ConsortEM

The newsletter for EM LawShare

Winter 2018

Welcome

We begin with a huge thank you to everyone involved in the organisation of the recent fifth EM LawShare conference. A particular thank you is extended to Carly Mars from Browne Jacobson who masterminded the event.

It was the best-attended conference we have held and was well worth taking a day out to hear our two excellent speakers.

Deborah Evans from Lawyers in Local Government clearly has some interesting ideas for the direction she wants to take LLG and I hope you agree that EMLS could gain many advantages by working closely with this organisation.

Dominic Campbell got everyone thinking about the future provision of services, although suggesting John Lewis might go under has caused me many sleepless nights!

The venue was equally excellent. Hopefully you completed your feedback forms and we will take account of all the things you liked and those things you didn't, to deliver an even better conference in two years' time.

Thanks again to everyone – organisers, sponsors, attendees for making it a great event.

At the conference we also launched our rebrand and over the next few months you will see a total rollout of the new EM LawShare brand.

It is modern and professional but retains the history of the consortium. We hope you like it and a big thank you to Geldards and particularly Robert Smith for all his hard work.

EMLS now has 148 members covering a whole variety of public bodies and it is this growth that has made us consider the governance arrangements.

We have merged the Management Panel and the Delivery Group to form a Management Board for the consortium which will meet four times a year. We will put a note of the meeting on the website so all members can see what has been discussed. In addition, individual board members have been given the lead for certain issues as set out below:

- Stuart Leslie – Training
- Sam McGinty – Website
- Jayne Francis-Ward – Conference / Newsletter/ Partner Liaison
- Elizabeth Warhurst – Development Group
- Barbara Hearst – On line Resources
- Heather Dickinson – Budget / Framework Procurement

If you are interested in becoming involved in working on any of the above matters, then please drop either Stuart Leslie or me, Jayne Francis-Ward, an email. We would be absolutely delighted to hear from you.

We hope you have all had a great 2018 and we wish you a very Happy Christmas and prosperous New Year.

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visit...
EMLawShare.co.uk

Our website is here to help you get the most out of your EM LawShare membership.

Our full range of website benefits include:

- advertise your vacancies for free
- full training programme, with online booking form
- access to members pack
- a full range of resources updated regularly, including articles, precedents, training materials and videos
- join group discussions and interact with other EM LawShare members

Contact our website administrator james.cavanagh@geldards.com for more information.

www.emlawshare.co.uk

Member news

Under new management

We've recently reorganised the management structure of the consortium to spread the workload, clarify roles and responsibilities and increase transparency.

The new Board replaces both the Panel and Delivery Group and is made up of 10 members:

- Jayne Francis Ward (Chair)
- Heather Dickinson (Nottinghamshire)
- Gerard Rogers (Chesterfield)
- Stuart Portman (Walsall)
- Mona Sachdeva (Nottingham Homes)
- Sam McGinty (Loughborough University)
- Barbara Hearst (Leicester)
- Elizabeth Warhurst (N .W. Leicestershire)
- Fran Whyley (Gedling)
- Stuart Leslie (EMLS Cordinator).

Pictured from left: Sam McGinty, Stuart Leslie, Mona Sachdeva, Elizabeth Warhurst, Jayne Francis-Ward, Francesca Whyley, Barbara Hearst, Heather Dickinson and Gerard Rogers. (Not pictured Stuart Portman).

At the conference we had a number of individuals who expressed an interest in helping with running EMLS and, we hope, to get them involved with the various specialist groups we operate on such issues as the annual training programme, biennial conference and website.

We very much welcome such input so if you wish to play a part, please contact our Coordinator, Stuart Leslie at sl.emlawshare@yahoo.com

Conference 2018 – "Best one yet!"

"Highly professional", "very well organised", "great event", "very interesting topics" and "highly motivating" were just some of the very positive feedback we received following this year's conference at the Pride Park Stadium in Derby.

"Inspirational" key note speakers Dominic Campbell, from FutureGov, and Deborah Evans, from Lawyers in Local Government (LLG), were especially popular and helped to attract just under a hundred delegates, some coming from as far afield as Bristol, Greenwich and Kent.

Plans are now already underway for our 2020 conference!

Member news

Welcome to our new members

We've had three new members since our last newsletter, bringing our total membership to 148. So, it's a warm welcome to Loughborough College, Castle Donnington Parish Council and E-ACT, who are a multi academy trust.

Loughborough COLLEGE est. 1909

Castle Donington Parish Council
Serving the people of Castle Donington

E-ACT

Website revamp

Our website is currently undergoing a major revamp and we are sure you will see a dramatic improvement when it's relaunched in January including:

- A vastly more efficient search engine
- Much easier ways to navigate and log in
- A generally more cleaner, contemporary and streamlined look.

We hope you'll take a look and let us know what you think.

EMLS chair wins major award

EMLS Chair, Jayne Francis-Ward, left Nottinghamshire County Council in the summer but the important part she played there and her major role in setting up and growing EM Lawshare to be the largest organisation of its kind, was recently recognised.

Lawyers in Local Government (LLG) bestowed on her the award of Significant Contribution to Local Government Law and Practice 2018.

Jayne is seen receiving her award from Deborah Evans, Chief Executive at LLG.

Privilege revisited – judgment provides clarity when investigating alleged wrongdoing

On Wednesday 6th September, one of the most awaited court judgments in recent times was handed down by the Court of Appeal.

The judgment impacts on any entity, public or private, conducting internal investigations in order to establish whether or not wrongdoing has occurred.

Background

In 2010, mining giant ENRC received an email containing allegations of apparent fraud, bribery and corruption relating to operations in Kazakhstan. External lawyers were instructed to conduct an internal investigation. After a number of meetings with ENRC, during which the progress of the internal investigation was discussed, the Serious Fraud Office (SFO) opened a criminal investigation.

