LocalGovernmentLawyer

Insight

December 2018

The sands of time
How can local government legal ensure its own survival?

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Welcome to *Insight*. In this issue journalist Neasa MacErlean reports on the challenges to local authorities posed by the shortage of mid-level lawyers and finds out the short and long-term strategies they can adopt in response. We hear from Suki Binjal, President of Lawyers in Local Government (LLG), on her varied career at public sector organisations across the country and how during her time in office LLG has evolved to help its members thrive, not just survive, in the current climate. V. Charles Ward meanwhile provides some top tips on how local government lawyers can make the most of management roles.

Many local authority legal departments have considered whether they should set up an alternative business structure as they seek to widen their commercial opportunities beyond their immediate area, but relatively few have so far taken the plunge. Hilary Irving of First North Law, the first ABS in the North of England, explains why she and colleagues at North Yorkshire County Council went down this route and what it takes to get up and running.

The first area under the spotlight in this issue is child protection. Julien Foster of leading set 1GC provides a must-read article on the pitfalls in public law proceedings and how local authorities can avoid them. Graham Cole, LLG's National Lead Officer for Children's Services and Education, meanwhile calls on legal teams to do more to promote legal staff wellbeing, as more and more child care lawyers suffer from stress, anxiety and burnout.

We also look at current issues around Place, with articles including an analysis by Cornerstone Barristers' Matt Hutchings QC on the role of local authorities in housing supply, and Chris Plumley of Trowers & Hamlins on what can be done to unlock stalled development sites. As always, we are keen to receive feedback so do get in touch.

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Austerity has left authorities with a severe shortage of senior lawyers while a dearth of trainees and NQs is failing to swell the junior ranks. *Neasa MacErlean* assesses what can be done to close the gap.

Running out of time?

Is there a crisis brewing in the legal departments of local government? Or, more specifically, will there be enough lawyers in future to carry out the work demanded of them? And are we running out of leaders to direct these legal teams?

Calculations from *Local Government Lawyer* suggest that current ranks of lawyers would need to work to 77 (see box, p5) in order to maintain present numbers. But even this unlikely prospect would not resolve the difficulties.

Suki Binjal, President of Lawyers in Local Government (LLG) is particularly worried about the higher tiers. "There is a real shortage of 5 years plus qualifieds," she says. "These would be the heads of law and monitoring officers of the future. That really is a huge issue nationally." Hannah Cottam, a Director of Sellick, the largest local government locum recruiter, echoes Binjal's views: "There is a real gap at the top of the tree - of the young, dynamic, energetic leaders of the future. There is going to be a crisis at the top in the next five to 10 years."

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And Noel Inge, managing director of CILEx Law School (part of the Chartered Institute of Legal Executives) paints the picture somewhat more broadly: "There is insufficient staffing to do the work in local authorities. At every authority I visit they say they are absolutely stretched for resources."

So acute are shortages now, in fact, that Sellick estimates it is seeing a 20% increase in demand for locum placements.

The problem is particularly acute in certain areas. The three sectors that are most affected are, according to Sellick, childcare; contract; and, particularly in the south east, housing including debt recovery. Discussing childcare, Cottam says: "Historically councils paid whatever was needed. Now, because of the funding crisis, they can't offer big money anymore."

Supply and demand

One of the reasons for the current dearth of experienced mid-level lawyers in the profession has been the gradual drying up of new talent coming in at the bottom in the form of trainee solicitors.

Binjal remembers the days when local councils "used to have two or three trainees". But the post-2007 funding cuts changed that, and many authorities stopped trainee recruitment completely. Back at the start of this decade, the flow of annual traineeship registrations dipped so low that lawyers would need to have worked well beyond their life expectancy (to age 89) to maintain numbers.

Nowadays, those LAs which do recruit a trainee lawyer generally stick at one. But, in contrast with private practice, councils tend to let them go when they qualify. It remains an uphill task to persuade peers in HR and Finance of the value of retaining newly-qualifieds.

Jill Coule, who has just transferred from the Metropolitan Borough of Sefton to take up the position of Chief Legal & Monitoring Officer at the Liverpool City Region Combined Authority, is distinctly concerned. "The letting go of trainees is a real issue," she says. "I have let high quality newly-qualified solicitors walk out the door at the end of their training contract.

"Unless a vacancy coincides with a trainee solicitor departure/end of training contract, it's very difficult to keep hold of trainees that become *super numeri* to your staffing structure at the point of qualification? It does, therefore, mean that you don't get more of the benefit of the investment that you, your staff and the organisation have made to the trainees."

Rise of the machines?

So what can local authorities do if they struggle to push up recruitment numbers? AI (Artificial Intelligence) is another partial solution. "It would release lawyers to do more specialist work," says Binjal. "A lot of our work is routine which eventually could be picked up by AI. Most of the City firms have introduced it. There are huge areas where it could be used."

However, local government has not been a fast adopter - and Tanya Corsie of Iken predicts that even the most

Number crunching

How the figures stack up:

- Numbers of lawyer trainees starting in Local Government per annum (average of last three years) = 83
- Numbers of Law Society solicitors working in Local Government (average of last three years) = 4,491
- Therefore (4,491/83), lawyers need to work an average of 54 years to maintain the current workforce level
- Assuming lawyers qualify, on average, at age 23, they would need to work to age 77 (23 + 54) to maintain present numbers without external recruitment.

Source of statistics: Law Society of England and Wales

Shamsher Zada

Shamsher Zada is used to hearing the idea expressed that "local government lawyers might be frowned upon". Just two years out of training, he organises training and networking events for Junior Professionals nationally as part of his role at Lawyers in Local Government. "A question is almost always asked at each event," he says. "There is something of an ethos expressed that you're not as good as a City lawyer."

But the 28-year old clearly does not agree. Doing his training contract at Sandwell Metropolitan Borough Council in the West Midlands meant that he could stay near his family home. "It was more practical for me, and cheaper and meant that I could save," he said.

And, yes, he is aware that newly-qualifieds in the most competitive US firms in London earn over £140,000 while a NQ in local government earns nearer £30,000 - £35,000. "In London, especially with the cost of living, you'd be expecting to earn more. And even when you take out the higher travel and accommodation costs, there would still be a differential."

In local government, there are several very attractive benefits which compensate, he says - the pension, flexible working (in which you can take days off by building up overtime) and holidays (25 days a year for him now, but with the prospect of rising to 34 in the years to come). But what really interests him is the variety of work in the town halls. "I didn't want to be a lawyer working in just one area," he says, pointing out how often that happens in private practice. "As a trainee in local government, the variety of work is so wide - and I wanted knowledge of lots of areas." In his two years at Sandwell, he worked in litigation (including prosecutions), regulatory, employment, contract & procurement, property and - to his great pleasure - governance.

Because he enjoyed governance so much, a new area for him, he studied to gain accreditation in it. He is now working as a Solicitor at the City of Wolverhampton. Many trainees move on after qualifying, he says - partly because budget cuts might not mean there is money to employ them at that stage. But it is also easier in many cases, he adds, to be seen as a qualified solicitor - rather than as an ex-trainee - in a new environment.

Talking about life before and after qualifying, he says: "As a local government lawyer, you work on certain projects and then you see them in action. You see how people and the community benefit from them. It's very rewarding." He particularly enjoys contract and procurement and governance but would also be happy if in future he ended up working in other areas instead.

And he thinks that future trainees might be given more attractive financial terms. he says. "Local authorities are becoming more commercial. If they want to attract the right talent, they might offer an attractive salary."

pioneering local government "disrupters" are "a year or two" away from transition. Corsie is the Chief Operating Officer at Iken, the case and matter management IT specialist. The first step towards exploiting AI usually comes through accessing the Cloud. But Corsie says: "Cloud has been a lot slower to take off in local government than we had anticipated. Very few local authorities have transitioned their entire IT estate into a Cloud platform." Not even a quarter (22%) of local authorities are "actively moving" applications or infrastructures to the Cloud, according to research used by Iken.

In the meantime, local government is particularly focused on the recruitment of chartered legal executives and paralegals. "Local government is becoming more open-minded about recruiting people from different backgrounds," says Cottam. And Binjal says: "There is a reduced demand for trainee solicitors but we are meeting the demand with paralegals - and that reduces the cost."

About 40 local authorities are using apprenticeships to train paralegals and chartered legal executives through the CILEx Law School. It is difficult to predict precisely how these numbers might change since both CILEx and the SRA (Solicitors Regulation Authority) are reviewing their professional qualifications. Nonetheless, paralegal apprenticeships are becoming better understood while chartered legal executive apprenticeships, which only started in September 2017, have attracted the interest of several authorities.

Of the 40 authorities now working with the CILEx Law School, eight are city authorities, 27 are boroughs, four are counties and there is one shared services venture.

Inge explains some of the attractions for these employers: "Local authorities like paralegals because they can use a fixed term contract for two years. It should be the intention of the authority to keep the person on after but it is not mandatory…. Local government employers are often unaware that they can use the 'Apprenticeship Levy' [using 0.5% tax relief on pay bills over £3m] to pay training fees for existing employees through an apprenticeship. That will help them meet the government's target of at least 2.3% of the workforce in public sector bodies being apprentices by 2020."

Looking at the more practical issues of employing a trainee paralegal, Inge says: "Getting an apprentice adds firepower to a local authority's legal team. But when someone starts off they do require a lot of supervision. You have the dis-benefit of training them for the first few months. But our research suggests that after nine to 12 months they work much more independently."

He acknowledges that the difficulty for councils now is "finding the salary" for these trainees but he is confident that numbers will expand. He expects that more local authorities will follow the example of the leaders when they see the results. He says: "Some authorities are very far-sighted and quick to adapt the apprenticeship scheme into their workplace plans."

LLG has its own initiatives in the planning. Agreed in the first half of 2018 by discussions at board level, the development of a "new suite of tools" will be one of the main projects that LLG's new (and first) chief executive Deborah

Evans will be working on, according to Binjal. "We will be looking at the gap in the market, particularly in the middle years, to see what we can do." Focusing especially on the 5 years+ qualified sector, LLG wants to build "succession and resilience". Binjal talks of a range of areas of focus - "to build mentoring, secondments and career breaks; to work with the private sector; to have more collaboration".

Binjal hopes that the proposals will be ready "by about March 2019". She explains the underlying theme: "I advocate training your own people. So we should continue to offer training contracts. But it's in the middle that there are gaps: people retire and haven't built a succession plan. It's a national issue. We are losing people to the private sector, central government, health and industry - although some do a zig zag, and then come back to local government. But we haven't built a sustainable business model and we need to do that. We need to communicate that to local government chief executives and other stakeholders."

A broadening of the mind for recruiters and finance teams will also have to be part of the new approach. It will include people working longer but rarely to 77 (or 89). Speaking personally, Binjal says: "Looking at different flexible models of working is vital. So, for example, I will still carry on working two-to-three days per week until I am about 70. But we have to think about how we use experienced members of an organisation." Coule, who has already clocked up 24 years, probably speaks for many when she says: "I personally have no plans to work until 77!"

Exchanges and closer collaboration with the private sector will play a part in LLG thinking. Law firm Browne Jacobson and NWL Legal Focus (the Legal Services Team at North West Leicestershire District Council) launched a partnership on education in 2016. This might stand as a model for the future - although, in this case, not a great deal of joint working is taking place now.

But Coule is keen that lawyers from private practice contribute their different perspectives within the public sector. At Sefton, Coule's six-strong senior legal management team was equally split between lawyers who had trained in the private and public sectors. She says: "It's important to have a balance of staff that can bring skills, knowledge and ways of working that are different to your own so that you have a more rounded and professional legal team."

And Cottam says she sees a regular flow of lawyers leaving mid-tier firms and the High Street for local government. It might not represent more than one in 20 candidates but it is a recognisable trend. Some are burnt out by stress, some "feel they are like machines" and others say "there isn't enough career progression". Local government salaries may be dwarfed by the £143,000 offered to newly-qualifieds by some firms in the City of London but the City burn-out cases "are no longer just wanting money", she adds.

But despite the current challenges, there are some fundamental attractions to working in local government which will still draw candidates. Helen McGrath, policy and communications manager at LLG, lists some of them - "very good equality, flexible working, excellent benefits and much greater sympathy to personal obligations".

On work/life balance - an area which used to be better in local government - she gives a qualified opinion: "Fifteen years ago local government lawyers could do 9 to 5. But in 2007 and afterwards there were major changes and cutbacks. And now it's not uncommon for local authority lawyers to be putting in a huge number of hours."

The pension is another reason that candidates consider local authorities. The Local Government Pension Scheme is listed as one of the top ten by Moneywise which gives the example of a 40-yer old town planner [who could be a lawyer instead] earning £40,000 and who "can look forward to an annual income of around £29,500 if they retire at age 65". By contrast, the average person retiring in 2018 will receive about a third less - £19,900 a year, according to the Prudential.

So if local authority employers could manage to become more flexible and efficient in their hiring and training strategies, they could find that they already have the tools to solve their recruitment challenges.

Neasa MacErlean is a freelance journalist

Case Study - Sonny Groom

If he had chosen another path in life, Sonny Groom would now be starting out his career with over £40,000 of debts. But, having decided not to go to university, the 22-year old believes he has found what is "probably the best way forward" in the law for non-graduates. As a paralegal apprentice, he works in the legal team at the London Borough of Barking and Dagenham, spending a fifth of his time on the paralegal distance learning course run by the Chartered Institute of Legal Executives.

