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Welcome

You only have to watch the local news to know that it is budget setting time in another year of cut backs. Difficult decisions will need to be made. In this edition Owlen Dutton offers timely and helpful advice on how to keep that process lawful and the implications of failing to do so (page 14).

Alternative delivery models are often seen as a way of achieving required savings but, as Kim Howell points out (page 10), there are other motivations and she explains why it is important to be clear about your aim from the start in order to choose the most suitable model.

One of the strategies being used increasingly is shared services and, in our ‘Spotlight’ item, Kevin Lane gives an insight into how he helped achieve a shared service model with three of our member authorities’ legal teams (page 5).

Meanwhile, Richard Medd looks at the option of establishing a local authority company to deliver services and specifically considers the ambivalent role and legal responsibilities of officers and councillors who are appointed as directors to such bodies (page 8).

It is not all bad news, because there is the tantalising prospect of devolved transport budgets, housing investment funds and retained business rates being held out by the government. As John Riddell explains, there is as always a trade off in these matters and this initiative is likely to keep a lot of local authority lawyers very busy (page 16).

In your spare time you will also need to sort out health integration (see Raj Shah’s article on page 6) and keep vexatious litigants from your door (see Philippa Dempster and James Gorman’s practical advice on page 12)!

It is the season to be jolly and, while the New Year will no doubt bring challenges, this is a good time of year to celebrate what we have achieved as a consortium. We remain the largest consortium of its kind in the UK. We continue to grow in size with more new members joining regularly. We continue to contribute to the savings target required by our respective organisations through membership and usage of the EM LawShare arrangements. We have a training programme that rivals anything in the sector. In short, it is not all bad. So we wish you a very Merry Christmas and a Happy New Year. See you in 2016!

Member news

EM LawShare welcomes new members

We have four new members since our last edition: Wychavon District Council, Sandwell Metropolitan Borough Council and, for the first time, two authorities from Suffolk; Babergh District Council and Mid Suffolk District Council. The latter two, like an increasing number of our members, operate a joint legal service. Our total membership is now 94 and a full list of members is on the EM Lawshare website.

SRA competence training: Are you ready?

The new competence training regime has now been brought in and will be compulsory for all solicitors from November 2016. Do you know how it works? Are you and your teams geared up to meet its requirements? We have arranged for Richard Williams from the SRA to come and talk to members about it at a special training event on 11 February 2016 at Freeths offices in Nottingham. You should have received an email invite on 8 December. If not and you are interested, please contact julie.scheller@freeths.co.uk. Early booking is recommended as we anticipate demand will be high.

www.emlawshare.co.uk
New training programme

We hope to launch the training programme for 2016/17 in February next year. The programme has been tailored to reflect the requirements of the new competency regime. It will also include an increased number of courses in Birmingham and Sheffield, and we are looking at a possible venue near Cambridge.

The courses will remain free and are available to anyone from a member authority, not just legal staff.

The new programme will be emailed out to everyone on our current database, which includes all those who have previously booked on a course.

If you do not think you are on this list and you want to see the new programme, email the course administrator, Julie Scheller, at julie.scheller@freeths.co.uk. It will also go on the EM LawShare website.

Goodbye Anita

After over nine years on the EM LawShare management panel, Anita Bradley is stepping down as she leaving one of our member authorities, Cheshire East, to join Browne Jacobson in the New Year. Anita has been a much valued member of the panel and her pragmatic, considered and patient approach has been greatly appreciated. We thank her and wish her well in this new episode of her career.

Secondments

In response to the positive feedback we got from the survey we conducted in the summer, we have been pressing ahead with proposals to set up an EM LawShare secondment scheme.

As a first step we will be putting a secondment request form on the website shortly where members can insert brief details of their requirements. This can include areas of law, level of experience, start date and duration of secondment.

The completed form will go to the six partner firms who would then let the requesting member know if they had anyone suitable available and the cost proposals.

If there is sufficient demand for this, the next stage will be to look at partner firms establishing a ready pool of lawyers with public law experience to act as secondees.
Want to play a part in running and developing EM LawShare?

To help the management panel, we have a delivery group of around six to eight members who:

- identify new initiatives;
- provide feedback on existing arrangements;
- do detailed work on some major projects;
- act as representatives on sub groups, such as the training, conference and website sub groups; and
- act as a succession pool to the management.

The group usually meets quarterly. There may well be ad hoc meetings on special interest issues but rarely more than three a year.

We are looking for two or three new members to join the group and would welcome interest from anyone. A dynamic personality and willingness to share new ideas is of more importance to us than age, experience or status.

The current membership is:

- Lyn Sugden, Gedling Borough Council;
- Samuel McGinty, North West Leicestershire District Council;
- Philip Horsfield, Broxtowe Borough Council;
- Barbara Hearst, Leicester City Council;
- Heather Dickinson, Nottinghamshire County Council; and
- Stuart Leslie, EM LawShare coordinator.

Ideally we are looking for representatives from a wide geographical spread and a variety of different organisations but would be pleased to hear from anyone who is interested. If you want to put your name forward or just want to know more, please email the EM LawShare coordinator, Stuart Leslie, at sl.emlawshare@yahoo.com.
Spotlight on ... Kevin Lane, head of law and governance at Cherwell District Council and South Northamptonshire Council and joint head of Cherwell/South Northamptonshire/Stratford-on-Avon District Councils’ shared legal team

In each edition of Consort EM we shine a light on a member to show the variety of roles within the consortium. This month Kevin Lane provides an insight into shared legal services.

