

Community management of library services - legal issues

1. Introduction

- 1.1. The purpose of this note is to set out the legal issues which arise in relation to the community management of libraries. This note is prepared in a context of radical proposals around libraries by a number of local authorities across England and Wales, in recognition of the public spending restrictions currently being applied to the public sector.
- 1.2. These are issues of some controversy that, particularly in relation to the statutory duty on library authorities outlined below, are already the subject both of litigation and of review by central government. Clearly the outcome of both these processes may affect the content of what is set below, along with the swiftly changing wider context, and it should be read in this light.
- 1.3. "Community management" in this context means the making of arrangements for third sector involvement in the delivery of libraries working with the relevant local authority, by means of either:
 - 1.3.1. a library building or assets being transferred to a third sector organisation ("TSO") or
 - 1.3.2. a similar transfer to a parish or town council or
 - 1.3.3. a contract for the delivery of library services being procured by the local authority.
- 1.4. The note explores legal issues which are common to these approaches as well as those which are particular to each.
- 1.5. These include:
 - 1.5.1. the statutory duty to provide library services, and
 - 1.5.2. how this duty may be affected by proposals to involve the third sector in the transfer or delivery of libraries.

2. The Statutory Duty

- 2.1. The Public Libraries & Museums Act 1964 ('the Act') provides for the duties of some Local Authorities to provide library services. The Act defines these authorities as "library authorities", and they are:
 - 2.1.1. county councils.
 - 2.1.2. metropolitan district councils.
 - 2.1.3. unitary authorities and
 - 2.1.4. London boroughs, and the Common Council of the City of London.
- 2.2. Under s7 of the Act there are general duties that are imposed upon library authorities. It is the duty of every library authority to provide "a comprehensive and efficient library service for all persons desiring to make use thereof".

- 2.3. Although a library authority has power to make facilities for the borrowing of books and other materials available to any person, it is not under a duty to make them available to persons other than those whose residence or place of work is within the authority's area or who are undergoing full-time education within that area.
- 2.4. In fulfilling its duty, a library authority must in particular have regard to the desirability of:
 - 2.4.1. securing, by the keeping of adequate stocks, by arrangements with other library authorities, and by any other appropriate means, that facilities are available for the borrowing of, or reference to, books and other printed matter, and pictures, gramophone records, films and other materials, sufficient in number, range and quality to meet the general requirements and any special requirements of both adults and children (our emphasis); and
 - 2.4.2. encouraging both adults and children to make full use of the library service, and providing advice as to its use and of making available such bibliographical and other information as may be required by persons using it; and
 - 2.4.3. in relation to any matter concerning the functions of both the library authority as such and any other authority whose functions are exercisable within the library area, securing that there is full co-operation between the persons engaged in carrying out those functions.
- 2.5. The overall authority in relation to the duties under the Act is the Secretary of State (now for culture, media and sport) who is responsible for superintending the library authorities and making sure that their duties are appropriately discharged.
- 2.6. The last (and only the second) time that the Secretary of State intervened formally in library matters was in the local inquiry into the provision of library facilities by Wirral MBC, in 2009. The inquiry found that Wirral MBC was in breach of its statutory duties, in relation to the proposed re-structuring of library services. The reasoning given is instructive in providing an interpretation of the general duty as it was applied at the time.
- 2.7. The Culture Minister Ed Vaizey MP wrote to local authorities in December 2010 and in February 2011 reminding them of their statutory duties under the Act, and raising key indicators of compliance. He said library authorities should provide:
 - 2.7.1. a statement of what the service is trying to achieve.
 - 2.7.2. a description of local needs, including the general and specific needs of adults and children who live, work and study in the area.
 - 2.7.3. a detailed description of how the service will be delivered and how the plans will fully take into account the demography of the area and the different needs of adults and children in different areas (both in general and specific terms); and
 - 2.7.4. information on the resources available for the service, including an annual budget.
- 2.8. We understand that there is a potential legal challenge pending both against some of the library authorities, in relation to their plans, and against the Secretary of State, for his alleged failure to intervene using his powers under the Act. However our understanding is that this has not resulted yet in a claim being issued in the courts.

