



Trusts for Big Society

The growing role of trusts in the culture, library and leisure sectors

This brochure is a summary of the current law of England and Wales.

It is not intended to be an exhaustive summary of all matters which need to be taken into account when considering the alternative means of local authority service delivery. The trust is just one option and each local authority will need to consider carefully if it is the right option for the authority and the particular portfolio of services. It is hoped, however, that this brochure will provide a useful source of information for local authority members and officers contemplating such an initiative. This publication is not a substitute for advice on specific matters and should not be taken as providing legal advice on any of the topics discussed.

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Regulation Authority

Winckworth Sherwood is at the forefront of the private and public sector interface. We are committed to providing proactive professional advice to our public sector clients. Our collaborative approach provides a genuine skills transfer from our specialist lawyers to our clients.

About Us

The combination of skills and experience from across the firm – including projects, procurement, planning, property, charities, employment, contracts, housing, education and parliamentary – makes Winckworth Sherwood’s local government team a truly multi-disciplinary offering who like to make things happen. Dedicated to the advancement of local government, the team has worked with local authorities on the transfer of services such as leisure, arts, museums, parks and libraries to entities such as charitable trusts and community interest companies.

With an in-depth knowledge of the local government landscape – and the new challenges the sector is facing – the team understands the importance of being attuned to the vital issues which lie ahead. It provides practical, well-informed and up-to-date advice which is valued in local government services throughout the country. Clients appreciate its collaborative and partnering approach.

The team has recently been strengthened further still by the appointment of Simon Randall CBE and Joanna Bussell, both experts in local government work and at the forefront of the trust option for local authority service delivery.

Joanna is the lead partner at Winckworth Sherwood being recognised as one of the leading local government and charity

lawyers. In the legal directories Joanna “draws plaudits from the market for her sector knowledge”. She is regarded by clients as “indispensable” and valued for her “comprehensive knowledge and positive manner” and “there is never any doubt that she’ll get the job done, no matter how tight the timeframe”.

Simon, who joined as a consultant, is recognised as one of the leading local government and social housing lawyers in the UK. He is ranked in Band 1 in the key legal directories and is described as “very knowledgeable in acting for local authorities” and “exceptionally bright, energetic and positive”. Simon has had a long career both as an elected member of London Borough of Bromley and has advised ministers and MPs on housing and local government issues. He was awarded his CBE in 1991 for services to housing and local government in London.

Over the past 15 years, Joanna and Simon have advised over 70 local authorities on the successful transfer of local authority services to newly established charitable trusts. Such services have included leisure, arts, museum and library services. The newly established trusts continue to go from strength to strength and Joanna continues to act for such trusts. It is the unrivalled track record and experience that means both Simon and Joanna can provide full advice and support in relation to projects of this nature.

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Winckworth Sherwood – providing valuable service to local government

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1 | Introduction and policy background

Prior to the recent General Election all the political parties were competing with each other in their promotion of localism and the desirability of public services being run by non-profit distributing organisations. In particular, David Cameron on 11 November 2009 highlighted his vision for the Big Society and stated that his government “will identify proven social programmes, franchise them to social entrepreneurs [and third sector organisations such as charities] with a track record of success and fund them directly from existing state budgets to deliver public services”.

Since the election, the Coalition Government has put this vision for the Big Society at the heart of its thinking for public sector service reform. The Queen’s Speech at the opening of Parliament announced “My government will seek to build a strong and fair society by reforming public services and encouraging individual and social responsibility. The role of social enterprises, charities and co-operatives in the public services will be enhanced.” This was reinforced in the Coalition’s programme for government:

- *“we will promote the radical devolution of power and greater financial autonomy to local government and community groups;*

- *“we will support the creation and expansion of mutuals, co-operatives, charities and social enterprises, and enable these groups to have much greater involvement in the running of public services;*
- *“we will give public sector workers a new right to form employee-owned co-operatives and bid to take over the services they deliver.”*

These messages have been regularly repeated and reinforced by ministers particularly from DfE, DCLG and DCMS within the overall concept of the Big Society. This concept was articulated in the first paper promoted by the Coalition which highlighted four principal themes:

- give communities more powers;
- encourage people to take an active role in their communities;
- transfer power from central to local government; and
- support co-operatives, mutuals, charities and social enterprises.

Culture n:

- a vital part of people’s lives, enabling them to have fun, meet people, develop skills, keep fit, achieve aspirations
- contributes to quality of life and social policies
- one of the fastest growing sectors in the UK



Thus it is envisaged that many aspects of our public services could be transferred to a range of “not for profit” bodies. Indeed such bodies could be used to run every service or commercial activity within our communities. By way of example, co-operatives in England run leisure centres, housing, public houses, shops and cafes, wind farms, rugby clubs, GP and other health services, and a telephone service.

In this brochure we will explore the different options for public services run by local authorities in the leisure, education, heritage and arts areas although similar issues arise throughout the public sector.

We are publishing the results of an in-depth survey which was recently carried out among thirty-four culture and leisure trusts operating in England and Scotland. We use the word “trust” in the context of any non profit distributing organisation (NPDO) whether charitable or not.

All local authorities currently operate under the Best Value Regime, which will inform their decision-making as they consider their services particularly in the context of the October 2010 spending review.

The Best Value Regime

Since the introduction of the 1999 Act and under the Best Value Regime, local authorities have been encouraged to look critically at the services provided by them and to consider a number of options for providing services in the future. These have included:

- the creation of public-private partnerships as a way to provide a service;
- the transfer of the service to an external provider;
- the provision of the service only after a process of competitive tender;
- the restructure of the in-house provision;
- the cessation of the service either in whole or part.

A key part of this is to consider NPDOs. The view is that the voluntary and community sector play a vital role in the delivery of public services, within the context of localism and the Big Society, and taking on partnerships with the public sector. A number of enabling changes were made to charity law. These included:

- a clear focus on the meaning of "public benefit";
- extending the list of charitable purposes;
- cutting regulation;
- encouraging participation and entrepreneurship.

The Audit Commission

The Audit Commission has had a vital role to play in the review and measurement of planned changes to the provision of services by local authorities.

It undertakes detailed independent reviews of local authority services and these can be found at www.audit-commission.gov.uk.

Many of the Audit Commission's reports have recommended that local authorities look at all the options for the delivery of services, often recommending the setting up of trusts.

The Commission, in association with Sport England, considered how local authorities in England evaluated their provision of community sports and recreation facilities and how they might develop strategies for the future taking into account the requirements of value for money. The result was a joint report 'Public Sports and Recreational Services – making them fit for the future' in which some important recommendations were made, including:

- the need for the local authority to develop a clear vision in its role of delivering sporting facilities;
- a review of the local and regional context;
- the need to produce a plan of action to be monitored on a regular basis.

After the downturn

An important joint report with the above title produced by CIPFA and SOLACE examined the management of a significant and sustained adjustment in public sector funding. It drew attention to the fact that leisure services may not be a core public service and that joint working amongst local authorities should be encouraged. This, coupled with the policies of the present government, predicate more outsourcing of culture and leisure and public services as a whole to the social enterprise sector within the Big Society ethos.

2 | The trust route – why consider it?

Survey

The trusts surveyed listed many advantages of trust status, the key ones being:

- less bureaucracy and greater speed of decision-making;
- increased access to small and other charitable funding streams;
- ability to react quickly to market forces;
- single focused body;
- tax and NNDR savings;
- independence and ability to diversify.

There are three key reasons for considering the trust option:

- favoured by central and local government as indicated above;
- enables individuals and communities to participate;
- many fiscal advantages.