A year into the two-year course, he has already worked in Housing, Property, Contracts, Adults safeguarding and (now) Children's Safeguarding. He can draft a range of documents including letters of instruction and police protocol requests. He prepares court bundles. He learnt these skills mainly through on-the-job learning, backed up by the study - a module on client care, for instance, which includes client communication. "I've been given more and more responsibility as time has gone on," he says, explaining what he enjoys about his work life. "I'm working for our clients. The days go quite quickly."

But four years ago his developing CV was not pointing towards the law. When he left his Dagenham school, he had a triple science BTEC (the equivalent of A levels). After visits to the Job Centre and Job Shop he had his choice of eight different career starts. He chose an apprenticeship route into Business Administration within the legal team at Barking and Dagenham Council. When he completed that he decided to specialise in the legal side, rather than staying within legal admin.

Every Monday afternoon - and also for two other two-hour slots each week - he takes his lap top away from his desk to go "somewhere quieter" in order to study. The borough pays the course fees to the Institute." I get the opportunity to do the legal work and then the studying allows me to put it in context."

He is particularly looking forward to the chance he will get to work in litigation. If he had to bet on it now, he thinks this is where he would like to end up. "They always seem to be busy with different businesses and diverse cases," he says.

A commitment to public service and a willingness to move for the right opportunity have seen Suki Binjal, President of LLG, work for public bodies across England. *Philip Hoult* finds out what she considers to be the key challenges for local government lawyers.

The road from here

Suki Binjal, who is in the middle of her term as President of Lawyers in Local Government (LLG), is the first lawyer in her family. Studying business at Hammersmith College, an interest in law was first piqued by a summer job as an outdoor clerk for a criminal law firm in Shepherd's Bush.

Although ultimately not attracted to working in that particular field, it did mean that she went to the University of Wolverhampton to do a law degree.

A spell of teaching law at a 6th form college, whilst also working for a high street law firm, called Tedstone, George & Dove, in the Midlands followed, before she went to the College of Law in Guildford to complete the Law Society Finals. Then the legal market – in the mid-90s – turned as the recession hit.

"Whilst awaiting a training contract, I landed a job in Westminster City Council's housing department, in its housing protection team. I thoroughly enjoyed this role, which at times could be challenging, simply due to the nature of the private sector landlords.

"But Westminster was my light bulb moment, realising that I found local government really fulfilling. I felt I could relate to local communities and to changing lives in a positive way."

Westminster was very accommodating towards another of Binjal's loves, travelling, which she did, on and off, for 18 months, around work commitments. "When I got back, I applied for a training contract in a district council in Nottinghamshire - Bassetlaw District Council."

So she moved up to Nottinghamshire for what turned out to be another of many formative experiences. "The work was very interesting. It was a rural district where you had to be a Jack of all trades. It was a good foundation for learning all about district councils. I started to gain an understanding of being a policy maker, a regulator, an employer and service provider."

During her time at Worksop, Binjal got to handle a lot of housing work. As soon as she completed her training, she managed to secure the role of Principal Housing Lawyer at Blackpool Borough Council. So again she was on the move. But she also wanted to expand her knowledge of local government and frontline services and Blackpool was to prove the perfect opportunity to do that.

"I was there when it became a unitary authority," she says. "I managed the childcare and adult team and other new services that came into the council. David Eccles, the then Director of Legal Services, showed me how you could step from one role to another. It was one of those lovely ways of not mothering you or smothering you, but empowering, involving and teaching you."

"There are some clients who just see the legal team as the ones they go to for legal advice and that's it. Rather than going to them for help in delivering what they want to deliver, or to work together as partners because you all work for the council. I think that bit has been lost. We need to work collaboratively, to deliver whatever the mayor's or leader's priorities are; what the corporate plans require."

Eventually Binjal decided to return to London for family reasons, and to fit in some more travel. But before she could leave, she was approached about becoming the interim Director of Law at the Commission for Racial Equality (which in due course became part of the Equality & Human Rights Commission). It was a big break to be part of Central Government and travelling could wait.

"It was a challenging period for the CRE and I had to give the Commission some robust advice on certain occasions. But I didn't shy away from doing that," she says. "I also shaped their first strategy on how they directed their legal resources and decided which cases they would take on – up to that point the causes, whilst commendable, were piecemeal. The strategy provided the legal team with a strategic direction and an organisational focus."

Suki finally went travelling (again), and her travelling companion became her husband. On her return to the UK, an eight-month spell at the Local Government Association provided an opportunity to help shape legal policy in the aftermath of the Victoria Climbié case and with the prospective introduction of the Children Act 2004. Subsequent stints at Westminster (again), Tower Hamlets Council and Portsmouth City Council were to give her the opportunity to run a wider range of services beyond legal.

These experiences encouraged Binjal to set up her consultancy and she has not looked back since, with spells at a range of organisations before landing at Hackney – on a fixed-term contract. "It is niche, working with organisations that are ambitious and want to change, want to create different models of service and drive traditional legal services models into the 21st century.

"I have helped recruit permanent directors of law and also delivered alternative service delivery vehicles including advising on devolution. My briefs have not been to sit and watch, the directorate whilst the recruitment of a permanent director concludes. My consultancy roles are challenging but I get

to do something that makes a difference. My commitment is there for the organisation and I can see things from a different perspective."

So what does she see as some of the key issues facing the local government legal profession? Having a handle on the increasingly complex governance arrangements in place is one, she says. "It is a case of really understanding the relationship with the citizen and scrutiny, whilst setting up alternative, perhaps commercial vehicles. The residents need to see a clear line of sight and accountability to the decision makers." This is particularly true in the aftermath of the tragedy at Grenfell Tower. It is important for lawyers to remain connected with their communities, she says.

Lawyers also have to understand the political and governance frameworks and, even more importantly, be able to manage risk, she argues. Understanding the local political environment is something that she suggests has been made more difficult by the move away from committee structures.

This is linked to another challenge faced by local authority legal teams, that Binjal identifies – career development and succession planning, and not just for those with an eye on being a Director of Legal Services or Monitoring Officer.

"We need to create a structure that allows both generalists and specialists to progress and be rewarded in local government," she says. "I think for someone starting out now [in local government legal practice] it is an exciting, but also a challenging time. The budget cuts have opened doors for us to be creative and pioneering as lawyers, finding solutions and applying the law in such ways that deliver ambitious results for our councils. You can actually be a lawyer that makes a difference – supporting the public sector interest."

But the perception is still there in some quarters that the legal team are blockers rather than enablers, she admits. "There are some colleagues that still view the legal team as the ones they go to for legal advice and that's it. Rather than going to them for help in delivering what they want to deliver, or to work together as partners because, after all, we all work for the 'one' council. I think that the in-house re-charging model – 'playing internal shops', has lost its focus – we all only have one pot of money, which is the same pot. My view is that we need to work collaboratively, also with other public sector service providers, to deliver the vision of the democratically elected leaders."

The need for local authorities and their legal teams to work more collaboratively with other councils, external partners and service providers has been an important development, according to Binjal.

She believes that there is greater scope for 'soft' collaboration with other legal teams and private practice, rather than necessarily a need to pursue ever-larger shared legal services or alternative business structures. "I think that has gone as far as it can. There's an appetite for people to do more, smaller collaborative working. I have used framework arrangements to have in place secondees to work alongside our in-house lawyers and together they have provided the in-house service. Explore other models to bridge the resources gap. A lot of my peers have probably said that trading has had its day – let's think of other ways, which I think are genuine collaborative, working partnerships."

It is not just legal-to-legal collaboration either, she says, pointing to the importance of co-operation with other local government professionals and different sectors such as health. And, she argues, this is one of the ways that LLG – as the national representative body for lawyers in the sector – is making a difference. "We can make sure we are plugging those gaps. We need to open a door for people to connect with their health colleagues."

For Binjal, the recent appointment of the organisation's first chief executive – Deborah Evans, a former chief executive of the Association of Personal Injury Lawyers and the Law Society's Legal Complaints Service (as was) – is a significant moment in its development.

"It will be pivotal not only for our membership, but also for our stakeholders and corporate partners," she says. "As presidents come and go they bring their own style, they bring their own key issues. Having Deborah in place will help deliver a strategic vision – which is longer than a presidency term. LLG is supporting, connecting at a national level and is moving towards a campaigning organisation, whilst forging relationships with SOLACE, CIPFA, ADSO and CfPS to name a few."

As well as bolstering LLG's representative role on the national stage, the appointment will aid its work helping lawyers to develop their careers in the sector, and help legal and governance departments tackle thorny issues around recruitment and retention.

"We need to create a structure that allows both generalists and specialists to progress and be rewarded in local government. I think for someone starting out now [in local government legal practice] it is such an exciting, but challenging time. The budget cuts have opened doors for us to be creative and pioneering as lawyers, finding solutions and applying the law in such ways that deliver really good results for our councils. You can actually be a person that makes a difference."

"We can recruit, but we can't retain and there is a reason why – it is because we are not highlighting clear lines of succession – to becoming a head of law, or a director, or a chief executive," Binjal argues.

"One of the things I am doing here in Hackney is modernising the service and developing legal talent. I would like to leave a legacy where a member of the team can arrive as a trainee solicitor and feel that in, say eight to ten years' time, that they can become a director."

LLG can really help with that, she says. "As a membership organisation, we are truly focused on proving support and for training /junior lawyers and also provide excellent courses for specialists. And we are very good at providing support and championing our more experienced member, such as the heads of service and the monitoring officers. But it is the lawyers at the start and middle stages of their careers that we need to attract and retain to move into more senior roles in the future. LLG is currently building a campaign agenda focused exclusively on doing just that.

For Binjal, whose term of office at LLG runs until March 2019, it is the opportunity to continue making a difference that keeps her motivated – and a reason why she has always resisted the lure of private practice. "For me, the key driver isn't just the financial rewards. Yes, of course, the rewards can be excellent in private practice, but I think there is greater flexibility and more choice in what you do in your day job in local government. I like the broad strategic approach and the ability to serve the communities in which we all live."

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What does it take to set up a legal services alternative business structure? *Hilary Irving* of North Yorkshire County Council outlines the risks and rewards.

Striking out in a new direction: Setting up an ABS

North Yorkshire County Council's legal department has a long history of providing value-for-money services to their colleagues at the council and external clients. We are an innovative, commercially-focused legal team and we like to keep ourselves at the forefront of the latest legal developments.

The exciting prospect of setting up an alternative business structure, or ABS, captured our entrepreneurial spirit particularly as we would be the first to evolve from an in-house legal team in the North of England.

We are confident that our expertise and knowledge would provide a valuable resource to others. However, due to regulatory rules, we are not able to sell our services more widely than the North Yorkshire boundaries.

Our aim was to provide legal services to the public, private and voluntary sectors through a stand-alone company initially using seconded resource from NYCC. Thus, First North Law Ltd was born.

I was under no illusion that it was going to be easy; I needed to draw on a multitude of skills that I had developed along the way in traditional legal roles and also from my experience of setting up my own company outside of my legal career.

Firstly, we looked at our unique selling points; what customers would want; and how we could compete in the market place with our private sector colleagues. We needed to play to our strengths and start with a sector in which we excel - the education legal advice sector - and exploit our significant expertise in this area.

Finding our place

We quickly identified our unique selling points which are listed below.

1. We are a trusted brand: we are North Yorkshire County Council's in-house team but are seconded to work for First North Law. Whilst we have a specialist legal education advice team, we provide a full range of legal support from commercial/procurement support, employment law to children's/adult's social care advice.

2. First North Law operates with a strong public sector ethos and profits made will be invested back into the public sector. Our customers will benefit from receiving excellent legal services that are extremely competitively priced in comparison with other legal services providers. We work in true partnership with our customers.

3. We offer a significant range of legal services and have particular expertise in the education sector; we understand the legal duties and challenges faced in this area and this enables us to achieve the best outcomes for our customers. Our legal advice helpline provides services to schools, colleges and academies and has been operational for over 17 years. Our legal services in this area are second to none.

4. We act with transparency, honesty and reliability built into every aspect of our work to give complete confidence in our services and charges to our customers.

Lining up the hurdles

We also needed to identify and overcome the challenges ahead.

We knew, in the real world, we were not going to be able to be completely certain about our business uptake and growth; as with the majority of new 'start up' companies, this was going to be a risk management exercise between best and worst case scenarios. We communicated this very clearly to our elected members and senior management.

We were careful to keep the development team small and worked with colleagues who had experience of working 'outside the box' and who were skilled at securing cooperation from others. This kept bureaucracy in decision-making to a minimum and allowed the project to develop at pace.

We did not want this project to be 'just another job', it was important for everyone to understand that this constituted an important opportunity to diversify workload, generate revenue, and provide job security for the future. Securing this goodwill, support and willingness to learn new systems and processes and adopt a more commercial mind-set was instrumental to the success of the project.

It was also critical to get elected member and NYCC senior management

I was under no illusion that it was going to be easy; I needed to draw on a multitude of skills that I had developed along the way in traditional legal roles. and also from my experience of setting up my own company outside of my legal career.

'buy-in' for the commercial venture and to make sure they accepted the risks in creating a new company which could not absolutely guarantee any set returns on investment.

We set up a good governance and decision-making framework for the company which included regular board meetings and monitoring sessions for the Compliance Officer for Legal Practice (COLP) and the Compliance Officer for Finance and Administration (COFA). This not only kept the pace for the project development but it also gave confidence to our senior management.