How long have you been with Cherwell and South Northamptonshire councils?
I joined South Northamptonshire in 1994 as head of legal services and held a number of corporate roles until 2011, when the council created a shared management team with Cherwell District Council and I was appointed to my current post.

What does your role entail?
On the legal side I share the running of a three-council shared legal team with my colleague Phil Grafton, head of legal and democratic services at Stratford-on-Avon District Council. This shared team was created in October 2014 with the aim of increasing the resilience of three small legal teams and reducing the need to externalise work to private firms. Of course if we do, it goes via EM LawShare! On the governance side I am the monitoring officer for both South Northamptonshire and Cherwell and the approximately 140 town and parish councils in their combined area. I am responsible for the democratic and elections team, which is shared between these two councils. I am also the designated data protection and freedom of information officer for both councils. I still find time to do ‘real’ legal work, primarily in support of major regeneration projects, and the creation of council-controlled companies.

Who do you report to?
I report to the director of resources for Cherwell and South Northamptonshire. He is also the Section 151 officer and it is fair to say that we very much work as equals in our respective statutory roles. The shared legal team is divided into three teams covering contentious, non-contentious and planning, although individuals with wide skill sets are not siloed and they work across teams. The democratic and elections team has a single manager and each individual works in both disciplines.

What are the most pressing issues for you at the moment?
On a corporate level, maintaining the financial viability of the councils with more central government cuts following on from previous cuts. Key components of this for Cherwell and South Northamptonshire are encouraging growth, in the right locations, increasing shared working and identifying new ways of working via a confederated company approach to the commissioning and the supply of services. On a service level it is difficult to recruit experienced lawyers in high demand areas, like planning and commercial property, on local government salary rates.

What regulatory issues are on the horizon?
Hopefully a better understanding of the role of the public sector and in-house lawyer from the Solicitors Regulation Authority and a marrying-up of the solicitors’ regulatory framework with the Legal Services Act 2007.

How do Cherwell and South Northamptonshire councils compare with other places you have worked?
Ancient history in my case but I worked at two councils before South Northamptonshire and in private practice before that. All of the councils have been good places to work and the opportunity to work with professional colleagues from other disciplines in the same organisation is a big plus. In my 30 years in local government I have seen many changes in outlook and approach. Needless to say, the amount of ‘dead wood’ has been significantly pruned in that time.

At the start of my career I had three to four years in private practice. I find the culture and mutually supportive approach of the public sector, if not the financial rewards, a lot more palatable.

What law would you like to see changed?
The Freedom of Information Act 2000, where I would like to see a public interest test at the request end of the process in order to weed out the high number of requests that are commercially or academically motivated.

What is the best piece of advice you have received?
When emailing, think before you press ‘send’.

Finally, two truths and one lie in any order.
The current and last government have been genuinely introducing localism. The standard of conduct among MPs is lower than that among councillors. I support a good football team.
Commissioning health services: a brief introduction

From 1 October 2015 local authorities have responsibility from NHS England for the commissioning of health visitor services for children aged 5 and under.

This short guide is intended to clarify the current commissioning structure by looking at the key NHS bodies, their functions and their interrelationships.

Top-level organisations – including NHS England

The Department of Health, which receives funds from the Treasury including £116.4 billion for 2015/16, sponsors arm’s-length bodies like Public Health England, which is responsible for protecting the population from disease and which works closely with local authorities to reduce health inequalities.

Over 80 per cent of the Department of Health’s total spend is allocated to NHS England. Originally established in October 2012 as the NHS Commissioning Board, this pan-England body is responsible for much of the NHS’s day-to-day strategy and oversees the functioning of the whole commissioning system. NHS England directly commissions health services for people serving in the armed forces and for offenders in prisons, as well as specialist healthcare services for conditions affecting a small number of people. Since April 2015 NHS England has been co-commissioning primary medical services provided by GPs with Clinical Commissioning Groups.

Clinical Commissioning Groups

Clinical Commissioning Groups replaced primary care trusts under the Health and Social Care Act 2012. Clinical Commissioning Groups are mostly made up of medical professionals and are responsible for planning and commissioning healthcare services in their local area. The geographical boundaries of Clinical Commissioning Groups, of which there are more than 200 in England, generally match up with those of local authorities.
Clinical Commissioning Groups mainly commission secondary services, which are the provision of healthcare following referral, usually in a hospital, and tertiary services, meaning services accessed by referral from consultants. They also commission ambulance services and community care services.

In April 2015, 64 Clinical Commissioning Groups in England took on responsibility for commissioning general practice in their area, with a further 87 beginning a lower level of joint commissioning of general practice with NHS England.

Commissioning Support Units assist Clinical Commissioning Groups in transactional commissioning, for example, data analysis, contract negotiations and market management, as well as transformational commissioning, such as service redesign. Clinical Senates offer specialist clinical advice to Clinical Commissioning Groups.

Providers, regulators and Healthwatch

The commissioned healthcare services are delivered by a variety of providers, many of which may be NHS Trusts or, alternatively, from the private or voluntary sectors.

The Care Quality Commission registers providers against essential levels of safety and quality, and has established a single integrated licensing and registration process with Monitor, the economic and competition regulator for health services in England.

The Care Quality Commission has a statutory committee called Healthwatch England. This national user representation organisation provides advice to the Secretary of State for Health, NHS England, Monitor and local authorities about user views. Healthcare England also offers guidance and support to local Healthwatch organisations, which have been set up to enable citizens to influence and challenge the provision of health and social care services in their local areas.

Local government authorities and health and wellbeing boards

Under the Health and Social Care Act 2012, local authorities have assumed various responsibilities for improving the health of their local population, such as the appointment, jointly with Public Health England, of a director of Public Health and the establishment of local Healthwatch organisations.