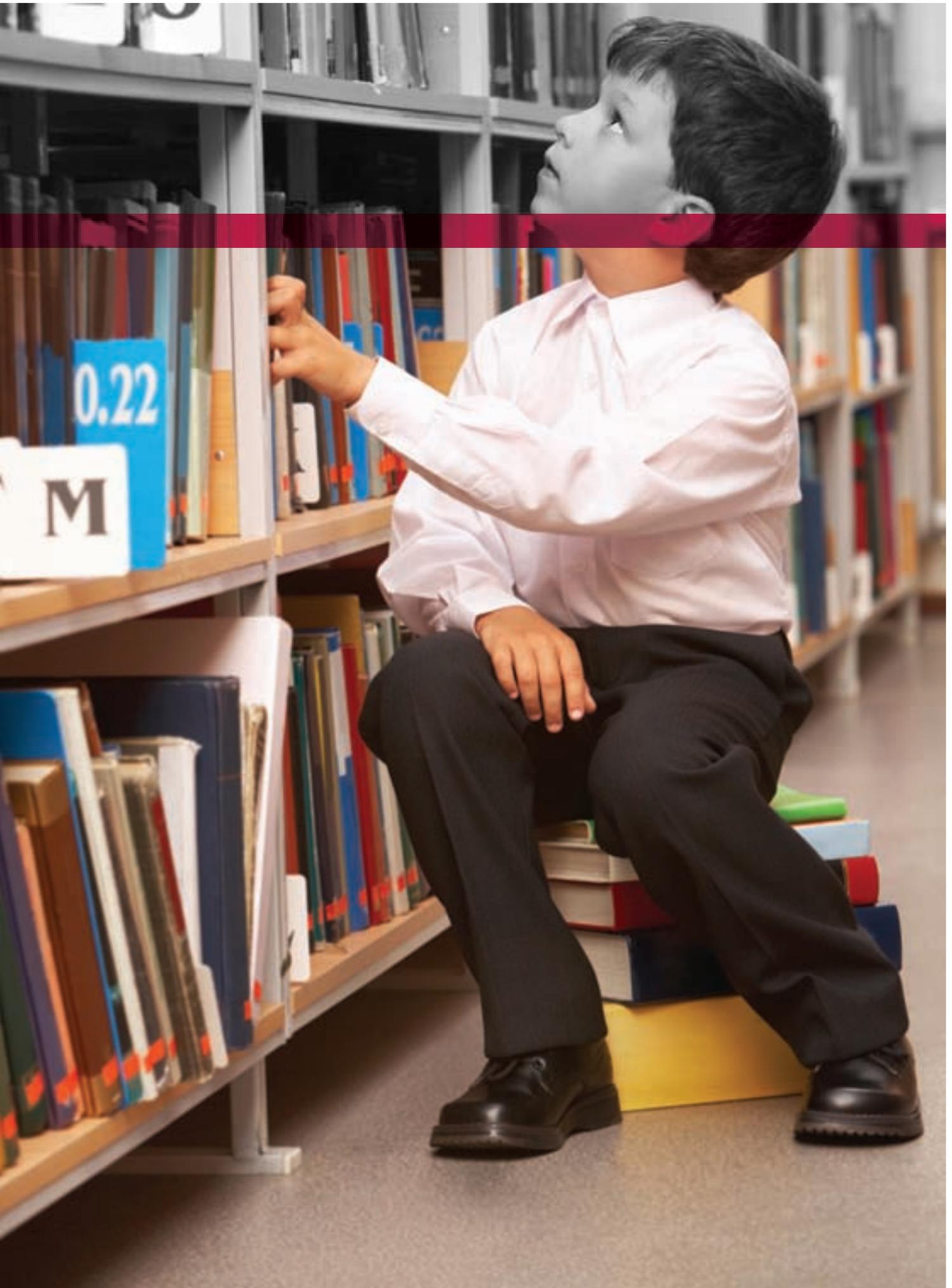
Under the umbrella of the Best Value Regime, taking the trust route is now the favoured option of both the Government and local authorities and other interested bodies, enabling as it does local communities to participate in the running of their local services.

The key advantages when considering the transfer of services to a charitable trust are:

- increased community involvement in the decision-making process within the Big Society concept;
- the removal of the service from the local authority regime, and therefore from the constraints of local authority funding;

- improved and more direct management and employment security, together with freedom and flexibility in the decision-making process;
- access to private funding;
- the ability to work in partnership with the local authority;
- the considerable fiscal advantages which charitable entities attract;
- generally, the number of VAT breaks for voluntary bodies;
- specifically, the exemption from VAT which non-profit distributing bodies are entitled to on entrance fees for sporting and cultural facilities;
- the mandatory NNDR rate of relief of 80% and discretionary relief from the remaining 20% for charitable entities;
- tax relief on charitable donations which encourages funding through sponsorship;
- the increased likelihood of National Lottery funding.

“ Transforming ourselves from a facility operator into a campaigning charity and proud of our status and purposeful mission ”



3 | Applying charity law to local authorities

“ Trusts can be very successful
...and will be most successful
when the local authority
supports them ”

To be established as a charity engaged in providing public sector services, the organisation must:

- be exclusively charitable;
- be “independent” of the local authority;
- retain its discretion in relation to how services are delivered.

A number of considerations must be taken into account when considering the trust option:

- In order to obtain charitable status, the objectives of the proposed trust must be exclusively ‘charitable’. If there are objects which cannot be considered to be charitable, the entity will not be permitted to register as a charity.
- The local authority must continue to fulfil its duties and the provision of the service by a trust must not conflict with the statutory imperatives. (See the Charity Commission’s publication ‘Stand and Deliver: the future of charities delivering the public services’.)

- A trust must be managed by its trustees – and local authorities must accept that this will entail a loss of control for them.

A full list of charitable purposes can be found on page 32 but those which are most relevant for local authority leisure and culture activities are:

- the advancement of education;
- the advancement of health;
- the advancement of arts, culture and heritage;
- any other purposes charitable in law.

In addition, under the 1958 Act the provision of facilities for recreational purposes is also recognised as a charitable purpose and this Act is still in force.

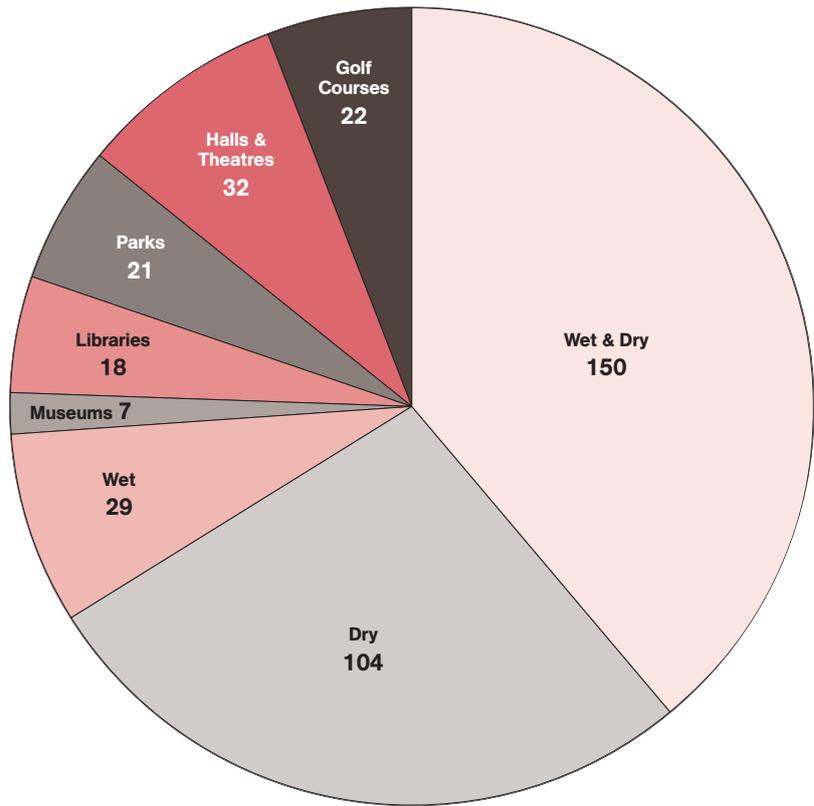
Examples of public sector service delivery compatible to delivery by a charity or part of a charitable group include:

- museums, art galleries, concert halls and theatres;
- sports, leisure and recreational facilities;
- parks, recreational grounds and crematoria;
- tourism and conference facilities;
- libraries;

- housing stock;
- housing management;
- schools and educational services;
- town centre programmes and regeneration projects;
- sheltered accommodation;
- social services including home help and domiciliary care;
- countryside facilities;
- residential and outdoor facilities for young people;
- fundraising charities for charitable projects sponsored by the local authority.