In order to secure SRA approval for First North Law, we had to work closely with the SRA; we established an excellent client relationship contact, who guided and supported us with the ABS application process. Face-to-face meetings reaped benefits and helped with the relationship.

We recognised the need to use the right kind of expertise at the right time, whether that be internal services or outside expertise. We worked very closely with our internal systems colleagues in order to put in place the framework and processes to allow First North Law to operate with clear separation from the NYCC systems. The technical steps to this can be challenging, especially in terms of technology, and it was crucial to get internal key players on board early.

It was essential to implement a charging structure (at realistic commercial rates) to allow NYCC to charge First North Law for any services rendered (either directly via seconded staff hours or indirectly via support/systems functions) in order to provide an audit trail which would demonstrate that public services were not being inappropriately used and that the public sector is not subsidising the wholly owned company.

Setting up First North Law is one of the most challenging but satisfying tasks I have undertaken during a long legal career. The launch of the company and 'opening the shop door' was a very exciting moment in recognition for all that we had achieved.

Some background

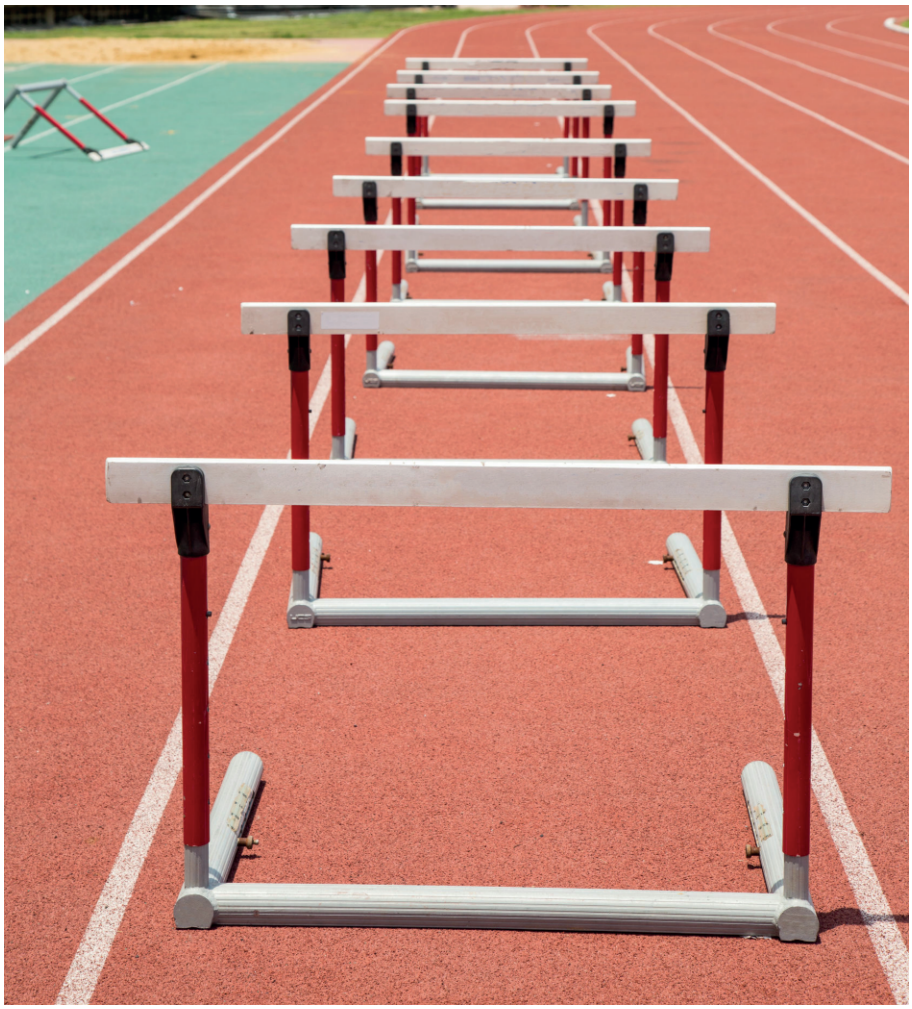
The creation of First North Law was developed to support North Yorkshire County Council's commercial growth and is one of the companies that forms part of the expanding portfolio of services offered to external markets. These commercial ambitions are driven by the council's determination to protect as well as transform frontline services.

North Yorkshire's trading arm already generates around £95m, contributes £2.2m towards the costs of the council and adds £3.6m profit on top.

First North Law, as the name simply suggests, is the first ABS developed from a local authority in the North of England to trade in legal services. I am proud to have set up a company which showcases the skills of a legal team that has an enviable background and reputation in the provision of legal services and in achieving excellent customer satisfaction.

We believe First North Law is a law firm with a difference: we take pride in the services we offer and are confident that the company will thrive and achieve a strong customer base in order to achieve our commercial ambitions.

Hilary Irving is a Director of First North Law.



Rosalee Dorfman Mohajer **looks at the implications of the Cliff Richard judgment against the BBC and South Yorkshire Police for local authorities when they share information with the press.**

Through the looking glass

Sir Cliff Richard v the British Broadcasting Corporation and The Chief Constable of South Yorkshire Police [2018] EWHC 1837 (Ch) (18th July 2018)

On 14th August 2014 South Yorkshire Police searched the home of Sir Cliff Richard, as part of an investigation into a complaint of historic child sexual abuse. This was not an ordinary search – the BBC had rolling live coverage with a helicopter filming the celebrity and police searching his flat. The BBC found out about the investigation from a source who should not have revealed it to them and the South Yorkshire Police notified them of the search date. In 2016 the investigation was dropped.

Sir Cliff Richard brought a claim against South Yorkshire Police for informing the BBC and the BBC for informing the world, thereby infringing his privacy and data protection rights. The High Court found that the defendants did infringe Sir Cliff's privacy rights and declined to determine his data protection rights because the claimant would not get higher awards. Accordingly, the defendants had to pay £210,000 in damages which was split 65:35 as between the BBC and South Yorkshire Police.

In this case Mr Justice Mann had to balance two competing rights – the individual's right to respect for his private and family life (Article 8 European Convention on Human Rights(CEHC) and the right to freedom of expression (Article 10 ECHR), which underlies press freedom.

He came down on the side of the individual, and perhaps inadvertently, made a significant change in the law by stating that the *prima facie* position, i.e. a presumption, that an individual will have a legitimate expectation that a criminal investigation against them will be kept private, which then raises the conflict between Article 8 and Article 10. Below I set out Mann J's reasoning and lessons for local authorities when working with the media.

Analysis of judgment

The approach the judge took to considering Sir Cliffs's claim was: (1) Did Sir Cliff have a legitimate expectation of privacy in relation to the investigation and search? (2) If so, was there an infringement of his privacy rights and what were the damages?

In short, the judge found that the answer was yes to both questions. The judge found that *prima facie* an individual has a legitimate expectation of privacy, in part based on the recommendations of the Leveson inquiry report.

Sir Cliff's status as a famous celebrity did not mean he had a lower expectation of privacy, especially in relation to a criminal investigation.

As such, the Article 8 right to respect for private and family life was engaged. Mann J had to balance the private life right with the freedom of expression right and determine whether the BBC was justified in interfering with Sir Cliff's right and whether it was proportionate to do so.

The judge considered a number of criteria to answer these questions and decided each one in favour of Sir Cliff. In particular, he found that reporting the scoop was not in the public interest because it was done with the sole aim of satisfying a reader's interest in the person's private life:

"Knowing that Sir Cliff was under investigation might be of interest to the gossip-mongers, but it does not contribute materially to the genuine public interest in the existence of police investigations in this area." [282]

Although the BBC did publish accurate information, they used questionable methods of obtaining it. Their source from Operation Yewtree should not have revealed it to them and they knew it was private and sensitive information. In addition, the BBC breached their own Ethical Guidelines by not giving Sir Cliff a genuine right of reply.

The judge sharply criticised the sensationalist presentation of the story which he said weighed against the public interest of freedom of expression. In addition the unnecessary use of the helicopter was aimed to increase the impact. The BBC appeared to disregard the consequences of the individual, which for a person like Sir Cliff were very serious. Although the criminal law requires a presumption of innocence, the judge criticised the BBC for not taking into

account that the public would likely not maintain that presumption:

"The failure of the public to keep the presumption of innocence in mind at all times means that there is inevitably going to be stigma attached to the revelation, which is magnified in this case by the nature of the allegations against him, which were allegations (especially in the then climate) of extreme seriousness." [316]

Surprisingly the judge found that there was not a public interest in identifying people who have engaged in historic sex abuse. He downplayed the constitutional importance of this judgment, finding that press did not have a right to report the truth about the police investigation [322].

Impact and lessons for local authorities

The finding that a person under police investigation has a *prima facie* reasonable expectation of privacy, in that the investigation would not be made public, may have the most significant impact on press freedom.

If this legal position is correct and applied to other cases, then it may prevent public interest journalism on police investigations because, in many cases, there would be conflict between the Article 8 and Article 10 rights and the court (or police officers and journalists who have to make frequent decisions on disclosure) may take a view that it should not be published because the alleged infringement of privacy rights is not justified.

Local authorities should carefully consider whether or not to share information online or with the press if there is an ongoing criminal or civil case investigation.

Although the Sir Cliff case concerns investigations and searches, the judgment could apply more generally to disclosures to the press concerning individuals who have a right for their information to be kept private.

The presumption should be not to share it unless there is a strong public interest in doing so. Applying the judge's approach, officers should consider the following steps in assessing whether or not to share the information and allow it to be published:

1. Does the individual expect that the investigation will be kept private? The rebuttable presumption is that the individual does have such an expectation.
2. If so, if it is published, would there be an infringement of his/her privacy rights (Article 8)?
3. Finally, balance the competing right of the press, freedom of expression (Article 8), with the privacy right of the individual. Decide whether it would be justified and proportionate to infringe the privacy right by weighing the following factors:

a. Would the reporting of the investigation contribute to a debate of general interest?

b. How well-known is the person concerned and what is the subject of the report?

c. Prior conduct of the person concerned. Is the coverage of the event already in publication?

d. Method of obtaining the information and its veracity. Do the methods adhere to ethical guidelines?

e. Content, form and consequences of the publication. How severe would the consequences be for the individual?

f. Severity of the sanction imposed. What would be the effect of the sanction of not reporting the investigation?

Instead of appealing the judgment, the BBC have decided to ask the Attorney General for advice on the impact of the case on future reporting. Any further clarification on what police can share with journalists will be welcomed by practitioners across the country.

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Hesitant about taking on management responsibilities? *V. Charles Ward* explains how it gave a real boost to his career, and gives some pointers for those taking their first steps.

A chance to make a difference

The Senior Solicitor gave me a final word of warning, "If you accept this job, you'll get more responsibility than you've bargained for." A month later I started my first job as Assistant Solicitor in Hart District Council's six-person legal team. It was then that he gave me the news, "I'm leaving in two days. This is all yours." There were challenges from the start.

Although I was now the only solicitor, there were experienced legal staff within the team. They did not take kindly to having their correspondence checked and signed off by someone barely three months' qualified. There were also issues with other department heads. The Senior Solicitor had barely been on speaking terms with the Director of Planning. And he had no time at all for the Planning Enforcement Officer, a former army-major whom he detested. But over the following weeks I was able to repair those relationships and win the trust of my staff.

So it was with some sadness that seven months later I had to hand over the reins to Charles Herbert, Hart's newly appointed Senior Solicitor. But I wouldn't have traded the experience for the world. That was in 1977. It was another 30 years before I was able to enjoy an equivalent level of responsibility.

I stayed as Hart District Council's Assistant Solicitor for another two years until making a sideways shift to the Borough of Basingstoke and Deane, to be part of a bigger legal team. I was soon upgraded to Senior Assistant Solicitor but still had no management responsibility. Then I moved out of local government altogether.

In 1984 I took a job at Unilever House to specialise in commercial conveyancing. Gaining that expertise enabled me to head the conveyancing function of a fledgling law firm occupying fifth floor offices in Gloucester Road, SW7. It worked exclusively for NHS clients and was owned by one Brian Capstick. Over the next four years I saw the firm grow. But matters came full circle when, in January 2000, I was appointed to a senior solicitor role with the London Borough of Sutton.

My management breakthrough came in August 2007, when I was appointed leader of Sutton's eight-person Property, Contracts and Planning team. It was a post which I held for the next six years.

More than money

For me, management was the chance to make a difference in the way public services are delivered. It was certainly not about the money. The pay differentials were so miniscule as to be barely noticeable. And that was before tax and other stoppages. But it gave me the chance to put my own ideas into action instead of playing second fiddle to someone else's ideas.

For anyone stepping into management for the first time, my advice is to think about your management priorities. Are they outward focussed? Are they about productivity, meeting client expectations and hitting targets? If not, what are they about?

Many years ago, I attended a team-leaders' meeting. Out of the several team leaders present, I was the only one meeting his own operational targets. But the person chairing that meeting not impressed.

"Charles. The only reason you are hitting your targets is that you are not doing enough management"

He was very much a manager 's manager. His life was one of appraisals, management team meetings, one-to-ones; staff meetings; flip charts and bonding games. With so much going on, he had little time for operational work, let alone leadership.

