

CLG REVIEW OF LOCAL GOVERNMENT'S LEGAL DUTIES - CIPFA-CJC RESPONSE

<http://www.communities.gov.uk/localgovernment/decentralisation/tacklingburdens/reviewstatutoryduties/>

Who we are and why we are responding

- 01** The membership of the **Commissioning Joint Committee** covers all the main disciplines involved in commissioning and competition, and also contractors' and third sector organisations. We are sponsored by CIPFA but are an independent forum, and therefore accept no funding from any source. We meet all our expenses from sales. We publish guides to many aspects of commissioning, particularly those calling for collaboration between bodies in different sectors, or for input from a range of disciplines.
<http://www.cipfa.org.uk/pt/CJC/index.cfm>
- 02** We welcome this review, and have many suggestions to make. Some may appear to be legal minutiae of no strategic importance. It might even be felt that practitioners should never allow such minutiae to obstruct good initiatives, and that practitioners who do allow it are themselves the real problem. Any such feeling does however leave out of account all the pressures on practitioners to make sure to follow all the rules. These pressures come from the many types of inspection, regulation, appeal, review and litigation to which most practitioners are now subject. Those found to have ignored any of the rules, or even to have taken them lightly, then get no sympathy, however worthy the initiative being pursued.
- 03** We want to draw the department's particular attention to consequences of over-regulation which often obstruct initiatives to which we know ministers attach great importance. These initiatives include joint commissioning and service-sharing between different sectors, and also between the different sub-sectors of local government. The labour of complying with regulations is often aggravated by the wide differences between government departments in the form taken by regulation in the different fields for which different departments are responsible. These inter-departmental differences are of long standing but appear now to serve no useful purpose.
- 04** The diversity in the form taken by regulation, and also its sheer quantity, were brought home to us by the research and consultations which we have carried out in drafting some of our publications. These have covered the many legal, organisational and practical factors which need be understood by the partners engaged in the different types of collaboration.
- 05** We have noted many times that these differences are now significantly greater for England than for Scotland or Wales. There is of course a reason for this - both countries have had to adapt their legislation to their new national institutions, and the ensuing rationalisation of their legislation probably simplified this process for them. We hope ministers will take the present opportunity to move towards similar rationalisation for England.

Our response

- 06** The obstacles to which we draw attention are
- ◆ the lack of effective partnership vehicles for executive partnerships
 - ◆ limitations in local authorities' delegation powers
 - ◆ constraints on the recovery by agents of the cost of delegated activities
 - ◆ statutory constraints on the powers and membership of joint committees
 - ◆ differences between the powers of different sectors to trade with one another
- 07** We appreciate that the department has provided a spreadsheet designed to accommodate views on the many listed statutes and instruments. We quite see the advantage of collecting views in this way, and hope it will be fruitful.
- 08** We do not however think there is any way in which we can use the spreadsheet to express our comments on the many differences between sectors. We are therefore setting them out now in narrative form.

Sources

- 09** The text contains cross-references to the many statutory sources quoted. Cross-references quote source documents, first, in bold, followed where necessary after semi-colons by section or paragraph numbers.

Source document numbers and names are listed at the end. This list is from our own master list of sources.

- 10 The sheer numbers of sources and cross-references tell their own story.

The lack of effective partnership vehicles for executive partnerships

- 11 We distinguish between **executive partnerships** and **advisory partnerships**. Both address the common purposes of the partners - the difference is in who takes the action agreed. **Executive partnerships take it themselves**, spending funds contributed by the partners. Advisory partnerships on the other hand discuss and agree **what action each partner will take**, at its own expense, as its contributions towards the common purpose.
- 12 Almost every sort of partnership vehicle can be used perfectly well for **advisory partnerships**. Indeed, many appear to work well using no vehicle at all.
- 13 Executive partnerships do however need suitable partnership vehicles. There is a dearth of vehicles suitable for many purposes, including **joint commissioning and providing joint services**. This is mainly because of the restricted range of bodies to which local authorities may delegate functions.