Leisure and other facilities operated by trusts

The chart opposite illustrates the percentages of facilities managed by the trusts in our survey. The majority were dry or wet and dry facilities and over half of the survey group operated all three types. There are a growing number of trusts operating a wider portfolio of services, including golf courses, community halls, theatres, parks and libraries. We anticipate that this trend will continue, particularly if libraries and museums feature in local authority outsourcing proposals as recommended in an MLA report on the topic of trusts.



Key

 Wet & Dry	 Libraries
 Dry	 Parks
 Wet	 Halls & Theatres
 Museums	 Golf Courses

4 | Choosing the new type of organisation

The key issues to consider:

- decision as to charitable or non-charitable trust
- type of corporate entity to choose
- registration and ongoing regulation formalities

Once a local authority has decided to transfer a service to a new entity, it must then decide whether to transfer to a charitable entity or to a non-charitable organisation. If there is any doubt over whether the purposes of the new organisation are charitable, then it is possible to seek informal guidance from the Charity Commission. Reference should also be made to two key decisions of the Commission made in 2004 in relation to the successful registration of Trafford Community Leisure Trust and Wigan Leisure and Culture Trust.

Types of charitable entity

A body established by Royal Charter:

To receive a Royal Charter, an application must be considered by the Privy Council and is usually reserved for substantial organisations with clear public purposes. Once the application has been approved, an application for charitable status must be made to the Charity Commission. The charitable trust would be established through a company limited by guarantee.

An unincorporated association: This type of entity does not have limited liability. It is suitable for a charity, such as a village hall, where there is wide membership and management by a small committee of volunteers. They can be inexpensive to run.

Declaration of Trust: Charities created by a declaration of trust are unincorporated and are therefore generally unsuitable for local authorities' activities as the trustees have unlimited liability.

Industrial and Provident Society (IPS):

An IPS must be established for 'community benefit' and could be either charitable or non-charitable. They:

- are registered under the Industrial & Provident Societies Act 1965;
- are corporate bodies with limited liability;
- qualify for registration under the 1965 Act if they are conducting an industry, business or trade and established for the benefit of the community or are bona fide co-operatives;
- are regulated by the Registrar of Friendly Societies – now part of the FSA.

To establish an IPS, the Society's rules must be prepared and submitted to the Registrar for approval. Each member has at least one share in the society and control is vested in the members equally and not in accordance with their financial interest in the society.

All charitable IPSs were treated as "exempt" charities, such that they obtained their charitable status from HMRC who regulated them thereafter. As there had been a perception that HMRC regulation was less than robust, the 2006 Act will require charitable IPSs to be registered and regulated by the Charity Commission probably from early 2011.

Non-charitable IPSs are often the vehicle used for employee-owned entities or co-operatives.



Company limited by guarantee (CLG):

A company limited by guarantee is the usual vehicle when creating a new charity. The key features of this type of entity include:

- it is incorporated under the Companies Act 2006 without issuing shares but instead requiring its members to guarantee a sum of money in the event of insolvency;
- it gives limited liability rights;
- the directors have duties and responsibilities under the Companies Acts. They will have additional duties as trustees if the company is a registered charity;
- it is regulated by Companies House;
- it does not need to use the word 'limited' after its name;
- it can be established with charitable or non-charitable status, but if charitable it will be subject to the Charity Commission's regulation.

This type of entity has a number of advantages. It operates within the modern and flexible regime of the Companies Acts. It is also a structure which is well known in the private sector, making external funding and partnerships much more likely. However, as there are requirements for administration, annual reports and meetings, and audited accounts, this can make it more expensive than other structures.

Community Interest Company (CIC): This is a new type of company created in 2004 by the Companies (Audit, Investigations and Community Enterprises) Act.

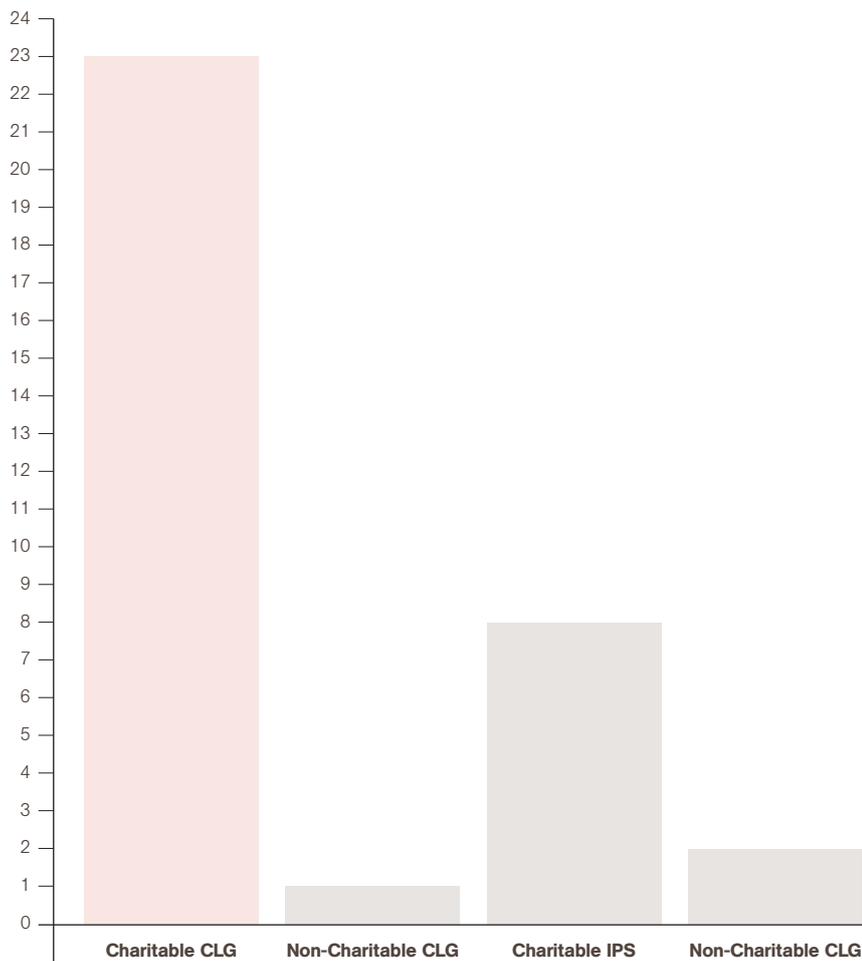
Its key features are:

- it is a limited company with members and shareholders, as either a guarantee or share company and can distribute a dividend;
- it is a bespoke vehicle for social enterprises;
- it is regulated by an independent regulator based at Companies House;
- it must be established for "community benefit" and meet a community interest test;
- for existing entities created as a company limited by guarantee, it is a straightforward process to convert to a CIC.

An organisation cannot be a CIC and a charity – and therefore (like non-charitable IPSs) CICs would not be eligible for the tax reliefs available to charities.

Charitable Incorporated Organisation (CIO):

Even newer than the CIC, the CIO was introduced by the 2006 Act. It is regulated entirely by the Charity Commission – not the Companies Registry – and reduces the administration burden on charities. Existing charities are able to convert to CIOs, but they will not be available for use until either late 2010 or early 2011.