One particularly important responsibility of local authorities is the commissioning of a range of public health services. From 1 October 2015, this includes health visitors for children from birth to 5 years, previously commissioned by NHS England, and local authorities are expected to provide the same level of service at the point of transfer.

The Health and Social Care Act 2012 also established health and wellbeing boards as statutory committees within unitary and upper-tier local authorities. Health and wellbeing boards ensure that commissioning plans meet local needs by leading the development of Joint Strategic Needs Assessments and Joint Health and Wellbeing Strategies. Local authorities must have regard to these when commissioning the relevant services.

Joint commissioning

Local authorities and Clinical Commissioning Groups may enter into partnership arrangements to commission some services jointly. These are called section 75 agreements, after section 75 of the NHS Act 2006, and are intended to encourage the pooling of money and integration of resources. So far, section 75 agreements have been used particularly in learning disability services and services for children and older people.

Where this commissioning approach is used, lead responsibility for commissioning may rest with either the local authority or the Clinical Commissioning Group.

The Better Care Fund, which went live on 1 April 2015, consists of £5.3 billion, increased from the original pledge of £3.8 billion, to be deployed locally on health and social care through pooled budget arrangements, formalised in section 75 agreements. Health and Wellbeing Boards must jointly agree plans for how the money is to be spent, with the plans signed off by the relevant local authority and Clinical Commissioning Groups.

Where next?

Further integration between the various component organisations of the NHS is likely. The NHS’s Five Year Forward View, published last year, gives some indication of potential future directions. This includes the removal of barriers between hospitals and family doctors and new models of service delivery, such as multi-speciality community providers. This will inevitably entail more complex partnerships and financial interdependencies, and the contractual approaches to these will need to adapt accordingly to ensure joined-up and seamless services.

A short webinar on this topic can be found online at www.sharpepritchard.co.uk/resources/presentations/commissioning-health-services.
Directors’ duties in the context of local authority companies

Directors’ duties have existed for the past 300 years and were codified by the Companies Act 2006. These duties are owed by directors of private companies but also extend to shadow directors and any person performing the same functions without having been formally appointed as a director. Duties are owed to the company and it is only the company that can bring an action against a director for breach of duty, breach of trust or negligence. In very limited circumstances, a minority shareholder can bring a derivative action claim against directors. However, the criteria needed to bring a valid claim are onerous.

The remedies for breach of a director’s duties include damages, an injunction, setting transactions aside, accounting for profits and the return of the company’s property. There could also be grounds for terminating a director’s service contract or disqualification as a director.

The general duties

The Companies Act 2006 sets out seven general duties:

Duty to act within powers (section 171)

A director must act in accordance with the company’s constitution and must only exercise powers for their proper purpose.

Duty to promote the success of the company (section 172)

A director must act in good faith and in a way that would be most likely to promote the success of the company for the benefit of its members as a whole. The Companies Act 2006 contains six factors that must be considered:

- the likely consequences of the decision in the long term;
- the interests of the company’s employees;
- the need to foster the company’s business relationships with suppliers, customers and others;
- the impact of the company’s operations on the community and the environment;
- the desirability of the company to maintain a reputation for high standards of business conduct; and
- the need to act fairly as between the members of the company.

This is not an exhaustive list; other factors such as profitability can also be considered, and the factors are in no particular order. Indeed there is no guidance on which should take priority in the event of a conflict. In order to demonstrate compliance with this duty, directors should document the factors that have been considered for each decision in the minutes of meetings.

Duty to exercise independent judgment (section 173)

A director must exercise their own judgement, independent of the views of others on the board. This duty does not prevent a director from taking advice but their own judgement must be used in deciding whether to follow the advice.

Duty to exercise reasonable care, skill and diligence (section 174)

A director must act as a reasonably diligent person. This takes into account:

- the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as that director; and
- the specific general knowledge, skill and experience of that particular director.

The first element is an objective test and the second analyses a director’s particular expertise. For example, a director with accountancy qualifications or experience would be expected to exercise greater scrutiny of the company’s accounts.

Duty to avoid conflicts of interest (section 176)

A director must avoid situations where there could be an interest that conflicts with the interests of the company, although the directors who are not conflicted may be able to authorise a director to continue to act despite there being a conflict. This duty is interpreted widely and applies to the use of any property, information or opportunity available to the company. The duty will be breached even if a director exploits an opportunity that the company considered but decided not to pursue and continues to apply after a person ceases to be a director.

Duty not to accept benefits from third parties (section 176)

A director must not accept any benefit from a third party that is given due to their position as a director or their actions, or omissions, as a director unless the benefit cannot reasonably be regarded as likely to cause a conflict of interest. The benefits covered by this duty include financial and non-financial benefits. It is important to consider what would be regarded as ‘normal’ in the circumstances and whether the benefit is excessive.
**Duty to declare an interest in a proposed transaction or arrangement with the company (section 177)**

There is no duty to avoid interest in transactions or arrangements with the company. However, a director must disclose to the other directors the nature and extent of any interest in a proposed transaction or arrangement with the company, whether direct or indirect. Such a declaration must be made before the company enters into the transaction or arrangement at a board meeting, by written notice or by general notice and must be updated should the interest change. There is also a duty under section 182 of the Companies Act 2006 to declare any interest in an existing transaction or arrangement.