The SFO subsequently sought to compel the production of a number of documents generated by ENRC and their lawyers during the internal investigation. ENRC refused to disclose four categories of documents on the basis that they were protected by legal professional (in this case litigation) privilege:

1. Their lawyers notes of meetings with ENRC's employees (past and present) and third parties;
2. Material generated by forensic accountants instructed to undertake a "books and records review";
3. Documents prepared by lawyers to update senior persons within ENRC on the progress of the internal investigation; and
4. Reports generated by the forensic accountants and a number of emails/letters enclosing copies of those reports, including emails from and to a lawyer occupying a senior post within ENRC.

Legal professional privilege

The SFO's powers of compulsion do not extend to documents which can be withheld on grounds of legal professional privilege in High Court proceedings.

Communications between clients or their lawyers and third parties will be protected by litigation privilege if they are drafted in order to obtain information or advice in connection with existing or contemplated litigation when, at the time that they are made:

- Litigation is in progress or reasonably in contemplation;
- The communications are made with the sole or dominant purpose of conducting that anticipated litigation which includes receiving advice in relation to it; and
- The litigation is adversarial.

The May 2017 judgment

The SFO made an application to the High Court. In May 2017, Mrs Justice Andrews ordered ENRC to provide the SFO with the material sought.

In making the order, Mrs Justice Andrews held that documents prepared by ENRC during the investigation conducted by the company's lawyers did not attract litigation privilege. Her ruling was that, at the time the documents were created, there could be no reasonable contemplation of criminal proceedings since the SFO investigation was at such an early (i.e. pre charge) stage.

The ruling created justified unease that clients would feel deterred from conducting internal investigations and seeking early legal advice if documentation created during those investigations could be forcibly disclosed at a later stage.

The successful appeal

In overturning the High Court ruling, the Court of Appeal concluded that the disputed categories of documents had, on the facts before them, the benefit of litigation privilege. Importantly, the court also said that advice in respect of which the dominant purpose is to avoid legal proceedings, or which is given with a view to settlement, is as much protected by litigation privilege as advice given for the purpose of defending such proceedings.

The Court noted that it is "obviously in the public interest that companies should be prepared to investigate allegations from whistle blowers or investigative journalists, prior to going to a prosecutor such as the SFO, without losing the benefit of legal professional privilege for the work product and consequences of their investigation".

The success of the appeal means that ENRC will not be compelled to disclose the relevant documents to the SFO. The ruling confirms that documents prepared for the purpose of avoiding litigation, whether this be criminal or civil, maybe protected by litigation privilege.

The Law Society, which had intervened in the appeal, emphasised the importance of the ruling for the principle of lawyer-client confidentiality. Christina Blacklaws, Law Society President, stated that 'the rule of law depends on all parties being able to seek confidential legal advice without fear of disclosure.'

What does this mean for your sector?

Public bodies may find themselves facing a criminal or regulatory investigation as a result of an incident, accident or whistle-blower allegation. It is recognised that there is a particular expectation on public bodies to be transparent and accountable. Indeed, in the health sector, this is enshrined in law in the form of duty of candour.

That said, seeking to conduct investigations and receive confidential advice should not be seen as inconsistent with such accountability and transparency. It is equally important an organisation, like an individual, can take advice and gather and submit information to or alongside its lawyers in confidence. It must be remembered that any legal privilege always belongs to the client and so can be waived by the client, and only the client, at any time allowing disclosure of material. Conversely, privilege can rarely be retrospectively claimed once material has been disclosed or produced in an unprotected manner. This judgment provides welcome reassurance that public bodies can conduct such investigations under the banner of privilege. It is, however, extremely important that the investigation is structured and conducted in the proper fashion:

1. Most importantly, litigation must be reasonably contemplated. The factual position at the time is key and early instruction of lawyers and the subsequent exchanges with them can provide good evidence of the state of mind of the organisation at the relevant time.
2. It is also important that those exchanges also make clear, if it is the case that communications are for the dominant purpose of conducting litigation, including receiving advice in relation to it.
3. In relation to the above, it is self-evident that when 'litigation' and legal advice are part of the test, a organisation has a stronger basis to assert privilege if lawyers are engaged at the outset, particularly in respect of advising upon internal investigations.
4. On a practical note, lawyers will assist in key early decisions such as who the 'client' providing instructions and receiving advice should be, who should investigate and author any report , the purpose and remit of such a report and how that report and its findings are delivered.

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Employing European nationals after Brexit

It is estimated that 3.1 million European nationals currently live in the United Kingdom. Of these, at least two million are understood to be in employment. As some of the largest public sector employers, local authorities are turning their minds to the question of whether their European employees will be able to remain in employment and, if so, whether any further steps will need to be taken to retain them post-Brexit.

As a result of the free movement provisions, employing a European national is currently a straight-forward process for an employer. They simply need sight of a European passport or national ID card to be satisfied that the person has a right to work in the United Kingdom.

Free movement will technically come to an end when we leave the European Union in March 2019. Many local authority employers are concerned that we do not yet have a legally binding agreement on the status of European nationals after March 2019. The withdrawal agreement has however set out provisions for the legal status of European nationals following our departure from the European Union. In light of this, the EU Settlement Scheme has been implemented by the Government. This does give a clear indication of the ongoing rights of EU nationals to work in the UK.

Although no Government minister will publicly admit this, the EU Settlement Scheme effectively allows for the ongoing free movement of EU nationals up to the end of the implementation period in December 2020. Prior to this date, EU nationals will be able to continue to enter the UK to live and work without difficulty.

Employers can continue to be satisfied as to their right to work by viewing the employees original European passport or ID card and retaining a copy.

The EU Settlement Scheme opened on a trial basis in the North West in August 2018 and opened for employees of higher education institutions in November 2018. It is anticipated that it will open nationally in January 2019. This scheme essentially provides a process for EU nationals to register with the UK Government. They may register for either settled status (indefinite leave to remain) or pre-settled status (limited leave to remain).

Those who have completed a period of five years residence in the United Kingdom will be able to apply for settled status. Those who have not yet completed a five year period will be able to apply for pre-settled status. Pre-settled status and settled status provide for the right to live in the UK, work, study and access public funds and services.