Pocket Trust: Conventionally private sector leisure contractors use “pocket” trusts as part of their management arrangements so as to attract NNDR savings. These trusts are generally either non-charitable IPSs or CLGs. Such organisations can potentially benefit from discretionary rate relief, but unless they are registered (or exempt charities) are not eligible for mandatory rate relief. Depending upon how they are structured, they are also unlikely to benefit from the VAT exemption on sporting and cultural activities.

Any local authority contemplating such an agreement will need to be aware that these pocket trusts will be wholly-owned by the parent contractor, managed by the contractor’s nominees and charged management fees equating with any surplus generated by the pocket trust. The parent will guarantee the obligations of its trust as the body contracting with the authority. Great care should be taken in granting rate relief as this could be challenged.

Preferred choice of entity

The types of structure used in our survey indicated an overwhelming preference for the CLG.

“ The keyword is **“trust”** – the necessity to build up a relationship which is **“worry-free”** for the authority and [brings] added value ”



5 | What are the advantages of becoming a charity?

“Willingness of public and private businesses [wanting] to work with the trust”

Charities have a privileged position in the UK and over the years government has encouraged philanthropy by providing tax incentives for donors and charities.

Fiscal advantages

Where it can be shown that the charity's income and capital is applied for charitable purposes only, charities are conferred with a number of tax advantages for themselves – and also for those who support them.

Capital Gains Tax

Gifts to charities are entirely free of capital gains tax. When a gift is made, the donor's tax liability passes to the charity. Charities are also generally exempt from capital gains tax on disposals of their assets. This means that capital gains tax exemption is achieved as long as the sale of the assets are for charitable purposes only.

Inheritance Tax

All gifts to charity are free of inheritance tax, made during the lifetime of the donor or by will. Restrictions do apply where the gift is not outright but where the owner retains an interest in the property.

Income and Corporation Tax

As long as income is applied to charitable purposes, charities are exempt from income and corporation tax. Rental income and investment income is exempt.

The situations in which trading activity is exempt from tax are as follows:

- where its primary purpose is trading – for example, charging entrance fees;
- where work is mainly carried out by its beneficiaries;
- where there is ancillary trading such as selling food and refreshments in a connected cafe;
- fundraising events.

There are also exemptions for small trading activities carried out by charities which are not otherwise exempt. The limits are:

- £5,000 of income from the trade if the total income of the charity is under £20,000;
- 25% of income for charities whose income is between £20,000 and £200,000;
- £50,000 if the income is over £200,000.

Separate trading subsidiaries can gift aid income not falling within the exemptions to the charity to save tax.

NNDR

The relief available to charities on the payment of national non-domestic rates has been a major factor in local authorities transferring property to charitable trusts.

Charities are entitled to 80% mandatory relief for rates on property which is used wholly or mainly for charitable purposes. Local authorities also have the discretion to grant the remaining 20% as further relief. The net savings for a local authority for charitable NNDR relief is 85% and 75% on discretionary relief assuming 100% relief overall.

Stamp Duty Land Tax

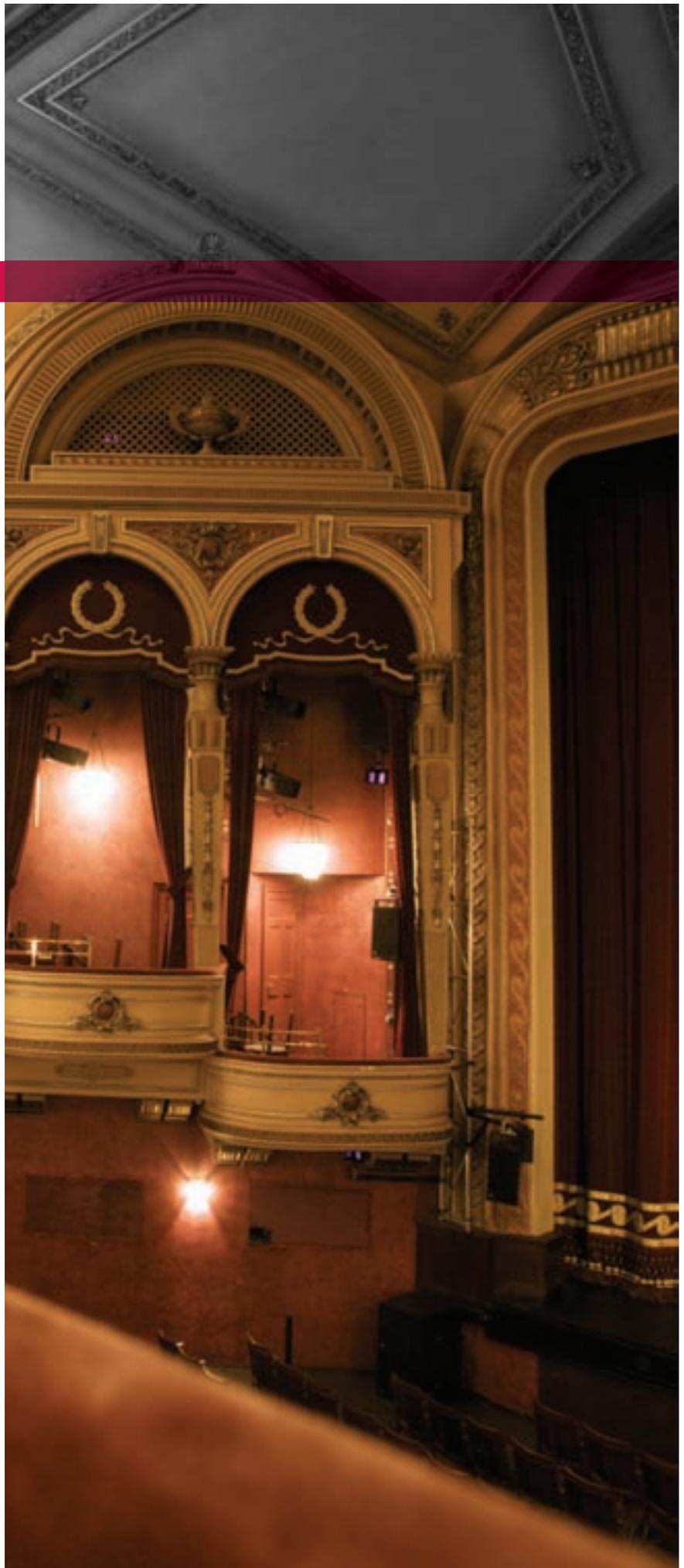
This tax is not normally payable on gifts and purchases or leases of land and shares to or by charities.

Gift Aid Donations

Tax relief is available on donations and annual membership fees to charities, enhancing the value to the charity itself and encouraging donors to give because the gift is worth more in the hands of the recipient than in the hands of the donor. These reliefs are available for gift aid, payroll giving, gifts by companies and lifetime gifts of capital on legacies under bequests and death. Charities can reclaim basic rate tax on gift aid from individuals, enhancing the value of the gift by nearly 30%. As from 1st April 2006, gift aid can be claimed on museum and other similar entrance fees paid by taxpayers. The Office of Charity and Third Sector Finance advises on gift aid as well as acting as a policy and strategy network for HM Treasury.

Although registration with the Charity Commission means that the charity will qualify for tax relief, the Inland Revenue will nevertheless ask the following questions:

- does the charity have good title to the income and capital?
- has it been applied for charitable purposes?





VAT

Charities are on the whole fully liable to VAT although there are a number of specific reliefs which are reduced, zero rated or exempt.

These include 5% VAT charge on energy costs for the non-business operations of charities, zero rating for VAT on disabled adaptations and recruitment advertising, and exemption from the climate levy for non-business operations.

However there are two areas where the transfer of local authority activities to a not-for-profit body has positive VAT advantages.

