging continuous improvement and focusing contractors on excellent service delivery.

The Private Finance Initiative may have had its day but other arrangements are already starting to emerge to allow private sector investment.

Performance management

Under any contractual arrangement lasting for a couple of years or more, some form of performance management will probably be helpful as a means of encouraging continuous improvement and focusing contractors on excellent service delivery.

A set of performance indicators needs to be specified or agreed, and calibrated according to their respective importance to provide a scoring mechanism. Scores above a specified minimum (either in respect of individual performance indicators or in relation to all of the indicators taken together) can then relate to incentives, for example entitling the contractor:

- to receive the whole of its profit element (an alternative arrangement would be an entitlement to the public sector partner to make performance deductions for under performance against performance indicators);
- to share in savings below target costs; and/or
- to extensions to the contract period.

Our recent experience

We have current commissions from both the health and local authority sectors to advise on procurement strategies for soft and hard facilities maintenance contracts in relation to corporate property, leisure and library facilities, schools estate, social housing stock, clinical acute facilities, mental health facilities and primary care facilities.

If any of the issues in this paper have struck a chord with you, we would welcome the chance to discuss your situation and concerns in more detail to help you develop an appropriate repairs and maintenance strategy.



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Section 20 leaseholder consultation – not to be overlooked in the procurement process

Financial pressures are causing authorities across the country to review the way they procure and deliver repairs and maintenance works to their housing stock. This article focuses on the consultation regime that will apply when an authority intends to enter into a Qualifying Long Term Agreement for discharging its repair and maintenance obligations.

Recent case law has brought into sharp relief the importance for local authorities of complying with the leaseholder consultation process in Section 20 of the Landlord and Tenant Act 1985 (“the Section 20 process”).

The Court of Appeal decision in **Daejan Investments Ltd v Benson [2011] EWCA Civ 38** is a stark reminder that a failure to comply strictly with the Section 20 process can have disastrous financial consequences for landlords. In Daejan, the tenants of a block of flats relied on their landlord’s failure to comply with the Section 20 process to prevent him from passing on £270,000 of expenditure to them through their service charge.

As a result, Daejan is a timely reminder that, where it applies, the Section 20 process must not be overlooked. Where contracts are to be re-procured, the process will have an impact on how a procurement process is undertaken and needs to be factored in from Day 1.

The Section 20 process – how it applies to local authorities

The Section 20 process has been on the statute book since 1985 when the Landlord and Tenant Act was introduced. The basic principle underpinning the process is that tenants who pay service charge and have a significant interest in their property should be consulted with by the landlord before the landlord embarks on major works or enters into any long term contracts for goods and services.

For local authorities, the good news is that the process does not apply to secure tenancies and only applies to “long tenancies”. This definition covers leases of more than 21 years, and right to buy leases granted under Part V of the Housing Act 1985.

Consequences of a failure to comply

The sanctions for failing to consult properly are that statutory caps are imposed on how much a landlord can recover through service charge. These are:

- £250 per flat/unit in relation to qualifying works
- £100 per flat/unit where works are done (and/or goods and services are supplied) under a “qualifying long term agreement” or “QLTA” (basically a contract lasting longer than 12 months).

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Where the amount to be recovered from all properties affected will be less than these figures, no leaseholder consultation is required. However, if costs could be higher for any affected property, statutory consultation must be undertaken otherwise the statutory caps will limit the amount which can be recovered.

In Daejan, these caps were applied by the Leasehold Valuation Tribunal (and on appeal, the Lands Tribunal) and this was why the landlord was unable to recover £270,000 of expense on works which fell within the tenants' service charge provisions in their tenancies. It is clear therefore that the stakes are high.

The consultation process

Section 20 is the statutory provision which imposes the obligation to consult, although all of the detail is set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (or the equivalent Welsh regulations).

The Regulations are detailed and impose different consultation regimes depending on whether the proposed costs relate to expenditure on "qualifying works" (i.e. works which will lead to a service charge liability of more than £250 per unit), or the entering into of a QLTA.

