Law Share

Bringing Lawyers Together

September 2022

ConsortEM

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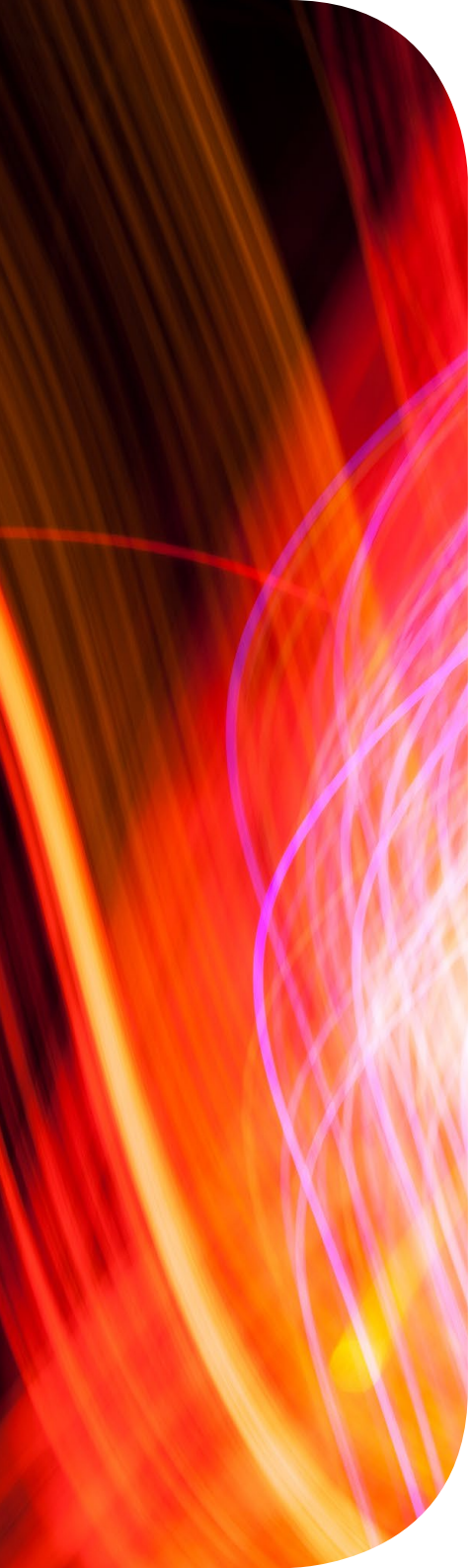

Welcome

Welcome... everyone to the latest edition of your newsletter.

As I write this, we are melting in unprecedented summer heat which has been challenging to cope with. I expect that I am not alone in having developed some "Heath Robinson" contraptions to cope with the heat - iced water bottles sitting in front of a fan; moving the mattress downstairs to avoid the rising evening heat, to name but two.

It is a stark reminder to us all that our climate is changing faster than perhaps we might have imagined and no doubt we will all be involved in local initiatives to help tackle the climate emergency.

Hopefully by the time this edition hits your desks the weather will have cooled somewhat and everyone will have had an opportunity to recharge their batteries with a holiday, or the imminent prospect of one.

As we return to our roles in this autumn session there will no doubt be many issues to address and one which will potentially affect us all is the change in Prime Minister. We will have to see which candidate secures the votes they need and whether they adjust the Government's course at all on any key issues.

The thing which the above issues tell us is that change is inevitable. Change doesn't happen at a consistent pace or in ways which we might have been able to predict but it is happening all the time, in every sphere of our lives. For all of us it is a question of how we adapt to that change which dictates whether we can get the best from it.

Our consortium has a range of added value benefits to help you to adapt to change. We have work going on in the **Development Network** to support colleagues with the increasing challenge of recruitment and to equip our colleagues with skills which they may need for the next phase of their careers.

I hope that you are also able to

take advantage of the EM LawShare **Training Programme** which is a key feature of our consortium arrangements. The programme has a range of more academic legal topics as well as soft skills, so do dip in and see what might help you adapt to a variety of changes in your professional lives.

The **Precedent Bank** which has been developed to date is a really helpful tool to assist with documents to help you in your work. It's available in the members area of the website and is arranged in subjects so you can drill down into areas you are interested in. If you need or have any precedents you think might be useful to others then please take a look and get in touch so that these can be shared and uploaded to the website.

So please use your membership of EM LawShare to help with managing change and personal development and if you think there is something we can do to add further value to our offer then please drop a line to our Co-ordinator, Deborah Eaton and we will discuss it at a future Board meeting.

Before signing off, I also want to let you know about the next set piece event we are holding - our biennial lecture. This year we are planning for sometime in October (hopefully avoiding school holidays) and, as in the past, it will be a late afternoon/ early evening lecture which I hope some of you will be able to attend after your work commitments. Details including start time and venue, will be circulated as soon as possible.

Take care everyone, until next time.

Heather

Heather Dickinson

Heather Dickinson

Chair of the EM LawShare Management Board

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Member news

Member spend - another new record

Last year we reported a record spend by member organisations across the seven partner firms and this year we've hit a new record high (much like the temperatures!) of £16.5m, up £3m on the previous year.

The continued impact of the pandemic and the problems of recruitment may well be driving this increase. Recruitment and retention will be a topic at our Spring conference - more news of which is to follow.

Local Government Diploma Sponsorship

Many congratulations to Samuel Ball, Legal and Democratic Services Manager at Oadby and Wigston Borough Council and Sarah Harriot, Corporate Governance Solicitor at Coventry City Council who have been selected to be sponsored by the ten partner firms on the Law Society's Local Government Diploma Course starting in the autumn.

We wish them all the best as they start their studies.

Samuel Ball

Sarah Harriot

New Members

Our membership continues to grow and this quarter we welcome to the EMLS community:

- Milton Keynes Development Partnership
- Tewkesbury Borough Council acting as One Legal on behalf of Gloucester City Council, Stroud District Council and Cheltenham District Council
- National Parks Partnerships
- Liverpool City Council
- Cumbria County Council

Biennial Conference

Save the date!

2nd March 2023 sees the return of an in-person conference at the East Midlands Conference Centre on the Nottingham University campus. Over the last few years EMLS has grown significantly.

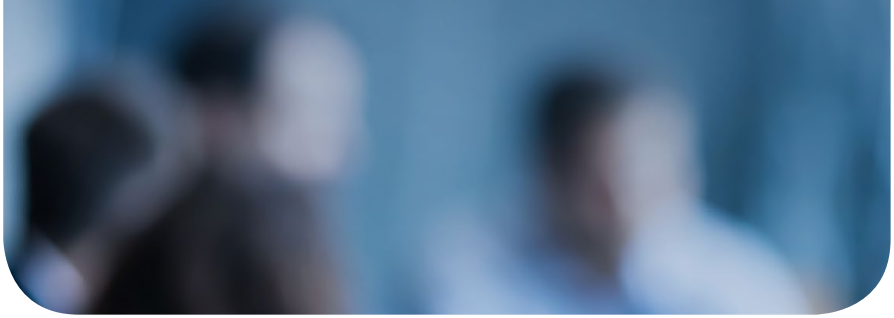
There are new panel firms and new members. There are also new people in post and a renewed focus on the future following a self-imposed hiatus during the peak of the pandemic. With this in mind now is the time to reset, refocus and reconnect.

These three R's will form the basis of the 2023 biennial EMLS Conference, which will take place at East Midland's Conference Centre on Thursday 2nd March.

We are currently working up some exciting workshops and details of these and the keynote speakers will be firmed up in the autumn, and in line with feedback from previous events, the emphasis on sessions relating to personal and team development will have equal stature to those relating to legal practice and knowledge.

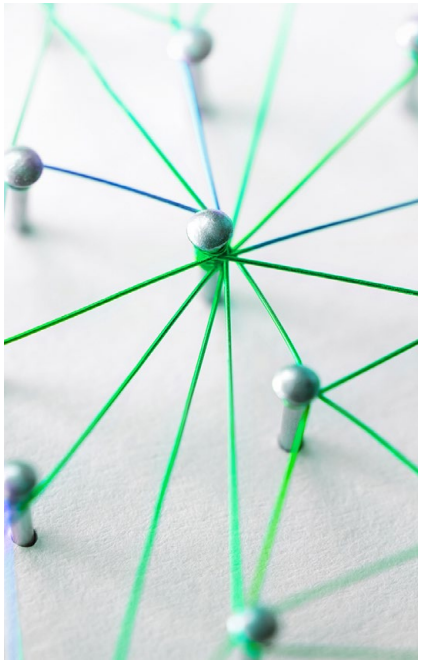
The timings will be 9.30am to 4pm.

We hope to see as many of you there as possible - it will be a great opportunity to meet up with old friends and colleagues and establish new connections.



EMLS Precedent Service

Hi, I'm Fran Whyley. You probably remember me talking to you all about the virtues of the EMLS precedent service during the clutches of the pandemic - I billed it as the solution for fruitlessly searching through old files or online resources seeking that elusive obscure deed, contract, skeleton argument, application form or report.



You know that some local authority, at some point, must have been through the same process, written the same report or drafted the same deed and you don't want to "reinvent the wheel". The precedent service was the answer and we asked each of you to appoint a precedent's officer to coordinate the submission of specialist local government precedents to the bank.

I recognise that since the re-launch of the precedent service, we have had tough times, working through the pandemic, as we start to return to some degree of normality, we would like to refresh our request for support of the precedent service.

Deborah Eaton and I will be writing to all authorities shortly to repeat the request to appoint a specialist precedents officer. It would be great if you could respond, we've put a lot of work into setting up the precedent service and want it to work to your advantage.

The other part of the precedent service is the ability to request specific precedents when you're stuck.