Limitations in local authorities' delegation powers

- 14 We recognise that services have to be protected from getting into the wrong hands. No limitations on delegating-out are however needed for this purpose. Protection is instead readily secured by the **law of agency**, which allows principals who are dissatisfied with the performance of their agents to terminate their delegation agreements with immediate effect. Statutory responsibility for delegated-out services thus normally **remains with authorities, as principals**; it takes special statutory authority (which is now rare) to pass statutory responsibility to agents.
- 15 There are many restrictions on **delegating-out** which are unhelpful to localism. These restrictions now appear anomalous because there are no parallel restrictions on **delegating-in**. Local authorities with wellbeing powers may accept the delegation-in of any functions by any other body or person (**46**; 2.4.f).
- 16 Local authorities' **general powers** of delegating-out are available only for delegation to other public bodies. These powers are for
- ◆ delegation by principal authorities to other principal authorities, joint authorities other than police authorities, joint boards, joint committees, and parish councils and meetings (**11**; 101 & 107) (**20**; 105 & Sch 14.15)
 - ◆ delegation by the executives of principal authorities to the executives of other authorities and to the London mayor (**45f**; 19.1 & 19.2) (**46**; 38 & 39)
 - ◆ delegation by the London Mayor to any local authority (**45f**; 38)
- 17 There are thus many types of bodies which may act as agents, but only two types, **joint committees** and **joint boards**, are constituted so that they can act readily as executive partnerships.
- 18 Neither are however well suited for joint commissioning or service-sharing. The constraints on the effectiveness of **joint committees** are their non-corporate status and restricted voting membership, as addressed later. **Joint boards** are no longer available for any new purpose because the statutory powers to set them up by Order are extinct. The few surviving joint boards are restricted as to their functions and membership by the Orders which set them up.
- 19 Besides the general delegation powers just mentioned, principal authorities have the following powers to delegate **specific functions**
- ◆ social care and children's services authorities may delegate **specified social care functions** to NHS bodies (**45a**; 31) (**143**; 6). These are the only government or quasi-government bodies to which local authorities may delegate functions
 - ◆ housing authorities may delegate the **management of any of their houses** to any other bodies (including commercial and voluntary bodies, and private individuals) (**21**; 27)

- ◆ local authorities may delegate to any other body the (closely prescribed) functions covered by orders made under the **Deregulation & Contracting Out Act 1994**. All these functions are small except those us referred to collectively as school improvement (152)
- ◆ the London Mayor may delegate any of the functions of **Transport for London** to its companies (45f; 158)

20 So far as we now, only the first of these powers (for social care) has in practice been used for joint commissioning.

Constraints on how agents recover their costs in carrying out delegated activities

- 21 The law of agency entitles agents to the reimbursement by principals of costs properly incurred in carrying out the activities delegated. Delegation agreements therefore normally provide for principals to reimburse agents, at cost, for all expenditure on their behalf.
- 22 Because agents normally have to be reimbursed, they need to keep records of **who contributed what, and of what their respective contributions were spent on**. Principals cannot just delegate their budgets to agents. The two exceptions to the requirement for reimbursement are
- ◆ where there is specific statutory provision for budget pooling, as there is for **specified care functions** (45a; 31) and the costs of **children's trust boards** (63; 12.C) (99; 194.2). Budget pools are funds in which contributions lose their identity, so that none of the expenditure from them is identified against the contributions made by any particular contributor
 - ◆ delegation under the local government acts to **joint committees**, whose costs are recovered in accordance with whatever arrangement were agreed when they were set up (11; 103)

Statutory constraints on local government joint committees

- 23 The main constraints on the usefulness of joint committees as partnership bodies are
- ◆ that they are **not corporate bodies**
 - ◆ that they are severely restricted as to their **voting membership**
 - ◆ some services have access only to **service-specific joint committees**