Of course such administrative tasks have to be done. They are part of the public sector manager's job. But what is the point of administrative box-ticking if the team itself is not delivering? Real management is about leadership. It is something which has to be earned. To provide effective leadership, one has to know the job. Not like the graduate chief constable who has never worked the streets.

In my own case I was not only the team leader, I was also the most experienced conveyancer. Anyone who asked me a question would always get a constructive answer. Being in control also meant that I could try to do things differently.

Does a scheduled two-hour team meeting really need to last two hours? All inte rnal meetings have a hidden organisational cost because they take staff away from the work which they are paid to do. Yes - the essential business has to be addressed during the course of the meeting. But there should be no scope for it to be side tracked. As the person chairing the meeting, only you have power to drive the agenda and prevent that from happening. Your staff will thank you.

Leader or manager

True leadership is not about telling staff how to do their jobs. Nor does it

involve pinning motivational pictures to the wall. True leadership is about setting the example. Don't expect punctuality from your staff if you are consistently late for work. If someone up the management chain is not hitting their financial targets, how can you insist that your staff meet theirs? Like the captains of old, leadership has to come from the front.

Anyone stepping into management for the first time will soon discover that it changes the way other people react to them. Yes - it's true. You may enjoy a good working relationship with your staff. But you are no longer one of the guys. You are now the face of authority. Ever wondered why the place goes quiet the moment you walk into the room?

You need that emotional separation to manage effectively. If you were still 'one of the guys', how would you deal with the difficult situations which can blight managers' lives? It always disappoints me to see able colleagues pass up opportunities to take on management responsibilities. Many reasons are put forward. "I don't want the additional responsibility." "I'm happy as I am." "My work-life balance is too important to me." But if you've never taken the management challenge, how do you know what you are missing?

If you've never taken the management challenge, how do you know what you are missing? Taking a management promotion is as much about self-development. You may think you have people skills - but it is only when you are managing a team of people that you are putting those skills to the test.

Taking a management promotion is as much about self-development. You may think you have people skills - but it is only when you are managing a team of people that you are putting those skills to the test. Can you make a team which is already performing well, perform even better? As the new team leader, can you win the confidence of those clients, whom in the past have always been seen as 'difficult'? When you are in charge, there is no one else to blame.

With the October 2013 merger of Sutton Legal Services into the new South London Legal Partnership, I took redundancy and early retirement. I thought that my management days were over. But I was wrong. After my severance terms had been settled, I took a two-month locum assignment with the Harrow/Barnet shared legal service, which has continued indefinitely. In September 2015 I was invited to take temporary charge of one of its two conveyancing teams pending the recruitment of a new team leader. Today, as someone at the back of a 45-year legal career, I am quite happy to step back. But I'll never have any regrets.

***V. Charles Ward currently works as a Senior Property Lawyer with HB Public Law. He is also a legal writer and author of* Legal Profession: Is it for you?**

Spotlight on…

Child Protection

- **Order in Court: avoiding the pitfalls in public law proceedings**
- **s20: Welcome guidance from the Supreme Court**
- **LAs and s38 assessments**
- **Breaking point: can child care lawyers take the strain?**

***Julien Foster* examines good practice, bad practice and the pitfalls when it comes to local authorities and public law children proceedings.**

Order in Court

Acting for local authorities is so simple, I thought in the days when I acted only for family members. Your client always turns up to court. Being able to say "I'm for the local authority" in the robing room sounds so grand ... and, a bit like prosecuting before magistrates, your case is bound to be cast-iron.

That, as I say, was in the days before I moved to new Chambers whose members acted not only for family members but also for local authorities, and I volunteered enthusiastically to add another area to my practice.

My naïve preconceptions came home to me when I was instructed to represent an authority at a final hearing. I discovered when I got to court that the social worker did not agree with the care plan; it was her manager, she said, who had insisted on it. Yet the manager was not there to give evidence.

How, I wondered, could the social worker possibly be expected to give oral evidence in support of a care plan with which she profoundly disagreed? Matters were resolved in the end through a conversation with a head of service and the case concluded by agreement: but it could all have gone disastrously.

Since I started practising in the area, local authorities have, among other things, had to grapple with the major decisions of the Court of Appeal in *Re B-S (Children)* [2013] EWCA Civ 1146 and *W (a child) v Neath Port Talbot Borough Council* [2013] EWCA Civ 1227. I have often found that it is the local authority of all the parties which has to bear the brunt of criticism, whether it be from the court, family members or the children's guardian. Here are my thoughts about the conduct of litigation by local authorities: good practice, bad practice and the pitfalls…

Compliance with orders

I once heard a team manager say defensively, "It's not me. It's [fill in name of borough]". This followed a series of criticisms about non-compliance with directions from the other parties' representatives.

All parties to care proceedings should be familiar with the Court of Appeal's reminder to practitioners of the truism that orders are "not preferences, requests or mere indications" – and local authorities should be particularly mindful of the chilling warning that "an unwilling party who flouts the court's orders may find itself in contempt, even if it is an agency of the State such as a local authority".

The problem that local authorities face which other parties do not is simple: directions are made against "the local authority" which, while a singular legal entity, has many officers fulfilling its responsibilities. (There is at least one High Court Judge who would disagree with me that local authorities are "singular": on draft orders, he always changes references to "is" to "are" and so on.)

While I would prefer directions to be against the individuals who are meant to comply with them, I accept that this is impractical in the case of the authority. What is essential, in my view, is for someone of sufficient seniority within the local authority to delegate the various parts of the order to relevant officers, to monitor the position in good time to ensure that orders will be complied with – and to seek the court's directions if for any reason there is likely to be non-compliance: beforehand, rather than after the event.

Here is another practical suggestion, which deals with the problem that arises when a local authority is waiting for evidence from another body – even another party to the proceedings who has failed to comply with a direction – and the document the authority is due to file depends on receipt of that other piece of evidence.

Let us suppose, for example, that the local authority is due to complete a statement setting out recommendations in relation to a child's placement once it has received a medical report.

There is nothing to stop completion of the statement, but its author should make it clear that the local authority may seek to supplement the statement upon receipt of the medical report. The author should also reserve the authority's position in relation to any matters that depend on the contents of the medical report.

The statement's author should also be careful, if necessary, to provide "either/or" conclusions in much the same way as an expert's report prepared in advance of the court's findings on disputed facts. It may be inconvenient to have to prepare two statements rather than one – but better inconvenience than criticism for non-compliance; and, of course, the local authority's non-compliance may serve to divert attention from the failure by the person due to provide the missing piece of evidence.

Disclosure

The duties underpinning the duty of disclosure on local authorities in public law cases are longstanding and have been comprehensively summarised by Baker J (now Baker LJ) in *Kent County Council v A Mother, F and X, X and Z (IR Intervener)* [2011] EWHC 402 (Fam) at 153 – 158.

It is worth distilling them further and including a bare summary here because in my experience, they are all too often not followed. The duty in question is one of full and frank disclosure. For the authority, that means a duty to disclose the documents (1) on which the authority relies; (2) which adversely affect its case; (3) which adversely affect another party's case; (4) which support another party's case; and (5) which the local authority is required to disclose by relevant practice direction. It also means a duty actively to consider what relevant documents it possesses and whether there is any countervailing argument against disclosure.

The case law makes clear that the task of examining the files should be carried out by someone who has a proper understanding of the legal principles, the issues in the case and the court procedures, such as a litigation lawyer. In other words, it should not simply be left to a social worker.

So much for the duty to disclose the local authority's own records. As the applicant, the local authority will often be responsible for obtaining and disclosing evidence from third parties, whether medical records, police records, or records from proceedings concerning other children or different local authorities.

The problem is that it is not in the gift of the local authority to state by when a document in the possession of a third party will be disclosed. Yet court orders frequently impose dates on local authorities.

It seems to me that the remedy is greater use of third party disclosure orders – already often used against the police (eg in the case of records) and the Department for Work and Pensions (eg in the case of a missing father) which can be served on the organisation in question. To maximise prospects of obtaining such an order, it would probably assist to consult the organisation in question in relation to a date.

I have often found that it is the local authority of all the parties which has to bear the brunt of criticism, whether it be from the court, family members or the children's guardian.

In such circumstances, it is worth bearing in mind that the demands of the court timetable may differ from the standard time organisations lay down for disclosure of their records. Sometimes, it may be necessary to remind organisations such as hospitals courteously that a disclosure order is an order of the court and trumps any standard protocols they may have in place. Sometimes, indeed, it is necessary to remind other departments within local authorities of that simple fact.

I recall sitting next to a social worker who was being stonewalled on the telephone by a colleague in the housing department, and I resorted to hissing suitable lines for her to use.

Threshold criteria

At the time when proceedings are issued, local authorities are required to set out the facts upon which they rely in support of the proposition that the threshold criteria within the meaning of section 31 of the Children Act 1989 are met. For obvious reasons, this task is often completed hurriedly.

If the child subject of the proceedings is, in the view of the social worker, at risk of significant harm attributable to the care they are receiving and if the risk of harm demands their immediate removal, there may well be little enough time to draft a flawless threshold document.

But in most cases, the local authority will have the opportunity to redraft the threshold document before the final hearing and many threshold documents reserve that right. Yet all too often, threshold documents and the evidence relied upon in support break the fundamental rules highlighted by the former President, Sir James Munby, in *Re A (Application for Care and Placement Orders: Local Authority Failings); sub nom Darlington Borough Council v M, F GM and GD* [2016] 1 FLR 1, FD.

First, the local authority which bears the burden of proof, must adduce proper evidence: the term "primary evidence" has increasingly and rightly become part of the vocabulary of family lawyers in a way that it was not when I first began practising in family law.

Secondly, the threshold document should not include allegations such as "he appears to have" done X, or that various people have "stated" or "reported" things. Such wording is to muddle an assertion of fact and the evidence needed to prove it. Thirdly, the local authority is required to demonstrate why the alleged facts, if proven, lead to the conclusion that the child has suffered or is at risk of suffering significant harm of the kind alleged.

Witness statements

Usually, in my experience, witness statements by social workers are drafted by them and, sometimes, checked by a manager within their discipline. It is less usual, I find, for them to be read by the lawyer with conduct of the case before being filed. It is less usual still for the lawyer to take on the burden of drafting

the document in the first place by taking instructions from the social worker.

I suspect that this is usually due to pressure of time and resources. Also, it is expected that social workers will have the skill to prepare a balanced report and will know, through experience, the legal principles that apply.

There is, of course, the standard social work evidence template, unattractively known by its acronym, which is clearly intended to ensure that all relevant matters are included. Regrettably, I find that its use leads to much material from previous statements being repeated unnecessarily.

I have occasionally wondered whether if the effort put into filling in all the boxes were devoted instead to thinking carefully about the child's welfare and a five page document were produced in place of the SWET … but that is heresy. All the templates in the world cannot, in my view, usefully replace the input of a specialist lawyer and the process of repeated redrafting.

There are three other straightforward recommendations I have: (1) the need for the statement to be balanced – or there is bound to be uncomfortable cross-examination; (2) the need for the statement to be signed (so important) and a copy of the signed page put into the bundle; and (3) if the statement is to be served electronically, the need for any tracked changes to be accepted and for tracking to be turned off. (There are embarrassing tales to be told in relation to the third point.)

Assessments

Assessments of family members are integral to social work practice and to care proceedings. And there are so many different types: among others, viability assessments, parenting assessments, connected persons assessments, risk assessments. Even the rather tortured "preliminary viability assessment", used to minimise the amount of work which is to be done. I suggest that often, far too great emphasis is placed on the label given to the assessment.

For social workers particularly, the type of assessment is of significance because it dictates the precise nature of the work that needs to be done and the information that needs to be gathered – and, often, the multi-paged template to be used. That is not to say that the label cannot be of significance from the perspective of lawyers too. But I have sometimes found myself discussing a requirement for an assessment with a social worker and it has seemed to create more anxiety than I would have expected – probably because I am not the one who is going to be carrying out the work!

Much of the anxiety arises, I suspect, because of the sense in the social worker's eyes that the work is unnecessary in comparison with other pieces of work – in relation to the same family – which demand attention. Think, for instance, of the urgent life story work that often needs to be done with an emotionally damaged, vulnerable child, which takes careful, patient social work.

I would suggest that social workers should avoid using the mantra "We are not carrying out a parenting assessment" (say in a case where children have previously been recently removed). Leaving aside the local authority's duty to provide the court with sufficient material to conduct its welfare and proportionality evaluation, the social worker is, in such cases, giving too narrow a definition of the word assessment.

Better, surely, to say, "I will reassess the parents drawing on the previous assessments and identifying what if anything has changed and evaluating their parenting capability for this child. This will be done through a series of meetings and at least one observation of contact".

This is surely likely to be more productive than a rather sterile debate about the difference between types of parenting assessment which is, in any event, likely to lead to a more prescriptive approach by the court. Micro-managing by the court is a modern curse; the risk of that can be lessened by producing a carefully crafted plan for assessment.

The plan should consider what, precisely, requires attention in relation to the adult: for instance, is the case about basic parenting or is it about associations with risky adults?

A short final point on assessments of extended family members: based on recent experience, I would suggest that it should be the duty of the legal department and not the social worker to send the completed assessment to the person being assessed, together with the instructions as to how to challenge it.

And given the vagueness that often ensues, with no response having been sent by the extended family member in question but the parent asserting that they DO want to be assessed (one can speculate, possibly unfairly, on family dynamics at play here), far better to rely on something in writing from the family member themselves than on a non-response which can always be blamed on the post, a social worker not returning calls etc etc.