This is triggered by sending an e-mail to myself: *Francesca.Whyley@gedling.gov.uk* and John Riddell at Weightmans: *john.riddell@weightmans.com*

This is working really well, and we get two or three requests a month. We find ourselves able to answer most requests. We just want to make you aware of it again and please do contact myself or John whenever you get stuck for a precedent, and we will do our best to assist.

Thanks in advance for your help.

The precedents sub-committee:

- Fran Whyley
- Emma Plumbley (Nottinghamshire County Council)
- Chris Parry (Stoke City Council), Deborah Eaton (EMLS Coordinator)
- Kieran Stockley (Melton BC)
- John Riddell (Weightmans)

We plan to meet at least every three months to move things along. If you'd like to discuss anything in the meantime, just drop myself or John an e-mail.

Bus Services and Partnership Working - all you need to know about Enhanced Partnerships

Back in 2017, through the Bus Services Act 2017 "BSA 2017"), the Government secured Royal Assent for legislation amending the Transport Act 2000. Initially causing mere ripples in the local transport sector but now taking up significant time in all authorities with transport responsibilities and on the part of bus operators within their areas.

This article provides a summary of how partnership working between LTAs and bus operators is now falling into place and what benefits can achieved.

The BSA 2017 provided two key reforms to the way bus services (currently deregulated and therefore, although regarded as a vital local service, largely available only where profitable to the operator).

"Bus Back Better", published by the UK Government in early 2021 set out a strategy for the future of bus services. It took a familiar carrot and stick approach - a commitment of £3bn to the sector provided that provisions of the BSA2017 were taken advantage of and a partnership - curiously described in the legislation as an "Enhanced Partnership" was established by all authorities with transport responsibilities.

There was an exception and that was for any authority pursuing the second reform under the BSA 2017 - namely bus franchising. Franchising is a complex project for an authority to embark upon but which leads to all local services falling under the control of the authority allowing it to determine the service network, timetables and fares.

Only the Greater Manchester Combined Authority has made a formal decision to adopt the franchise model whilst a few other authorities are following preparatory steps of this kind.

Enhanced Partnerships - what do they mean for local bus services?

An Enhanced Partnership is developed by an LTA in conjunction with its local bus operators. These will in, most cases, include major national operators but also smaller operators running services in particular parts of the LTA's area. All operators providing registered local services should be involved in the process of developing the partnership. Most registered bus services will be within scope of the partnership but there are exceptions - such as demand responsive services and tendered services.

The foundations for Enhanced Partnerships are to be found in a document LTAs were required to develop and deliver to the Department for Transport ("DfT") known as a Bus Service Improvement Plan ("BSIP"). Bids for a share of the funding pot also formed part of the submission.

Following submission, all authorities then embarked upon development of their partnerships. This required the authority to develop and secure operator support for two documents:

- An Enhanced Partnership Plan - building on the detail included in the BSIP this document forms the focus for strategic level discussions between the LTA and its Operators. The Plan has to meet a number of requirements within the BSA2017 including objectives to improve the quality and effectiveness of local services and how through the implementation of Schemes (explained below) improvements will be delivered. The plan is to be in place for a period specified in the Plan and must secure bus operator supported as explained below. For local government lawyers its important to appreciate that this document should provide detailed arrangements for the governance of the partnership - with, potentially, a role for democratic services.

- At least one Enhanced Partnership Scheme - a formal statement of intent about improvements to services that are to be implemented must also be developed. The Scheme can include improvements in the form of Facilities, Measures and requirements for Service Standards to be met by bus operators.

Examples of these are:

Facilities: typically infrastructure provided by the authority that contributes to the operation of bus services efficiently. Facilities can include bus stations, bus stops, information systems for the benefit of passengers and bus priority lanes.

Measures: are other initiatives that an authority can take or ask other authorities to take that will facilitate the operation of bus services. An example would be changes in the town centre car parking policies of a district authority that are designed to encourage travel by bus rather than car, the development of a website integrating all travel information available for passenger reference or even making funding available to operators to reduce fare levels.

Standards of Service: Operators can be required to accept standards of customer service, comply with a customer charter, provide real time information and even participate in multi-operator travel card schemes.

It's important to appreciate that the Enhanced Partnership Plan and the Enhanced Partnership Scheme are "made" by the authority under a statutory power created by BSA2017. Misunderstandings have arisen in some cases where these documents are regarded as a form of agreement between the authority and bus operators. Confusion was, in particular, created through DfT guidance on the drafting of Plan and Scheme documents which was incorrectly entitled "Agreement" guidance.

There is no delegation of the LTA's powers to the partnership. LTA's must retain control of decisions. Many will involve expenditure commitments, may have competition law considerations and must not cut across existing contractual commitments (such as a contract with a bus shelter maintenance company).

So what role do Bus Operators have in Enhanced Partnerships?

Partnerships are generally created by consensus - everyone involved will agree to be involved and will sign up to any document formalising the partnership. With an Enhanced Partnership things are different. Bus Operators do have an early opportunity to review the partnership documents and can object through a process that the LTA must follow. Regulations made under the BSA2017 provide a basis upon which if a certain number of operators object, the LTA must take plans back to the drawing board.

Similarly, during the life of the partnership, variations that are

contemplated to the EP Plan or the EP Scheme must be exposed to an objection procedure.

Engagement with a range of other stakeholders is also required and if that leads to any changes there is reference back to Bus Operators again who can once again raise objections.

Once an Enhanced Partnership is in place, Bus Operators must operate their services consistently with the requirements of any EP Scheme that is in place. An undertaking to do so will be given to the Traffic Commissioners formalising the compliance requirement.

And what has happened about the promised £3bn funding?

Many LTAs have been left disappointed. The funding allocation proves to be only £1.4bn - the balance earmarked instead for a continuation of Bus Recovery Grant which is a funding arrangement to keep bus services on the road in the face of the consequences of the pandemic.

Only 31 authorities have been provided with funding. All funding is provisional. The fortunate ones are currently working up more detailed delivery plans relating to how the funding will be utilised. An interesting aspect is that significant amounts of funding provided is revenue related and can be applied to fare incentive schemes. DfT is placing considerable emphasis upon the establishment of more multi-operator ticketing arrangements to further simplify use of buses.

Other authorities will want to maintain momentum around Enhanced Partnerships - in the hope that a strong collaborative environment can be developed between authorities and bus operators notwithstanding the absence of DfT funding.

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Spotlight on...

Gillian Duckworth

Director of Sheffield Legal Services at Sheffield City Council

How long have you been with Sheffield City Council?

I joined Sheffield as an Assistant Director of Legal & Governance in 2010 and was appointed to the Director and Monitoring Officer role in 2015.

What does your role entail?

The role is often referred to as the City Solicitor which embodies the fact that I am the principal legal adviser to the Council which is made up of 84 councillors. I am also the council's statutory Monitoring Officer appointed pursuant to Section 5 Local Government & Housing Act 1989.

This gives me statutory responsibility for good governance within the organisation. It also requires me to maintain a Register of Councillors' interests that is available to the public and to provide a system for the public to complain about their Councillor.

I am also a member of the strategic leadership team within the Council and therefore take responsibility for leading a proportion of cross organisational projects.

To whom do you report? What is the structure of your team?

I report to the Executive Director of Resources.

I have approximately 140 staff made up of lawyers, democratic services officers, information governance officers and secretaries and support staff for councillors.

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

Following a referendum Sheffield recently changed from a Cabinet with a strong leader model to a committee system as well as becoming a council with no overall control so embedding the new system and teaching officers how to work in a no overall control environment has been interesting.

What regulatory issues are on the horizon?

Taxis and Clean Air Zone charging.

What was your career pathway?

I left school after A levels not really knowing what I wanted to do and joined Burnley Borough Council as a Trainee Legal Executive. I spent the next few years progressing through the exams and gaining experience, moving to a Legal Executive, Senior and finally Principal Legal Executive role.

I knew I wanted to manage the team but at that time it was impossible to progress without having a solicitor qualification, so I cross qualified whilst continuing to work and went straight into a senior solicitor role.

By the time I qualified as a solicitor, I had 18 years of experience of working in a Local Authority legal team which has been invaluable.

I would encourage local authorities to seriously consider adding Trainee Legal Executive apprenticeships to their staffing cohort to increase diversity and future proof your workforce.

How does Sheffield compare with other places you have worked?

Sheffield is much higher profile than any other council I have worked for. This brings both challenges and opportunities. I can say most definitely that it's never boring!

What law would you like to see changed?

I was hoping that the Government would recognise the anguish for some councillors in having to have their home address published on their Register of Interest, but they have declined to make any changes and are leaving it to Monitoring Officers to rely on s32 Localism Act 2011, Sensitive Interests.

What is the best piece of advice you have ever received?

Proceed until apprehended!

And what's next career wise for you?

Having worked as a Monitoring Officer in a core city for 7 years, I was unsure whether I would find another Monitoring Officer role fulfilling so have been considering my options. However, my interest was caught by the advert for the Greater Manchester Combined Authority Solicitor and Monitoring Officer.

The role has the same name but is substantially different from my current role and was offering the kind of challenge to spark my interest in the law once again. I applied and was successful so will be starting my new role across the Pennines at the end of September.

Finally, two truths and one lie in any order...

I was head girl at school.

I sing soprano in a classical choir.

My cat Penny leads a double life and is known as Brian.

Levelling Up - Challenges in Delivering Construction Projects

Levelling Up remains high on the political agenda with the Conservative leadership election over the summer and a General Election looming on the horizon. There has been increasing scrutiny of the numerous funding streams that broadly fall under the Levelling Up policy.

Added to this, the construction market is facing challenging times due to national and global issues. Getting a public infrastructure project up and running can prove a challenge in this context. Even with a contractor selected, there are likely to be hurdles to overcome in getting the project delivered on time and to budget.