3. The powers of authorities to enter into new delivery arrangements

- 3.1. Section 7 (2) of the Act provides that library authorities are to secure that library facilities are available "by arrangements with other library authorities, and by any other appropriate

means” (our emphasis). This latter wording gives, in our view, a principal power on which to rely in making arrangements for provision of library services by TSOs.

- 3.2. In our view library authorities could also rely on the “well being” powers set out in the Local Government Act 2000 if they are considering the transfer of assets or the procurement of library services, as in either case if the alternative is closure due to lack of funds, there is a clear social (and possibly economic) benefit to the community.
- 3.3. We therefore consider it unlikely that any alternative delivery arrangements authorities may put into place are likely to raise any issues in relation to vires for library authorities. When the new general power of competence under the Decentralisation and Localism Bill becomes law, then the position, we suggest, will become even clearer.

4. The procurement of library service provision by TSOs

- 4.1. Local authorities have a general power under section 1 of the Local Government (Contracts) Act 1997 to enter into contracts with any organisation for the provision of assets or services in relation to any local authority duty or function. There are examples of library authorities delegating their duties to third sector organisations.
- 4.2. If a library authority wishes to include the provision made by a transferred library within its scheme for compliance with its duties under the Act, then even if such a contract is entered into, the statutory duties under the Act remain with the relevant library authority. Documentation should therefore enable the authority to monitor how this duty is being met and ensure that, as a minimum, there are clear lines of reporting. TSOs will need to ensure that they are aware of those requirements and that documentation strikes the right balance between enabling the library authority to meet its statutory obligations, and allowing the TSO to develop the service according to community need or aspiration.
- 4.3. One option for library authorities to consider is the awarding of short term (3-5 year) contracts for library provision to allow the current market (such as it is) time to evolve, on the basis that the situation may be clearer and the market more mature when the time comes to re-let the contract.
- 4.4. **The Procurement process**
 - 4.4.1. Depending on the size of the transaction, the European procurement rules may apply. This is not the place for a full analysis of those rules¹.
 - 4.4.2. However, the detailed breakdown of the relevant CPV codes (the codes which define whether a service is “Part A”, requiring full procurement, or “Part B” services, which do not) states that “libraries, archives, museums and other cultural services” along with “library services” are all Part B services. “Recreational services” and “training services” (along with various sub categories) are also defined as Part B.
 - 4.4.3. Recent case law suggests that it is unlikely that a contract for the provision of library services, being Part B services, need be advertised, as there is unlikely to be sufficient EU cross-border interest in the contract. However, the library authority should still ensure that their general procurement rules are complied with, that the basic obligations under the EU treaty are met, and that they achieve value for money.

¹ The rules, as they apply to the third sector, are usefully set out in Pathways Through the Maze as published by NAVCA and NCVO, and available at: <http://www.navca.org.uk/publications/maze>