The scheme is voluntary until 30th June 2021. Employees may wish to register earlier but they cannot be required to do so. They do, however, need to be aware that if they are not registered by the June deadline, they will then be considered to be over-stayers and will no longer be able to work legally in the UK.

Local authority employers must be acutely aware of this deadline, as they could face a civil penalty if they employ a European national without settled or pre-settled status after June 2021.

What do employers need to do now?

Employers do not need to do anything immediately. There are, however, steps which can be taken to prepare for the new scheme.

Local authorities are best advised to start readying themselves for 1st July 2021 when the scheme will become mandatory.

Employers can start by taking the following steps:

- Understand which employees will need to apply under the new application route, including the family members of European nationals;
- Ensure all HR records and right to work checks for all employees are up-to-date;
- Put in place a communications strategy for employees as the scheme is rolled out and in the run up to 1st July 2021 and ensure employees have access to information about the new scheme;
- Ensure that employees provide evidence of having registered on the scheme when they do so, to enable HR records to be updated;
- Offer to support employees with the application process; and
- Ensure a full audit of status documentation is undertaken shortly before 30th June 2021 to ensure that all employees continue to be in lawful employment.

What do employees need to do?

The Home Office have revealed details of how the application process will work. They intend to open an online application process which will be accessible through smartphones, tablets, PCs and laptops. They have released a smartphone app which will read the chip in biometric documents such as passports. This will enable applicants to retain their ID during the application process. This app is only available on Android devices.

The fee will be £65 for an adult application and £32.50 for a child under 16. There will be no fee for those who already have a document certifying permanent residence. From April 2019, there will be no fee for those applying for settled status who already hold pre-settled status.

The Home Office have confirmed that those applying under the scheme will only need to prove three things; their identity,their residence in the UK and declare they have no criminal convictions.

1. Proof of identity

   A valid passport or ID card will be sufficient proof of identity. An applicant will be able to scan their passport to the app which will read the chip in a biometric document.

   They will be able to upload a recent digital photo of their face.

2. Proof of residence

   Applicants will not need to provide substantial evidence of residence. The Home Office intend to use HMRC and DWP records to confirm residence in the UK. An applicant can give HMRC permission to share their data with the Home Office. Evidence of employment from HMRC will be accepted as proof of residence.

   In addition an applicant can upload scanned copies of their P60s, bank statements or utility bills to evidence residence if further evidence is needed.

3. Declare any criminal convictions

   The UK crime database will be cross-checked to ensure that the individual is not a serious or persistent criminal or poses a security threat. This will be judged on a case-by-case basis.

How will settled status be issued?

EU nationals will not receive a biometric card or passport endorsement. Proof of status will be accessed through an online system. Non-EU national family members should still receive a biometric residence permit.

Right to work checks will be carried out through the online system with electronic verification provided to the employer to satisfy them that their employee has a right to work.

The Home Office have emphasised that caseworkers are looking to grant applications rather than refuse and will work closely with applicants to give them opportunities to remedy any deficiencies or omissions in the application.

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Education, health and care plans: a breeding ground for disputes

Education, Health and Care ('EHC') assessments were introduced in 2014 as a statutory requirement to put any child/young person with Special Educational Needs ('SEN') and their family/carer in the driving seat for informed decision-making about SEN-related support and provision.

EHC plans aim to engage the individual and their family to set aspirations and outcomes as high as possible for all practitioners involved in the individual's care and learning. For many, this integrated approach is incredibly empowering and inspiring.

But the reality in some cases is that the ambiguous wording of the statutes and statutory guidance – coupled with the scarcity of resources that public authorities must manage – has created a fresh battleground for uncertainty, protracted disputes and possible litigation.

For authorities, managing the demand is potentially overwhelming.

At January 2018, local authorities maintained 285,722 children and young people with EHC plans and 34,097 children and young people with SEN statements. The total increase of more than 11 percent on the year before was driven by large increases in the 16-19 and 20-25 age groups (source: DfE).

In May 2018 – following an investigation into one authority – the Local Government and Social Care Ombudsman revealed it is upholding the majority of EHC complaints it investigates, and warned authorities to avoid unnecessary delays when creating support plans.

Requirements of the EHC Plan

The EHC plan sets out how assessed needs related to a child/young person's SEN will be met. This can be a contentious document, and it is important for any local authority to be aware of its competing obligations so that it can make sure the family and individual are fully informed, and any limits to their decision-making powers is properly foreshadowed.

If an EHC plan is required, it must be detailed in its provision to meet each and every identified need and supported by evidence from advice and information obtained.

By way of an example:

An EHC plan must not include ambiguous terms such as "regular", "often" and/or "when required"

- Any hours of support should be allocated to the appropriate professional e.g. teaching, specialist teaching, support assistant time and/or speech and language therapy
- All activities/provisions should be designed to meet the recognised outcomes that must be demanding but achievable by the end of the next educational phase

Scope for Dispute

Each EHC plan should also specify all of the healthcare provision that is appropriate to meet all identified health needs arising from the SEN

that have been identified. The local authority will be responsible for all health provision that "educates or trains a child or young person," with the relevant CCG and/or NHS England responsible for securing the rest of the health element. There is clearly scope for disagreement between education and health as to whether a provision "educates or trains."

The statute stipulates that the local authority must decide to commission the educational institution the parents and/or young person state they prefer. This seems very clear. However, it also states that the local authority may decide to commission a different placement if it believes attendance would not meet the person's SEN; it would be incompatible with the efficient education of others; or it would be incompatible with the efficient use of resources.

Understandably, individuals and families may consider that they have a determinative right to a real choice in placement, whilst in reality this is significantly caveated by the way the local authority interprets the exceptions, particularly when making efficient use of available resources.

There are also often competing/conflicting obligations when a young person turns 18 and is deemed eligible for NHS Continuing Healthcare (CHC). It is often entirely unclear which statutory framework takes precedence and who, therefore, is the lead responsible commissioner.