Scrutiny of the funding streams

The Levelling Up, Housing and Communities Committee recently sought details of the progress of the "many grants and funding pots" which have been established to deliver the Levelling Up policy and to gain insight into the progress made to date.

The response from the Department showed that allocations have been made through twelve funds, namely Coastal Community Fund, Coastal Revival Fund, Community Ownership Fund, Future Highstreets Fund, Towns Fund, Levelling Up Fund, Shared Prosperity Fund, Community Renewal Fund, Getting Building Fund, Local Growth Fund, Transforming Cities Fund and Regional Growth Fund.

The response showed that substantial financial commitments have been made across the funds and also, that further funding rounds will be open for applications.

However, there is less clarity at this stage about how many projects are actually coming through to market. This will undoubtedly be a matter for continued close oversight, and the Government has said it is committed to providing qualitative as well as quantitative data in relation to the impact of the funding.

Challenges to delivery

The policy is being delivered in a hugely challenging construction market and in a context of stretched resources at local government level. There are numerous delivery challenges and market issues which need careful consideration to ensure a project comes in on time and budget. These include:

- Constraints on project team capacity
- Route to market and best use of frameworks
- Programme risk - delays due materials
- Price risk - particularly inflation
- Insolvencies of contractors.

The project team

A well-resourced, integrated, dedicated and focussed client team is key to the success of any construction or infrastructure project. That is particularly so when there are so many similar-type projects potentially coming to market. Establishing and maintaining a team can be a challenge with budget constraints and the need to deliver business-as-usual matters.

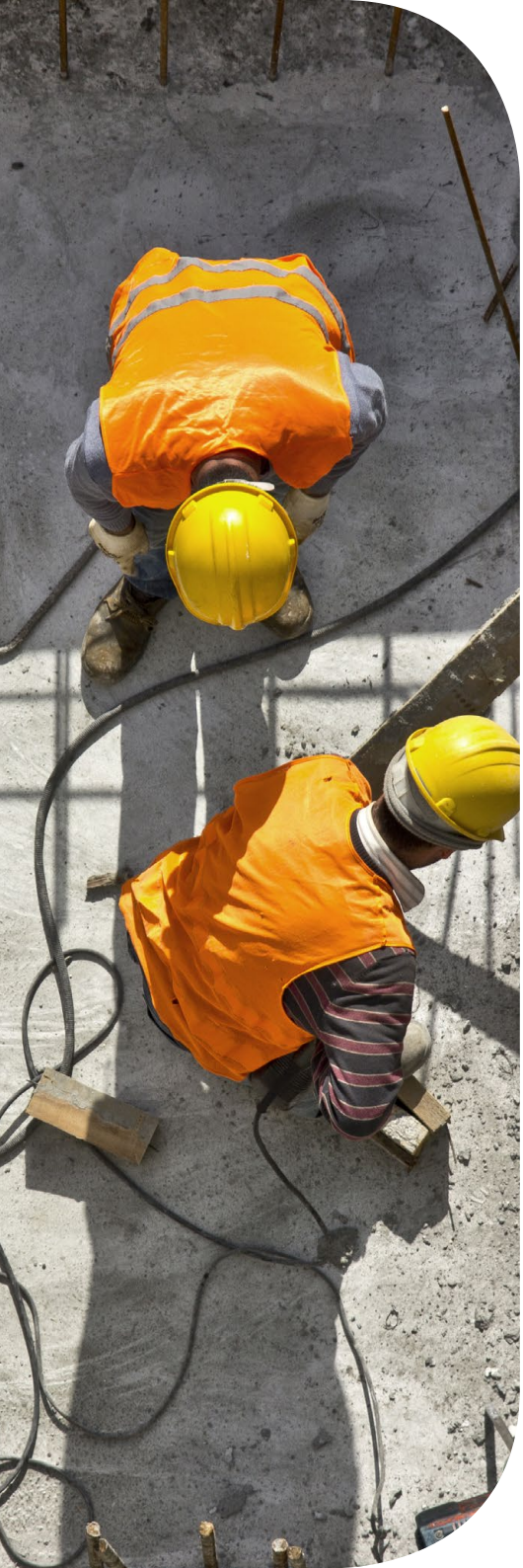
However, developing the concept, appointing the right external advisers, understanding the financial models and the complexities of bidding for funding, preparing the site and testing the contractor market are all issues which a good client team will prioritise from the outset to ensure a successful project.

Getting the project to market

There undoubtedly can be benefits for a council to run its own procurement, to develop a "bespoke" relationship with the selected contractor, to test specific areas in dialogue with bidders and to open up the competition more widely in the market.

However, for the majority of construction and infrastructure projects that councils will deliver (including those through the Levelling Up agenda), there are a number of highly suitable consultant and contractor frameworks that can be accessed which include as wide a selection of private sector partners as should be needed to make the procurement truly competitive.

Procurement through frameworks will significantly reduce the cost and time for councils to select both the design team and the contractor. Many frameworks also give considerable flexibility regarding the terms of contract, allowing framework users to apply their own templates and standard forms, thereby further reducing potential costs in getting into contract.



Programme delays

When developing a programme, the client team needs to be mindful of project specific risks and also wider construction market issues which may put pressure on a completion date. It is prudent to build in an appropriate "float" in the programme to hedge against such risks.

The last few years have seen unprecedented volatility in the construction market. The reaction of contractors has, understandably, been to resist taking contractual risks until they can better understand and manage the developing situation.

The pandemic was a case in point. Construction contracts were often drafted or amended to allow the contractor extra time to deliver a project in the event that lockdowns or other Government restrictions impacted on the project. This risk has now largely passed and contractors should be able to plan their programme to deal with all but the truly unthinkable in terms of any potential future restrictions.

The post-pandemic construction landscape is, however, continuing to cause real issues for construction programmes. The ripple effect on the world manufacturing economy of the spike in activity post-pandemic, together with materials supplies being affected by Ukraine, may mean contractors cannot commit to the delivery programmes. Early engagement and understanding by the project team can mean realistic dates are set - making the project more attractive to the market.

Inflationary pressures

Funding allocations are likely to be fixed to an extent that cannot necessarily keep pace with the inflationary pressures that have been seen in projects recently. The price of steel and bricks, in particular, have increased at eye-watering pace. Contractors generally cannot take all the inflation risk on a project in the current climate, particularly as the rate of inflation looks set to climb further and there is no obvious immediate stabilisation in world markets.

For the first time in recent memory, building contracts are including inflation/price fluctuation clauses which were until very recently, simply crossed out or not used. Care needs to be taken to ensure that a balanced approach is taken in these clauses. Focus should be on the materials which are truly at risk of significant price increase through a project rather than a blanket approach which ties the contract sum to one of the pricing indices.

Contractor insolvency

An unfortunate symptom of the market volatility is the increase in contractors becoming insolvent. When this happens, a project will be thrown into a huge amount of turmoil; time scales and cost budgets are likely to go out of the window.

Proper due diligence of the financial strength of potential contractors is essential. The fact that a contractor's name is on a framework does not give any reassurance that anyone else is monitoring their covenant strength. The relevant credit references and searches should always be undertaken.

Protections should always be put in place to give financial relief in the event that a contractor does fail. Performance bonds will generally pay out up to 10% of the construction price. Inevitably, the bond market is currently very competitive, and the cost of bonds is high. However, they should be seen as a type of insurance that can provide at least a degree of financial protection when things go wrong and the funding cap has been reached.

Similarly, project bank accounts are starting to become more popular in public sector construction projects. These allow the contractor's supply chain to be paid directly rather than through the contractor's bank account so these payments should be secure in the event of a contractor insolvency. An increasing number of councils are using project bank accounts, and that trend is likely to continue.

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The future of subsidy control

The introduction of a subsidy control regime specific to the UK reached a key stage, with the making of the Subsidy Control Act 2022. This will allow the UK to move on from the European Union State aid regime which previously applied, whilst complying with its commitments under international trade agreements.

The Act received Royal Assent on 28 April 2022 but many of its provisions will require statutory instruments to bring them into force.

The definition of subsidy in the Act is that it is financial assistance which is given directly or indirectly from public resources by a public authority. It confers an economic advantage on one or more enterprises, and it is specific in that it benefits one or more enterprises over others. It also has or is capable of having an effect on competition or investment within the UK, trade between the UK and other countries, and investment between the UK or other countries.

This is similar to the definition that applies in the Trade and Co-operation Agreement between the United Kingdom and the European Union.

However, the Act says that financial assistance is not to be treated as conferring an economic advantage on an enterprise - unless it is provided on terms that are more favourable to the enterprise than what they might reasonably have been expected to obtain on the market. This is a very practical measure as it will, in effect, create a presumption that a transaction on market terms will not involve the provision of a subsidy.

Some subsidies are prohibited by the Act and some have the benefit of exemptions. Otherwise, if a public authority proposes to award a subsidy, it will need to assess whether this complies with statutory subsidy control principles.

These principles are aimed at ensuring that subsidies pursue public policy objectives and that they are only given when this is necessary and proportionate to the relevant objective.

One principle is that subsidies should be designed to achieve their specific policy objective while minimising any negative effects on competition or investment within the United Kingdom.

This shows that the impact of subsidies in creating advantages for particular enterprises over other enterprises within the UK will be subject to the same level of scrutiny as subsidies which benefit UK enterprises in comparison with enterprises in other countries.

Additional principles apply when subsidies address environmental and energy objectives.

The Act makes provision for subsidy schemes. This would involve a public authority establishing a scheme and setting criteria for eligibility and terms and conditions for subsidies to be given under the scheme.