Corporate status

- 24 Joint committees are not corporate bodies. They cannot therefore bring or defend legal proceedings in their own names. Joint committees have to delegate this activity to agents, normally one of their constituent authorities, which brings or defends the proceedings in its own name.
- 25 The non-corporate status of English joint committee has never been expressly stated in legislation but has always been accepted. It is expressly stated in Scotland (12; 235.1) but the absence of corporate status there can be overcome. Scottish ministers may, by agreement, order the incorporation of any joint committee as a joint board (12; 62A) (35; 20).
- 26 Joint committees are however expressly precluded from **employing staff** (11; 1A.1).
- 27 Seconded authorities are treated for all purposes except pensions as being the employers of seconded staff (11; 113). There are therefore **doubts about whether joint committees can accept staff on secondment**, and there is no specific provision for local authorities to second staff to them.
- 28 The same result as secondment is however secured if joint committees delegate to local authorities the activities for which staff are needed, and reimburse their costs in the usual way.

Restrictions to their voting membership

- 29 Authorities **nominate their own representatives** on joint committees, but two thirds of any constituent authority's own nominees on any joint committee have to be **elected members** (11; 102.3).
- 30 Authorities may **invite other bodies to nominate representatives**, but if such nominees are given **voting rights**, functions cannot be delegated to the joint committees in question (11; 102.4).

- 31 **Executives** may appoint only executive members, and **council managers** may appoint only themselves or another officer (1054).
- 32 These restrictions preclude third sector and private sector bodies from becoming full and equal partners in joint committees. Any joint committees with non-local authority members can act only as **advisory partnerships**.

Services with access only to service-specific joint committees

- 33 **Police authorities** have no powers to delegate functions to other authorities of any sort (11; 107.2).
- 34 Two or more police authorities may however set up a joint committee (11; 107.2.1.b) and delegate functions to it (11; 101.5.a & 107.2.6). They may delegate functions to other joint committee but only to joint committees whose members consist wholly of police authority members, in other words only to the joint committees of other police authorities (11; 106.7).
- 35 **Maintained schools**, federations of maintained schools, and further education colleges may set up their own joint committees, and delegate functions to them (52a; 26) (72; 166) (195; 4).
- 36 There is however no provision for
- ◆ LEAs to nominate members to schools joint committees
 - ◆ school governing bodies to delegate functions to local government joint committees, or to appoint voting members to them

Statutory constraints on NHS joint committees

- 37 NHS bodies may set up joint committees with local authorities (73; 75.4).
- 38 These joint committees can exercise functions even if they include voting members nominated by local authorities (11; 102.4). There is however no provision for them to include voting members nominated by bodies other than local authorities or other NHS bodies.
- 39 NHS joint committees are, like local government joint committees, non-corporate bodies

Constraints on trading powers

- 40 All the trading powers of principal authorities are restricted as to
- ◆ **what** they may sell
 - ◆ **the conditions** under which they do so
- or
- ◆ **who** they may sell to
- 41 Powers restricted as to **what authorities sell** are for
- ◆ the use of **computers or computer services** (14; 38) (84; Sch 13.2)
 - ◆ the sale of **heat, electricity or steam** (14 ; 11 & 44)
 - ◆ the supply of **meals and refreshments** from restaurants (2e; 1)
 - ◆ the sale of **discretionary services** (59; 93). These are services which authorities may but not must provide
- 42 Powers restricted as to **the conditions under which sales may be conducted** include the sale of any 'function-related activity'. These are any activities which authorities may carry out or provide **for their own normal functions** (59; 95) (185). The conditions on which they do so include requirements to
- ◆ set up and work through **trading companies** (59; 95.4)
 - ◆ draw up **business cases** (166; 2.2) covering a large number of specified factors (1215; 38 & Appx D)
- 43 Authorities are also precluded from making **differential charges** for discretionary services which depend on where service users live (1176) and from charging **more than the cost** of the service provided (59; 93.3). 'Cost' for this purpose is defined at length in statutory guidance (1175).