How the process works

The consultation requirements vary depending on the value of the proposed contract and whether or not the procurement will be subject to the EU procurement rules.

Stage One: the consultation process for a proposed QLTA starts with the service of a "notice of intention" by the landlord. The purpose of the notice is to provide leaseholders with basic information about the proposed contract and to invite their observations on it within 30 days.

If the OJEU process does not apply, the notice should invite nominations for the contractor from the leaseholders and any tenants' association. Nominations do not have to be requested if the procurement will be subject to the OJEU process, but the "notice of intention" needs to be sent out before the OJEU advert is placed to enable leaseholders to encourage their favourite contractor to reply to the OJEU advert.

In brief

Recent case law has brought the importance for local authorities of complying with the Section 20 leaseholder consultation process into sharp relief.

Where contracts are to be re-procured, the Section 20 process will have an impact on how a procurement process is undertaken and needs to be factored in from Day 1.

Failure to comply with the Section 20 process could lead to significant restrictions on the amounts which can be recovered through the service charge.

Stage Two: once the procurement process has been undertaken and a preferred contractor has been identified, a further consultation phase must take place. This involves the service of a second "notice of intention" on leaseholders, but this time providing much more detail about the terms of the proposed QLTA. The notice needs to provide leaseholders with:

- the identity of the contractor;
- any connections between the contractor and the council;
- the term of the contract;
- a summary of observations received from leaseholders to the first notice of intention and the council's formal response to each of them; and
- the best available costs information to allow leaseholders to understand the likely financial impact of the contract upon them (and if this is not available at the time, the council must say when it will become available).

Leaseholders need to be given a further 30 days to comment on the proposals and the QLTA cannot be entered into until the 30 day consultation period has expired and the authority has had proper regard to all comments received.

So, is that all that is required?

Not necessarily. Once a QLTA has been signed up, if specific works are to be carried out under the contract that would expose leaseholders to a service charge liability of more than £250, further consultation is required. However, as the contractor for those works will already be in place the consultation will relate to the nature and extent of the works and why they are required.

Dispensation

It is possible for a council to apply to the Leasehold Valuation Tribunal for dispensation from some or all of the consultation requirements in the Regulations. Applications for dispensation are becoming more common in respect of large or complicated procurements, and/or procurements designed to put in place framework arrangements (which do not sit well with the Section 20 process).

Dispensation can be applied for before or after the works have been carried out or the QLTA has been entered into. However, authorities are advised against reliance on retrospective applications for dispensation. This is what the landlord sought to do in Daejan, and he failed. The starting point for the LVT will be that the consultation process should be gone through unless there are good reasons to dispense with all or part of it. Mere inconvenience will not be enough.

If time permits, any application for dispensation should be made sufficiently early in the process to allow the authority to undertake the consultation process if dispensation is refused. However, taking upfront legal advice on the merits of a dispensation application is likely to be a prudent step, as this may enable an authority to avoid both the wasted time and effort on an unsuccessful application and the resultant delays to the procurement process.

Concluding remarks

Given the work involved in undertaking a re-procurement of contracts for goods and services which will affect service charge payments made by leaseholders, it is all too easy to overlook the Section 20 process. However, a failure to comply with the process could lead to significant restrictions on the amounts which can be recovered through the service charge. For an authority with anything more than a minimal number of "long tenancies", the adverse financial consequences of non-compliance with the Section 20 process could significantly eat into the targeted cost savings - which will no doubt be one of the main drivers for the procurement in the first place.



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Recent case law has brought the importance for local authorities of complying with the Section 20 leaseholder consultation process into sharp relief.

What future for Standards Committees ?

The Localism Bill will place a new duty on principal authorities in England to promote and maintain high standards of conduct among elected and co-opted members of the authority. It will also remove the present means of discharging this duty by abolishing the General Principles, the Model Code of Conduct, the Standards Board and local authority Standards Committees. In its place will be a new statutory Register of Members' Interests, with criminal penalties for failure to comply.