The authority would assess the compliance of the scheme with subsidy control law and would not then need to go through a separate assessment of the subsidy control compliance of each subsidy given under the scheme. The Government has said that it intends to create subsidy schemes of streamlined routes for research, development and innovation; energy usage, and levelling up.

Transparency obligations will require public authorities to ensure that they comprehensively record details of subsidies and their decisions to award these, and that they provide them to a Government database.

The Competition and Markets Authority will have a role in enforcing the requirements of the Subsidy Control Act. A Subsidy Advice Unit (SAU) will be set up within the Competition and Markets Authority (CMA), with the functions of monitoring and oversight, and providing pre-award and post-award advice.

The Act makes provision for the Secretary of State to make regulations to define subsidies and subsidy schemes of interest and particular interest. These are subsidies which are regarded as having a potential risk of leading to undue distortion and negative effects on domestic competition or investment or international trade or investment.

Public authorities granting subsidies or schemes of particular interest are required to refer them to the Competition and Markets Authority's Subsidy Advice Unit for a report.

Draft statutory guidance from the UK Government suggests that whilst public authorities are not bound to implement any conclusions in a report from the Subsidy Advice Unit, failure to do so may increase the risk of a successful challenge against a decision to grant a subsidy or make a scheme.

The UK Government has published draft regulations which define subsidies of particular interest by reference to a threshold of £10 million, with a lower threshold of £5,000 for some sectors. This could result in many public sector projects coming within the scope of the definition.

The Act has a threshold of £315,000 given to an enterprise over three financial years, allowing public authorities to provide minimal financial assistance without triggering the application of the subsidy control regime. This is higher than the de minimis threshold which previously applied to the regulation of State aid.

The Government has published draft statutory guidance on the Subsidy Control Act 2022. The aim of this is to help public authorities to develop subsidies and subsidy schemes that are appropriate, well-designed, and in compliance with the Act.

The guidance is also intended to help recipients of subsidies and wider stakeholders to understand the Act and the legal requirements associated with their subsidies.

Whilst public authorities will need to ensure that they devote sufficient resources to assessing, monitoring and recording compliance with subsidy control, the new regime will provide opportunities to use subsidies effectively to pursue important objectives, whilst ensuring that competition is maintained.

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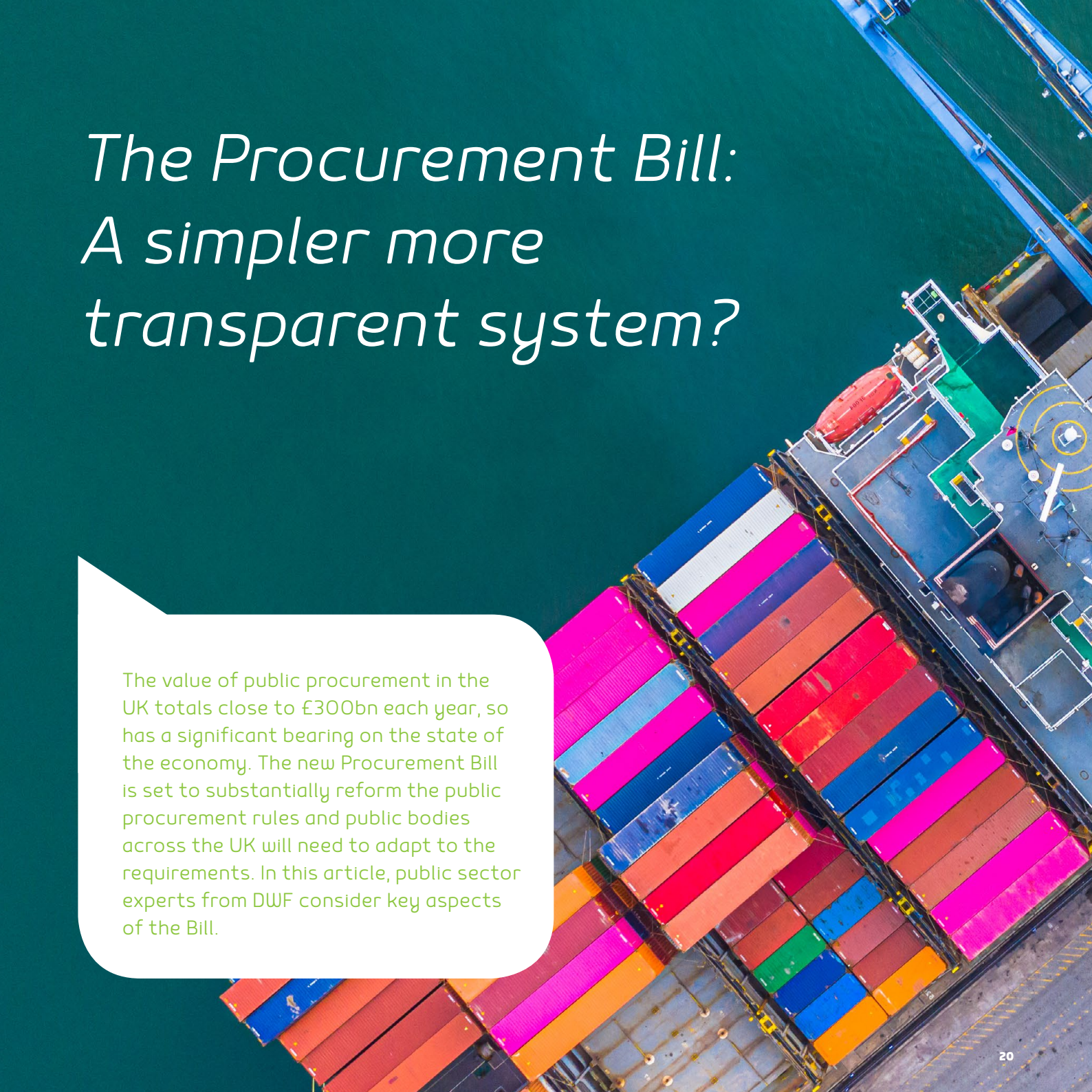
The Procurement Bill: A simpler more transparent system?



The value of public procurement in the UK totals close to £300bn each year, so has a significant bearing on the state of the economy. The new Procurement Bill is set to substantially reform the public procurement rules and public bodies across the UK will need to adapt to the requirements. In this article, public sector experts from DWF consider key aspects of the Bill.

Context

On 11 May 2022 the long-awaited Procurement Bill (the "Bill") had its first reading in the House of Lords. The purpose of the Bill is to reform the UK's public procurement regime following its exit from the European Union, creating a simpler and more transparent system, placing value for money at its heart, generating social value and unleashing opportunities for small businesses, charities, and social enterprises to innovate in public service delivery.

The Bill reached the Committee Stage on 4 July 2022 where it came under scrutiny from across the political spectrum.

Regulatory reform

The Bill contains 13 parts with 11 Schedules addressing a range of issues relating to public procurement and contract management. It will replace the four main sets of rules (the Public Contracts Regulations 2015, Utilities Contracts Regulations 2016, Concession Contracts Regulations 2016 and the Defence and Security Public Contracts Regulations 2011) currently in place which consist of over 350 individual regulations.

Whilst the Bill will consolidate the four sets of regulations into a single Act, various aspects will be remitted to supplementary regulation or guidance.

The draft Bill is distinct from the wording provided within the current procurement regulations, including in particular the Public Contracts Regulations 2015 ("PCR 2015") which may throw into question the application of existing case law, particularly on points of interpretation.

Application

The Bill will extend to England, Wales, Scotland and Northern Ireland. However, it does not make provision for all public procurement in Scotland; it will apply to contracting authorities in Scotland which are either cross-border bodies or exercise wholly reserved functions. The Scottish Government are presently minded to retain their own procurement regulations.

As anticipated, the Bill will apply to contracts awarded by most central government departments, their arms-length bodies and the wider public sector, including local government and health authorities, as well as contracts awarded by utilities companies operating in the water, energy and transport sectors, and concession contracts. The definition of a 'contracting authority', however, is slightly different and it may be that it now captures some entities that previously relied on the commercial or industrial nature exemption.

It will not, however, extend to "procurements by the Security Service, the Secret Intelligence Service, the Government Communications Headquarters or the Advanced Research and Invention Agency".

Procurement objectives

Section 11(1) of the Bill requires contracting authorities "to have regard to the importance of":

- "delivering value for money";
- "maximising public benefit";
- "sharing information for the purpose of allowing suppliers and others to understand the authority's procurement policies and decisions"; and
- "acting, and being seen to act, with integrity".

In addition, section 11(2) requires contracting authorities to "treat suppliers the same unless a difference between the suppliers justifies different treatment".

Currently, the above requirements are drafted as "objectives" as opposed to a complete set of principles that must be followed by contracting authorities.

Importantly, there is no longer an explicit requirement for contracting authorities to "treat economic operators...without discrimination and [to] act in a transparent and proportionate manner" as set out in Regulation 18 of the PCR 2015.

Transparency

Despite there being "broad support for...increasing transparency" at the consultation stage and a clear intention to include an "overriding requirement for contracting authorities to comply with the principles of non-discrimination, transparency and fair treatment", the Bill does not contain an explicit obligation on contracting authorities to act in a transparent manner.

This has resulted in calls for "a wider duty of transparency" to be included in the Bill noting that, "even in the midst of a crisis, integrity and transparency should be non-negotiable".

That being said, the Bill does aim to improve transparency in places. For example, the Bill will require "notices...to be published at each stage of the commercial lifecycle in an open, accessible format" which will help to "ensure greater transparency of data [and therefore making] it easier to scrutinise procurement decisions".

Automatic Suspensions

Section 91 introduces a new test to lift automatic suspensions. The new test will replace the current American Cyanamid test which has been the applicable test since the 2010 case of Indigo Services (UK) Limited v The Colchester Institute Corporation.