Due to the differences in availability of funding between those who have an EHC plan and/or are CHC eligible, there is lots of potential for dispute. The decision as to whether a young person is – and the remit of their care-package – can be very contentious. This can also translate into sour relationships between public authorities which is frustrating for the frontline staff and disconcerting for families.

This highlights the intrinsic difficulty of dovetailing the purposes and outcomes envisaged by the authors of the SEN legislation and the pragmatic compromises that must be made on implementation due to resource shortages and practical difficulties.

Transition to Adulthood

Long before the advent of EHC plans it has been recognised that there is a plethora of additional challenges for young people with complex needs and their carers/families in the lead-up to and the years following their 18th birthday.

Many of the difficulties stem from individuals 'falling through the gaps' during the changeover from children's social support to adult services (which can be more limited and fragmented), and also on the switch to different funding regimes.

This is particularly the case where the young person has complex needs and receives support from different services. In response, legislation has focused on encouraging public authorities to implement joint working, budget pooling and commissioning for young people with a goal of advanced, bespoke and coordinated transition planning.

In addition to EHC plans, from the age of 14 there now must be an all-round focus on preparation for "positive life outcomes for adulthood" so that by the time they are 18 their needs continue to be met without any apparent loss of continuity of provision. This is important for both the individual and the authorities with ongoing obligations to get provision right within a difficult landscape.

Policies and Procedures

The potential for unresolved disputes within the EHC and CHC frameworks is considerable. CCGs and local authorities are facing tribunal or judicial reviews after being accused of unfairly refusing to provide or issue needs assessments or failing to secure the provision set out in the plan. Responding in court proceedings, particularly a judicial review, is immensely costly and time consuming, and should be avoided if possible.

A key way in which authorities can ward against the prospects of such challenges is by setting up policies and procedures that guide their employees as to how to make lawful decisions. These policies should be regularly reviewed and outcomes audited.

Practical Guidance

Public authorities can meet statutory obligations without needing to engage in lengthy disagreements, in the majority of cases. As part of this, it is increasingly important to develop a good relationship with young people and their families/carers at any early stage, through careful planning, good communication, joint organisational working and expectation-setting. This can then sustain the relationship right through adulthood.

Alternatively, protracted disputes often leave families/carers feeling that they need to "fight the system" to secure what they feel they are entitled to for their family. This leads to resources being lost on litigation throughout that young person's life into adulthood. Ultimately this shifts focus from developing their aspirations, with positive outcomes getting lost in the process. It also substantially diverts public authorities' precious resources, in both time and money, to defending their decision-making.

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Spotlight on...

Adele Wylie

Director for Legal and Democratic Services (Monitoring Officer) at Melton Borough Council

In each edition of ConsortEM, we shine a light on one of our members to show the variety of roles within the consortium.

How long have you been at Melton Borough Council?

I have been with Melton Borough Council for just over four months so I am relatively new in post.

What does your role entail?

I am the Monitoring Officer and a member of the Senior Management Team. I give high level legal and governance advice and support my team to provide a comprehensive, democratic, legal, information governance, business support, complaints and elections service.

However, as with any role in a small organisation I'm never surprised by the random jobs I pick up on a day to day basis.

Who do you report to? What is the structure of your team?

I report to the Chief Executive. My Directorate is brand new as most of the services within it were disaggregated some years ago and became the responsibility of individual departments.

We also had a shared legal service arrangement with a neighbouring authority until June this year which has now been brought back in-house. I'm therefore in the process of designing my structure and creating specialist teams. The teams will be led by service managers who will form part of our wider Leadership Team.

What are the most pressing issues for you at the moment?

Following a Peer Review at the end of last year and a subsequent Governance Review, we are exploring alternative governance models to our current Committee system. This has involved working with a select group of members, public consultation and learning from colleagues all over the country.

We hope to have a decision from elected members as to how we can improve our decision making towards the end of this year.

Obviously building my directorate is also key and, in particular, creating and supporting a forward-thinking legal team who can respond to the council's renewed ambitions is a priority.

What regulatory issues are on the horizon at the moment?

We have been considering the impact of the new rules regarding licensing of houses in multiple occupation (HMO) that will mean a substantially higher number of properties will require a licence.

How does Melton Borough Council compare with other places you have worked at?

Melton has been on a journey of change since last year when a new Chief Executive started and there was a change in leadership. I'm part of a new Senior Management Team and there is a drive, energy and excitement that I haven't felt in a Council before.

Following a Peer Review at the end of last year the council has renewed clarity and ambition which is felt from the top to the bottom of the Council. In particular, as with most Local Authorities, we are focussing on growth and regeneration.

It's not very often that you get to join a Council at such a pivotal point and it is extremely exciting to be a part of it.

What law would you most like to see changed?

The Standards Regime. We can only hope that the review into local government ethical standards by the Committee on Standards in Public Life provides us with more "bite".

What is the best piece of advice you have received?

"Do the things that nobody else wants to do and prove yourself through them."

Finally, two truths and one lie in any order

i) The quality of my advice depends on the quality of the chocolate that client departments provide.
ii) For almost ten years I commuted 160 miles a day. For two of those, I also worked weekends in a bar.
iii) My laugh can be heard from one end of the open plan office to the other and I laugh A LOT!

The future of the high street

Since the decline of major retailers such as Woolworths in 2008 and then, more recently, BHS, there has been an ever-increasing number of high street retailers facing difficulties.

This year alone has seen House of Fraser, Mothercare and Marks & Spencer announce plans to close stores alongside a number of well-established chains closing down altogether. It has been estimated that, since 2008, 11,000 high street outlets have gone under with at least 35,000 retail jobs lost or put at risk of redundancy this year alone.

So, what has caused the high street to suffer? How does it affect the local community? And what can be done by local authorities to support the increasingly fragile high street?

Reasons for the continuing decline of the high street include; the growth of online retailers, ever increasing business rates (a property-based tax affecting only those with physical stores), the introduction of out-of-town retail parks and increased costs of city centre parking.