There are certain exemptions where declaration of an interest is not required, including the following:

- the director is unaware of the interest or of the transaction. However, ignorance is not a complete defence and the director will be deemed to be aware of matters that they ought reasonably to be aware of;
- there is no reasonable possibility of a conflict of interest;
- the other directors know of the interest, therefore no disclosure is required if the company has only one director. It will be for a director seeking to rely on this exemption to prove that the other directors knew, or ought reasonably to have known, of the interest. It is therefore best to declare an interest in order to avoid any doubt; and
- the transaction is a service contract between the company and the director.

**Additional duties**

Directors will owe a number of other duties under company law, including ensuring that the company complies with filing requirements and other legal duties. In addition to company law, directors will also owe duties under specific legislation. For example, directors will owe specific duties in relation to insolvency, health and safety, environmental, anti-bribery, competition, and pension issues.

**Directors’ protection**

The vast majority of people who are directors of companies carry out their roles without any problems. Directors’ indemnity insurance is available to offer some protection in the event of a claim being made. Where proceedings are brought against a director, the court has the discretion to relieve them of their liability if it considers that the director acted honestly and reasonably and, considering all the circumstances, they ought fairly to be excused. In addition, shareholders can in some circumstances ratify the conduct of a director by way of an ordinary resolution, unless otherwise stated in the company’s articles of association.

**Difficulties facing local authority nominees**

The most important point to bear in mind for local authority appointed directors is that although the council makes the initial nomination or appointment, after appointment the director holds office according to the constitution of the company. Once an individual, whether officer or elected member, accepts an appointment as a director, they take on all the responsibilities of that position and their duty when acting as a director is to the company, not to their appointing council. They must therefore act in accordance with what they consider necessary to promote the success of the company.

It would, for example, in theory be a breach of a director’s duty to the company to disclose confidential company information to their appointing council, even if it were relevant to something that the council was discussing. This applies both ways and it would be equally wrong to disclose confidential information belonging to a council to the company.

The duty towards the company only applies when the member is acting in their capacity as a director. When at council meetings or acting in a role as a local authority officer or elected member, he or she must act in the best interests of the council, subject to the above point about confidentiality. It is therefore very important that directors have a clear understanding of ‘which hat they are wearing’ at any time.

It may often be the case that a director has been appointed to an outside body because he or she has a particular interest in the subject matter. In those circumstances it would not be unusual if the director’s own views and those of the particular organisation were closely aligned.

Alternatively, a director may have gained particular knowledge about a subject because of their involvement on another body. It is perfectly proper that the director should express those views or use that special knowledge during council debates because they are his or her own views.

However, a director should never be seen to use their position as a council officer or elected member to act as an advocate on behalf of an outside organisation, because that would be putting the other organisation’s interests ahead of the council’s. This applies regardless of whether or not they were appointed by the council.

Where local authority officers or elected members serve as members or directors of outside bodies, it is inevitable that conflicts will arise, from time to time, between the duties they owe to the outside body, and the duties they owe to the council. Conflicting interests should be declared on every occasion and the rules in the company’s articles or in relevant council codes of conduct, in terms of conduct in the event of conflict, should be carefully followed.
Traditionally, the use of alternative delivery models has been thought of as something local authorities consider to save costs. In fact, there are a variety of reasons why a local authority might consider this.

It is important to be clear about your purpose from the start, as that will affect the type of model that is most suitable and the arrangements that you make. Possible reasons are:

- **savings** – local authorities must balance the demands of service users with the pressure on their budgets. Many local authorities have already taken a lot of action to make savings through efficiency, so they will need to consider radically different ways of working if they are to find further savings;

- **reassessing the local authority’s role** – local authorities should consider whether they need to change their role to reflect changes in services and the requirements of service users. For example, a council that has traditionally provided all or most of its services itself may find it appropriate to move to a commissioning role for some services;

- **making use of other sectors** – as well as considering their own role, local authorities should consider whether the involvement of service providers from other sectors, such as the private or voluntary sectors, could improve the effectiveness of their services; and

- **community engagement** – models of service delivery that allow for involvement from members of the community may achieve greater satisfaction and interest from communities in the delivery of services.

There are various models to use for alternative delivery of local authority services. Your motivation should influence your choice of model rather than the structure directing how you approach the arrangement, which could result in failing to achieve your objectives. Typical models for service delivery can be categorised as:

- in-house provision;

- outsourcing through a contract;

- a strategic partnership, involving a service delivery contract, with arrangements to deliver long-term transformation objectives;

- shared services between local authorities;

- establishing a corporate entity to deliver services; and

- a contract with an organisation that has an objective of delivering services for the public good, such as a mutual.
Whichever model you decide to use, you must comply with all legal requirements in implementing the arrangements. This will require you to address various important aspects. The first is powers.

A local authority will need to have a power for every action it takes to introduce an alternative delivery model and will need to act reasonably in using this power. It is vital for a local authority to consider this at the outset of planning alternative service delivery, as failure in this could leave the validity of the whole arrangement vulnerable to challenge. On the face of it, there are plenty of powers available to local authorities to develop alternative delivery models. In addition, there is a range of requirements that may need to be addressed in particular arrangements. Examples include discharge of functions, contracts, employment of staff, participation in companies, and disposal of land. The local authority needs to know that appropriate powers are available for all of these.

As well as taking time to identify relevant powers, you will need to ensure that there is evidence that your local authority has acted reasonably in exercising them. Minutes and records of decisions should show that the authority has taken account of relevant information, has observed any specific requirements associated with the exercise of a particular power and has taken decisions for proper purposes. Any shortcomings in the decision-making process will expose the authority to potential challenges.