In considering whether to make an order to lift an automatic suspension, the courts will, under the Bill, be required "to have regard to the public interest in, among other things":

- "upholding the principle that public contracts should be awarded, and contracts should be modified, in accordance with the law";
- "avoiding delay in the supply of the goods, services or works provided for in the contract or modification";
- "the interests of suppliers, including whether damages are an adequate remedy for the claimant"; and
- "any other matters that the court considers appropriate".

Debrief Requirements

The Bill has introduced various requirements to publish notices throughout the procurement lifecycle, including a requirement to publish a "contract award notice" prior to entering into any relevant arrangement.

Unlike the current rules, it is proposed that the standstill period will run for eight working days from the date of publication of the "contract award notice". This will be supplemented by a "contract details notice" which is more akin to the current contract award notice and is published after entry into the relevant contract.

Prior to the publication of the "contract award notice" the contracting authority is also required to provide those participating in a procurement an "assessment summary" outlining the assessment of the relevant tender.

Whilst transparency is a key theme of the proposed Bill, the "assessment summary" does perhaps give rise to a concern that less information on the award decision might be provided to losing tenderers.

Unlike the current rules, however, for those agreements that have an estimated value of more than £2 million, there will now be a requirement to publish a copy of their procured contracts within 90 days of entering into such arrangements. It is not yet clear what or how much of that contract can be redacted.

In a similar vein, section 43(1) will also "mandate the publication of a transparency notice whenever a decision is made to award a contract using a procedure as a direct award".

Conclusion

The Bill will go some way in redefining "the formal contractual interface between the private sector and the various aspects of the state". Whilst the objective for the regime is to "be simpler and more flexible" than the current regulations, it is clear that there are still key omissions within the draft legislation and changes that could be made to the Bill to realise this ambition.

DWF will be publishing further articles and delivering workshops on specific aspects and progress of the Bill in due course.

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Relationship between Limitation Act and Scheme for Construction Contracts

Hirst & Another v Dunbar & Others [2022] EWHC 41 (TCC)

A recent case in the Technology and Construction Court considered the interplay between the Limitation Act 1980 and the Scheme for Construction Contracts (England and Wales) Regulations 1998 (as amended) (the "Scheme"). The court considered whether:

1. there was a contract between the parties; and
2. the claim was time barred.

The Facts of the Case

The claimant, Mr Hirst, carried out construction works between October 2011 and December 2012 at a residential development in Bradford. Mr Hirst claimed that he carried out the works pursuant to an oral contract between himself and Mr Dunbar, the defendant. Mr Dunbar denied this, stating that Mr Hirst had carried out the works at his own risk in order to improve the value of the site for his own benefit as he later intended to purchase the development.

The works finished on 4 December 2012 and 16 months later in March 2014 the claimant made a demand for payment. Upon receiving no such payment, the claimant issued a claim form in August 2019.

Contract

In this case, the court concluded that there was no contract between the parties and that the claim therefore failed. The judge noted that neither Mr Hirst nor Mr Dunbar were reliable witnesses and that the events had taken place over 10 years before. The court based its decision on the following factors:

- The claimant could only provide vague details of the supposed contract - no related documents were provided, and it was not apparent that any express terms were agreed;
- When the parties had worked together previously, they had entered into formal written contracts;
- The claimant did not chase for payment until 16 months after the works were completed, which would have been expected if there had been a contract in place; and
- The evidence of third parties supported the conclusion that Mr Hirst undertook the works for his own benefit.

Time limitation

The question of whether the claim was time barred was academic at this point as the judge has already ruled that there was no contract in place. The Limitation Act provides

that the limitation period for a simple contract (rather than a deed) is 6 years from when the cause of action accrues.

Practical completion had been achieved by Mr Hirst on 4 December 2012 and the claim form was lodged on 2 August 2019. The claimant argued that the time limit should run from the time a payment notice was (or should have been) issued by the Defendant and that the claim was therefore within the limitation period.

Where there are no clear payment provisions in a construction contract, the Scheme implies provisions into the contract. Mr Hirst claimed that the Scheme implied a provision that Mr Dunbar should have issued a payment notice within five days of Mr Hirst's demand for payment and that the limitation period did not start until this date, which would be in March 2014.

The court disagreed with the claimant's interpretation, citing the cases of Coburn v Colledge [1897] 1 QB 702 and Ice Architects Ltd v Empowering People Inspiring Communities [2018] EWHC 281 (QB), both of which held that the claimant's cause of action accrued on the date the work was completed rather than the due date of payment.

The judge stated that "there is a difference between a provision which gives rise to an entitlement or right to payment and one which identifies when payment is due. The difference might be thought a narrow one but it is real".

It was held that the provisions of the Scheme relate to the processes of billing and payment rather than the entitlement to payment.

Therefore, in this case the limitation period was six years in accordance with the Limitation Act, beginning on 4 December 2012, and therefore the claim was time-barred in any event.

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All change - preparing for change in political administration

On 5 May 2022 146 councils in England, all 32 councils in Scotland and 22 Welsh councils held elections. Across England, Wales and Scotland this accounted for 6,863 seats. 34 of the 146 councils saw a change in political control, with the number of councils changing to no overall control increasing from 19 to 28.

The proportion of councils that have no overall control is steadily increasing and is now nearly double the proportion in 2015 and it is unitary authorities at 44% that now have the highest proportion of councils with no overall control.

The elections team at your council will already be preparing for the 2023 election. They will be booking venues, staff, and the resources necessary to undertake an election and declare the result. But what happens after the votes are counted and declared is worth planning for now too.

Often after an election members and officers are finding their feet and members can, unintentionally, blur the boundaries of where responsibility lies between officers and members. This can mean that officers are unsure what to do and may need additional skills in navigating this dynamic, especially if the ways of doing things have been a certain way for a long period of time.

Consider offering officer and member relationship training for officers at the same time as the new members induction. This would assist officers at all levels in navigating the next municipal term.

And it is at all levels, don't assume that the senior management team have experience of political change, have asked the question, and found out now what experience they actually have in a change of political control and have learnt, would repeat or do differently. It could come in useful.

Although the focus is understandably on the councillors' induction for the new term, the ability for officers to adapt to a new political environment is just as important.

When a change in control happens there are a lot of questions about previous decisions and why decisions have taken a particular route. It is really important for officers to understand that this is part of the process and that the ability to have crucial conversations

that are not perceived as a challenge or criticism becomes part of how business is done at the council. Knowing how to take decisions outside of the budget and policy framework is also something that is worth being more familiar with.

Usually in the first year, whilst budget and policy items are being changed, some early decisions may actually be contrary to the budget and policy framework. This results in decisions that are usually within the remit of a committee or executive needing to be made instead by Full Council. It's a different way of reading and interpreting your constitution.

Linked to this is the ability to vary or change previous decisions that the council has taken. This could be a series of decisions that the council has spent hours, even years building, that are then deconstructed. Assessing the risk in taking decisions contrary to those taken before them and advising on the best way to achieve the outcome sought is what is required, and this needs the ability to look at a situation from every possible angle.

The outcome of an election could mean a significant change at your Council. The whole election process is project managed but I am not convinced that the impact of the election result always is.

It is a change programme and should be approached in that way with some thought given in advance to not just the result and induction of councillors but to how the change will affect the strategic and operational focus of the Council over the first twelve months.

Because of the complexities involved in this settling in period, lawyers are absolutely key in achieving the decisions necessary to meet the new political aspirations. This can often involve new ways of working but in my experience local government lawyers have the ability to be creative, look at a problem from every angle and are more than ready for the challenge.

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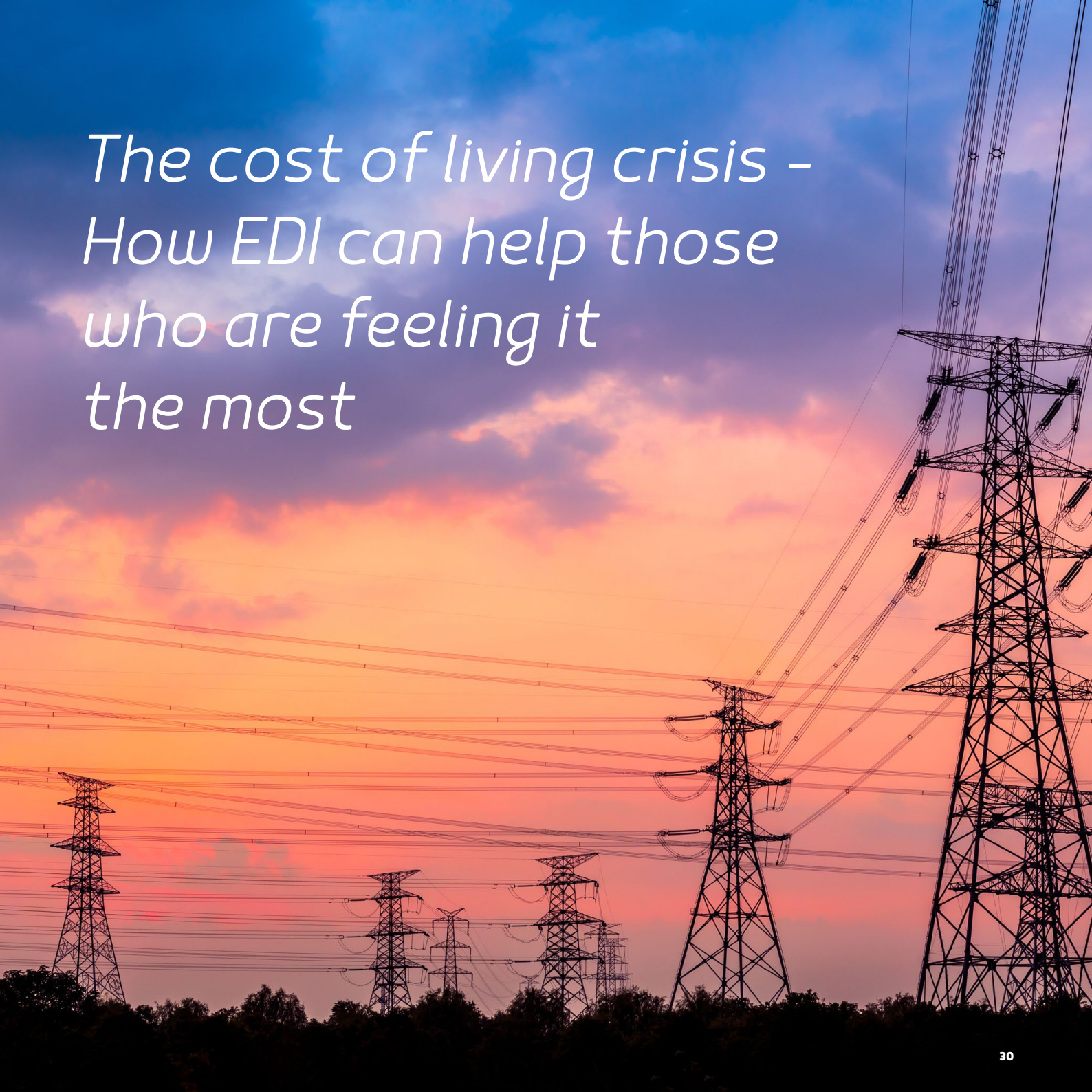