Peter Keith-Lucas considers how local authorities may fulfil this new duty.

Some members have suggested that their authority should do nothing other than implement the new statutory interests regime. But I would suggest that high standards of conduct go beyond mere compliance with a statutory interests regime. The General Principles indicate that Parliament considered that standards covered such issues as honesty and integrity, openness and accountability, respect for others, personal judgement and stewardship, so an authority which simply implemented the statutory interests regime would fail to address substantial areas of standards of member conduct, and so fail to discharge its new duty.

Non-statutory Code of Conduct

The Localism Bill envisages that authorities may wish to adopt their own non-statutory Code of Conduct, and it is hard to see how any authority could claim to promote and maintain high standards of conduct unless it had set out what standards it expected of its members. The simplest course would be simply to re-adopt the general conduct rules in paras. 3-7 of the Model Code, as these are the parts which will not be replaced by the statutory interests regime. If this non-statutory Code were applied to conduct as a councillor (and not getting into the complications of trying to apply the Code to conduct in private life), it is hard to see what can really be objected to. Does anyone seriously consider that it is appropriate for members to bully, breach confidentiality, misuse their positions for personal advantage, fail to treat people with respect, cause the authority to discriminate unlawfully, intimidate or victimise witnesses, bring their offices as members or their authorities into disrepute, misuse council resources or ignore statutory officers' advice?

Such a non-statutory Code could be supplemented by guidance to members on danger areas such as use of IT and the Internet, planning and lobbying, member-officer relations and gifts and hospitality.

However, the Localism Bill provides that, where a local authority does adopt a non-statutory Code of Conduct, it must then respond to any written complaints that a member or co-opted member has failed to comply with that Code by considering whether the matter should be investigated and, if satisfied by the investigation that a member or co-opted member has failed to comply, decide what action if any to take. This removes the un-lamented review sub-committee, and gives considerable freedom to delegate more of the process, to enable speedier investigation and resolution of simple matters.

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Investigation of complaints

It is possible to do all of this between the Monitoring Officer and full Council. But full Council is not a convenient forum for detailed examination of an investigation report so most councils will find it more convenient to set up a committee to advise them on how best to discharge the new duty and to undertake case-work on complaints. The Bill removes the rigid bureaucratic process for handling of complaints, so that this committee could allow the Monitoring Officer to seek local resolution and determine that a complaint need go no further if the complainant is satisfied with the member's response. To speed the process, the committee might say that the consent of the Chair would be required for a decision not to investigate a complaint, but that the Monitoring Officer could take the decision to initiate an investigation. The Monitoring Officer's investigation report might then go to the Standards Committee for examination, and to give the member an opportunity to respond.

Independent members

That raises the issue of whether such a committee can include co-opted independent members. Section 102(3) of the Local Government Act 1972 enables the co-option of non-councillors onto the committee, but s.13 of the Local Government and Housing Act 1989 prevents them from having a vote on the committee unless it is purely advisory. So, at present, it would be necessary for the committee to recommend any matter on to Council for decision, if the co-opted independent members are to have a vote. This may be positively advantageous on individual complaints, as full Council would have ownership of the matter, could remove the errant member from outside bodies and, with the approval of the member's Group Leader, remove the member from committees. But it would be tedious to have to wait for the next Council meeting where the committee was undertaking administrative steps such as trying to arrange member training. It would be welcome if the Government were to indicate a willingness to amend either the Localism Bill or the Committees and Political Groups Regulations 1990 to allow co-opted members full voting rights on non-statutory Standards Committees.

In brief

The Localism Bill abolishes the local authority Standards regime, replacing it with a new statutory Register of Members' Interests, with criminal penalties for failure to comply.

An authority which simply implemented the statutory interests regime would fail to address substantial areas of standards of member conduct, and so fail to discharge its new duty.

Without the statutory sanctions of suspension, an authority's ability to deal with serious member misconduct will be strictly circumscribed.