It is important to recognise the impact of alternative delivery models on the control a local authority has over the service delivery arrangements. If services are outsourced through a contract, that contract will set out the terms on which services are provided, and control by the local authority would need to be exercised through the provisions in the contract. A local authority will therefore need to ensure that contracts provide sufficient rights for it to meet its statutory duties and ensure the delivery of quality services. If a local authority decides to participate in an outside entity, such as a company, there may be practical reasons why it would make sense for the local authority involvement to be minimal. For example, if it is important to achieve charitable status, local authority involvement would need to be minimal, so as not to compromise the independence of the charitable body. By contrast, if you are expecting to rely on the Teckal exemption from public procurement, see below, the authority will need the same control as it has over its own departments. If your local authority is considering an arrangement where its input must be limited, you should make sure that the local authority’s members are aware of this.

Alternative service delivery arrangements made by local authorities must be compliant with public procurement law. It is beneficial to note this early on, as some arrangements will be affected by the relevant legislation more than others. For instance, social and other services specified in the Public Contracts Regulations 2015 are subject to a light touch procurement regime. Companies within the scope of the Teckal exemption are able to provide services to the bodies which set them up. Contracts for social and other services specified in the Public Contracts Regulations 2015 can be restricted to organisations meeting specified criteria, such as mutuals. Considering the procurement implications at the outset of planning alternative delivery arrangements will help to identify the most appropriate model and ensure you do not fall foul of public procurement law.

State aid is an important issue. There are various ways in which state aid might arise in transferring assets to a new provider and in the ongoing provision of services by the new provider. There are also ways of minimising the potential for state aid to arise. Appropriate steps to take include ensuring that transactions are at market value, keeping amounts of aid sufficiently small to be within the de minimis exemption and identifying whether any other relevant exemptions would apply. However, compliance with state aid rules in any arrangements for alternative delivery models would need to be analysed on an individual basis.

Employment issues may be important factors in a local authority’s reasons for considering alternative delivery models. They also have the potential to make a significant impact on alternative delivery models adopted by local authorities. Local authorities should consider the potential employment implications when considering which arrangements are most likely to meet their objectives. Your local authority might want to consider an alternative delivery model because this is seen as a way of reducing staff costs. However, a reduction in local authority staff numbers may result in other costs, such as redundancy and associated costs. There may also be service delivery implications if reducing staff leads to a reduction in the adequacy or quality of services. The overall staffing implications need to be clear before a final decision is made on an appropriate model.

Using alternative delivery models can help local authorities to achieve savings and high quality in service delivery. There is a range of important issues to consider when deciding on and implementing alternative delivery models. It is essential for any local authority considering alternative delivery to assess the advantages, disadvantages, risks and costs associated with each model. Having decided on a suitable model, a local authority needs to put it in place thorough arrangements to plan and implement arrangements, including provision for a periodic review.
Protecting your organisation and employees against vexatious litigants

Due to the sensitive nature of some of the work undertaken by councils and public bodies, from time to time you may come across members of the public who are particularly aggrieved, difficult or fixated on one issue. Unfortunately, situations may escalate, resulting in staff members being verbally abused over the telephone, social media or email, harassed or threatened, which may require involvement from the police. In such circumstances, councils may consider it appropriate to obtain an injunction against an individual to protect their staff from harassment.

Some individuals go further and issue baseless civil court proceedings, or a series of court proceedings, against a council for a variety of unfounded reasons. In such circumstances, councils have to allocate huge resources, time and costs to defend such matters. It is, however, possible for councils to restrict the actions of litigants by obtaining a Civil Restraint Order, as set out below. Such measures can be draconian and will only be imposed in very limited circumstances.

This article considers the powers available to the courts, how effective they are and in what circumstances further action may be needed to ensure your employees are sufficiently protracted.

First of all, what is a vexatious litigant?
There is no formal definition but vexatious litigants are usually people who:

- bring repeated litigation obsessively despite, in many circumstances, the matter or matters having already been decided by a court; and
- ignore court orders.

In AG v Baker (2000) it was said that: ‘The essential vice of habitual and persistent litigation is keeping on and on litigating when earlier litigation has been unsuccessful and when, on any rational and objective assessment, the time has come to stop.’

There are five major sanctions that the court can apply to vexatious litigants. Briefly, they are:

- a prohibitory order pursuant to the court’s case management powers (CPR 3.3 and 3.4) – an order by application or made under the court’s own initiative to strike out an application, action or statement of case that is utterly devoid of merit;
- civil restraint order – an order made by the court to restrain a vexatious litigant from making any further applications in relation to a single set of proceedings;
- extended civil restraint order – an order made by the court to restrain
General civil restraint order

Obtaining a general civil restraint order made by the court is as specific as the litigant. It is key to ensure that the order can be a useful tool to restrict a vexatious litigant from instituting any proceedings or making any applications in the courts identified in the order; and

- civil proceedings order – a long-term order made upon an application to the courts by the Attorney General under section 42 of the Supreme Court Act 1981 to deal with persistent and habitual vexatious litigants.

It is normal for the courts to make such orders for no more than two years at a time.

General civil restraint order

Obtaining a general civil restraint order can be a useful tool to restrict a vexatious litigant. It is key to ensure that the order made by the court is as specific as possible to ensure it sufficiently restricts the individual in question. Each case must be considered on its own facts to ensure there is sufficient protection for your organisation and employees.

The order obtained should contain a penal notice that confirms if the individual does not obey the terms of the order, they may be sent to jail. The order should also provide that without leave of court, the individual is forbidden from:

- issuing any new applications, appeals or other process in the claims already issued with the court; and
- issuing in any court in England and Wales any new proceedings and any applications appeals or other process concerning any matter involving or relating to or touching upon or leading to the issued proceedings.