5. Community asset transfer and libraries

- 5.1. An alternative approach to the procurement of a TSO to run or manage the library service, is the transfer to a TSO of the library assets². Here typically the authority will transfer both the building in which the library is housed, and the library stock, to a TSO.
- 5.2. In this approach, if the library authority ceases to have any control over how (or, indeed, whether) a library service continues to be provided at the facility – or elsewhere – it must be assumed that the library authority can no longer consider the transferred asset to be part of its strategy to meet its duties under the 1964 Act.
- 5.3. If, however, the terms of the transfer require the recipient TSO to continue to provide a library facility, then this may well mean that the library authority is able to include the facility in its assessment of whether or not it is meeting its statutory duties, particularly if there is a continued relationship of monitoring or accountability between the authority and the TSO. The terms of any lease or transfer agreement will be key here.
- 5.4. We are aware of proposals involving a library authority which, while transferring individual library buildings to TSOs, is retaining the strategic library functions (for example book purchase, events in libraries) “in house”. The terms of the proposed arrangements require the TSOs to co-operate with the authority in the provision of the strategic functions. Such arrangements can only strengthen the authority’s case that they are able to meet the statutory duty notwithstanding the transfer of the assets.
- 5.5. However, this may mean that the authority is, in substance if not in name, procuring a service rather than simply transferring assets, which again raises the issue of an appropriate procurement process. We suggest that authorities should seek to be very clear on the nature of their proposed arrangements.
- 5.6. In practice, even if the arrangement is structured as the procurement of services, our view as stated above is that those services will be “Part B” services for the purposes of the EU procurement rules and therefore, in all probability, there will be no requirement to advertise the contract.
- 5.7. We are aware of a proposed transaction in which, notwithstanding the fact that it was expressed as an asset transfer, the local authority undertook a full EU compliant procurement process, in order to avoid there being any issue here. For the reasons stated above, we suggest that this may be a cautious approach.
- 5.8. **Ownership issues**
 - 5.8.1. At an early stage in any transfer process the owning library authority will need to consider its ownership of the building asset, including relevant title issues, and therefore its ability to transfer the building.
 - 5.8.2. There are some libraries which were originally provided under the scope of the Literary and Scientific Institutions Act 1854 (LSIA). LSIA provides for a right of reverter; as originally expressed, if the site ceased to be used for the purposes for which it was donated, then ownership would revert back to the original owners.
 - 5.8.3. This right of reversion was modified by the Reverter of Sites Act 1987, which

² There is extensive guidance on the legal process of community asset transfer generally which is available at <http://www.atu.org.uk/Support/legaltoolkit>

provides that where ownership would have reverted, the current owners (often the library authority) hold the site under a trust for sale under which they hold the proceeds for those who would have been entitled to ownership.

5.8.4. The key issue, therefore, is the question of whether the site has ceased to be used “for the purposes of the institution” (the wording in section 4 of LSIA). We would argue that if:

5.8.4.1. the library authority procures a library service from a TSO which may include the lease of an asset; or

5.8.4.2. the site is asset transferred to a TSO under terms which require the TSO to continue to provide a library facility;

5.8.5. then the purposes have not changed, despite the change in ownership, and the rights will not arise. However this will depend on the wording of title documents and the history of ownership and use in each use, and library authorities should take advice on these issues if they apply to sites which are considered for transfer.

5.9. Value and asset transfer

5.9.1. The library authority will also have to take a view on the value of the assets being transferred. In general, local authorities are required to achieve the “best consideration reasonably obtainable” when they are disposing of land based assets under the Local Government Act 1972. If they are seeking to dispose of land or buildings at less than the market value, then they have to obtain the consent of the Secretary of State for Communities and Local Government.

5.9.2. However, the Secretary of State has issued a number of “general” consents, that is, a set of conditions which, if they apply to a particular transfer, means that a local authority does not need to obtain specific permission to transfer at an “undervalue”.

5.9.3. The most important of these consents in a community asset transfer context is the General Disposal Consent 2003 (“the General Consent”). This permits authorities to transfer land at less than its market value, without the need to seek specific permission from the Secretary of State, provided that:

5.9.3.1. the purpose for which the land is to be transferred is likely to contribute to the “promotion or improvement” of the economic, social, or environmental well-being of the area; and

5.9.3.2. the difference between the market value of the land and the actual price paid for the disposal (if any) is not more than £2,000,000.

5.9.4. The conditions for the consent to apply mirror the wording of the “well-being power” in section 2 of the Local Government Act 2000, although the General Consent applies to a wider cross section of authorities than those actually covered by the Act.

5.9.5. It may be that, in practice, the assets in question do not have a particularly high value – especially if they are subject to restrictive covenants governing use which would restrict any commercial exploitation of the site. TSOs will need to satisfy themselves that, if a viable business plan depends on realising at least some value from library premises, there is nothing preventing them from so doing.