Ability to deal with member misconduct

Some councillors will misbehave. Their conduct can seriously disrupt the ability of an authority to discharge its functions effectively. They can discredit the authority with the public. Repeated leaking of confidential information deters citizens from confiding in the authority. They can drive out good officers and deter good candidates from seeking election to the Council. Breaches of the general conduct rules are rarely visible to the electorate and are rarely resolved through the ballot box, and an authority may need to limit the damage which an errant member can wreak before the next election.

Without the statutory sanctions of suspension, an authority's ability to deal with serious member misconduct will be strictly circumscribed. It can name and shame. Full Council can remove as Leader or, with the Group Leader's support it can remove from committees, and the Leader can be persuaded to remove the errant member from Cabinet. Where there is a failure to register interests, it can seek to persuade the Police to take an interest.

Few Standards Committees will mourn the loss of responsibility for parish and town councillors, but where a member is seriously disrupting the ability of the authority to discharge its functions effectively, such new non-statutory committees may feel that they lack the tools to fulfil the new statutory duty to promote and maintain high standards of conduct among members.



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The Stratford Taxis case – Licence to make policy decisions?

The Court of Appeal's judgment in the 007 Stratford Taxis case addresses the issue of whether the Cabinet of a local authority has the power to adopt a policy to direct the discharge of a non-executive function. In this article, Peter Keith-Lucas considers problems raised by the judgment, and its wider implications.

The facts

In **R (007 Stratford Taxis Ltd) v Stratford on Avon DC [2011] EWCA Civ 160**, the District Council's General Purposes Committee considered the merit of having a policy that all new taxis must have wheelchair access. But although taxi licensing is a non-executive function discharged by the General Purposes Committee under powers delegated to it by Council, the Committee recommended the draft policy to the authority's Cabinet, and it was the Cabinet which formally adopted the policy. That decision was challenged by a taxi operator (007 Stratford Taxis) some six months later on a number of grounds, including that the Cabinet was not competent to take the decision. The taxi operator contended that under the Local Authorities (Functions and Responsibilities) (England) Regulations 2000 ("the Functions and Responsibilities Regulations"), a decision to adopt a policy that all taxis should have wheelchair access was the exercise of a function which was calculated to facilitate, or was conducive or incidental to, the discharge of the power to license hackney carriage and private hire vehicles and so was a non-executive function, rather than the adoption of a plan or strategy that was an executive function.

At first instance the Recorder allowed the operator's application on a number of grounds, while upholding that the Cabinet's adoption of the policy was valid, but he dismissed their application as being out of time and refused an extension.

The District Council appealed to the Court of Appeal, but had no interest in challenging the Recorder's view that its policy had been validly adopted. So the issue appears as Ground 3 in the Court of Appeal's judgment and the polite thing would be to suggest that the absence of a strong challenge on this point meant that the Court of Appeal's determination of this point was less rigorously reasoned than it might have been.

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Vires

The Court of Appeal started by approaching the issue of vires: did Council or did the Cabinet have the statutory authority to adopt such a policy? The service legislation (the Town Police Clauses Act as supplemented by the Local Government (Miscellaneous Provisions) Act 1976) makes no mention of a policy. So the Court of Appeal considered whether the making of such a policy could be covered by s.111 of the Local Government Act 1972, which empowers an authority to do anything which is calculated to facilitate, conduce or incidental to, the discharge of the function of determining applications for taxi licences. The court admitted that, at first sight, the adoption of a policy might appear to facilitate the determination of applications to which the policy applied. However, it felt that the adoption of a policy fell more readily within the wording “plan or strategy” in the Functions and Responsibilities Regulations.

The court recognised a distinction between the political decision to adopt a policy and the determination of individual applications for taxi licences. However, it took the surprising view that the adoption of a policy did not facilitate or make easier the determination of individual applications as the policy was not directed to the individual exercise of the power to determine such applications. The court therefore held that the adoption of the policy was a function distinct from the determination of individual applications, and did not come within s.111.