Is obtaining a civil restraint order enough to protect your organisation and staff?

While the examples set out above may restrict an individual from issuing court proceedings and applications, and consequently reduce management time and money incurred by you as well as court time and costs, obtaining such an order does not necessarily protect organisations and employees against especially fixated litigants.

Is an injunction required as well?

In certain circumstances an injunction may also be required to sufficiently protect your employees in cases where threats have been made by vexatious litigants to specific staff members or, more generally, to specific departments. Some sanctions that can be obtained by way of injunction include prohibiting the individual from:

- entering the claimant’s offices;
- using threatening or violent language towards any employee, regardless of their location;
- acting in an intimidating or aggressive manner towards any employees;
- using foul or abusive language, whether orally or in writing, towards any employee;
- contacting directly specified individuals; and
- sending any offensive, derogatory, threatening, racist or homophobic communication to employees whether by emails, telephone calls, voicemails, text messages or any other form of direct or indirect communication.

Conclusion and practical considerations

In many instances, obtaining a civil restraint order will provide the desired effects. However, such orders need to be carefully drafted to ensure that they provide the required protection. Restricting an individual’s right to issue court proceedings is a draconian step and courts will only make such an order in very specific instances. In addition, in certain circumstances, an injunction may be required to ensure that your organisation and its employees are sufficiently protected.

In the unfortunate event of being faced with a vexatious or fixated litigant, below are some practical points that you should take into consideration when preparing to take action. Following these suggestions will help: protect your staff and strengthen your position before taking formal action, ensuring you obtain the remedy sought and reduce external costs. Taking positive action will also boost staff morale and show that their safety is paramount.

- Ensure that whoever has direct contact with the vexatious litigant is willing to assume that role and ensure that individual has someone to escalate matters to if the vexatious litigant persists.
- Act quickly and decisively to ensure the litigant understands what line you will be taking in response to the claims brought, persistent emails or contact. Put the litigant on notice that you will be taking action that will increase costs if they do not desist.
- Do not get dragged into protected and inflammatory correspondence with the litigant. Short formal responses to specific allegations are usually best.
- If you give the litigant a final warning, follow through with the action set out in your previous correspondence.
- Actions brought by vexatious litigants usually result in a large amount of paperwork. Keeping this in chronological order and ensuring you have a clear log of the contact from the vexatious litigant will be important.
- If there is threatening, abusive or inappropriate language used, an injunction may be required. If so, you must act quickly to protect your organisation and staff.

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The politics of setting the budget

‘It’s clearly a budget. It’s got a lot of numbers in it.’
George W Bush

As the days shorten and the temperature drops, most local authorities have one thing above all others on their mind, which is the setting of the annual budget. Over the years, since at least 2010, local authorities have had to budget more and more tightly and have taken a massive amount out of their budgets. Indeed, many have commented that if they had been told in 2010 to take out the amount of money that they have already done they would have thought it was impossible. But it has happened.

The trouble is that we are not yet at the end of austerity and councils are bracing themselves for another round of savings announced by the Chancellor of the Exchequer in the recent Comprehensive Spending Review. Local authorities have already delivered cuts of 40 per cent on average to government grants and £10 billion worth of savings, but will have to find further savings again. While there is a tiny cash terms rise over the life of this Parliament from £40.3 billion to £40.5 billion in 2019/20, this represents a fall of 1.7 per cent per annum, but it will affect councils differently with some needing to make larger cuts. There is to be 100 per cent retention of business rates by the end of Parliament and a boost to adult social care through a £3.5 billion investment from:

- a social care council tax ‘precept’ of 2 per cent for delivering adult social care – expected to raise up to £2 billion a year by 2019 to 2020; and
- £1.5 billion that Government will make available to local authorities for social care services.

Proposals in the Cities and Local Government Devolution Bill will also allow a precept to be added for elected mayoral combined authorities. Therefore the burden of increasing local taxation will also be shifting to local residents, including you and me. Never more has there been the need for local authorities to become more financially self-sufficient.

Councils have risen to the challenge and are setting strategies to help them cope with these pressures while continuing to deliver services and they are looking at ways in which they can raise income or provide income through a far more commercial approach. There are also rumours of councillors feeling that they will not be able to set a budget this year because of the serious financial pressures.

At the Solace Summit 2015 conference in October, there were suggestions that members in some councils will favour either deliberately not setting any budget at all or will set an unlawful budget. Of course, whether it ever comes to this is another matter. However, what is the position when a council looks as though it might be unwilling to set a budget?

Legal requirements

The provisions of the Local Government Finance Act 1992 set out what the council has to base its budget calculations upon, and requires the council to set a balanced budget with regard to the advice of its chief finance officer (section 151). The setting of the budget is a function reserved to full council, who will consider the draft budget that has been prepared by the executive (in a leader and cabinet or elected mayor model). Once the budget has been agreed by full council, the executive cannot make any decisions that conflict with it, although virements and year-in-year changes can be made in accordance with the council’s financial regulations.

Section 30(6) of the Local Government Finance Act 1992 provides that the council has got to set its budget before 11 March in the financial year preceding the one in respect of which the budget is set, although failure to set a budget within the deadline does not in itself invalidate that budget. Such delay, however, may have significant financial administrative and legal implications, including potentially an individual liability for those members who contributed to the failure to set the budget. If a budget is not set, section 66 of the Local Government Finance Act 1992 provides that failure, or delay, to or in setting the council tax can only be challenged by an application for judicial review; with either the Secretary of State or any other person with sufficient interest, which potentially could include a council taxpayer, able to apply.