6. Transfer to town or parish councils

- 6.1. As an alternative to working with the third sector, some library authorities are considering transfer to the most local tier of local government. This raises a number of issues which are common to the transfers considered above, including the powers of library authorities themselves, and the questions of ownership and value if an asset transfer is proposed.
- 6.2. Part of the attraction of transfer to a parish or town council (referred to in the remainder of this section as "parish councils") may be their ability to raise additional revenue funding by means of the precept, and the continuing direct relationship with democratically elected councillors.
- 6.3. However there are issues which are raised by the particular nature of parish councils. Like local authorities, parish councils have a statutory basis for their existence, and may only carry out a particular type of activity if there is a clear basis for them to do so in law.
- 6.4. Parish councils are eligible to exercise the "well being" power in the Local Government Act 2000 if they meet the requirements in the Parish Councils (Power to Promote Well-being) (Prescribed Conditions) Order 2008. The conditions relate to:
 - 6.4.1. there being at least two thirds of the seats on the parish council filled at the most recent scheduled set of elections;
 - 6.4.2. the clerk having received certain training;
 - 6.4.3. 80% of the councillors also have received the relevant training; and
 - 6.4.4. the parish council having published a statement of intent as to community engagement.
- 6.5. If a parish council meets those conditions and can use the well being power, then this will in all probability provide a suitable power for their involvement in providing a library, particularly if they make reference to it in any statement on community engagement.
- 6.6. The Decentralisation and Localism Bill, in its current form, also provides that the new general power of competence will apply to "eligible" parish councils, which the impact assessment published by the Government defines as parish councils which "meet certain minimum standards". Once this power is in force, then again this would support a parish council becoming involved in the provision of library services.
- 6.7. However, for those parish councils which are not eligible to exercise the well being power, and who may not be able to meet the "minimum standards" (which are as yet undefined) in relation to the general power of competence, there must be some doubt concerning their powers in relation to library services. Parishes could consider relying on the residual power in section 137 of the Local Government Act 1972 ("the LGA") to incur expenditure "in the interests of their area ... or any part of it", but this power is subject to strictly defined financial limits.
- 6.8. Parish councils do have a number of specific powers which could be of assistance depending on the detail of proposals in each case. For example:
 - 6.8.1. under section 133 of the LGA, parish councils have the power to provide, or "contribute towards the expenses of" the provision of "buildings to be used for public meetings and assemblies". If this use is part of a multi purpose building including a library, then this power could be used to support a community organisation which could then run the library service and other services from the facility;
 - 6.8.2. under section 144 of the LGA, parish councils may provide facilities for

conferences, trade fairs, and exhibitions, or may encourage any other person to do so;

6.8.3. under section 19 of the Local Government (Miscellaneous Provisions) Act 1976, a parish council may provide “such recreational facilities as it thinks fit” including the power to charge (or not) for such provision, and to supply “assistance of any kind”. There is a specific power to provide either grant or loan support to “any voluntary organisation” providing such facilities under this section, and to provide grant support to any other local authority doing so (including any other parish council).

6.9. There may well, therefore, be scope for parish councils assisting with the provision of library services where such assistance can form part of a clear exercise of one of the above powers.

6.10. The other point to note, in relation to the Localism Bill, is that once that bill becomes law parish councils will have the power to exercise the “right to challenge” in relation to library services if they choose to do, as will TSOs. Parish councils may also be susceptible to the right to challenge them, although this will be clarified by regulations and is unclear as yet.

7. State aid

7.1. Library authorities should also consider whether the terms of any arrangement they are making with TSOs – whether by asset transfer or through a procurement route, or both – are likely to constitute illegal state aid under the EU rules.

7.2. This is not the place for a full exploration of the possible application of state aid, but in essence illegal state aid arises where there is aid which:

7.2.1. is granted by a Member State or through State resources – which would include any aid granted by library authorities.

7.2.2. favours certain undertakings, or the production of certain goods.

7.2.3. distorts (or threatens to distort) competition; and

7.2.4. has an effect on trade between Member States.

7.3. Such aid can be repayable if it is found to have taken place, with interest on the period since the time the aid has been given.