Allocation of functions

This determination was critical, as the allocation of functions between Council and the Executive (Cabinet) also rests on the application of s.111. Section 13 of the Local Government Act 2000 allocates the authority’s powers between the Council and the Cabinet. It provides that all the powers of the authority are to be exercised by the Cabinet unless they are specifically reserved to Council by legislation, including regulations made under s.13. The Functions and Responsibilities Regulations are just such regulations, and reg.2 and Schedule 1 define that the determination of individual application for taxi licences shall be a non-executive function and, as such is exercisable by Council and can be delegated to a committee. But s.48(4) of the 2000 Act provides that any reference to the discharge of a function shall include reference to the doing of anything which is calculated to facilitate, conduce or incidental to the discharge of that function.

So, having determined that the adoption of the policy was not calculated to facilitate the determination of individual applications, the Court of Appeal concluded that, in line with the reference in the Regulations to “plan or strategy”, it must be an executive function.

This element of the judgment is surprising for three reasons:

- the policy sets a framework within which the individual application must be determined, such that clear and substantial reasons would be required for the Committee to depart from the policy. At least in common parlance, it would therefore seem to make the determination of individual applications easier (unless worded so poorly that it merely caused confusion);
- having started its analysis on the basis of vires, and finding the vires of the Council unsatisfactory, the court failed to examine the vires of the Cabinet with equal rigour. Local authorities are statutory corporations. They can only do what statute permits them to do. The Court of Appeal appears to have felt that the reference in the Functions and Responsibilities Regulations to “plans and strategies” provided the Cabinet with vires. But the Regulations do not purport to provide an original source of powers, they merely allocate existing powers between the Cabinet and Council. If there was legislation outside the regulations which gave a power to adopt a policy on taxi licensing, the regulations could allocate that power as between Cabinet and Council, but it could not grant the Cabinet a new power;
- further, the Court of Appeal failed to consider how a policy adopted by the Executive might govern the discharge of a function by the General Purposes Committee. Regulation 5 and Schedule 4 to the Regulations cover this in respect of the Cabinet, providing that, if the Cabinet wish to take a decision which is contrary to a policy approved by Council, it is a “departure decision” and must be referred by Cabinet to full Council for determination, except in cases of urgency. The regulations make no such provision in respect of a Committee of Council. In truth it would be redundant for the regulations to do so. The Committee’s powers to determine taxi licensing applications are delegated to the Committee by Council. So the Council’s adoption of a policy comprises an instruction to its agent Committee on how it is to

In brief

The Court of Appeal’s judgment is problematic, and has much wider implications than just taxi licensing.

The absence of a strong challenge means that the Court of Appeal’s determination was less rigorously reasoned than it might have been.

The council is not appealing the decision so it is unclear how this constitutional impasse can be resolved unless and until a similar case reaches the Court of Appeal.

discharge this delegated power. Even if Cabinet had the statutory power to adopt a policy in respect of the discharge of a non-executive function, there is no mechanism by which that policy would be binding upon the Committee.

Our view remains that, except where there is a specific statutory power to adopt a policy, the preparation and adoption of a policy for the discharge of a function is “calculated to facilitate, conducive or incidental to the discharge of” that function and comes within s.111. This means that the policy-making power would rest with Cabinet for executive functions and with Council (delegable to Committees) for non-executive functions. What reg.4 of the Functions and Responsibilities Regulations (which does not rate a mention in the Court of Appeal judgment) then does is to vary that arrangement in specific instances. So reg.4(1) - (3) provides that, in the specific instance where the policy is one which is either listed in Schedule 3 or which Council has resolved to adopt:

- the Council resolves that a draft policy is required;
- the policy preparation activity, which would normally fall to Council where the policy related to a non-executive function, falls to the Cabinet; and
- the approval of the policy remains with Council.

Implications of the judgment

The implications of the Court of Appeal’s judgment are far-reaching. Whereas the Local Government Act 2000 provided that the Cabinet must operate within the policies and budget set by Council, the Court of Appeal seems to have given the Cabinet the power to adopt policies which constrain the Council and its Committees in the discharge of their non-executive functions. The view that Council and its Committees should be subordinate to the Cabinet represents a radical re-invention of the 2000 Act.