Duty to provide services

However, budget set or not, the council has a legal duty to provide a range of statutory services and these duties are not absolved if the budget is set late. Most councils must also consider the impact on precepting authorities such as the Fire Service and the Police, to whom the council will have to pay the monies due, whether or not it has collected them through council tax.

Furthermore, a delay in setting the budget may well affect the council’s ability to enter into any new agreements unless the budget is agreed, as otherwise these would be
potentially unlawful as unfunded commitments. Councils also have increasingly important financial and corporate governance reputations to keep strong and the failure to set a council tax, even informal references to a potential failure to set a council tax, would be likely to have a significant adverse impact on the council’s reputation locally and nationally in terms of investor confidence.

If members decide that they will not set the council tax, there are likely to be some liability issues. Members have to abide by their council’s code of conduct and, as members have an active duty to ensure that the council sets a lawful budget, voting against those proposals repeatedly knowing that the result will be no lawful budget is almost certainly incompatible with their obligations under the code, as it is bound to bring the council into disrepute. Furthermore, although surcharge has long since been abolished, if a councillor’s wilful misconduct in refusing to set the budget is found to have caused a financial loss to the council, they may be liable to make good such loss. To achieve such a finding, it would have to be proved that the members were acting deliberately or recklessly and in a way that involved persistent failure to facilitate the setting of a lawful budget.

**Secretary of State’s intervention**

It is always worth considering that in such a situation the Secretary of State could intervene and direct the council to take any action that he considers necessary or expedient to secure compliance with the requirements of Part 1 of the Local Government Act 1999, which would include setting a budget by a specified date. In such a situation, it would be unlikely that the Secretary of State would actually set the budget but instead he would require the council to do so. However, such a direction is very much a measure of last resort and it would itself be challengeable by way of judicial review.

The most pertinent case that applies to this is *R v Hackney LBC v Fleming* [1986] RVR 182 where the question of not setting a budget was considered by Woolf LJ. He suggested that, while the facts of each case must be examined, in the ‘absence of a reasonable explanation, not to make a rate by the beginning of a financial year or within a reasonable time thereafter – I have in mind weeks rather than months – would prima facie be unreasonable and, therefore, in breach of duty’.

The result, therefore, is that the council as a corporate body and the members, both individually and collectively, have a fiduciary duty to council taxpayers to avoid things that would result in a loss of revenue or a failure to deliver services and they have the moral and democratic obligation to set the council’s budget on behalf of the electorate. There is always going to be a tension between members’ desire to vote for the right decision and the legal obligation to set a lawful budget, and this has just been brought into sharp relief by the financial considerations around at present.

**Refusal**

Given the split in roles since the Local Government Act 2000, what would be done if either the executive refused to propose a budget to full council, or if council, with a proposed budget from the executive, refused to accept it?

The bottom line is that the executive cannot thwart the duty of the council to set a lawful budget by refusing to recommend one. Accordingly, where the executive refuses point blank to comply with their duty to recommend a draft budget to council, the practical thing to do would be for the Section 151 officer’s report to the executive to be sent to council. This is an extreme situation, as it would be seen as a fairly disastrous loss of control if the cabinet were unable to recommend a budget.

Alternatively, if it looks as though the draft budget proposed by the executive will not be agreed by council, the practical approach is to remind members of their duty to facilitate rather than frustrate the setting of a lawful budget with a view to trying to reach compromise and agreement beforehand. It should not be forgotten that, if the council refuses to accept the draft budget proposed by the executive, they have to give the leader five days in which to consider the alternative proposals put forward by the council and come back to council on a further date to consider the proposals.

**Monitoring officers’ powers**

Disagreement when the budget comes to full council needs to be resolved. This could involve introducing short adjournments or adjournments to another day or, if this is unlikely to resolve the impasse and the deadline is getting close, officers could advise that members first identify those amendments that have cross-party support and can be voted on. Subsequently, with the substantive vote, officers could recommend that those members who support the proposals should vote in favour and those members who do not support the proposals abstain.

Remind members that the most important thing is to ensure that the council does set a legal budget to avoid the damaging legal, financial and practical consequences discussed above, to keep the setting of local tax local and to preserve the council’s reputation. Both the monitoring officer and the Section 151 officer may need to consider the use of their formal legal powers to report in such a situation. However, the better thing to do is not to get to that situation. But if you do, I hope the advice and practical steps outlined above will help.
Local devolution of powers

Devolution is nothing new. It has been a part of the political agenda since 1997, when the Labour government decided to create the Scottish, Northern Ireland and Welsh Assembly. Nine regional development agencies were established in England. Regional assemblies were set up until they were abolished by the Local Democracy, Economic Development and Construction Act 2009. Regional development agencies were later replaced by leader boards, until abolished in 2011.

The Local Democracy, Economic Development and Construction Act 2009 also made it possible for the Secretary of State to create new bodies involving two or more adjacent authorities – economic prosperity boards, to promote economic development and regeneration, and combined authorities, to perform the role of economic prosperity boards and take on the transport functions of integrated transport authorities.

The other significant change at this point was the creation of elected mayors, beginning with the Local Government Act 2000. There are now 11 elected mayors, including for Bristol, Salford and Liverpool, which represent less than 5 per cent of the local authorities in England.

Local economic partnerships appeared as non-statutory bodies charged with economic development planning, in practice working through local authorities and combined authorities in their areas. Their members are self-selected, with the majority representing local businesses. There are 39 local economic partnerships operating in shire counties as well as cities.

This political and constitutional framework gives the background for the current moves to devolution in England. There is a political will and public mood that supports devolution and it is now being adopted through elected mayors and combined authorities.