The cost of living crisis - How EDI can help those who are feeling it the most

You can't escape the news that the cost of living is rising, with UK inflation at its highest rate in 40 years, more people relying on foodbanks to feed their families and having to choose between the cost of heating / lighting their homes and eating. Whilst the cost-of-living crisis affects everyone, data tells us that it is those working in lower bands who feel the increases the hardest.

The Low Pay Commission estimates that in 2019/2020, 85% of workers in the UK earning the National Living Wage come from a Black, Asian or Minority Ethnic background[1] and roughly a further 7% from a mixed / multiple ethnic group background. In 2021, more than 50% of workers covered by the National Living Wage were below the age of 25 (add second year onward apprentices and that figure increases to 67%)[2].

The Low Pay Commission also comments that minimum wage coverage rates were higher among men and women with disabilities relative to their non-disabled peers. It doesn't take much to draw from these statistics that many of the lowest paid workers in the UK are from minority groups.

Against this background, for employers, their work towards levelling the playing field for staff through the use of effective Equity, Diversity and Inclusivity (EDI) policies and compliance with the Public Sector Equality Duty has never been more important.

The risks of getting it wrong

In establishing a strategy, it is important to be aware of the potential pitfalls. Knowing what to avoid will help steer your decision on where to go next. From a business perspective, poor or poorly implemented EDI policies and strategies can lead to increased sickness absence levels (including absences arising from mental health conditions such as stress). Of most concern, it can contribute to an increase in staff turnover as those who do not feel valued and recognised as individuals (whether that is in a monetary sense, professionally, or personally) will vote with their feet. There may also be increased numbers of grievances and of course the ultimate risk of Employment Tribunal claims, in particular for discrimination.

The benefits of getting it right

In addition to avoiding the pitfalls above, there are a wide range of significant benefits to be derived from strong EDI policies and approaches. We know that your EDI policy and practices are your message about why EDI is a priority in your workplace: it is the slow but steady route to ensuring that everyone has the opportunity to achieve their potential and is key to attracting strong talent at a time when employers are struggling to recruit.

Better opportunities for training and support opened up by a good EDI practice should mean career progression for those from minority groups and ultimately better pay, better engagement and people working more efficiently and effectively, which has benefits for both their financial and mental health and your organisation. Workers who can bring their whole selves to work feel valued and this removes one potential stressor during challenging times.

Top tips for an effective EDI Strategies

So where do we go from here, to make work-life as equitable, diverse and inclusive as possible:

1. Remember that this is about "Equity" not "Equality" so think carefully about how your policies will ensure that everyone is put (as far as possible) on a level

playing field. This may include treating some more favourably than others to give them the assistance they require, for example through the use of 'positive action' (provided this more favourable treatment complies with the provisions of the Equality Act 2010);

2. Engage with staff in a meaningful way about the cost of living crisis and support that can be provided, as well as your EDI strategies. They live and breathe the organisation, they know where the issues lie and they often come up with the most creative ways of resolving them;

3. Promote fair pay and look carefully at your pay gaps. Collect and analyse data, in a similar way as gender pay gap reporting, and then draw up a plan and take action to address any issues identified. In order to help employers who want to demonstrate and drive greater fairness in the workplace, BEIS will publish guidance to employers on voluntary ethnicity pay reporting this summer (2022);

4. Consider signing up to the Government's "Inclusion Confident Scheme" which broadens the concept of the current Disability Confident Employer Scheme

to cover ethnicity and race. At present, the Disability Confident Employer Scheme guarantees an interview for a disabled candidate where they meet the minimum qualification criteria for a role.

The Equality Act 2010 does not currently permit favourable treatment for any protected characteristics other than disabilities and so there are questions about the extent to which the proposed extension of the scheme will comply with the Equality Act. Nevertheless, the Government has announced that organisations will be able to sign-up to the scheme voluntarily by autumn 2023. This may assist with access to better job opportunities and improved career prospects;

5. Consider the benefits of flexible working. One advantage to employees may be cost savings in respect of childcare and transport which organisations may wish to take into account when considering how they can support employees in managing the cost of living crisis. It is important for organisations to consider who benefits from being able to work flexibly (part time working, staggered start / finish times, core hours), in terms of role types and diversity to maximise the opportunities available;

6. Think about how networks can provide peer support, role-models and coaching opportunities to assist with career development;

7. Ensure that your EDI policy/ training touches every step of the work life-cycle, from the moment candidates consider applying to your organisation, through application, appointment, learning and development and appraisal and implement positive action, where appropriate, to help promote equal opportunities for all;

8. Most importantly, tell your staff what you are doing so they can see that you are prioritising the issues that are important to them.

Few employers are going to be able to relieve the pressure of this financial crisis, but with a good and well implemented EDI strategy, we can work towards taking other pressure off staff and ensure our colleagues feel valued and supported.

[1] *https://minimumwage.blog.gov.uk/2021/05/28/low-pay-and-ethnicity/*

[2] *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1039488/LPC_Report_2021_web_version.pdf*

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The role of Legal Project Management in public sector projects

The concept of Legal Project Management ("LPM") is increasingly relevant to the delivery of legal services, both in-house functions and private practice law. This is unsurprising, LPM is crucial if lawyers are to add value by controlling budgets, communicate pro-actively on risk mitigation and costs, and manage time by resourcing to deal with pinch points in the project.

As a result, public sector bodies often look for their legal partners to demonstrate not just LPM experience, but a dedicated LPM function to support complex matters.

What does LPM look like in practice?

LPM provides a set of tools and techniques to enable a legal team (whether in-house or external legal partners) to effectively and efficiently project manage operational aspects of the service delivery, keeping the project on track in terms of scope, time, and costs.

Depending on the size, complexity and/or duration of the matter, LPM can be as simple as coaching lawyers to embed these techniques within their day-to-day work.

For the larger projects, it might involve appointment of a dedicated legal project manager (PM) to work alongside the lawyers and whose role is solely to manage the operational aspects of the matter, allowing lawyers to focus on delivery of legal advice. LPM can also involve PMs working with wider teams on a consultative basis, to instil best practice to enable them to run matters more efficiently and effectively.

What are the benefits of LPM?

At its core LPM helps to bridge any gaps between the lawyers and their clients (whether internal or external). Even where a dedicated PM isn't appointed, embedding LPM principles in the legal team can significantly enhance delivery.

Taking a more controlled, risk-based approach is a key facet of LPM. It provides a platform for proactive stakeholder management, client reporting, costs control and the management of risks and issues as they arise. It also provides the client with a go-to contact for service delivery (in tandem with the client partner in many cases), and a more agile response.

That results in fewer surprises for the client, better communications and more matters being delivered on time and within budget. For the legal delivery teams, it also enhances client relationships by working with them more productively, it can reduce write-offs and removes certain stresses from the legal team throughout the delivery of the project.

How do we embed LPM?

LPM requires a PM, and/or LPM techniques, to be embedded from inception of the matter. To add the greatest value, the PM should be involved with scoping and pricing discussions upfront, coordinating the kick-off meeting (a key aspect of any legal project but sometimes overlooked), right through to project closure.

It is part of the role of the PM to establish well-defined goals early on and make sure the project stays focused on these as part of tracking and managing the project. As the matter progresses, the PM can co-ordinate regular project board/steering group meetings to keep relevant stakeholders abreast of progress and to manage any issues/risks etc that arise and consequential changes which may be required to the scope as required.

There are generally four key phases to LPM:

1. **Define** – at this stage the PM and lawyers work to understand client expectations, objectives, and success factors, understanding what is in and out of scope and any assumptions that need to be factored into the project. At this stage key milestones, should also be set, stakeholders identified and a budget set.

2. **Plan** – this is where the detailed project plan is produced breaking down the project into phases and tasks) and scheduling those workstreams against milestones. Often it will also include a communications plan, resourcing plan, risk analysis and change plans.

3. **Deliver** – throughout this stage the task is to manage the matter within the prescribed project plan (above). Risk and issues management is key.

4. **Close** – the final stage involves the client signing-off the project. At this stage it's also important to take time to evaluate how the project went and discuss any lessons learnt.