Sports or physical education

The Value Added Tax Act 1994 provides a list of activities which are tax exempt including 'the supply by a non profit making body to an individual of services closely linked with and essential to sport or physical education'. The exemption would not apply if the activity were being carried out by the local authority rather than a charity and applies to entrance fees, for example, but not on restaurant or social function facilities found in sports centres. One disadvantage of being exempt from VAT is that the charity will not be able to recover the input tax on major expenses such as refurbishment or building costs. If the local authority retains responsibility for the main structure of a leisure centre on the leasing arrangements, VAT could be saved on those costs even if they were largely funded by the charity. HMRC has provided guidance on when this arrangement is acceptable.

Cultural services

As for the provision of sports or physical education facilities, certain cultural services are exempt from VAT. This means that VAT exemptions might apply to admission to museums, art galleries or theatrical and musical performances provided there is no 'distortion of competition to place commercial enterprises at a disadvantage'. There is no such proviso for non-for-profit bodies or those managed on a voluntary basis by persons having no direct or indirect financial interest.

The HMRC has provided the definition for this. It states that the involvement of staff on the board of trustees of an arts or cultural trust will not affect the trust's eligibility for this VAT relief provided that:

- their involvement at board level is permitted in the governing document;
- the employee board member is excluded from any decisions relating to remuneration;
- the payments are not above market rates;
- the payments are not linked to profits.

Non-fiscal advantages

There are a number of significant non-fiscal advantages of trust status.

Accessing private funding

One of the benefits of trust status is the opportunity to access funds from charitable trusts or bank finance, which would be difficult while the facilities were under local authority control. They can

access funding from a range of financial institutions favouring the social enterprise sector and the forthcoming proposal to establish a “Big Society Bank” to provide finance for charities utilising dormant bank account funds.

National Lottery

Lottery funding has enabled local authorities to sponsor new sporting and cultural activities. However, some of the distributing bodies require funding to be provided to organisations independent of the local authority, albeit with their support and influence.

Community involvement

Any new trust created by a local authority will need to have maximum community involvement on the managing body from people willing to devote their time voluntarily to the cause. The commitment of the community representatives is often a significant factor in the success of a new trust reflecting the Big Society localism agenda. In particular, it is important to have a range of skills on the managing body of the new entity, including representatives from the financial, property, legal and HR professions as well as users and, in the case of sports and leisure centres, representatives from the health and education sectors.

Sound management and single purpose

Although, when they are first established, charitable trusts may be dependent initially on public grants, it has been shown that charitable trusts quickly become successful and independent. When they do, the charity is able to operate with greater freedom, less interference and without being affected by constraints on local authority funding.

What are the disadvantages of becoming a charity?

It is important for the local authority to consider the disadvantages – as well as advantages – of becoming a charity. They include:

- transfer into a charitable trust is irreversible;
- it takes between six and nine months to set up a company and register it with charitable status;
- the trust’s objectives can only be changed with the Charity Commission’s consent;
- the administration may be burdensome;
- the local authority loses control as the trust must be independent and there will be a limit on local authority board nominees as mentioned below.

Survey

comments on disadvantages

- Trusts are still regarded as part of the local authority
- Too much reliance on local authority funding
- Difficulty in accessing large capital sums
- Need to define relationship with authority
- Over-reliance on few key staff
- Need to have a longer term funding agreement

“ The trust [should not] be set up simply for financial reasons or as a short term financial expedient ”

6 | What powers do local authorities have?

Specific Powers

Although there has been some debate over the extent to which local authorities have the power to establish charitable trusts, there are some specific statutory powers which allow local authorities to transfer services into this type of entity. Here are some of those:

Service: *Theatres, concert halls, arts and crafts*

Act: 1972 Act Section 145

Provision: "A local authority may do, or arrange for the doing of, or contribute towards the expenses of the doing of, anything (whether inside or outside their area) necessary or expedient for [those] purposes"

Service: *Conference centres and tourism*

Act: 1972 Act Section 144

Provision: "A local authority may (either alone or jointly with any other person or body) provide, or encourage any other person or body to provide [those] facilities... or improve, or encourage [others] to improve, any existing facilities"

Service: *Libraries and museums*

Act: Public Libraries and Museums Act 1964 Section 9

Provision: A local authority can make "contributions towards the expenses...of any other person providing library facilities" and "may make contributions towards the expenses incurred by any other person...providing a museum or art gallery"

Service: *Careers Service*

Act: Employment and Training Act 1973, Sections 8-10

Provision: The Secretary of State has the duty to secure the provision of [careers] services...and may perform the duty by making arrangements with local education authorities or persons of any other description on their own or jointly

Service: *Public walks and pleasure grounds*

Act: 1972 Act and Public Health Acts

Provision: Local authorities may lease or purchase land for use as public walks and pleasure grounds and may support or contribute to the support of public walks and pleasure ground provided by other bodies including, for example, charitable trusts

Service: *Schools*

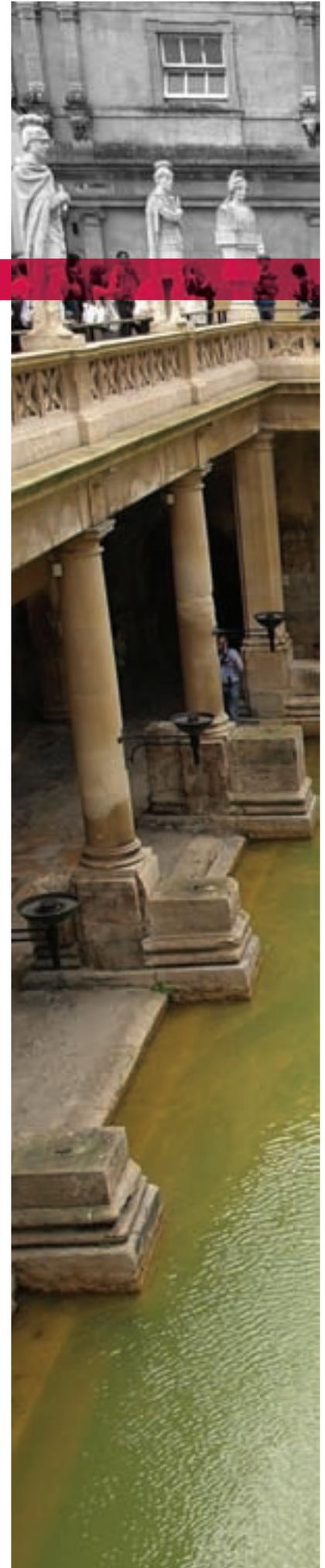
Act: Education and Inspection Act 2006

Provision: Includes provisions to enable every school to be an incorporated charitable body working in partnership with its sponsoring authority.

Service: *Sport and Leisure*

Act: 1976 Act

Provision: Section 19 is somewhat narrower than the 1972 Act provisions in that "a local authority may provide, inside or outside its area, such recreational facilities as it thinks fit" and assist "by way of grant or loan towards the expenses incurred... by any voluntary organisation in providing any recreational facilities"



General Powers

Some general well-being powers are contained in Section 2(1) of the 2000 Act, which gives local authorities power to:

- incur expenditure;
- give financial assistance to any person;
- enter into arrangements or agreements with any person;
- co-operate with, or facilitate or co-ordinate the activities of, any person;
- exercise on behalf of any person the functions of that person; and
- provide staff, goods, services or accommodation to any person.

Although the efficacy of the well-being powers have been challenged, local authorities can always utilise Section 111 (1) of the 1972 Act which provides that “without prejudice to any powers exercisable apart from this section...a local authority shall have power to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions”.

The Coalition plans to include a provision in the 2010 Bill to give all local authorities a power of general competence. This new provision will provide all the powers which an authority will require to transfer facilities to a trust and grant-fund such entity thereafter.