The Chancellor of the Exchequer, George Osborne, announced his intentions in a speech in Manchester in May 2015 when he said, ‘I am putting on the table and starting the conversation about serious devolution of powers and budgets for any city that wants to move to a new model of city government – and have an elected mayor’. The Cities and Local Government Devolution Bill seeks to give effect to this idea.

In June 2014 Mr Osborne made a further speech in Manchester about his vision of a northern powerhouse and the Greater Manchester Combined Authority signed up to the concept. The directly elected mayor of Greater Manchester will have a devolved transport budget, responsibility for franchised bus services, powers over strategic spatial planning, a new housing investment fund, a new earn back deal, a role in health integration and the role of the police and crime commissioner. Those with long memories will recognise that this looks rather like the old Metropolitan County rising from the ashes.
In July 2015 the Treasury also invited bids for devolution deals with a 7-week deadline, which could include proposals without an elected mayor. City regions and counties put in bids. Derbyshire and Nottinghamshire joint plans called for a 10-year transport settlement and fully devolved housing investment; Gloucestershire has sought control of all healthcare budgets, while Leicester and Leicestershire focused on skills devolution.

The structures vary. Norfolk and Suffolk, for example, are now proposing a combined authority with a strong leader who will have the same role as an elected mayor. Nine regions, including Leicestershire and Leicester and Nottinghamshire and Nottingham, have said that they would consider elected mayors.

Three new deals have been announced this autumn. The Sheffield City region deal was announced on 2 October, the North East City region deal on 23 October and the Tees Valley scheme on 23 October. While there are differences between the details of how these combined authorities will work, they have the following common features:

- there are city region mayors who will have their own powers, but must consult the combined authority as a body that will now be called a cabinet;
- the role of the local economic partnership and the private sector will be maintained or enhanced;
- the plan is to develop a single regional fund to support economic growth;
- transport funding will be devolved;
- the mayor will be given powers over strategic planning, including the responsibility to create a spatial framework for the city region;
- the mayor will chair some kind of land commission or assets board to oversee public sector land; there may be a housing investment fund;
- the mayor will chair some kind of land commission or assets board to oversee public sector land;
- there may be a housing investment fund;
- there will be pilot schemes for retention of business rate growths and there may be a limited power to levy a supplementary business rate;
- there will be a gradual process to devolve post-16 education;
- there will be more and extended enterprise zones;
- the combined authority will be responsible for broadband roll-out; and
- there may be combined integration of authority and NHS commissioning for health and social care.

The proposals for fiscal devolution should be noted. The Chancellor of the Exchequer told the Conservative party conference in October 2015 that he would bring forward proposals to allow councils to keep business rates and described it as ‘the biggest transfer of power to local government in living memory’.

More detail is available in the combined authority orders, including the Manchester order SI 2011/908 as amended by SI 2015/960.

We can, therefore, see the political will of devolving powers to elected mayors of combined authorities becoming a reality. What will happen next? A lot depends upon the final form of the Cities and Local Authorities Devolution Bill. The purpose of the bill is ‘to make provision for the election of mayors for the areas of, and for conferring additional functions on, combined authorities …’. It is proposed that the Secretary of State may by order provide that there is to be an elected mayor for the area of a combined authority. The order may provide, with the combined authority’s agreement, that any of the combined authority’s functions are exercised only by the mayor. The order may provide for the mayor to exercise police and crime commissioner functions in the area. The Secretary of State may make an order, if he considers that it is likely to improve the exercise of statutory functions in relation to the area, instead of limiting the powers for transport, economic regeneration and regeneration. The Secretary of State can import powers from other localities, including spatial planning powers without new primary planning legislation. The combined authority must have one or more overview and scrutiny committees.

The House of Lords introduced significant amendments. They removed the Secretary of State’s new ability to create a combined authority by reference to statutory powers generally. They also imposed express limitations on the power to transfer health functions away from the NHS. The bill is now making its way through the House of Commons and we await its final form.

It does, however, seem likely that elected mayors of combined authorities will perform a wide range of functions with some degree of fiscal devolution. There may also be devolution boards, rather than combined authorities. There will undoubtedly be challenges in governance. Very large bodies will be produced with very large financial resources. A good deal of power will rest in the hands of mayors and combined authorities. The role of the monitoring officer is going to become absolutely critical to the role and success of devolved local government in England. So, not for the first time, it is going to be down to the local government lawyers to bring order and coherence to these grand designs.

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We are delighted to announce an exciting and diverse programme of over 40 training events in 2015/2016 from our legal partners: Bevan Brittan, Browne Jacobson, Freeths, Geldards, Sharpe Pritchard, and Weightmans.

The seminars will be presented by lawyers from these six firms, each of whom are specialists in their field, and in locations across the East Midlands. This includes Leicester, Nottingham and Derby, with some courses repeated in Birmingham and Sheffield. Furthermore, a number of courses will be available via video conferencing in Birmingham, Leicester, Manchester, Milton Keynes and Sheffield.

We are very pleased to let you know that courses held at Browne Jacobson in Nottingham are now also available via video conferencing at their Birmingham office.

Detailed course outlines will be available on emlawshare.co.uk.

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<td>EU Procurement – Practical Impact of the new regulations Sheffield</td>
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<td>Anti Social Behaviour, Crime &amp; Policing Act 2014 – Good News?</td>
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New for 2015 – 2016

- Video conference extended to Manchester and Sheffield
- Some courses repeated in Sheffield

To book a place and find out more about video access, contact Julie Scheller on 0845 272 5701 or email julie.scheller@freeths.co.uk

Remember the courses are FREE!