Bundles

Care proceedings end with the final hearing, however many of those there may be, and whether they happen before or long after the twenty six weeks have expired.

Final hearings require the local authority to prepare a court bundle and preliminary documents in accordance with Practice Direction 27A. It would be dull to set out all the requirements and I will confine myself to one important provision which is frequently ignored: only those documents relevant for the hearing and necessary for the court to read or that will be referred to during the hearing should be included in the bundle.

Of course, one does not necessarily know what will arise during a hearing – but I would suggest that many local authorities could prune a great deal of extraneous material without complaint.

Electronic bundles are increasingly being used by advocates and I would recommend that complete electronic bundles (not merely an index) be sent to all legal representatives when lodged with the court; such a step will avoid a great deal of preliminary skirmishing, delay and those dreaded words "Your pagination is different from mine".

I would also set out a plea for the term "core bundle" to be scrapped; so often it gets confused with court bundle. It should be replaced with the term "abridged bundle" or "reduced bundle".

Conclusion

The various thoughts above may not lead to every case resulting in the outcome desired by the social workers – and that is how it should be – but I hope that they might lessen the angst for those conducting the case and lead to timely outcomes following intelligent consideration of the available evidence and not repeated wasted case management hearings and even adjourned final hearings.

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Kella Bowers **analyses the Supreme Court's guidance on s20 of the Children Act provided by its decision in *Williams v London Borough of Hackney*.**

s20: Some welcome guidance from the Supreme Court

Over the last five years there has been a barrage of cases making their way through the various levels of the court system with regards to the appropriate use, or otherwise, of s20 of the Children Act 1989.

Section 20 allows a local authority to accommodate a child in need who requires accommodation as a result of them being lost or abandoned, where there is no one with parental responsibility to look after them, the person with parental responsibility is unable to care for them or, regardless of whether a person with parental responsibility is available, if the local authority feels that it is necessary to promote and safeguard the welfare of the child.

As you will appreciate, this covers a wide range of scenarios and as such has been used regularly and frequently in situations where it has been both justified and wholly inappropriate. In the latter it has resulted in not only care proceedings but also formal complaints, judicial reviews and Human Rights Act claims.

Questions regarding the nature of consent, the necessity for the local authority to obtain such and indeed the length of time for which s20 should be used without court intervention have troubled the courts and by extension those in social care practice.

In cases where a decision has been made that the child cannot be rehabilitated into the family, but no action is taken to assess long-term plans or formalise that arrangement to ensure that the local authority have parental responsibility and the child's future is court approved, local authorities should expect criticism.

Local authorities in England and Wales were noted by the Court to have been involved with over 70,000 children in March 2017, a figure which has been steadily rising for the last nine years.

Of these children, 50,000 are the subject of care orders. Just over 16,000 children were accommodated by the local authority without any court order. As such, the question as to whether those 16,000 are lawfully accommodated and whether their human rights, and those of their parents, are being breached is an issue which will affect local authorities up and down the country.

The Supreme Court judgment in this particular matter is extremely helpful in providing guidance as the Justices have taken the time to analyse numerous past cases and the nuanced circumstances of each. One hopes that this is reflection of Lady Hale's Presidency of the Supreme Court and bodes well for future judgements providing practical guidance for those tasked with working to statutory duties.

The details of the previous cases assessed by the Court are too lengthy to go into here, but for the sake of clarity they include babies taken away from mothers at birth, retention of a child in local authority care when one or more parents have indicated a desire for the child to be returned, whether a parent can validly consent or whether it is actually required and lack of action in situations where the parents do not object to the accommodation but no constructive planning with regards to the future takes place.

Interestingly the Court accepted that, although s20 does not give the same protections to both child and parent that formal care proceedings would do, rushing unnecessarily into compulsory proceedings where there is scope for

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partnership working with parents may make reunification of the family unit more difficult rather than less. It was noted that there is nothing in s20 to place a limit on the length of time for which a child may be accommodated without care proceedings being initiated and as such, in theory, a child could remain accommodated under s20 for quite some considerable time. However, a local authority is under a duty to assess the child's needs a prepare a care plan for them with regards to their long-term upbringing.

This is largely where local authorities have fallen foul in claims for breaches of human rights for children accommodated under s20 without any court intervention and associated Independent Guardian support. In cases where a decision has been made that the child cannot be rehabilitated into the family, but no action is taken to assess long-term plans or formalise that arrangement to ensure that the local authority have parental responsibility and the child's future is court approved, local authorities should expect criticism.

In this particular case the eight children, including an eight-month-old baby, were removed from the parents by way of a Police Protection Order as a consequence of the condition of their home environment and potential issues of neglect.

The children were then subsequently accommodated under s20 and could not initially be returned due to the parents having a bail condition not to have access to the children whilst police investigations continued. During this period the parents were asked to sign a safeguarding agreement with regards to the children's continuing accommodation about which it was held that they had capacity to consent and did not object. Later involvement by the parents' solicitors was eventually held not to be an unequivocal withdrawal of consent but rather an offer of collaboration by the parents to avoid the need to care proceedings and achieve the return of the children, which is what eventually occurred. The appellants' case was that their article 8 of the ECHR rights had been breached due to the children having remained accommodated unlawfully. The Supreme Court dismissed this argument.

The court commented:

- The best way to ensure real and voluntary delegation of responsibility from parent to local authority is to inform the parents fully of their rights under s20.

- No such consent to delegation is required when a local authority essentially steps into the breach where there is no-one with parental responsibility or such a person is prevented from exercising such, as in cases of abandonment, parental refusal to accommodate or, as in this case being prevented by criminal investigation and bail provisions.

- If a parent with unrestricted parental responsibility rejects, the local authority cannot accommodate and must explore other routes to safeguarding the child.

- Safeguarding agreements were accepted as good practice but they should not give the impression of a *fait accompli* and that the parents have no right to object or remove the children.

- The objection to s20 or the removal of consent or delegation to the local authority must be unequivocal. An offer to work with the local authority to achieve the return of a child would not amount to a withdrawal of consent or delegation and therefore is not a reason to immediately require the commencement of care proceedings.

- There is no time limit within the Children Act as to the length of time that section 20 can be used. However, a failure to undertake long-term planning, regular assessments and take appropriate action when rehabilitation to the family is abandoned, could lead to criticism and human rights breaches

Williams v London Borough of Hackney is the culmination of a roller coaster of cases which have resulted in those in social care practice being reticent in the use of s20 as a practical tool in their arsenal. One hopes that this case will result in a more sensible and reasonable assessment of its use in the future.

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The Court of Appeal has issued a timely reminder in a case where a judge had ordered a local authority to fund a s38(6) assessment, writes *Rebecca Cross*.

Local authorities and s.38(6) assessments

It has become increasingly difficult to persuade the Court to grant ANY application for an expert report, let alone an application under section 38(6) for an assessment of the child. This issue was revisited by the Court of Appeal in *Re Y (A Child) (S.38(6) Assessment)* [2018] EWCA Civ 992.

A consultant psychiatrist recommended that the parents and J (aged 7 months) should be assessed at Phoenix Futures, an agency that specialises in drug addiction. Of the seven questions in the letter of instruction, only one related to J and her mother. The others dealt solely with the mother.

The local authority opposed the application on the basis that this was not an assessment of the child and, therefore, fell outside the Court's powers under section 38.

The Judge at first instance granted the application and ordered the local authority to fund the assessment.

The local authority successfully appealed. The Court of Appeal referred to:

(a) *Re C (a minor) (Interim Care Order: Residential Assessment)* [1997] 1FLR 1, where the House of Lords stated that "the proposed assessment must...be an assessment of the child".

(b) *Re G (Interim Care Order)* [2006] 1 FLR 601, where House of Lords stated:

i. that an assessment to give a parent the opportunity to change through therapy does not come within 38(6);
ii. what is required is an assessment of the child, including her relationship with her parents, risk, and how any risk can be managed.

In *Re Y*, the Court of Appeal stated that the court should ask itself two questions:

(a) is this a proposal for an assessment that falls within s38(6); and

(b) if so, is the assessment necessary to assist the Court to resolve the proceedings justly?

It has become increasingly difficult to persuade the Court to grant ANY application for an expert report, let alone an application under section 38(6) for an assessment of the child. This issue was revisited by the Court of Appeal in Re Y (A Child) (S.38(6) Assessment) [2018] EWCA Civ 992.

In *Re Y*, the Court of Appeal found that what was proposed was a unit that would assist the parents to become drug free and NOT a unit designed to assess the mother and the child.

Accordingly, the proposed assessment fell foul of both *Re C* and *Re G*, as well as section 38(6) itself. In addition, there was a question mark as to whether the assessment was necessary as there was already a wide range of information available to the court, namely:

(a) evidence from the social worker;

(b) evidence from the Westminster Drugs Project;

(c) hair strand and urine tests;

(d) an independent social worker's assessment; and

(e) a psychiatric assessment.

Accordingly, the appeal was allowed.

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Local authority child care lawyers are being overwhelmed by the rise in care proceedings and a crisis could be looming. *Graham Cole* calls for more to be done on staff well-being.

Taking the strain?

The last few years have seen a significant increase in the numbers of care proceedings, placing considerable pressures on all those involved. This has been particularly true for local authority child care lawyers who shoulder much of the responsibility for the management and progress of such cases and who are increasingly on the receiving end of criticism when things go wrong.

The challenge has not only been to deal with the rising numbers of cases, but their increasing complexity and the need to meet the 26-week deadline imposed by the Children and Families Act 2014. Coupled with this have been the increasing demands made by courts and other parties for disclosure, further and longer periods of assessment, the instruction of additional experts, the encouragement of a 'blame culture' and the threat of costs orders if court timetables are not met.

All these pressures fall heavily upon local authority child care lawyers who are also battling with declining resources within their authorities and in some cases, poorer terms and conditions of employment.

Local authority child care lawyers have shown great resilience in coping with these pressures and rising to the enormous challenges posed by the rise in care cases and what appears to be increasing levels of, and risks of, harm posed to children. The rising tide of litigation has required knowledge of forms of abuse which did not feature on the radar when many of us starting working in this area of law. Radicalisation, female genital mutilation and forced marriage are just several examples.

There is a much higher level of 'satellite' litigation, for example surrounding publicity, injunctive relief and deprivation of liberty. Whilst we have sought to absorb these additional challenges, there is only so much that we can take. Many local authorities are reporting increasing difficulties in recruiting child care lawyers and the pressures and demands, the threat of being 'named and shamed' if things go wrong and the reports of 'burn out' and stress amongst existing staff are contributing to a sense of crisis.

We are hearing a lot about wellbeing, both in the workplace and in society in general. I am hearing too many reports about local authority child care lawyers suffering stress, anxiety and burn out. One lawyer has bravely spoken in his blog about the challenges he has faced to his mental health and I have heard other accounts which indicate that his is not an isolated experience. We simply cannot have local authority child care lawyers working all hours to prop up a creaking system and keep cases on track.

It is time for local authorities to examine closely the situation regarding its child care legal staff. Without a strategy to encourage recruitment and make the job more attractive, a recruitment crisis could be looming in the years ahead as experienced staff either retire or decide that they have had enough. They also urgently need to consider measures to aid staff wellbeing, an issue which has been taken up by the new President of the Law Society in relation to the solicitors profession in general.

She has rightly indicated that there is no panacea but action is needed now. The warning signs are there and need to be heeded.

I acknowledge that this article may be seen as special pleading and I recognise that many other professionals within the child protection system are also under pressure and that the system itself is under huge strain. However, this is high-profile and important work and the consequences of getting it wrong are serious, most of all for the vulnerable children whom we are all seeking to protect.

Graham Cole is a solicitor at Luton Borough Council and Special Activity Area (SAA) Lead for Children's Services for Lawyers in Local Government

Spotlight on…

Place

- The role of local authorities in housing supply
- Unlocking stalled development sites
- Market snapshot: a turbulent year ahead for real estate
- The importance of Place and revenue growth for local government

***Matt Hutchings QC* considers how local authorities can boost housing in their areas through their roles as house builders, planning authorities and through the use of local housing companies.**

The role of local authorities in housing supply

In her foreword to the housing White Paper *Fixing our broken housing market* presented to Parliament in February 2017, the Prime Minister stated that, "Our broken housing market is one of the greatest barriers to progress in Britain today. Whether buying or renting, the fact is that housing is increasingly unaffordable – particularly for ordinary working class people who are struggling to get by."

According to Ministry of Housing statistics, in 2017 there were 1.15m households on English council housing waiting lists and, by the first quarter of 2018, there were approaching 80,000 homeless households in temporary accommodation provided by the same councils pursuant to the main housing duty.

Whilst the White Paper did not mention a specific target for the number of new homes to be built, the government had committed itself to an ambitious figure of 250,000 each year in England. By the Autumn Budget 2017, this target had increased to 300,000.

In the White Paper, the main role of local authorities in boosting housing supply was identified as strategic, in enabling the private sector to deliver much needed new homes using their planning powers.

This article explores three alternative roles for councils in boosting housing supply: (i) as house builders, (ii) via their strategic role as planning authorities and (iii) through the use of local housing companies.

Local authorities' traditional role as house builders

Local authorities' traditional contribution towards increasing housing supply comprised building subsidised council-owned homes. This model has a long history, dating back to the Housing and Working Classes Act 1890, and is epitomised by the large number of council estates that sprung up around the country in the post-war years.