7.4. However, we understand that the European Courts are now taking a narrower approach and looking for more evidence that an effect on trade is possible in reality, rather than simply accepting theoretical possibilities. In the opinion of a leading barrister specialising in State Aid, recent cases require that an effect on trade is possible and there needs to be evidence to that effect. The 2009 case of Commission v Italian Republic and Wam SPA (C-494/06 P) is one example of thinking in this area.

7.5. A key question to consider is the extent to which there is a market for the delivery of library services which is the subject of cross border competition. It is unclear whether, and to what extent, commercial organisations are seeking to provide library services and we suspect that over the next 3-5 years the whole question of whether there is such a market will become clearer. This may also depend on the question of scale; a transfer of a single library asset or service to a local organisation is, in our view, very unlikely to be seen to affect the market for such services. However a procurement of the provision of all the libraries managed by a given library authority might very well attract competition.

7.6. Whilst, clearly, the question of whether State aid is applicable is a matter for assessment in each case, our preliminary view is that it is unlikely to be an issue in the majority of library

transfers. The question will partly depend on the question of a “market” in library provisions, but also, if so, whether the aid provided could actually affect trade between member states in the EU.

8. Staffing issues

- 8.1. Clearly if the service of providing a library, or indeed an asset at which staff are employed to provide such a service, is transferring, then both the library authority and the TSO involved will need to consider the possible application of the TUPE legislation. Having reviewed the legislation, our view is that TUPE would also apply to a transfer of a library from a library authority to a parish or town council.
- 8.2. Again, this is not the place for a full explanation of TUPE, but the position in summary is that where a service function transfers across to a new provider then, generally, TUPE will operate to transfer the employment of the staff associated with that function.
- 8.3. The staff who will transfer are those who immediately before any transfer are “assigned” to the part of the library authority providing the library service.
- 8.4. It may well be fairly clear cut whether individual staff will transfer or not. However, where there is doubt (perhaps because staff work partly on the part of the service transferring and partly on a retained element), then all the circumstances will be looked at to determine if staff transfer including:
 - 8.4.1. the amount of time spent on one part of the service or the other.
 - 8.4.2. the amount of value given to each part by the employee.
 - 8.4.3. the terms of the contract showing what the employee could be required to do; and
 - 8.4.4. how the cost to the authority of the employee’s work had been allocated between the different parts of the service.
- 8.5. TUPE ensures that the contracts of employment of staff do not terminate but are preserved. The pre-transfer contracts are regarded as having effect after the transfer as though they had originally been made between the staff member and the new employer.
- 8.6. The only exception to this rule relates to pension rights which are not transferred (although it should be noted that early retirement rights do transfer). However, there is a measure of protection for pensions where there is a transfer. At present, the position outlined in “A Fair Deal for Staff Pensions” continues to apply, whereby if staff transfer from a local authority, the new employer has to either arrange membership of the Local Government Pensions Scheme or make available a “broadly comparable” pension, which must be certified as such by Government actuaries.
- 8.7. These rules are currently under review. A consultation on this area has just closed, and further change is likely, so this position may change in the near future.
- 8.8. If TUPE is found to apply, then it will be clear from the above that it has consequences (and carries obligations) on both the authority and the new provider (TSO or parish council), and so this should be considered early on in any proposed transaction. In the case of a multiple transfer, involving a large number of staff, this is potentially a very significant issue which will require careful management.
- 8.9. The general position in regards to TUPE transfers from the public sector is under review at present. Earlier this year, the Code of Practice on Workforce Matters in Public Sector Service Contracts (“the Workforce Code”) and the Statement of Practice on Staff Transfers

in the Public Sector were abolished with immediate effect, meaning that from now on, where TSOs or parishes have received staff under TUPE, they will be able to employ any new staff, taken on following the transfer, on different terms and conditions from staff who have transferred.

- 8.10. In practice, if a library asset is transferring without any funding, or with a minimal grant in support, both the library authority and the receiving body will need to consider the question of redundancy. TUPE is not affected by funding considerations, and so it is possible, if the issue is not properly dealt with, that staff could transfer in a situation where recipient organisations will then immediately need to make them redundant.

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Anthony Collins Solicitors
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