The District Council is not appealing the Court of Appeal’s judgment, so it is unclear how this constitutional impasse can be resolved, unless and until a similar case reaches the Court of Appeal.



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Defamation on the web

In these times of austerity, many public bodies are making very difficult decisions which impact on staff and service users. The increased level of awareness and scrutiny of these decisions, coupled with the prevalence of social networking sites and online forums, means that local authorities are fighting a daily battle against critical comments posted online, some of which stray into the realms of libel.

Examples of these that we have advised on include:

- an anonymous blogger making repeated defamatory statements against a councillor and the council;
- defamatory statements made in the press and on websites by a former councillor; and
- defamatory statements made online by a serving BNP councillor against individual named officers.

In March 2011, the BBC reported that a Caerphilly councillor had agreed to pay £3,000 compensation together with “substantial” legal costs and to publish an apology, after he posted a libellous comment about a political rival on Twitter.

This article answers the ten most common questions we receive from our local authority clients about this issue.

1. How do I know whether a statement is defamatory?

A statement, whether spoken or written, is defamatory if it is said, or sent, to a third party and if it contains an untrue imputation against the reputation of an individual, company or organisation. Whether a statement is defamatory is a question of fact that the court will determine. The court will apply the natural and ordinary meaning of the words used, or any special meaning known to the third party to whom the words were spoken or sent.

2. Who is responsible for the publication?

The individual posting the comments is primarily liable. However, the operator of the website and the web host may also be liable if they have been made aware of the defamatory material. To find out who is running the website, the operator’s contact details may often be on the website itself. If it is not obvious, the contact details of the domain name owner will be held by the domain name registrar. Various searches can be carried out to establish this.

3. Who is entitled to sue?

A defamation claim can be brought by, amongst others, an individual (and in certain circumstances a group of individuals), limited companies, firms and LLPs. A claim cannot currently be brought by a local authority or by central government or by any other democratically elected governmental body.

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4. Can a local authority fund the costs of a claim brought by its employee against a third party?

As the law currently stands, a local authority can fund a claim brought by an individual officer and it can also assist an officer in defending such a claim, where it considers such public expenditure to be justified. The position is, however, different for members where a local authority is only entitled to fund a defence, but not a claim brought by an individual member. The only condition is that the statements made must refer to and be defamatory of the individual concerned.

In all cases you should bear in mind the potential cost, staff time and adverse publicity that a decision to fund a claim or defence could bring.

5. Can I get damages?

Yes, provided you are entitled to make out a claim and you succeed in your claim, the court will award you damages. Damages in a defamation claim are intended to compensate the claimant for the damage caused by the statement to the claimant's reputation. The current perceived limit for damages in such a claim is £200,000. However damages awards are frequently less than £10,000.

6. Are there any practical steps I can take to limit the damage caused?

It is always worth checking the website's content policy as it may be possible to request the removal of defamatory material by contacting the web host direct. Unfortunately, the content policy of a number of popular blog sites such as Twitter and Google's Blogger and Blogspot do not contain any such provision. Others, including wordpress.com, do. Although they will be responsible for the publication, the law provides web hosts and operators with a defence to a claim provided that they took reasonable care in relation to the publication, and did not know or had no reason to believe that what they did caused or contributed to the publication. In practice, it is very difficult for web hosts to rely on this defence once they have been put on notice that they are hosting or making available the alleged defamatory material.

In all cases, including those where it is not possible to make out a claim, it is worth considering whether to formally engage with the person making the statement in order to allay their concerns and to provide them with all the relevant facts. This may help prevent further defamatory statements being made. A positive publicity campaign counteracting the adverse comments may also assist.