In the 1950s and 60s the delivery of council homes in England ran at about 200,000 new homes a year. In 1969-1970 the figure was 135,700. By 1999-2000 it had crashed to 60. What happened to cause this collapse? The enactment of the Right to Buy ("RTB") in 1980, which entitled tenants to buy their council homes at substantial discounts, together with strict restrictions on local authorities' use of RTB receipts, is the obvious answer.

More generally, local authorities fell out of favour with central government as suppliers of social housing. Social housing grant was targeted at the housing association and charitable sector. From the first such stock transfer by Chiltern District Council in 1988, successive governments encouraged large scale transfers of council housing stock to housing associations, as the preferred providers for delivering decent homes for social tenants. The resulting shift in the social housing sector can be illustrated by the statistic that by 2015 there were some 1.6m council homes, as compared with 2.4m housing association homes, an almost exact reversal of the figures in 2003.

Significantly, from the perspective of central government policy in this area, housing association borrowing to finance the delivery of new homes is not counted as part of the Public Sector Net Borrowing ("PSNB", in old money, the Public Sector Borrowing Requirement). A move by the Office of National Statistics in 2015 to reclassify housing association debt as part of the national debt was reversed in 2017 as a result of deregulation of the housing association sector

under schedule 4 to the Housing and Planning Act 2016 and the Regulation of Social Housing (Influence of Local Authorities) (England) Regulations 2017.

In April 2012 English local authorities became self-financing in relation to their housing stock. To the uninitiated, this may sound like a route to independent local decisions on housing investment. However, central government imposed a cap on Housing Revenue Account ("HRA") debt (ironically under Localism Act 2011 powers), which significantly restricted councils' ability to borrow against their housing rental streams, and thus to invest in housing stock.

The Local Government Association has consistently called for the borrowing cap to be scrapped, with support from the Chartered Institute of Housing and other bodies in the housing industry. The example of Scottish councils' successful building programmes has often been cited in support of this contention. In its unanimous report on the Autumn Budget 2017, the Treasury Committee agreed, recommending that "in order to increase local authority construction to levels sufficient to meet the Government's 300,000 target, the Housing Revenue Account borrowing cap should be removed."

However, the main thrust of government policy has been heading in a different direction. In its evidence to the DCLG Select Committee inquiry leading up to self-financing, the Chartered Institute of Public Finance and Accountancy had called for the government not to press ahead with the borrowing cap. The government responded as follows: "Our reforms must not jeopardise the government's first economic priority, which is to reduce the national deficit."

The government's position was that adherence to the Prudential Code governing local authorities' capital finance decisions would ensure local affordability but would not achieve national priorities. The UK is alone within the EU in counting local authorities' debt as part of the national debt. As a result, councils' borrowing for house building has remained firmly in the sights of the Chancellor of the Exchequer as part of government policy of deficit reduction.

Little was said in the Housing White Paper about reviving councils' traditional role as house builders. At paragraph 3.32, there was a vague commitment to: "work with local authorities to understand all the options for increasing the supply of affordable housing." This may be contrasted with the statement at paragraph 3.24 that: "Housing associations have a vital role to play if we are to build the homes we need. They already build the vast majority of new affordable homes, in addition to increasing numbers of homes for market rent and sale."

The UK is alone within the EU in counting local authorities' debt as part of the national debt. As a result, councils' borrowing for house building has remained firmly in the sights of the Chancellor of the Exchequer as part of government policy of deficit reduction.

Recent relaxations of the cap including an extra £1bn headroom for areas of high demand have been very modest, when compared with the Association of Retained Council Housing's June 2013 estimate of the financial capacity of national council housing stock, at £27.5bn.

It remains to be seen whether the Prime Minister's announcement at the Conservative Party Conference in October 2018 that the borrowing cap would be "scrapped" will go that far. However, potentially, this policy shift could spell a new era of house building by local authorities.

A strengthened strategic role

The government announced a review of local authorities' role in supporting housing supply in the 2013 Autumn Statement. The result of the review was the Elphicke-House Report dated January 2015. As its sub-title *From statutory provider to Housing Delivery Enabler* suggests, the main emphasis of the report's recommendations was in strengthening councils' strategic role in planning and facilitating the required house building by the private sector.

The Elphicke-House Report thus laid the foundations for the 2017 White Paper, which announced three things that the government was going to make happen to fix the broken housing market: (i) planning for the right homes in the right places, (ii) building homes faster and (iii) diversifying the housing market.

So far as local authorities were concerned, the Executive summary stated as follows:

> "the Government is offering higher fees and new capacity funding to develop planning departments, simplified plan-making, and more funding for infrastructure. We will make it easier for local authorities to take action against those who do not build out once permissions have been granted. We are interested in the scope for bespoke housing deals to make the most of local innovation. In return, the Government asks local authorities to be as ambitious and innovative as possible to get homes built in their area.
>
> All local authorities should develop an up-to-date plan with their communities that meets their housing requirement (or, if that is not possible, to work with neighbouring authorities to ensure it is met), decide applications for development promptly and ensure the homes they have planned for are built out on time. It is crucial that local authorities hold up their end of the bargain. Where they are not making sufficient progress on producing or reviewing their plans, the Government will intervene. And where the number of homes being built is below expectations, the new housing delivery test will ensure that action is taken."

The use of the National Planning Policy Framework ("NPPF") to influence local authorities to deliver the local need for new housing, often despite resistance from their existing residents, may be illustrated by the *Morris Homes* case in the Supreme Court, reported at [2017] 1 WLR 1865.

The Supreme Court decided that, because Suffolk Coastal District Council could not demonstrate a five-year supply of deliverable housing sites, paragraph 14

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in conjunction with paragraph 49 of the NPPF provided for a presumption or "tilted balance" in favour of granting planning permission for the development, which the Inspector refusing planning permission had wrongly found to have been displaced.

The draft revised NPPF published in March 2018 takes this presumption further. It would incorporate via paragraphs 11.d and 75 a new Housing Delivery Test, as part of the trigger for the presumption in favour of development. These revisions to the NPPF gave effect to the commitments made in the Housing White Paper "to ensure that action is taken" to boost housing supply.

However, it is questionable whether boosting housing supply through the private sector will meet the particular needs of "ordinary working class people who are struggling to get by". The draft revised NPPF proposes that, on major housing development sites, at least 10% of the housing should be for affordable home ownership, subject to some exceptions.

The requirement for developers to include affordable housing within housing developments is usually imposed by local authorities via planning obligations entered into under section 106 of the Town and Country Planning Act 1990. In the ordinary way, private sector developers will look to maximise profits and only deliver non-market housing when under an enforceable obligation to do so.

Affordable housing is currently defined in Annex 2 of the NPPF as rented at no more than 80% of market rent. In many areas, such rent levels are unaffordable for "ordinary working class people", let alone those reliant on housing benefit.[1] By contrast, social rents (including council rents), are commonly set at around 50% of market levels.

Against the background of a 52% reduction in the social housing stock over the previous 35 years,[2] social rented now accounts for just 3% of new supply. In 2015/16 in England only 6,550 new social rent homes were completed. Within the same year, RTB sales across council and housing association stock were in excess of 16,000.

Against the background of a 52% reduction in the social housing stock over the previous 35 years, social rented now accounts for just 3% of new supply.

The White Paper did not specifically address this unmet need, notwithstanding plans to extend the RTB to the generality of housing association tenancies via the so-called Voluntary Right to Buy, to be funded by the enforced sale of higher value council houses, under the Housing and Planning Act 2016. There is no sign of the overall trend of a reduction in the number of houses let at social rents being reversed.

Local housing companies

Local authorities have for a number of years enjoyed the power to provide housing through companies, under section 95 of the Local Government Act 2003 and, more recently, under the general power of competence conferred by section 1 of the Localism Act 2011.

The Elphicke-House Report embraced the concept of local housing delivery organisations and at paragraph 7.24 recommended that councils consider setting them up. Paragraph 7.2.1 of the report contained a description of three such models: (i) a wholly owned company funded by the council, (ii) an investment partnership, with funding provided by a developer and the council providing land and (iii) an operating lease granted by the council to a registered provider.

Relevant case studies were set out at Appendix 5. Indeed, at paragraph 4.2.4 the report suggested that innovative finance models, using local housing delivery vehicles, might be the answer to the cap on local authorities' borrowing capacity.

The government's response was unenthusiastic in relation to the use of local housing companies ("LHCs") to deliver any form of social housing. In a written statement to Parliament made on 20 March 2015 (HCWS441), the Minister of State for Housing and Planning said this:

> "It is important that new council tenants should have access to the Right to Buy, and that new homes should not be built by councils which are excluded from the Right to Buy. In order to be eligible, local authority tenants need to have a secure tenancy. All forms of secure council tenancies are subject to the Right to Buy, including new flexible tenancies, regardless of whether they are accounted for in the local authority's Housing Revenue Account or the General Fund.
>
> A number of local authorities have established local housing companies to help deliver local housing solutions. The Government recognises the benefits that public private partnerships can

[1] For a detailed analysis of housing affordability for those on low incomes, see the Institute for Public Policy Research paper *Priced Out?* published in November 2017.

[2] Pearce & Vine, *Quantifying residualisation: the changing nature of social housing in the UK,* Journal of Housing and the Built Environment, 2014

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bring in supporting new forms of housing, and notes that the Elphicke-House review into the role of local authorities in housing supply identified that different housing delivery organisations offer different strengths and opportunities. The Government welcomes approaches where local housing companies are developing new homes for market sale or purchasing private rented homes for the accommodation of homeless households, through an appropriate legal entity structure and/or the borrowing does not count as public sector borrowing."

The point to note is that the above expression of government support for LHCs is limited to their use in the provision of market housing or temporary accommodation, activities which fall outside the remit of social rented housing and the HRA.

Nevertheless, the establishment of LHCs by English local authorities appears to be on the rise. Current legal structures incentivise the delivery of council housing through LHCs. In particular: (i) LHCs are accounted for in the General Fund, therefore the HRA borrowing cap is not a constraint on council investment, (ii) LHCs are subject to the same regulation as ordinary private sector providers, and in particular are not subject to rent control,[1] and (iii) LHC tenancies do not attract the RTB.

It is easy to see that factors (ii) and (iii) above make long-term investment in housing via LHCs financially more viable than a similar investment in traditional council housing stock.[2].

In a report published in October 2017, *Delivering the renaissance in council-built homes: the rise of local housing companies*, the Smith Institute noted a rapid rise in LHCs. Other studies carried out by the Association for Public Sector Excellence (Novemner 2017) and Inside Housing (February 2018) have noted the same trend.

The Smith Institute paper estimated that there were currently a total of 150 LHCs in England, which were being used by councils to deliver a mix of housing tenures, including 30-40% affordable housing and some at social rents. The paper predicted that LHCs could increase completions over time from 2,000 homes a year to 10,000-15,000 homes each year by 2022.

This development may present a quandary for central government: on the one hand, it represents a much-needed contribution towards easing the housing crisis for "generation rent" households struggling on low incomes, but on the other, a potential way around its prized policy of enabling home ownership through the RTB.

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[1] Currently, a mandatory 1% annual rent reduction under the Welfare Reform and Work Act 2016.

[2] The recent decision in *Peters v Haringey LBC* [2018] EWHC 192 (Admin) establishes that councils may adopt a partnership model for housing delivery with a development partner, rather than use a company, with potential fiscal advantages, provided that making a profit is not the council's dominant purpose.

Chris Plumley **explores some of the most common traps in relation to stalled development sites and suggests some effective solutions.**

Unlocking stalled development sites

In many parts of the country the public sector is the driving force for urban growth. The trade press is awash with new mixed use, housing and investment based developments with local authorities place-shaping to bring "good growth". We are still, however, seeing too many stalled developments for a variety of very understandable but avoidable reasons.

Strategic and policy hurdles

Local government has many strong, charismatic leaders, members and stakeholders who drive the "just make it happen" approach to development. When they stay practically and closely involved in a scheme, it can be of tremendous benefit. Larger projects need strong leaders, advocates and champions. If, however, the leaders dip in and out and don't stay involved in the detail, that "leadership" can become a divisive distraction.

The best and most inspirational regeneration leaders are the ones who we see giving authority and direction to their teams to empower them to deliver. Where that does not happen we still see officers unable to implement and schemes stalling. Similarly, the drive towards a particular outcome must have a robust policy and auditable background to it. We have seen a number of schemes recently where the intended commercial or political outcome was not reflected in the stated policies of the council. This means that officers were trying to implement an attractive scheme only to hit the policy barrier. For example, members wanted to promote the council's support of a development by the use of CPO powers.

Sadly the planning policy did not support that position and so the desired outcome of a large comprehensive development project had to be scaled back. The reduced scale scheme will still be great but it is now left with a slightly negative "if only" feel to it.

Option paralysis

Twenty years ago, when I started advising on public sector regeneration projects, there was a relative "simplicity" to them. Almost always they were governed by a complex, but accessible, development agreement. The developer was appointed following an advert in the *Estates Gazette*,

transactions were cordial and the sun always shone. Well maybe not. The council would usually hold or assemble the land and the selected developer had the skills, occupiers and funding to build out and away you went.

We are getting quite a lot of feedback from colleagues in the industry that a stalling factor is simply the number of options available to bring about developments. It has become almost impossible for some authorities to make a decision as to how to proceed due to the agony of choice and option overload.