- 44 Powers restricted as to **who authorities may sell to** are for
- ◆ providing administrative, professional and technical services, and goods and materials
 - ◆ hiring out vehicles or plant and
 - ◆ maintaining buildings and land
- for 'other public bodies' (10; 1). Public bodies for this purpose include all other local authorities, joint committees, and NHS bodies; and also many other bodies which have been specified ad hoc in hundreds of statutes. Very few such other bodies are in the third or private sectors.

Other public bodies with wider trading powers

- 45 Few if any of the restrictions on local authorities' trading powers have any counterparts in other parts of the public sector.
- 46 **Police authorities** for example may contract for any of the works, services and supplies just mentioned with **any** body (10; 1.4) (36; Sch 4.5).
- 47 There is widespread commerce **between different NHS bodies**, and there is specific statutory provision for 'NHS contracts' (meaning contracts for specified services between different NHS bodies) (30e; 30) (73; 9).
- 48 NHS contracts are 'not to be treated as creating any rights or liabilities' (73; 9.5). They thus have the same status as service level agreements between different departments of a single body; they are not contracts for the purposes of the EU directives which define (168; 2) services contracts as '**contracts for consideration** under which a contracting authority **engages a person** to provide services'. NHS contracts do not therefore normally call for notices in OJEU, even though all NHS bodies are separate contracting bodies for the purposes of the EU directives (168; annex 1).
- 49 **Transport for London** may
- ◆ exploit the results of its own research (45f; Sch 10.22)
 - ◆ repair vehicles and equipment for any person (45f; Sch 11.8.2)
 - ◆ give any body professional or technical advice or help in any field in which TFL has skill, experience or expertise, and set up and manage undertakings on behalf of anybody so advised (45f; Sch 11.9)
 - ◆ provide and maintain facilities for the intermodal transfer of freight (for example from road to rail) (45f; Sch 11.9.14)
 - ◆ make whatever charges it thinks fit for its services and facilities (45f; Sch 11.17)
 - ◆ generally turn its own resources to account so far as not required for its own functions (45f; Sch 11.13)

Publication

- 50 We have no objection to all or any parts of our response being copied to any other body.

Sources

- 2e The Civic Restaurants Act 1947
- 10 Local Authorities (Goods & Services) Act 1970
- 11 Local Government Act 1972
- 12 Local Government (Scotland) Act 1973
- 14 Local Government (Miscellaneous Provisions) Act 1976
- 20 Local Government Act 1985
- 21 Housing Act 1985
- 30e NHS & Community Care Act 1990
- 35 Local Government (Scotland) Act 1994
- 36 Police & Magistrates Courts Act 1994
- 45a Health Act 1999
- 45f Greater London Authority Act 1999
- 46 Local Government Act 2000
- 52a Education Act 2002
- 59 Local Government Act 2003

- 63 Children Act 2004
- 99 Apprenticeships, Skills, Children and Learning Act 2009
- 73 National Health Service Act 2006
- 75 Childcare Act 2006
- 84 Local Government and Public Involvement in Health Act 2007
- 143 SI 2000/617 - NHS Bodies & Local Authorities Partnership Arrangements Regulations
- 152 SI 2002/928 - Contracting Out (LEA Functions) (England) Order
- 166 SI 2004/1705 - Local Government (Best Value Authorities) (Power to Trade) (England) Order
- 168 SI 2006/5 - Public Contracts Regulations
- 185 SI 2006/3102 - Local Government (Best Value Authorities) (Power to Trade) (Amendment) (England) Order
- 195 SI 2007/1321 - Collaboration Arrangements (Maintained Schools and Further Education Bodies)
- 1054 DETR Statutory Guidance to New Council Constitutions
- 1215 ODPM Guidance on Trading in Function Related Activities 2004
- 1175 ODPM statutory guidance on charging for discretionary services 2003
- 1256 CELTEC Ltd v Astley and others: Case C-478/03
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:182:0012:0013:EN:PDF>