Changes in spending habits since the recession have also played a part, with people still cautious about overspending and using any spare cash on leisure activities and holidays as opposed to retail.

Thriving retail developments can play an important role in maintaining healthy and successful communities, so the decline of the high street and closure of many retailers continues to have an impact on local communities through the loss of jobs and opportunities for local people, and a loss of community cohesion.

In many towns, once vibrant centres are now shadows of what they were, with many units empty and boarded up, causing investment to slow, and people to abandon the area.

Last month central Government announced the appointment of a panel of experts to diagnose issues currently affecting the health of our high streets and to advise on the best practical measures to help them thrive. The review will look at the current challenges and work out options to ensure our town centres remain vibrant.

A local authority might be able to assist in developing and shaping its high street in a variety of ways. The extent of their involvement will depend on the needs and requirements of their particular area and their appetite to intervene.

Ways in which a local authority could assist include:

- Considering applications for planning permission for retail development
- Being a landowner of site(s) which could be developed for retail and possibly other uses to supplement the retail market
- Distributing funding to third parties to assist with the development of the high street
- Acquisition of parts of the high street to enable the local authority to be actively involved in its management and future sustainability

A local authority should take a strategic approach to city centre development and management to achieve an environment which is best suited to the current and future needs of its community.

An area that was developed many years ago may have limited attraction to a community that does much of its shopping on-line, but might be keen to have access to work opportunities and cultural and leisure facilities in a city centre.

Expanding the high street to more than just retail has been key in redefining some high streets to ensure they can continue to be sustainable. Increasing the number of restaurants, and leisure and cultural activities around retail has been found to help attract visitors and encourage them to stay in cities for longer.

In addition, research has shown that in strong city centres, the dominance of office space provides greater footfall each day for retailers and leisure businesses while city centres dominated by shops struggle to provide enough daily footfall on their own.

Whatever the nature of the local authority's involvement, there will be a number of legal considerations to bear in mind. Firstly, a local authority needs to ensure it takes reasonable decisions. This means it must consider all relevant matters, disregard irrelevant factors, observe procedural requirements, act for proper purposes and not act in bad faith.

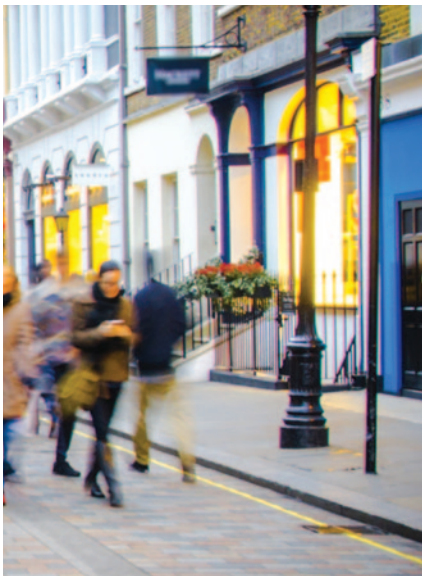
Disposals of land will be subject to the requirement for the local authority to obtain the best consideration reasonably obtainable (unless it falls within the general consent) together with any other specific requirements for particular types of land i.e. open space or assets of community value.

Public procurement and state aid rules will need to be considered if the local authority is considering entering into a contract with a third party for the provisions of services, goods or works.

Sheffield City Council has shown just how its continued input into the high street in developing the cultural and leisure community as well the retail has helped it to flourish.

Sheffield was at the forefront of centre shopping development with the Meadowhall complex – at the time the second largest in the country and soon due to be expanded to the fourth largest.

The council also had plans with a developer for large scale retail development in its city centre but those were put on hold with the financial crisis in 2008, but the City



Council did not stand still, putting its focus into encouraging development of non-high street sectors, bringing disused and run-down industrial buildings back into use, particularly around the universities, and attracting diverse independent retailers.

It also rejuvenated its public spaces including creating the Golden Route from the rail station, the award winning Grey to Green and Sheffield's forthcoming Knowledge Gateway to encourage private development.

Relocation of the city's main market led to redevelopment of the Moor, a shopping area that had been in decline for a number of years, which is now also home to a cinema complex and restaurants.

Although the pause caused by market crash was not welcomed progress is now being made at pace with Sheffield City Council in a prime position through its Heart of the City Two development to provide the resilient mixed use city centre that retail needs for the future.

Tiffany Cloynes, Rebecca Gilbert and Gillian Duckworth, Director of Legal and Governance at Sheffield City Council. They are guest writers on behalf of Geldards LLP.

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Give local government the opportunity to play the role it is qualified to perform

On 11 June, the Health and Social Care Committee published a report outlining a series of recommendations to help deliver effective health and social care integration in the UK.

Along with calling for better communication between agencies, the shelving of confusing and contentious jargon and a centralised, sustainable funding framework, the committee also gave guidance on the use of Accountable Care Organisations (ACOs).

It argued ACOs should be treated as NHS bodies. In reality this is likely to be the case for a number of aspirant ACOs but the report stopped short of giving clear guidance on how ACOs should be structured.

This is in part to enable the decision to be determined locally, but there is a risk that some valuable players, like local authorities and social care providers, could feel marginalised in the plans for implementation.

In order to ensure resilience, any ACO provider that takes control of a whole population budget for integrated service delivery is likely to be required to be a single purpose organisation – and that organisation is to go through an assurance and licence process with the NHS Regulator.

While it is easy to see the reasons for these requirements is (all Commissioners will want to see a stable and robust organisation take the contract) these requirements present difficulties for any local authority that expresses an interest in putting themselves forward to be lead provider.

A local authority cannot be a single purpose entity due to the other activities it carries out.

In fairness, no policy or other statement has been put forward to suggest that a local authority who wants to lead provision may not do so, but the current statutory and regulatory requirements are going to make this particularly difficult.

Much attention has been given to the possibility of private sector organisations taking up the position of lead provider. A big part of the committee's reasoning behind recommending ACOs be formally categorised as NHS bodies, was to allay fears over the privatisation of health and social care.