With policy changes, new funding solutions, numerous deal structures, collaboration protocols, political directions, procurement concerns, increasingly numerous consultees and stakeholders – no wonder things grind to a halt. We also see advisers looking to sell pre-packaged solutions rather than analysing the specific problem and coming up with something bespoke and suitable.

Whilst I don't want to hark back to the good old days, this cornucopia of options does highlight the need for proper strategic direction, quality project management, narrowed option selection criteria and good governance. All of this should be a given alongside the review of the commercial terms. Ultimately, form does follow function, so the legal and commercial solutions should always be kept in focus.

Assuming all of that is in place then the parties should have more confidence to make decisions and stick to them. This, in turn, should help to unlock the stalled elements of the scheme.

Implementation

With a supported policy and strategic position comes the ability to actually implement that solution. We are still seeing significant and avoidable delays in projects where there isn't proper project governance or delivery resource in place.

There are lots of reasons for this and I should not over simplify the root causes. There are, however, some common themes. For example, many in-house teams do amazing jobs of managing and delivering large-scale infrastructure and regeneration projects. Where there isn't the in-house resource and it has to be "bought in", we see delays in that procurement process. This often boils down to concerns over the routes to procure advisers and the linked up front costs. For example, a housing development was delayed for over a year whilst individual advisers were appointed, all from different disciplines, all from different call off panels and via protracted mini-competitions. No-one doubts the need to achieve value for money but we cannot have schemes stalling (and income or capital receipts not being collected from a completed scheme) by basic project inception delays.

We are getting quite a lot of feedback from colleagues in the industry that a stalling factor is simply the number of options available to bring about developments. It has become almost impossible for some authorities to make a decision as to how to proceed due to the agony of choice and option overload.

Being commercial about the use of multi disciplinary teams, using pre-procured call off panels, allocating proper project budgets and front loading the project management and governance all help to get from concept to inception much quicker. Once the team was assembled it worked well, but the time taken to do so wasted time and money.

What about in-house delays? With the enormous cuts in public funding, council officers are often overstretched, covering more than one job or "acting" up into another role. This has become the norm for many councils and the position in some cases has become untenable.

Regeneration projects are large, complex, long term endeavours and can be very time consuming. This means that lead officers either have to have the time to do it or the budget to appoint a proper external adviser team. A lot of time and budget is wasted trying to get by when the officers are not given the space and authority to deliver.

Who's in charge here?

The final point to mention is the number of agencies involved in delivery. It is great news for our industry that there are now numerous routes to delivery regeneration: Homes England and the combined authorities, local councils, trading, property, investment and development companies set up by councils, public / private corporate and contractual joint ventures and funding, investment and collaborative vehicles.

To this heady mix, add the fact that we have increasing layers of local devolved government and you can see where there is room for confusion. Who is responsible for what, what are the available funding routes and who should take control? Now, this last point is actually a positive to end on. We are seeing increasing support for the combined authorities taking more control of planning, procurement, remediation funding, land assembly and spatial strategy.

Conclusion

As regions look to expand and the public sector continues to play a vital role in housing delivery, employment creation and connectivity, we cannot afford avoidable stalled sites. So what is the answer? Proper funding and resourcing of local government would help. There is also an increasing school of thought as to the roles of the Mayors and the combined authorities.

Without treading on the toes of local government could they take more of a role in unlocking stalled development? Could they bring together the mixture of policies? Could they create blanket policies to ensure delivery? Could they create the toolkits to simplify the processes?

So long as they work alongside the democratically elected bodies that know the local areas and understand the solutions, maybe this shift could be the one that unlocks stalled sites once and for all.

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Nathan Holden **and** ***Clive Pearce*** **look at the lessons to be learned from recent topical legal cases and other changes in the real estate market of relevance to local authorities.**

A market snapshot

Property development is a major challenge for local authorities. Not only do they have to cope with a changing legal landscape but also the vagaries of the commercial climate.

EU procurement

When is a development agreement likely to constitute a works contract for the purposes of the EU procurement rules?

This question has been rumbling on since the ECJ's decision in *Auroux*[1], which widened the scope for development agreements to be caught by the Public Contracts Regulations 2015. This case was followed by *Helmut Müller*[2] which held that: (a) exercising regulatory planning functions did not qualify as procurement; and (b) for a public works contract to exist an essential element is that the contractor must assume a legally enforceable obligation to carry out the works.

In respect of (b) a creative approach had been adopted whereby development obligations would only be triggered in the event options were exercised, that is, some time after the contract had been entered into. In this way, at the moment the contract was entered into, there were no binding development obligations.

The Court of Appeal in *Faraday*[3] has held that such arrangements do not comply with the Public Contracts Regulations because they involve a contracting authority agreeing to act unlawfully in the future, that is, by effectively agreeing to contract for works in the future.

A second feature of the judgment is that it is the first time that a contracting authority has had a finding of ineffectiveness made against it in the English Courts. A fine of £1 was imposed, although had the circumstances been different then it is likely to have been a lot higher. Finally the Court had some interesting observations about the adequacy of the drafting of voluntary transparency notices.

Disposing of open space land

Local authorities have very broad powers to dispose of land under section 123 Local Government Act (LGA) 1972. However, where 'open space' is involved there is a further obligation to advertise the proposed disposal and consider any objections received. The conventional wisdom has been that by following this process it is possible to defeat the open space status of the land.

However, the recent decision in *Wandsworth*[4] is a reminder that this will not always be the case. The Court held that the disposal of land by way of a lease to a private nursery would be contrary to a statutory trust arising under section 10, Open Spaces Act 1906, because no public access to the land would, thereafter, be permitted.

In order to avoid a similar situation arising in future a simple solution is to appropriate the land from its open space use to planning purposes in reliance on section 241 Town and Country Planning Act 1990. Appropriation is the process by which local authorities transfer how they hold land from one statutory function to another. Section 122 LGA 1972 governs the process.

This requires that the local authority resolves that the land is no longer needed for the purpose for which it is currently used and the new function, or use, to which it is to be put is one for which they could have acquired the land. As with section 123 LGA 1972 there is an obligation to advertise where 'open space' is involved.

Town and Village Greens (TVG)

The registration of land as a TVG strikes a fatal blow to any hopes for its development. This can be as much of a problem for the public sector as it is for the private sector. In addition to proving that the land has been used for recreational purposes for a continuous

[1] *Case C-220/05 - Jean Auroux and Others v Commune de Roanne*

[2] *Case-451/08 - Helmut Müller GmbH v Bundesanstalt für Immobilienaufgaben*

[3] *Faraday Development Ltd v West Berkshire Council and another [2018] EWCA 2532 (Civ) (14 November 2018)*

[4] *R (Alexander Keay Muir) v Wandsworth BC [2018] EWCA Civ 1035*

period of 20 years, the registration authority must also be satisfied that the recreational pastimes have been exercised, without force, openly and without permission.

Recently, insofar as local authorities are concerned, the focus has been on the permission question and whether land held and provided for public recreational purposes stops in its tracks any claim that the land has been used without permission (see *Barkas*[1]).

The topical area of interest now, for public bodies, is whether the statutory basis on which land is held is incompatible with the creation of TVG rights. This principle was established in *Newhaven*[2] in which it was held that land could not be registered as a TVG because its statutory use as a port was incompatible with its designation as a TVG.

In conjoined appeals in *Lancashire County Council and NHS Property Services*[3] the Court of Appeal clarified the application of this principle, in the former case holding that the carrying out of a local authority's functions as an education authority were general, i.e. they were insufficiently specific, so as to give rise to the necessary degree of statutory incompatibility. However, the issue is not closed because the Supreme Court has now granted leave to appeal against the Court of Appeal's decision.

State of the market

The real estate development market, already in flux due to the ongoing collapse of the retail market and Brexit undercurrents, is set for uncertain times going forward as a result of government plans to implement substantial structural changes to the residential leasehold market including:

- Imposing a ban on leasehold tenures for houses save where absolutely necessary (for example shared ownership);
- Banning ground rents on all new leasehold flats; and
- Introducing new ways for developers to create long-term arrangements for the maintenance of shared facilities and open spaces on new developments (so possibly an end to rent charges!)

[1] *R (Barkas) v North Yorkshire County Council [2011] EWHC 3653 (Admin)*

[2] *R (Newhaven Port and Properties Limited) v East Sussex County Council [2015] UKSC 7*

[3] *R (Lancashire County Council) v Secretary of State for Environment, Food and Rural Affairs [2018] EWCA Civ 721.*

Nathan Holden

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Clive Pearce

Whilst the government has been consulting on these plans since 2017, and the market has started to incorporate the expected ban on ground rents into new residential development schemes, it is still not clear how the government intends to implement alternative satisfactory arrangements that will allow for the transmission of positive covenants that are generally required for large developments (and which was not necessarily an issue on leasehold transmissions). This is especially the case where there are substantive communal elements such as combined heat and power arrangements.

Traditionally the inability of positive covenants to pass with land has required developers of large schemes to rely on leasehold structures or, less often, rent charge deeds. We should also mention, of course, the alternative commonhold arrangements that have been available for some time but given the market has steadfastly refused to embrace this structure it seems clear that this will not be an acceptable alternative to the existing 'tried and tested' structures now under threat. Additionally, obligations to provide deeds of covenant on transfer protected by restrictions have proven unwieldy in the context of large schemes.

In addition, on 2 July 2018 the Ministry of Housing, Communities and Local Government confirmed that:

- new government funding schemes will no longer be able to use funds for unjustified new leasehold houses; and
- it will be introducing new proposals to create a minimum Assured Shorthold Tenancy (AST) lease term of 3 years with a six-month break clause to give renters greater term assurance and landlords longer term financial security.

Developers now face the prospect of reduced scheme viability because of the inability to capitalise ground rents and a potential softening of the Private Rented Sector market (recently seen as a key part of schemes in urban areas) due to the proposed AST changes.

All of this will make for interesting negotiations between local authorities and private developers for new regeneration schemes. 2019 is shaping up to be a momentous year for the real estate development markets.

Watch this space….

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***Judith Barnes* and *David Hutton* outline how local authorities can - and must - utilise their Place-making roles to ensure their future financial viability.**

The importance of Place and revenue growth for local government

No one working in local government can have failed to recognise the scale of cuts, transformation and change affecting the sector arising from the government's austerity programme. In particular, whilst local government is recognised as probably the most efficient part of the public sector, deeper cuts have been imposed than on other public organisations including the police and, more particularly, health.

Additional funds are poured into the NHS (even at the expense of preventative measures under public health budgets that have been cut) yet waiting times continue to increase and health budgets continue to overspend, due to the demands of an ageing population that is living longer with more complex needs.

The National Audit Office (NAO) report *Financial Sustainability of Local Authorities 2018,* published in March 2018, confirmed that the financial health of local authorities across England is getting worse.

Despite some short-term freedoms to increase council tax bills and one off short term funds from government, local authorities are struggling to juggle higher service demands (particularly for social care, both adult and children's) and cost pressures against significant central government funding cuts of nearly 50% since 2010/11.

The NAO report recognises that local authorities have been relying on reserves and services are overspending their budgets, neither of which is financially sustainable.

Ironically some of the problems have been caused by the coalition government from 2010 and the subsequent Conservative governments freezing and capping council tax levels, meaning that base levels have not kept pace with inflation or the needs of local populations.

Yet one of the original purposes of the council tax setting process was to bridge the gap between raising funds and spending to enable local authorities to set budgets that would ensure that they could meet their statutory obligations.

Numerous local authorities have over the last few months warned that they are unlikely to be able to meet even basic statutory duties over the next few years without radical change and more funding from central government (e.g. East Sussex, Northamptonshire and Somerset County Councils).

Opportunities

However, it is not all doom and gloom. The government has incentivised local authorities through the ability to retain increases in business rates for their areas.

Although a number of pilots pooling business rates are ongoing, the detail of how central government will legislate to deliver the arrangements in due course have yet to be worked out (protecting those that would lose subsidy from those that are likely to gain significantly).

The key to driving increased revenue from business rates must be a concentration on Place - making the area attractive to business, bringing inward investment, ensuring that the area is attractive to individuals to live, work and play, to have effective public service delivery across all public services, decent housing of the right type and an eye to becoming as self-sustaining as possible across the whole area.

The development of a strategy for growth that is relevant to Place is essential, however that is defined. In some areas the focus might be on a Combined Authority area - in others more specifically to the boundary of a local authority.

The boundaries need to make geographic and economic sense and relate to communities of interest on the ground. Connectivity, both through ICT infrastructure and transport, as well as culture, heritage and indigenous industries (e.g. advanced manufacturing; research or financial services) will shape the future strategy for an area to develop and grow and ensure long-term sustainability.

Strategies need to embrace not only demographic, funding and service pressures but other challenges and opportunities such as the environment, including flood risk management and energy; Brexit; the impact of internet shopping on the high street; the creation of new communities, rather than just housing, to meet housing demand; influencing the shaping of new sustainable communities; and engaging more effectively with local businesses and the community and voluntary sector.

All these issues are important in the context of seeking to provide quality outcomes for residents.

Generally speaking local authorities are not shy to innovate (although some are held back by the lack of or inadequate risk assessment). For example, Westminster City Council requested voluntary council tax donations from higher rate council tax payers and received over £1m on a 'no strings' basis). Supporting innovation is key, but can be challenging. What is clear is that there is no one size fits all solution,

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solutions need to be driven by strategic thinking, the needs of the area and its relative strengths and opportunities.