Local authority corporate involvement with trust

Most local authorities will wish to have nominees appointed to the trust's board. Until the enactment of the 2007 Act and the bringing into force of the local authority company rules, the provisions of the 1989 Act are still observed. Section 69 of the 1989 Act provided that local authority interests in trusts can be such that

- a) the local authority can have power to control up to 49% of the votes at a general meeting or power to appoint or recruit under half of the board provided the grant funding is less than 50% of the turnover and all assets are leased or transferred at market value;
- or
- b) the authority can provide over 50% of the grant funding (or deal with assets at less than market value) and still have an interest in the charitable trust – up to 19% of the votes

Accordingly, the conventional advice was to restrict local authority board membership to below 20% – i.e. 1 out of 6 or 2 out of 11 board members on the above basis.

The effect of the 2007 Act has confused the permitted arrangements for local authority trust membership and left the issue in the hands of auditors, who will take a view on a case by case basis. The main concern in the relationship between the trust and local authority is to ensure the expenditure (including borrowing) does not have to appear on the accounts of the authority.

“ If you’re only doing it to save money, you’re lost ”

Funding

Local authorities can fund charitable NPDOs both through revenue and capital grants. They do need to be aware of the limits upon funding in respect of voting control at general meeting or board level and further that any conditions attached to grant funding are not considered by the Charity Commission to impede the trustees’ discretion, which would jeopardise the charitable status of the new entity.

Provision of services

The provision of services to the new body is permissible under the 1970 Act to a number of specific public bodies including:

- managers of residential homes
- housing associations
- educational entities

It does not, however, currently cover leisure, arts or recreation trusts and thus the authority may either utilise its trading powers under the Best Value provisions in the 2003 Act or apply for the trust to become a “designated public body” under the 1970 Act.

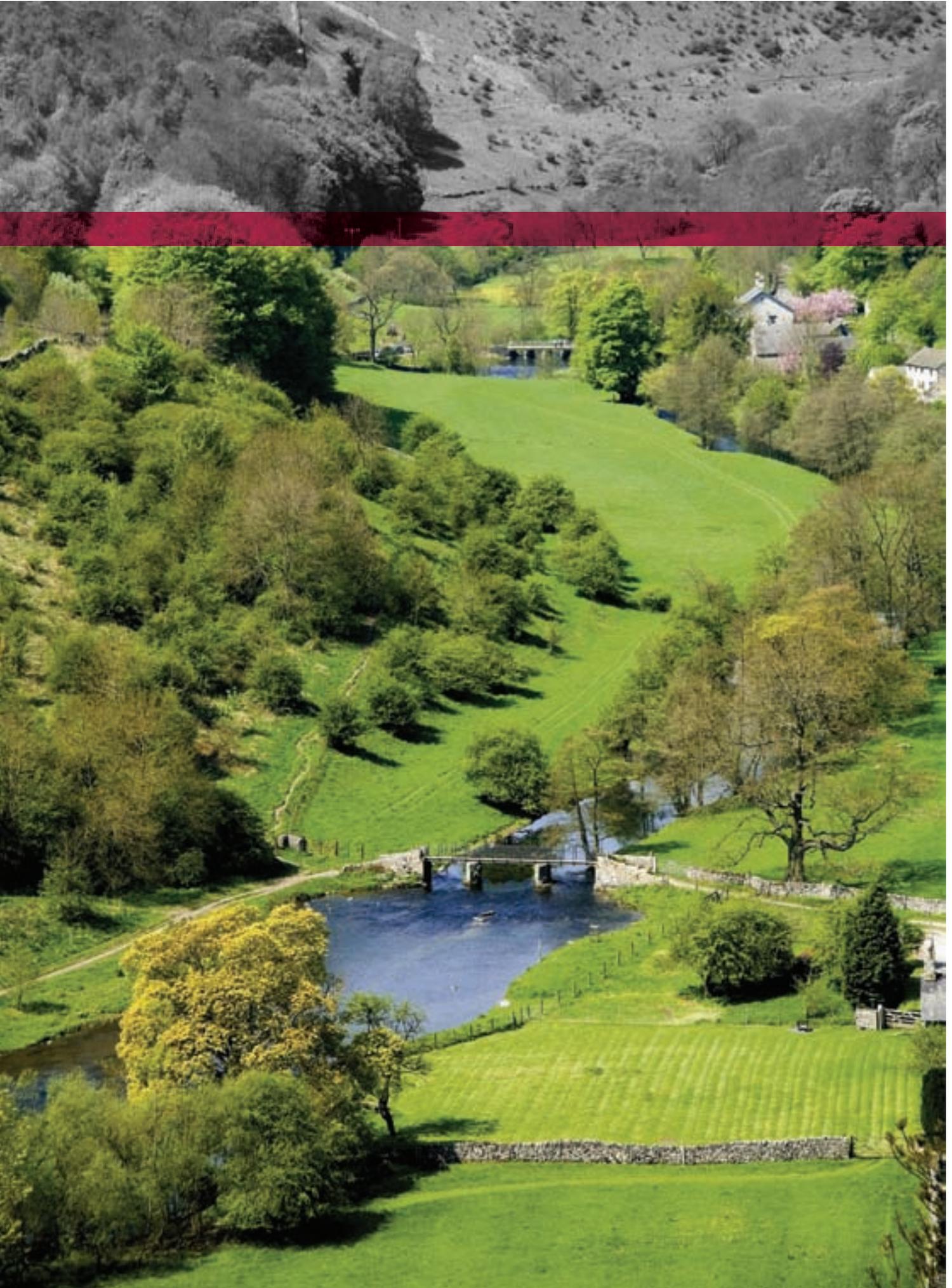
Conflicts of interest

A councillor or officer of a local authority who is also a director of a local authority company must be aware:

- that there are duties in the role of director of the company and also as a member or officer to the local authority;
- that there is a duty to disclose information on his activities as a director of the company when requested to do so at a meeting of the council, committee or sub-committee;
- that notice is required to be given to the local authority of all fees and expenses received.

Conflicts of interest could arise in a number of areas for someone who is a director of the company and a member of the council. The 1972 Act, the 2000 Act, the Code of Conduct for Councillors and standing orders for each local authority clarify the position. In the event that a conflict of interest arises between the local authority and the company, members should refer to the legislation and codes and also to the duties they have as a director of the company. In this instance, they may also be advised to seek legal advice.

Under the 2003 Act, local authorities can indemnify elected members or employees for actions they have taken as authorised by the local authority. Local authority nominees, directors and trustees should also take out indemnity insurance for the activities and work of the trust.



7 | The keys to becoming a trust

There are a number of key legal issues to consider in relation to transferring services to a trust:

- partnership
- financial support
- consultation with staff
- establishment of the trust
- transfer of land and other assets
- public procurement
- trading

Partnership

Partnership and collaboration between local authority and trust is vital. The relationship must be one of genuine partnership rather than that of client/contractor. In our survey this relationship was evidenced by the following:

- representation of trusts on a range of boards including the local strategic partnership which was considered important;
- important relationship with the primary care trust and involvement in programmes relating to physical activity and obesity;
- importance of keeping elected members informed of trusts' progress and regular dialogue with the local authority.

Financial support

Financial support, especially in the short term, is a vital part of a successful transfer. In addition to that, time and effort needs to be invested into developing structures to ensure that the maximum VAT savings are made.

Most trusts inevitably will require grant-funding. Our survey stressed the importance of both a longer trend of guaranteed funding arrangements (perhaps involving a reduced sum after the early years) and some initial recycling of the NNDR savings. Preparation of a robust business plan is a key element of ensuring a successful start for the trust.

“ Focusing on bottom line concentrates minds on the appropriateness and desirability of the outcomes of decision-making process and on a more robust approach to risk analysis ”

Consultation with staff

Communication is the key, both pre- and post- transfer as it can be an unsettling time for staff. TUPE applies to a local authority transferring staff to a trust.