Questions concerning what would happen if a private sector provider holding an ACO contract went bust, for example, are flagged explicitly as risks that need to be planned for in its report.

However if this blanket rule is applied, It is not realistic for a local authority to become an NHS body. However, if public reassurance is the aim, this could also be achieved by allowing an ACO to be accommodated as part of a local authority.

However, in comparison with NHS providers, little attention has been given to the need to develop the conditions required for local authorities to bid for ACO contracts, leaving councils, who provide a broad range of services, out of the running.

This is disappointing because, in many respects, local government is perfectly suited to the role. Councils are used to managing a fixed budget, are directly accountable to the public and have an inbuilt responsibility to maintain the diversity of the health and social care market within their localities.

Time will tell whether there is the appetite in local government to take on such a role and whether the need to find a solution will therefore arise.

However, to create a truly integrated system for health and social care there arguably needs to be more comprehensive engagement with local government, as their experience of service delivery, the social care market knowledge and financial management is essential.

This means, greater flexibility or harmonisation of regulation to allow a more even and coherent playing field and the contracts and regulations that govern ACOs must make room for the specific requirements and characteristics of local authorities, including their accountability to the public.

If this doesn't happen then the feeling of marginalisation may grow and the engagement and interest of local government to deliver some of the headline benefits of health and social care integration could be put at risk.

Ultimately, integration is about delivering better care services to the public. As the Government gears up to launch its Green Paper, it should consider the importance of the involvement of local government if the measures its planning to announce are to find long term success.

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Social housing and NPPF

The Government's Green Paper "A New Deal for Social Housing" (the Green Paper) started with Theresa May saying "Everyone in this country deserves not just a roof over their head, but a safe, secure, affordable place to call their own". Are these brave words from a Prime Minister who has made it her mission to champion social housing?

The amended version of the of the National Planning Policy Framework (NPPF) issued in July 2018, now seeks to assist councils in supporting the construction of social housing.

Although the NPPF will strengthen councils' ability to deliver social housing through the planning process by way of Section 106 Agreements or as part of a residential development, it does not itself enable councils to construct their own social housing.

So how is Government going to make this happen? In the Green Paper, the Secretary of State indicates there was significant work already underway in relation to increasing the housing supply, citing £2billion being put into the affordable housing programme, alongside flexibility to offer social rent, increasing local authority borrowing by £1billion, building new strategic partnerships between larger housing associations, the Government and councils, and offering housing associations longer term funding to help deliver more homes.

Since then we had the raising of the HRA cap on borrowing announced. The Secretary of State has suggested that councils will be able to build up to 10,000 homes a year as a result of the additional funding.

In the Green Paper, Government sets out five principles that will underpin a new fairer deal for social housing residents; one of the five principles being the 'building 'of social housing that we need and ensuring that these homes can act as a springboard to home ownership.

So how do the changes that have been made in the revised NPPF and whether these changes will assist in the building of social housing?

The planning reforms signalled in the NPPF are with a view to delivering 300,000 homes a year by the mid-2020's and Government's planning reforms, designed to achieve this, are outlined in the amended NPPF.

The amended NPPF sets out the Government's planning policies for England and how these should be applied; provides a framework within which locally prepared plans for housing and other development can be produced; must be taken into account in preparing the development plan/local plan; and is a material consideration in planning decisions.

Although the Green Paper makes reference to the NPPF at Paragraph 137 and Government's commitment to ensuring the planning system can deliver high quality buildings it makes no further reference to the delivery of affordable housing through the planning system.

Elements of the amended NPPF will nonetheless assist in the provision of affordable housing:

- A greater emphasis on the variety of land to be used for housing (as well as the amount) and on the need to address the housing needs of groups in local communities with special requirements, such as the disabled (Paragraph 59)
- Strategic policies should be informed by local housing needs assessment to determine the number of homes needed. This provides a more flexible approach to housing need and an acknowledgment that no one area is the same (Paragraph 60)
- A clear need to address different types of housing with specific reference made to affordable and rented housing (Paragraph 61)
- A clear presumption that affordable housing should be provided on site; and planning policy should specify the types of affordable housing (as defined in the NPPF) required (Paragraph 62)
- Major development which includes housing should look to provide at least 10 per cent affordable housing (Paragraph 64, no change)
- Small and medium sites can make an important contribution to meeting the housing requirements of the area particularly in urban areas by identifying through the Development Plan and brownfield register land to accommodate at least 10 per cent of the housing requirement on sites no larger than one hectare (Paragraph 68 a)
- Affordable housing definition to be found in Annex 2 to the Glossary in the NPPF: the Government has perhaps moved furthest on this following the original consultation

Affordable housing for rent should now meet all of the following conditions:

(a) The rent is set in accordance with Government's rent policy for social rent or affordable rent or is at least 20 per cent below market rents (includes service charges where applicable)

(b) The landlord is a registered provider

(c) It includes provisions to ensure that the affordable housing price will remain at an affordable price for future eligible households or for the subsidy to be recycled for alternative affordable housing provision

This definition allows local authorities to provide affordable social rent properties or financial contributions for such housing through planning obligations working with registered providers.

It strengthens housing planning policy support in local plans. The definition is wide, including housing for sale or rent, affordable private rent, starter homes, discounted market sales housing sold at a discount of at least 20% and other affordable housing routes to home ownership. This is the first time we have seen such a wide definition of affordable housing.

The changes embodied in the amended NPPF and the announcement of the scrapping of the HRA cap are small steps towards the additional provision of social housing in England.

While the amendments to the NPPF will not allow councils to build social housing, they will hopefully act as a catalyst to assist social housing providers to construct or purchase such properties for social housing provision from private residential developers.

If the proposed financial assistance from Government are to help councils and registered providers to construct more social housing, and to maintain stock levels, Government will need to review Right to Buy and the right to acquire.

We believe that the Right to Buy is currently subject to review by Government. The right to buy and the right to acquire both allow tenants to acquire their homes.

Such changes – if Government is brave enough – may prove to be a political and legal minefield, but if these rights are not limited or abolished the extent of social housing construction proposed will not have the much needed effect of maintaining social housing supply.