The strategic vision for a place needs to be relevant across all sectors and agreed or supported by the major players in the area, to ensure that resources, time, effort and opportunities are identified and driven forward.

Local Enterprise Partnerships (LEPs), may not have been welcomed by many, however, they have now been in existence for seven or eight years and have the support of government.

The Ministry of Housing, Communities & Local Government published a paper in July 2018 headed *Strengthened Local Enterprise Partnerships* that requires LEPs to improve governance; develop Local Industrial Strategies with an economic cision for the area based on local consultation; and develop a strong evidence base of economic strengths, weaknesses and comparative advantages within a national and international context that will be supported by robust evaluation of individual projects and interventions.

The government is encouraging LEPs to have or create a separate legal personality as a company or be part of a Combined Authority (where they exist) and break free where they are currently hosted by local authorities, by April 2019. The geographic basis of LEPs also needs to be realigned to remove overlaps and to ensure that geographies reflect real functional economic areas.

LEPs are here to stay and will be expected to drive industrial strategies locally to provide the long term vision to make 'Britain the world's most innovative economy' – at least until the next election.

Whilst local authorities have representatives on LEPs and it is important to work closely with local business through LEPs, local authorities are still best placed to develop, facilitate and deliver elements of a wider vision for the Place and develop that vision into objectives and outcomes for the area over the short, medium and longer term.

How will the authority know when it has been successful in delivering the Vision? Key elements will include what does success look like over three - five - ten years – the more aspirational the more likely people are to work together to deliver the aspirations as well as the detailed outcomes desired.

Key roles for local authorities include:

- Facilitator, which could include promoting social value, addressing market failures, spend to save, support for transport and improved communications, strategic commissioning and incubator for growth;
- Investor to promote development; address market failure; to deliver financial returns; or assist in facilitating by sharing risk and reward which could be on market terms (take care over state aid);
- Delivery, for example, creating smart cities that are technology enabled,

creating housing companies as part of a wider solution to address market need (whether affordable or market rented or for sale) or with a joint venture partner whether through One Public Estate or public/private JVs;
• Custodian of public realm and public interests including the skills agenda and inclusive and connected communities.

New ways of working
Local authorities have been exploring ways of operating more efficiently and effectively over many years. This has included consideration of a wide range of models of operation, not just for improved service delivery, but to generate revenue and capital from major projects. These new ways of working often include:

• Ceasing to provide services that are loss making or may be provided elsewhere more cost effectively;
• Using charging policies strategically to influence demand for services;
• Greater income generation including from the use of existing assets;
• Transformation through the use of ICT and digitising services so that there can be far more self-service and reduced cost through Smart-phone technology;
• Delivering functions through alternative service delivery vehicles, including:
  – Housing delivery vehicles;
  – Asset vehicles;
  – Shared services partnerships/vehicles;
  – Teckal or trading companies or charities e.g. for leisure, libraries and culture;
  – Social enterprises and mutuals;
• Delivery of renewables and sale of electricity through energy service companies etc;
• Social investment bonds, investment vehicles/partnerships;
• Supporting business growth and productivity through economic social and environmental regeneration.

One area where local authorities may have opportunities to shape their Place and deliver growth as well as improved financial returns is through the better use of assets particularly land and property – as well as using their powers to acquire manage and dispose of land.

Development of land and assets
Local authorities have wide-ranging powers to buy, sell and develop land. Their powers are set out in various statutes including:

• Local Government Act 1972;
• Housing Act 1985;
• Town and Country Planning Act 1990;
• Local Authorities (Land) Act 1963.

Local authorities also have explicit powers that allow them to provide financial assistance and subscribe for shares in companies to provide privately let housing under ss 24-26 Local Government Act 1988.

Roles of the Council	Example Documentation
Owner of the company and its business	Articles of Association or Partnership Constitution for the company/LLP Shareholders'/Members'/Partnership Agreement (including "Reserved Matters" requiring council approval)
Guarantor/funder of the company's business	"Parent company" guarantee Loan or revolving credit agreement Security documents/debenture
Client/customer of the business	Strategic delivery contract Service contracts Client management arrangements
Provider of services to the business	Service level agreements e.g. ICT, HR, legal, payroll
Provider of premises and assets to the business	Lease or licence of premises Licence of ICT

Local Authorities also have powers that enable them to appropriate land, in particular for planning purposes, or to acquire land for planning purposes to secure the proper planning of the area.

When land is acquired or appropriated for planning purposes then an authority may dispose of that land under section 203 Housing and Planning Act 2016 in a way that converts any easements, covenants or other significant encumbrances into monetary consideration - thereby enabling and facilitating development. In exercising their powers local authorities may take a long-term view and may acquire land under s120 Local Government Act 1972 even where land is not immediately required for the purposes for which it is acquired.

It is therefore open to local authorities to promote regeneration by acquiring land (either by agreement or compulsorily) to facilitate land assembly and strategic long term development that will support capital appreciation and growth, as well as potentially through development of revenue streams from those developments. Land acquisition and development generally needs to be for the benefit or improvement of the area, but does not necessarily have to be within the authority's area.

Incidental powers are usually sufficient to rely upon to form a company or other corporate vehicle, if required, depending on the purposes for which the corporate vehicle is being formed, for example, regeneration purposes or to improve the area, or to generate cash through a trading company.

Additionally or in the alternative reliance could be placed upon the general power of competence in s1 Localism Act 2011 that enables local authorities to do anything that an individual can do, so long as that it is not constrained by other legislation.

In setting up any corporate vehicle there will be many legal issues and requirements to cover including:

• The form of vehicle (contractual), corporate or joint venture;
• The constitution;
• Governance and accountability arrangements including who appoints whom to the board;
• Procurement;
• State aid;
• The need to obtain best consideration;

- Clarity on directors' roles and responsibilities and potential for personal liability;
- Insurance and indemnity arrangements;
- Information governance and GDPR requirements;
- Assessment of any tax and VAT implications;
- Staff and pension issues;
- Potential competition law issues;
- The impact of the Local Authorities (Companies) Order 1995; and
- Don't forget the need for a legal review of the business case and "critical friend" challenge of the assumptions.

It is important to avoid conflicts of interest between those who sit on the board of an alternative delivery vehicle and those taking decisions about that vehicle from within the authority. Whilst some conflicts are inevitable there may be a need for protocols to ensure that proper declarations are made by individuals at the relevant time covering appropriate requirements.

Another key consideration is the expectation that the authority will retain certain controls over the operation of the alternative delivery vehicle. As well as agreeing an annual and longer term business plan, we would normally expect to see a list of "reserved matters" where decisions are required by the parent(s) as well as the board of the alternative delivery vehicle.

Unless authorities invest in the Place and promote growth, the prospect of a self-inflicted downward economic spiral increases, particularly with the uncertainties of Brexit. With a positive mind-set and collaboration as appropriate with partners there are significant opportunities to control the future destiny of an area.

Authorities often like to put in place appropriate governance to enable decisions on reserved matters to be taken quickly so as not to impede the business of the alternative delivery vehicle. This may involve delegation of functions (usually executive) to a cabinet member or to a "shareholder committee" of the cabinet (or relevant committee in an authority that does not have executive governance).

Whether procured or not it will be important to ensure that there is clarity over the appropriate documentation between the authority and the alternative delivery vehicle, whether owned and controlled by the authority or established on a joint venture basis. At a high level those roles and responsibilities can be captured along the lines outlined in the table (p37).

When we establish alternative service delivery vehicles we would normally expect officers to be on the board of those vehicles, rather than members, however, such matters remain decisions for local choice.

Although establishing a "client function" may sound "old-hat", over-bureaucratic or even grandiose, someone within the authority needs to have the role of monitoring what the vehicle does and reporting when expectations are not being met.

This client role is important to evaluate the ultimate success or otherwise of any alternative delivery vehicle and, where necessary to put in place alternative arrangements, should delivery not be successful. The client would then oversee the exit strategy, preferably agreed in

advance, to extricate the authority from the vehicle.

Conclusion

As mentioned above there is no one size fits all. Of the 50 or so housing companies we have established over the last few years, no two are exactly the same, from a significant non-procured joint venture with a registered provider, Hyde Housing in Brighton delivering affordable housing, through to housing for private rent and housing for sale in a number of other authorities - all arrangements are bespoke.

Although resources within local authorities are thin on the ground, unless authorities invest in the Place and promote growth, the prospect of a self-inflicted downward economic spiral increases, particularly with the uncertainties of Brexit.

With a positive mind-set and collaboration as appropriate with partners there are significant opportunities to control the future destiny of the area - never has it been more important to invest time, effort and energy in agreeing and working towards delivery of a vision for Place.

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APPENDIX

Financial sustainability of local authorities 2018
Published: March 8, 2018

"…Continued increases in demand for social care and tightening resources are pushing local government towards a narrow remit centred on social care. From 2010-11 to 2016-17, the estimated number of people aged 65 and over in need of care increased by 14.3%, and the number of children being looked-after grew by 10.9%. Social care now accounts for 54.4% of local authorities' total service spend, up from 45.3% in 2010-11.

Despite growing demand, spending on social care still fell by 3.0% from 2010-11 to 2016-17. However, this compares with a 32.6% reduction in spending on all other service areas including: reductions of 52.8% on planning and development; 45.6% on housing services; 37.1% on highways and transport; and 34.9% on cultural and related services.

There is further evidence that these spending reductions are impacting frontline services. Since 2010-11, 33.7% fewer households have their waste collected at least weekly, the number of bus miles subsidised by local authorities outside London has fallen by 48.4%, and the number of libraries has reduced by 10.3%.

The Ministry of Housing, Communities and Local Government (the Department) has made improvements in understanding the sector's financial position since the NAO's last report in 2014 but, because responsibility for services is spread across departments, there is no single view of how funding cuts are impacting the whole of local authority services. At a time when social care spending is being prioritised by local authorities, failing to understand how funding and demand pressures affect the full range of local authority activities risks unintentionally reducing services to a core offering centred on social care.

The government has given local government several short-term cash injections in recent years, but most of this funding has only been available for adult social care. Uncertainty remains over the long-term financial plan for the sector. The government has confirmed its intention to implement the results of the Fair Funding Review in 2020-21 and to allow local authorities to retain 75% of business rates, but the implications of these changes for local authorities' finances are not yet clear.

"Current funding for local authorities is characterised by one off and short-term fixes, many of which come with centrally driven conditions. This restricts the capacity of local authorities and yet the weight of responsibility to respond to increased demand and maintain services remains very much on their shoulders. The Government risks sleep walking into a centralised local authority financial system where the scope for local discretion is being slowly eroded."

Amyas Morse, head of the National Audit Office, 8 March 2018

Notes for Editors

- 49.1% real-terms reduction in government funding for local authorities, 2010-11 to 2017-18
- 28.6% real-terms reduction in local authorities' spending power (government funding plus council tax), 3.0% real-terms reduction in local authority spending on social care services, 2010-11 to 2016-17
- 32.6% real-terms reduction in local authority spending on non-social-care services, 2010-11 to 2016-17
- £901 million overspend on service budgets by local authorities in 2016-17
- 66.2% percentage of local authorities with social care responsibilities that drew down their financial reserves in 2016-17
- 10.6% percentage of local authorities with social care responsibilities that would have the equivalent of less than three years' worth of reserves left if they continue to use their reserves at the rate they did in 2016-17
- 13 - number of departments asked by the Ministry of Housing, Communities and Local Government to provide information as part of the Spending Review 2015

1. Central government funding to local authorities has fallen by 49.1% from 2010-11 to 2017-18. This equates to a 28.6% real-terms reduction in spending power. In the 2015 Spending Review and the 2017 Budget, the government provided extra funding to relieve growing spending pressures in adult social care. Consequently, the rate of spending power reductions has levelled off since 2016-17 for social care authorities (single tier and county councils) and is predicted to remain relatively flat until 2019-20.

2. Total overspending on services by social care authorities in 2016-17 amounted to £1.023 billion. District councils, who do not have social care responsibilities, did not overspend in aggregate. Combined overspends of both social care and district councils were £901 million.

3. 10.6% of single tier and county councils would have the equivalent of less than three years' worth of reserves left if they continued to use their reserves at the rate they did in 2016-17. A further 9.9% would exhaust their reserves within four to five years – reference figure 24 in the report.

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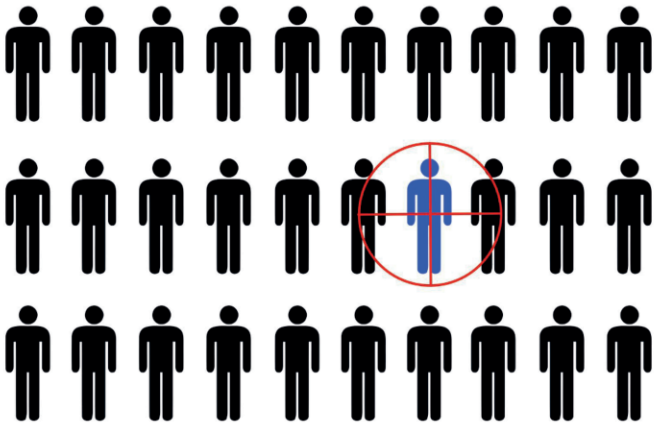

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