Thus all staff will transfer with their existing terms and conditions. Under TUPE there is an obligation to provide staff with a “comparable pension” and conventionally the new trust will become an “admitted group” within the existing LGPS. This process gives rise to a number of allied issues including handling any pension fund deficit, decisions as to whether new employees will be entitled to join the LGPS and response to the Code of Practice on Workforce matters in Public Service contracts, which is likely to be amended by the Coalition Government.





Survey

There were some important effects of the transfer for staff:

- increased motivation
- lower sickness levels
- many reported improved terms and conditions
- greater opportunities for individual career growth and development
- increased sense of ownership of the organisation with staff empowerment

Setting up the company

It is essential that the objects set down for the company are acceptable for charitable registration. The Charity Commission will inspect the final constitutional documentation. Once it has been agreed that the proposed purpose is charitable and a Companies Act entity is appropriate, the company's Memorandum and Articles of Association must be submitted to Companies House. The Certificate of Incorporation and the Memorandum and Articles of Association, together with a completed application form must then be submitted to the Charity Commission for consideration with other documents such as trustee declaration forms, evidence to demonstrate the activities of the trust, Criminal Records Bureau checks and details of the new entity's bank account.

Certain restrictions must be contained in the Memorandum and Articles to ensure that the assets are only used for charitable purposes. Broadly speaking they are:

- that the income and property are to be applied solely to the charitable objects as set out in the documentation;
- that no dividend shall be payable to members;
- that, on dissolution, surplus assets should be transferred to another entity with similar charitable objects.

The name of the new entity needs to be agreed at an early stage. In the case of a charity, the word 'limited' need not be included. However, there are some words which need to be approved by the Secretary of State if they are to be used and seeking early approval will avoid delays.

Setting up an Industrial and Provident Society

It is a reasonably straightforward process to set up an industrial and provident society with the FSA especially if a form of “model” rules are adopted. Charitable status is gained on application to HMRC, although as indicated above, the Charity Commission will soon be responsible for supervision of charitable societies.

Transfer of land and other assets

If land or other assets are to be transferred or leased at under the market value, then the Secretary of State’s consent is generally needed for any freehold sale or lease above seven years by virtue of Section 123 of the 1972 Act. However, under the 1972 Act, there is the General Disposal Consent (England) 2003, which permits disposal at an under-value if the local authority considers it will secure the promotion or improvement of the economic, social or environmental well-being of their area and the under-value does not exceed £2 million.

In order to assist with obtaining National Lottery funding with private finance, it is recommended that a lease of at least twenty years is entered into.

The landlord and tenant relationship gives the local authority some influence on the activities of the trust. However, care needs to be taken so as not to impede the discretion of the trustees.

Property issues concerning leases and occupancy are complex. Agreement on the important issues should be achieved at the earliest possible stage. The leasehold arrangements will need to reflect a division of maintenance responsibility,

the importance of any leases being “non-business” for VAT purposes and alienation provisions. The advertising requirements of Section 123 (2A) of the 1972 Act will need to be observed if any open space or recreational land is leased to a trust.

Public procurement

It is now generally accepted that local authorities contemplating transferring any facilities to a newly created trust may have to undertake some limited market testing or advertisement. This follows two important decisions of the European Court of Justice in the Parking Brixen and Teckal cases.

If the transaction could be regarded solely as a property transaction, it would only be subject to the best consideration issues under Section 123 of the 1972 Act. However, if the management of the facilities is a significant element of the transaction, the public procurement regulations may well apply.

Thus any authority contemplating the trust route will need to consider its response to these regulations and how to handle the requirement for market testing involving the nascent trust.

Trading

As mentioned previously, a trading subsidiary should be set up where the charity carries on a substantial amount of non-primary trading which falls outside its objects. This safeguards the charitable status and avoids any surprise tax charge.

The subsidiary, which will usually be set up as a company limited by shares and wholly owned by its parent, will normally have a number of the trustees from the parent charity on its board, together with people who have expertise in the area of the subsidiary’s trade – for example, retail, bars and catering. The subsidiary can give all its profits to the charity under gift aid to avoid corporation tax on its profits. Over half of the trusts in our survey had created subsidiaries for trading purposes.

It is recommended that group VAT registration is sought to avoid the payment of VAT on intra-group supplies. Where the charity enters in joint ventures with commercial organisations, there are a number of tax, trust and charity law implications to consider.

“ Being able to sweat the asset base and use proceeds to improve service quality and facilities ”

8 | Next steps

If a local authority is contemplating outsourcing service delivery of facilities outlined in this brochure we highlight some of the key steps.

Feasibility study

As mentioned above, the Audit Commission has provided guidance on feasibility studies so as to ensure a robust approach. The study will need to consider the Best Value approach to the provision of services within the Big Society concept, their future management and ensuring continuous improvement for the benefit of tax-payers. The authority should establish the financial benefits of the management option, ease of access to private finance, opportunities for income generation and the merits of community involvement.

Nature of NPDO

Once the decision has been made to proceed with the trust option, the authority should choose the corporate structure as outlined in Chapter 4 and decide if the NPDO will be charitable or non-charitable and have a trading subsidiary.

Selecting the NPDO Directors

The authority will need to agree the size of the board of NPDO directors and the number of authority appointees. In the light of importance of community involvement, we recommend the following process:

- open advertisement in local newspaper and leaflets in facilities;
- formal application with benefit of job description and person specification;
- key skills will be sought in such areas as business, law, finance, human resources and marketing;
- shortlisting and interview by local authority assessor;
- selection followed by CRB check and formal letter of appointment.

The key documentation

Any transfer to an NPDO will involve significant paperwork, the more important being:

Transfer agreement

Document contains details of the facilities being transferred together with the staff, contracts assigned, novated or retained, warranties (if any), pension provisions and appointments.

Property leases

The facilities will generally be leased to the NPDO for a period of at least twenty five years on a non-business basis.

Funding and management agreement

This key agreement will set out the respective expectations of the parties in the context of the management of the facilities and the grant-funding arrangements. Ideally, these should be on a five-year rolling basis and dovetail with any termination provisions in the leases. In particular, this document will outline the monitoring arrangements and provisions dealing with grant-funding adjustments on account of temporary or permanent facility closure or significant energy cost increases.