LPM tools

As part of the LPM, a PM will be armed with a toolkit to steer the project through these phases. Legal-tech solutions play a key part in that toolkit.

Perhaps the most fundamental tool at a PM's disposal is the project plan. This 'map' of the project lifecycle is developed by the PM in conjunction with the legal team and is a vital tool in tracking the project and should be updated and amended as the project inevitably evolves.

The project plan can also incorporate a Gantt Chart and/or PERT (Programme Evaluation and Review Technique) analysis. These tools allow the PM to diagrammatically represent the project schedule and assist with critical path analysis against certain fixed key project milestones.

The PM will also have at their disposal a suite of other tools and templates which can be adapted for each matter, but which may include, amongst many others:

- **A project charter** (forming part of stage one, 'Define' – as mentioned above). This is a high-level document setting out fundamental objectives and key aspects of the project and is often a very helpful reference point during any part of the lifecycle of the project.
- **A risk management log** (sometimes taking the form of RAID logs (Risks, Assumptions/Actions, Issues, Decisions). This allows the LPM to record and manage risks and issues as they arise.
- **A communications plan**
- **A roles and responsibilities matrix** – for each of the project team.
- **A change management plan** – including escalation protocol etc.
- **Client reporting dashboards** – these can be tailored to the requirements of the client and the project and provide an excellent (often online) platform for clients to be able to access progress reports on the status of a project for access at any time.

Project management, whether delivered externally or by a client's own team, is likely to become an increasingly vital element of the way in which legal services are delivered and for that reason Browne Jacobson LLP has recently established, and actively applies, a dedicated LPM function.

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Leisure in a post-pandemic world

Following a tumultuous few years in the local authority leisure sector, we are encouraged seeing outsourcing opportunities still receiving competitive interest. Sport England released a new procurement toolkit and whilst some user-friendly amends were made, the model remains largely unchanged. In this piece, we look at what the new template has changed and what it's missing. We also outline some different approaches that we are seeing in the market and their potential drivers.

The pandemic was a reminder of the common misconception that outsourcing means transferring all risk. Supply chain shocks relating to the Ukraine war and energy price hikes mean that contractors are considering relief claims as the unavailability of goods and higher utility costs are frustrating normal performance.

To avoid expensive risk pricing, the usual outsourcing model purposefully reserves certain risk items for the Authority. It is important from the outset that the Authority appreciates this risk balance to contract manage effectively.

2021 Sport England toolkit

In 2021 Sport England released a new procurement toolkit for local authorities outsourcing the management of their leisure provision. The updated version has made some helpful, practical changes but missed the opportunity to update some outdated provisions and introduced concepts which have received mixed responses.

The new template explicitly says it hasn't been updated to take account of Covid-19 which feels to us a missed opportunity. Authorities are seeking to draw a line under "change in law" claims for the pandemic given, currently, there are no further Covid-19 restrictions. Some standard wording would be helpful as we see most procurements are now negotiating Covid-19 drafting. It's also confusing why some key statutory provisions are not updated, including data protection legislation and references to EU bodies having jurisdiction over the UK.

We like the new inclusion of a risk allocation matrix which sets out some key risks, allocates the risk between the authority, contractor or shared and gives some explanation. The risk balance has come into focus given the crystalising of the Authority's risk relating to Covid-19. The matrix should be amended if appropriate and made available with the procurement documents from the outset.

Some of the new provisions haven't been received as well. The previous 2016 version provided that the authority and contractor shared profit in excess of the projected levels in specified proportions, whereas the new 2021 version includes that the authority has a share in the revenue.

Whilst Authorities may be getting a slice of a potentially larger pie, providers have commented that this creates an incentive for cost-cutting rather than maximising revenue. More revenue usually comes with an investment cost which can't be considered in this simplified calculation.

There are several other changes which don't have a material change on risk profile. But some changes are significant for example the change in law provisions. The changes remove the ability for the contractor to recover revenue losses because of a specific change in law (e.g. covid regulations).

Sport England are engaged in a further sector consultation exercise (to which we have been invited to contribute) and are updating the template Leisure Operating Contract further.

A collaborative model?

The Covid-19 pandemic was a stress test for the risk allocation which, due to lockdowns shutting leisure centres, left the authority picking up the bill. Many Covid relief arrangements were negotiated and settled on a collaborative approach more favourable to authorities, with contractors agreeing to work with the authority on services to mitigate losses and not take a profit - later allowing facilities to be used for vaccination centres.

These examples show that the sector is collaborative and able to work through crises with commitment to the longevity of relationships. This questions whether some strict risk allocation within contracts hold weight in a real crisis. Should drafting be amended to reflect that reality? Or would that move the risk balance to an extent which providers won't accept? The leisure market appears to remain robust despite the hit in revenues, so perhaps there is scope to move away from some strict risk allocation in favour of a more collaborative or partnering approach.

Many contractors led with an offering of taking no profit during lockdowns, starting good will discussions, but finance officers and members were still baulking at the potential sums that the authority would be liable for. The negotiation of financial settlements is likely to strain relationships.

From our experience that period has strengthened relationships and created helpful protocols suggesting that a more partnering approach to managing key risks is appropriate. Working in partnership, incentivising joint decision making and aligning parties' interests could be something to look towards in the future for different outsourcing models.

The war in Ukraine and spiralling energy costs are also feeding into the sector. Some contractors are afforded relief under their contracts either by utility tariff risk share or force majeure. The standard position under the 2021 Sport England template contract is that utilities tariff risk sits wholly with the operator.

However, this has commonly been negotiated away with contractors under the 2016 edition. Supply chains which rely on Ukraine or Russian imports, may result in contractors being eligible for unavailability relief if they cannot deliver wet provision due to lack of materials. Further risk share issues which see authorities potentially losing revenue or having to fork out will be another testing strain on outsourced relationships.

The state of the market

Whether Covid will have a long-term impact on leisure provision is yet to be seen, but some evidence suggests that the outsourcing model is not dead nor completely faltering. Procurements are still going ahead, and there is still competitive bidder interest. The big players in the industry survived the pandemic and are still seeking opportunities.

The same factors will affect whether the outsourced model is right for an authority. Often this is dictated by where the authority is coming from, tumultuous years of negotiations with an outsourced provider struggling to meet performance targets? Or an underperforming in-house asset base which is not delivering a good ROI?

Wherever the authority is coming from it's important to understand the asset base, whether the facilities are underutilised/underperforming, the likely return on investment in equipment, capital works or new programme of activity?

The answers to these questions may shift as services seek to return to normal business.

On the other hand, contractors are probably hesitant to bid for riskier opportunities, e.g. older facilities requiring investment and more proactive management, with potentially sluggish performance post-pandemic.

The cost of the pandemic may mean authorities now prefer to manage all operations and risks in-house or in a controlled entity. We are seeing a growing number of wholly owned leisure trading companies being established. But in-sourcing services isn't a simple feat nor is a panacea, so the decision shouldn't be taken lightly.

A hybrid approach to in-house delivery through a wholly owned company, can provide a degree of commerciality with an "in group" circle of trust that some outsourced relationships aren't able to establish.

Our team have worked with several authorities through options appraisals as part of planned and strategic reviews or on a more informal discreet basis to help authorities understand their options.

Our conclusions are that there is no one size fits all, outsourcing does not outsource all risk, and in-sourcing takes diligent planning and risk management.

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Nutrient Neutrality - the impact on development sites for Local Planning Authorities

A total of 72 Local Planning Authorities ('LPAs') are now subject to Natural England's strict nutrient pollution controls on their planning applications following the updated advice issued by Natural England under its statutory authority on 16 March 2022.

A Ministerial Statement was issued by the Government on 20th July 2022 to offer some (albeit limited) solutions for developers. However, other than serving as a reminder of the legislation, the advice keeps LPAs in the dark as to how to determine planning applications alongside nutrient neutrality.

Nutrient neutrality

Nutrient neutrality requires development proposals to demonstrate that they are 'nutrient neutral' i.e., they do not increase nutrient loads within sites designated as European Habitat Sites under the Conservation of Habitat Regulations 2017 ('the Habitat Regulations') and which are already in an unfavourable condition because they are polluted. In particular, residential development proposals must show that resulting increases in domestic wastewater does not cause further harm to already polluted water sources.

An appropriate assessment is required in accordance with the Habitat Regulations and planning permission can only be granted where there is a certainty of no adverse impacts on the identified European Habitat Site. Each affected LPA has been instructed to use the specific nutrient budget calculator provided for its administrative area to determine whether or not the proposal is nutrient neutral.

Approach for determining planning permissions

In determining its planning permissions, the LPA should:

- Give weight to the expert advice of Natural England where issued. If the LPA is minded to deviate from that advice, reasons for doing so must be given.[1]

- Agree extensions of time with the applicant where the approach results in a delay to determining the application (because the developer needs to consider and / or implement additional mitigation or the LPA is considering its approach). Regardless of any delay, the LPA is still under the statutory time limit to determine the application.

  Where a valid application has not been determined within the statutory time period,[2] the applicant has the right to appeal to the Secretary of State against non-determination and costs may be issued against the LPA for the unnecessary delay. The LPA also risks losing its power to determine its own planning applications where it repeatedly fails to determine its applications on time.[3]

- Refer applications which have been considered at planning committee (with a resolution to grant planning) but have not yet been granted planning permission back to committee. The nutrient neutrality advice is a new material consideration to which weight must be given and which has been introduced between the initial resolution and the formal grant of the permission by the planning officer acting under delegated powers.[4]

- Re-visit any pre-application advice given prior to the LPA being subjected to nutrient neutrality if the development may result in additional nutrient loads to the European Habitat Site.

Impact on reserved matters and discharge of condition applications

LPAs should proceed with caution in determining reserved matters and discharge of conditions applications where nutrient neutrality applies.