Through planning reform, coupled with financial support and fiscal flexibility, Government is laying the foundations to allow for increased construction of social housing.

Government has given social housing increased priority, but the jury is out as to whether the changes will assist in the construction of more social housing and housing that remains in the hands of the councils and registered providers for future generations.

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What now for development vehicles following Peters v Haringey Council ruling?

The recent case of Peters v Haringey London Borough Council [2018] EWHC 192 (Admin), resulted in a number of significant implications for local authorities seeking to set up development vehicles.

In particular, the ruling provides important guidance on the meaning of the words "commercial purpose" in the Localism Act 2011.

Background

The case arose from the decision of the Council to set up a development vehicle (the HDV) to deliver a series of major development projects and appoint Lendlease Europe Limited as its joint venture partner.

The idea behind the decision was to bring in private sector expertise to help the Council achieve the best from their land and to help achieve its aims in relation to improving and augmenting the Council's housing stock and providing employment opportunities.

There were four grounds of challenge:

1. The Council was acting for a "commercial purpose", therefore under the Localism Act 2011, it was not permitted to undertake these activities through a limited liability partnership
2. It had failed to comply with its best value consultation duties under the Local Government Act 1999
3. It had not complied with the public sector equality duty
4. The wrong forum within the Council had taken the decision in that it should have been made by the full Council rather than the Cabinet

What did the court decide?

The Judge, Ouseley J, dismissed all four grounds of challenge in a judgment, which is likely to prove really helpful for authorities considering similar schemes.

The Localism Act for the first time gave local authorities a "general power of competence" sometimes called the GEPOC, which said authorities could do anything an individual could do, subject to certain exceptions.

It allows authorities to do things for a "commercial purpose" provided that they undertake these activities through a company of the type referred to in section 4(4), essentially a company under the Companies Act 2006 or a co-operative.

The Council used instead a limited liability partnership. The purpose of the provision requiring local authorities to undertake commercial activities through a company is to ensure that they are subject to the same tax regime as private companies.

A company would have to pay corporation tax. Using an LLP provided a "tax transparent" structure. Members of an LLP pay taxes according to their own tax treatment. Since local authorities do not pay corporation tax, this is a significant financial advantage.

Ouseley J needed to consider what was meant by "commercial purpose". Before discussing his conclusion it is worth thinking for a moment about the oddity of this phrase in this context.

Local authorities, in reality, do nothing for a commercial purpose. Even when their object is to make a surplus this goes into the Council's coffers to be used for other functions for the benefit of the public.

If the money was going to a private business or an individual (i.e. what is usually understood by a commercial purpose) this would be plainly unlawful. We would be in the realms of crime and corruption.

The claimant argued that the Council were acting for a commercial purpose because the statutory purpose of establishing an LLP was to carry on a business with a view to profit.

The Council's reports referred to terms which indicated that this was a commercial venture: investment, return of profit, sharing risk and reward. The Council's reply was that it was necessary to look at the primary purpose.

This was to achieve the Council's strategic aims in terms of economic development and regeneration of the areas concerned, job creation and improved and additional housing, including affordable housing.

The judge concluded that the question was: *Is the purpose for which these things are being done a commercial purpose?* The phrase needed to be read as a whole. It is not enough that there may be a commercial element.

He had no hesitation in finding that taking an overall view of the project, the Council was not acting for a commercial purpose. Its objective was to achieve the strategic aims referred to above.

What are the implications of this decision?

This has important implications for local authorities. If an authority sets up a company which is intended to produce a fat profit for refreshment of the Council's coffers, this must be done through a company.

However, if instead of passing the profit back to the Council, it is reinvested in some other public function what the company is entrusted to carry out, then the use of an LLP structure is permitted.

This hugely increases the scope for local authorities to use LLPs to undertake their functions, whether on their own or with joint venture partners.

Provided any surplus is being reinvested in the LLP or used to carry out public functions which have been entrusted to it by the authority, this is lawful on the basis of this judgment.

The guidance in the judgment on the consultation issue is less helpful. Under s 3 of the 1999 Act the authority is under a duty to carry out consultation for the purposes of deciding how to fulfil its best value duty.

This is couched in very general terms and it would be impracticable to consult about a large range of operational decisions.

The idea that it could apply to individual transactions may not even have occurred to anyone before failure to comply with this duty was used as a ground of challenge to the London Borough of Barnet's outsourcing project.

In the case of *R (Nash) v Barnet LBC at first instance [2013] EWHC 1067 (Admin)*, Underhill LJ decided that the Council had failed in this duty, though in practice this had no consequences as the challenge was out of time.

In the Haringey case the judge concluded that in setting up the development vehicle the Council was making arrangements with a view to carrying out its best value duty and therefore the duty to consult arose. It had not been complied with. However, as in the Barnet case, the challenge was out of time.

The other grounds for challenge were disposed of briskly. The judge praised the way in which the Council had identified and considered the relevant equalities issues. There was, in his view, no realistic basis for a challenge on these grounds.

As regards the fourth ground, there was nothing in either the Council's constitution or the applicable regulations requiring the decision to be made by the full Council.

Ouseley J refused leave on all four grounds. Whilst the decision is both important and useful for local authorities planning regeneration, it may be of academic interest only in relation to what happens in Haringey.

Following changes in political control within the Council, the scheme may not go ahead now.

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EM LawShare Training Programme

You should by now have received a brochure with the full programme of 62 courses for 2018/19.

The programme is presented by lawyers from our seven partner firms – Anthony Collins, Bevan Brittan, Browne Jacobson, Freeths, Geldards, Sharpe Pritchard and Weightmans – each of whom are specialists in their field. Presentations are made by the host firm unless stated otherwise. Some sessions will be jointly presented by lawyers from member authorities.

The majority of the courses will still be held in the East Midlands but we will continue to have repeats of some in Sheffield and Birmingham, along with an increasing number in London.