7. What defences might be raised?

There are three main defences to a defamation claim:

- **Justification** is the ultimate defence and requires the maker of the statement to prove that the meaning of the defamatory statement is substantially true. They would therefore have to demonstrate that the "sting" or "gist" of the libel is true.
- **"Honest comment"**: this requires proof that the words are: (1) comment and not a statement of fact; (2) based on facts which are true or privileged; and (3) on a matter of public interest. Whether a matter is one of public interest depends on the factual circumstances in each case; however, it has been held that the private character and conduct of a person who fills a public office or takes part in public affairs may be the subject for honest comment in so far as it has reference to or tends to throw light on his or her fitness to occupy the office or perform the duties, but not otherwise. The administration of a local authority is also a matter of public interest. This defence is defeated by malice, which is established if the claimant shows that the defendant acted from an improper motive (e.g. spite, or revenge or personal gain). Proof that the defendant was aware that the statement in question was untrue, or was reckless as to its truth, is conclusive evidence of malice.
- **Qualified privilege**: this defence is available in a range of situations and arises where the person who makes the statement has an interest or a legal, social or moral duty to make it to the person to whom it is made. As with the defence of honest comment, qualified privilege is defeated if the maker of the statement was motivated by malice. Where the statements have been posted online (e.g. in a blog or on Twitter, both of which are potentially viewable by anyone) it would be difficult for the maker to demonstrate that the statements were made only to those who had an interest in receiving the statements (i.e. the community served by the local authority).

In brief

Local authorities are fighting a daily battle against critical comments posted online, some of which stray into the realms of libel.

A local authority can fund a claim brought by an individual officer and it can also assist an officer in defending such a claim. The position is different for members where a local authority is only entitled to fund a defence, but not a claim brought by an individual member.

The Ministry of Justice have published a draft Defamation Bill that proposes a new defence of 'responsible publication on a matter of public interest'.

The Ministry of Justice is currently consulting on proposals to reform the libel laws, including a draft Defamation Bill. If the Bill is enacted in its current form, the common law defences of justification and honest comment would be replaced by equivalent statutory defences, and a new defence of “responsible publication on a matter of public interest” introduced which would provide a defence where the maker can show that the statement complained of was, or formed part of, a statement on a matter of public interest, and that he or she acted responsibly in publishing the statement. The Bill would also extend the circumstances in which the defence of qualified privilege applies.

8. How can I find out who posted the statement?

Unless the person posting the comment indicates his or her email address or other contact details on the website, it is often very difficult to determine their identity. It may however be possible to obtain an order from the court requiring the web host to disclose to you the identity of the individual or their IP address.

9. Can I get the website closed down?

If none of the practical steps set out above succeed, and provided you have put the web host on notice that the site contains defamatory material, you will be entitled to and may succeed in obtaining an injunction against the web host requiring them to remove the material.

10. Am I liable for statements made by people within my organisation?

Yes, an employer is jointly liable for any defamatory statements made by an employee provided the employee was acting within the scope of his or her employment and authority. The question the court will determine is whether there is a sufficiently close connection between the employment and the defamatory statement.

Bevan Brittan has substantial experience in advising local authorities and other public sector bodies in connection with a range of defamatory material, including statements made in emails, blogs and on social networking sites. If you would like to discuss any of the issues raised in this article, please contact Wesley O’Brien or Emily Heard.



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Local Government Training Programme

Bevan Brittan's well recognised programme of training is designed to assist all local authorities in successfully implementing legal change.

If you have questions regarding the local government training programme please contact the Bevan Brittan events team.

E events@bevanbrittan.com

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Bevan Brittan local government team

Bevan Brittan's Authority view offers a general view of this ever changing and complex field. For more specific detail, there is no substitute for the professional advice provided by Bevan Brittan's leading local authority team of over 50 lawyers. In the first instance contact one of the following people.

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Bevan Brittan's local government team is keen to have feedback on the issues raised in this newsletter. Comments are welcomed by our specialists.

The information provided in this newsletter is intended to give general information about legal topics and is not intended to apply to specific circumstances. The contents of this newsletter should not, therefore, be regarded as constituting legal advice and should not be relied on as such. In relation to any particular problem that a reader may have you are advised to seek specific legal advice.

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