Natural England's advice in March 2022 stated that nutrient neutrality applied to both types of applications.

However, there is no power under the Habitats Regulations for an LPA to require an appropriate assessment at the reserved matters or discharge of conditions stage. Considering the impact of a proposed development's nutrient budget on a European Habitat Site is to be done when the LPA is determining whether to grant planning permission (i.e., the outline permission).

An LPA cannot refuse to approve details submitted pursuant to conditions which go to the principle of the development, including the parameters fixed by the planning permission.[5] LPAs therefore should not withhold consent for otherwise acceptable applications to discharge conditions or for reserved matters approval. A High Court ruling on these points is, however, needed to confirm that Natural England's approach on these application types is incorrect.

Longer term impacts

Longer term impacts for LPAs are highlighted in a recent (March 2022) appeal decision.[6] In this appeal, Ashford Borough Council's allocated housing development sites in its Local Development Plan were subject to the Natural England advice.

The Inspector concluded that the Local Development Plan ('LDP') was effectively out of date because no nutrient neutrality policy or guidance was given and therefore the planning balance lay in favour of development for the local housing need. Whilst this may benefit some LPAs, this approach enables some developments to be granted planning permission contrary to policies within the LDP.[7].

Also in this case, the Council had not acquired (or provided evidence of acquiring) any mitigation land of its own and had merely made funds available to purchase mitigation land. The Inspector concluded that there was insufficient evidence for the allocated sites to have a realistic prospect of being delivered within five years and thus the Council's five-year housing supply would not be met.

It is therefore advisable for LPAs to consider:

- Issuing a Supplementary Planning Document on nutrient neutrality with guidance for the developer on the appropriate assessment and necessary mitigation
- Including nutrient neutrality and mitigation strategies as policies in an updated Local Development Plan
- Introducing LPA led mitigation strategies and/ or provide mitigation land on LPA owned land to enable development on development sites allocated under the LDP to be deliverable

Draft Levelling Up and Regeneration Bill

The draft Levelling Up and Regeneration Bill 2022 proposes to remove the need for LPAs to demonstrate that they have a 5-year housing land supply, provided that their LDPs are up to date. This reiterates the importance of an up to date LDP.

As European Habitat Sites often cross administrative areas, LPA's may also benefit from the proposal under the Bill to allow joint planning committees, Spatial Development Strategies and strategic decision making.

Summary

Although some of Natural England's advice is legally untested and the approach lacks clarity for LPAs in determining planning permissions (including reserved matters and discharge of conditions applications), the principle of nutrient neutrality and the Habitat Regulations need to be adopted in the consideration of planning applications.

LPAs should, however, be careful that in delivering nutrient neutrality, they do not open themselves up to challenge either by not determining applications correctly or in time and the LDP is updated to reflect this approach.

[1] *R (on the application of Ronald Wyatt, acting in a representative capacity) v. Fareham BC & Others [2021] EWHC 1434 (Admin)*
[2] *Article 34 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (as amended)*
[3] *Sections 62A and 62B of the Town and Country Planning Act 1990 (as amended)*
[4] *R (on the application of Kides) v South Cambridgeshire District Council and others [2002] (Court of Appeal)*
[5] *Proberun Ltd. V. Secretary of State for the Environment [1990] 3 P.L.R. 79*
[6] *Appeal decision: https://ashford.moderngov.co.uk/documents/s16801/21-01292-As%20Appendix%201%20Appeal%20Decision.pdf*
[7] *The Ashford Appeal is subject to a s288 of the Town and Country Planning Act 1990 challenge by the Council because some developments will be granted planning permission contrary to the adopted LDP.*

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EM LawShare Training Programme 2022

We are delighted to confirm the full Training Programme for 2022/2023 was launched in April and includes around 80 courses. The majority of courses will continue to be delivered as webinars with a few face-to-face courses. Webinars will be delivered 'live' and recordings will be available on the EM LawShare website.

The full Programme of webinars including details of exact dates once finalised, are available to book on the **EM LawShare website**. Webinars planned to the end of 2022 will include:

Date	Title
07 September 2022	Coaching
09 September 2022	Introduction to service charges
13 September 2022	What does a council need to know when it lends money to a commercial organisation?
15 September 2022	Planning law and the environment
20 September 2022	Construction Projects: Bonds, Guarantees and Other Security
21 September 2022	The UK COVID 19 inquiry – will it be you?
22 September 2022	Points to consider when acquiring a portfolio of properties
07 October 2022	The future of planning law
10 October 2022	Regeneration and Development workshop – to include CPO and land assembly
12 October 2022	Local Government Pension Scheme Admission Agreements
13 October 2022	Information Law Update SIRO/DPO Training
17 October 2022	The Environment Act 2021 and Waste Authorities
19 October 2022	Local Government Law Update
20 October 2022	Technology and digitisation
02 November 2022	New powers for traffic regulation

Date	Title
03 November 2022	Introduction to Highways law
08 November 2022	Land disposals and appropriation a beginners' guide to council's powers to dispose and appropriate land
09 November 2022	Landlord and Tenant Update
16 November 2022	Dealing practically with the emerging Equalities issues in Employment law
23 November 2022	How will the new health and care arrangements work?
24 November 2022	Tools for use within your empty homes strategy
01 December 2022	Admissions and appeals – a look at the impact of the School Admissions Code 2021 and other legal updates on admissions and appeals
06 December 2022	The evolving procurement law landscape
07 December 2022	Microsoft Word training for lawyers
08 December 2022	Social media issues / defamation
13 December 2022	JCT: Back to Basics – exploring the JCT suite of contracts, how to put a JCT contract together, key clauses and pointers, common pitfalls and how to avoid them
14 December 2022	Cost round up 2021

Please don't forget to complete the Evaluation Form after each webinar you attend so your Development Record is updated.

If you have any queries please contact Julie Scheller the Training Administrator at *Julie.Scheller@Freeths.co.uk*

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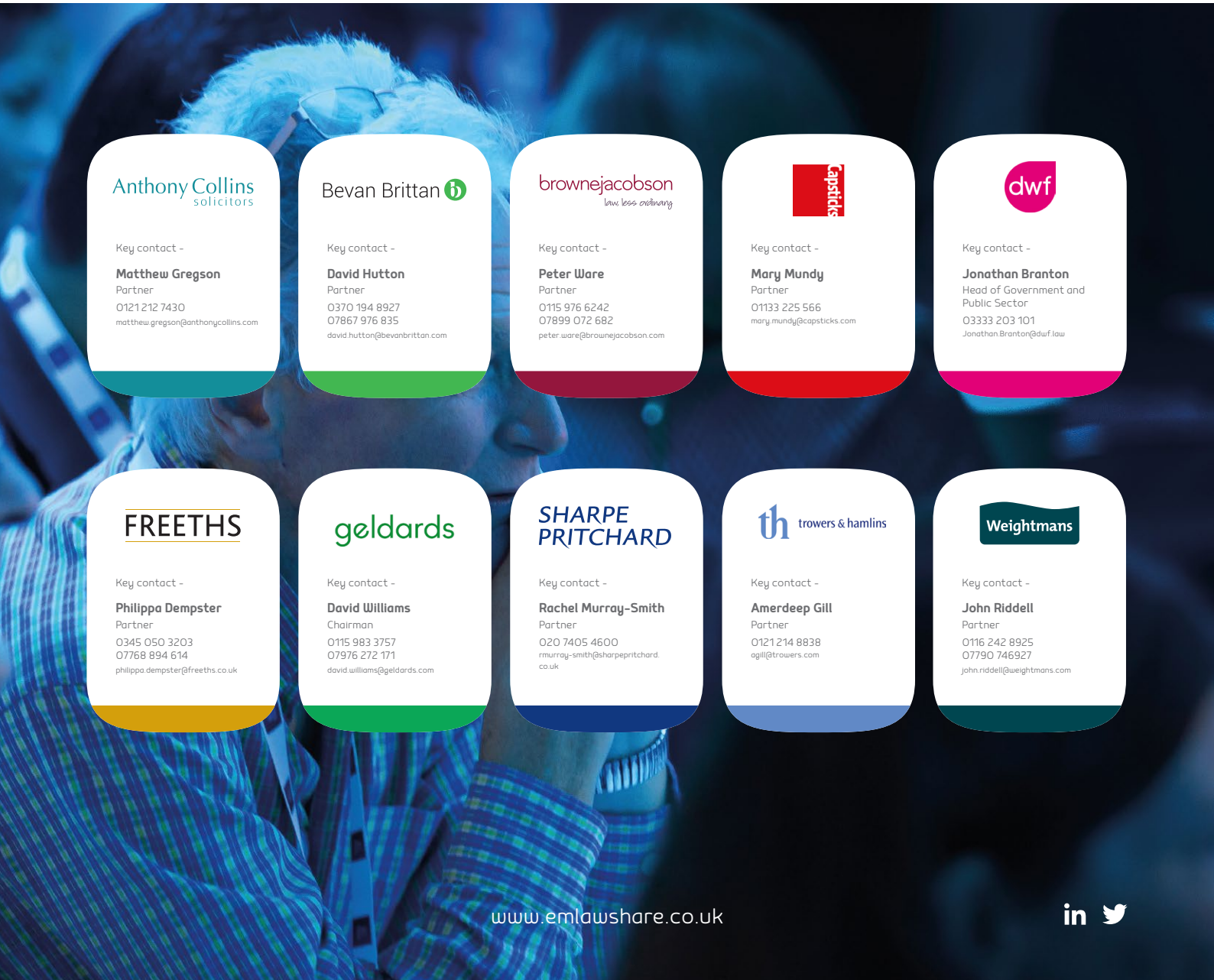

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