Video conferencing for most courses hosted by Freeths will also be available in their Birmingham, Leicester, Manchester, London and Sheffield offices.

Video conferencing for most courses hosted by Browne Jacobson will also be available in their Birmingham and London offices.

The courses remain **free to anyone** working for a member organisation, not just legal staff and can be booked on the EM LawShare website – **www.emlawshare.co.uk**.

Date:	Title:	Location:
18 Dec	**CPR Comprehensive Update – Civil litigation** (Intermediate) **Repeat of 6 Nov course**	**Weightmans, Birmingham** (video conferencing not available)
19 Dec	**Immigration Update – morning session** (All levels)	**Browne Jacobson, Nottingham – Presented by Freeths and Browne Jacobson** (with video conferencing to Birmingham and London)
19 Dec	**Immigration Update – afternoon workshop** (All levels)	**Browne Jacobson, Nottingham – Presented by Freeths and Browne Jacobson** (with video conferencing to Birmingham and London)
8 Jan	**Construction Contracts (JCT, NEC3) – with top tips on contract management and post-Grenfell issues** (Introductory)	**Geldards, Nottingham – Presented by Anthony Collins** (video conferencing not available)
16 Jan	**Regeneration Masterclass – Land acquisition, appropriation and disposal** (Intermediate/Advanced)	**Geldards Derby – Presented by Geldards and Anthony Collins** (video conferencing not available)
22 Jan	**RIPA Update – Criminal Litigation** (Intermediate)	**Browne Jacobson, Nottingham** (with video conferencing to Birmingham and London)
23 Jan	**Immigration Update – morning session** (All levels) **Repeat of 19 Dec course**	**Sheffield City Council – Presented by Freeths and Browne Jacobson** (video conferencing not available)
23 Jan	**Immigration Update – afternoon workshop** (All levels) **Repeat of 19 Dec course**	**Sheffield City Council – Presented by Freeths and Browne Jacobson** (video conferencing not available)
24 Jan	**Update for Monitoring Officers – Local Government law** (Intermediate/Advanced)	**Freeths, Nottingham – Presented by Bevan Brittan and Sharpe Pritchard** (with video conferencing to Birmingham, Leicester, Manchester, London and Sheffield)
29 Jan	**An Introduction to the Coroners Court for Local Authorities** (Introductory/Intermediate)	**Geldards, Nottingham** (video conferencing not available)
5 Feb	**Legal Research Skills Course** (All levels)	**Freeths, Nottingham – Presented by Weightmans** (video conferencing not available)

Date:	Title:	Location:
6 Feb	**Responsibility towards Children and Young People including Disclosure in Children's Services Claims and their impact on social care provision** (Intermediate/Advanced)	**Browne Jacobson, Nottingham** (with video conferencing to Birmingham and London)
11 Feb	**General Property Law Update – Land acquisition, appropriation and disposal** (Beginner/Intermediate)	**Freeths, Nottingham – Presented by Sharpe Pritchard** (with video conferencing to Birmingham, Leicester, Manchester, London and Sheffield)
12 Feb	**Judicial Review Masterclass** (Intermediate/Advanced)	**Leicester City Council – Delivered by Andrew Sharland, Barrister** (video conferencing not available)
13 Feb	**Making an in-house team more commercial** (Introductory)	**Geldards, Derby** (video conferencing not available)
27 Feb	**Licensing Update** (Intermediate)	**Gedling Borough Council – presented by Weightmans** (video conferencing not available)
28 Feb	**Working with Politicians Masterclass** (Intermediate/Advanced)	**Freeths, Nottingham – Presented by Anthony Collins** (with video conferencing to Birmingham, Leicester, Manchester, London and Sheffield)
5 Mar	**General Property Law Update** (Intermediate/Advanced) **Repeat of 11 Feb course**	**Sharpe Pritchard, London** (video conferencing not available)
6 Mar	**Conducting Local Authority Prosecutions** (Intermediate)	**Geldards, Derby** (video conferencing not available)
7 Mar	**Private Sector Housing** (Intermediate)	**Browne Jacobson, Nottingham** (with video conferencing to Birmingham and London)
12 Mar	**Education Law Update** (Intermediate)	**Freeths, Nottingham – Presented by Sharpe Pritchard** (with video conferencing to Birmingham, Leicester, Manchester, London and Sheffield)
14 Mar	**Workshop on Committees, Scrutiny and Standards** (Intermediate)	**Freeths, Nottingham – Presented by Weightmans and Freeths** (with video conferencing to Birmingham, Leicester, Manchester, London and Sheffield)
19 Mar	**Legal Research Skills Course** (All levels)	**Weightmans, Birmingham** (video conferencing not available)
26 Mar	**How to make change happen** (All levels)	**Freeths, Nottingham – Presented by Sharpe Pritchard** (with video conferencing to Birmingham, Leicester, Manchester, London and Sheffield)
27 Mar	**Information Governance Update** (All levels) **Repeat of East Midlands 2018 course**	**Sheffield City Council – Presented by Geldards** (video conferencing not available)

Detailed course outlines are available on our website: **www.emlawshare.co.uk**

Cancellations and non-attendance

If you cannot attend a course you are booked on you should cancel by emailing **julie.scheller@freeths.co.uk** or phone **0845 272 5701.** Your email should clearly state the title and date of the course and should be sent at least 48 hours before the course is due to start.

We appreciate that this may not be possible in all circumstances but if you fail to attend and fail to give the required notice on four occasions in a 12 month period, we reserve the right to require a £50 deposit before accepting any future bookings from you. The deposit will be returned if you do attend.

N.B. It is your responsibility to sign in at the start of the course. If you do not, you will be deemed to be absent for the purposes of this policy.

Continuing Competence

You will be aware that in 2016, the SRA removed the requirement for solicitors to undertake 16 hours per year CPD and have replaced this with a requirement for individuals to make an annual declaration confirming they have reflected on their practice and addressed any identified learning and development needs.

EM LawShare has considered the competence statement and the revised requirements in details. As such, the 2018/19 training programme is fit for purpose under the revised approach.

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