Equipment lease

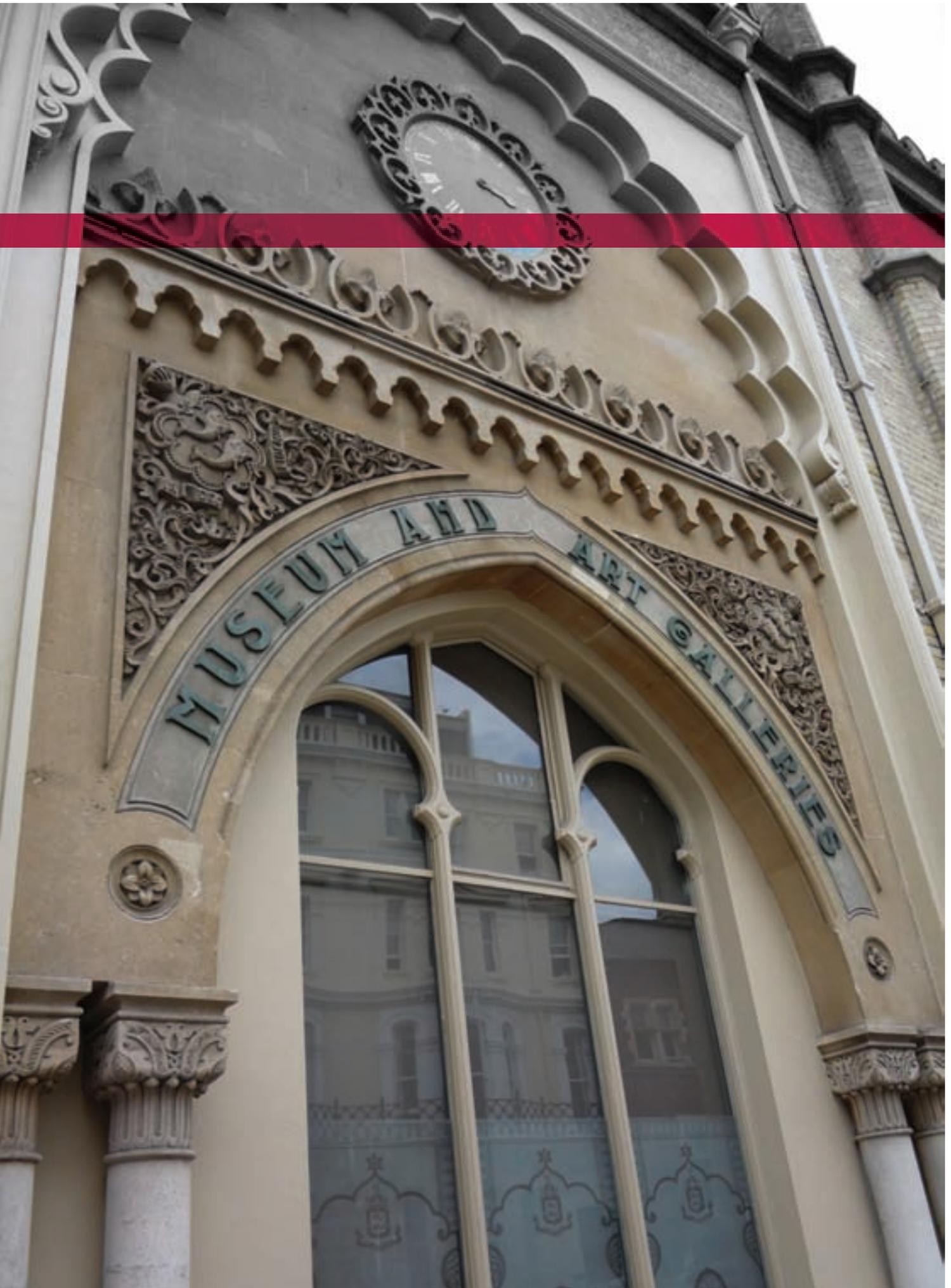
This would cover all the equipment (such as fitness kit or computers) being retained by the authority.

Collections agreement

The authority will always retain a museum and art collection which will be subject to a management agreement with the NPDO.

Admissions agreement

The NPDO will enter into a pensions agreement whereby the transferring staff can remain with the relevant LGPS and such agreement may well be guaranteed by the local authority.



9 | Conclusion

Many successes have been reported following the transfer of local authority services to trusts. The main ones are:

- customer needs met
- focus on core activities
- enhancement of facilities
- group structures

Customer needs: The transfer process has allowed the new organisations to look after the needs of the customer, rather than the interest of the local authority. The improved customer service experience is a result of less bureaucracy, the ability to take decisions more quickly and the new enthusiasm of employees. Importantly, this has driven usage rates up.

Focus on core activities: A focus on the principal activity of the new trust, instead of among many other local authority priorities, has meant that management has improved considerably.

Enhancement of facilities: One of the immediate benefits of transferring to a trust is that the resources are made available for improvement of the facilities, for either major overhaul or redecoration and modernisation. Trusts have obtained funds from the National Lottery, from private funding and through borrowing from the local authority.

Group structures: Some trusts have expanded and are undertaking work for other authorities on the basis of creating a parent which employs central staff such as finance, marketing, HR and development. They then sell these services to individual subsidiaries created to manage every new contract.

Survey

Some hints for local authorities contemplating trust status for their cultural and leisure facilities:

- clearly establish your reasons for the trust approach;
- the trust should not be treated as a contractor or an arm of the authority;
- be clear about desired objectives and outcomes;
- keep some expertise at the authority;
- ensure the trust management has skills to cope with the demands of a trust operating in a commercial environment;
- accept that the trust approach is not a quick saving solution - it is a long term and positive relationship;
- gain all party support for the project;
- transfer sports and/or into arts development.

“ Cultural change has been a significant challenge ”

10 | Success stories

There are many successfully operating NPDOs which have diverse portfolios and undertake work for more than one local authority. Some examples follow:

Active Luton – manages the local authority’s leisure centres including a youth academy and outdoor recreation centre with its own small farm

BH Live – took transfer of the Bournemouth International Conference Centre, the Pavilion Theatre and three leisure centres utilising a trading subsidiary

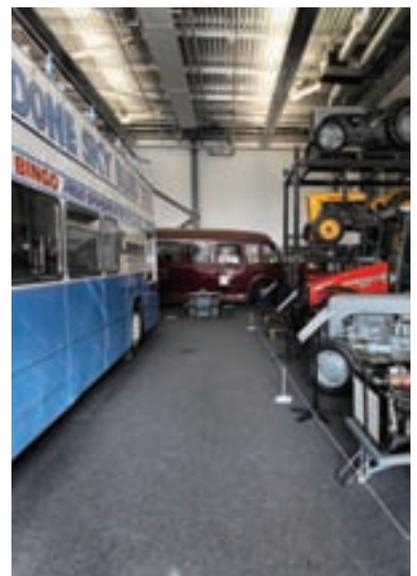
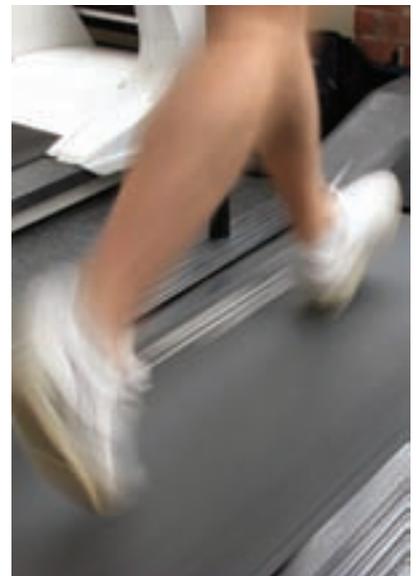
Mytime Active – manages Bromley Council’s leisure centres and specialises in healthy lifestyle issues and golf course management with contracts in Bromley, Maidstone, Hillingdon and Southampton

Coventry City Council – recently transferred the newly redeveloped Herbert Art Gallery and Museum and other heritage sites to a charitable trust with the extensive collections subject to a management agreement.

Peterborough City Council – have recently completed the transfer of its leisure centres, libraries, theatre and museum to Vivacity, Peterborough’s Culture and Leisure Trust.

Wigan Leisure and Culture Trust – is one of the largest and most diverse charitable trusts managing Wigan Council’s leisure centres, libraries, heritage service, theatre, country parks, art gallery, community halls and the International Jazz Festival. The trust recently started managing Selby District Council’s leisure centres.

York Museums Trust – took over the management of York’s principal visitor attractions in the city including the Castle Museum, St Mary’s, the Yorkshire Museum and Art Gallery. The trust’s vision is for it “to play a major part in positioning York as a world class cultural centre”. Its mission is “to cherish the collections, buildings and gardens entrusted to [it], presenting and integrating them as a stimulus for learning, a provocation to curiosity and a source of inspiration and enjoyment for all”.



Appendices

Appendix 1

The Charities Act 2006

Although the 2006 Act received Royal Assent in November 2006, some aspects of its provisions remain to be introduced. However, the key provisions of the legislation are in force including the overriding requirement that all existing and new charities must demonstrate explicitly that their aims are for the public benefit. The Charity Commission has issued much guidance on the issue, some of which is reproduced below.

Charitable purposes

Charitable purposes (or aims) are those that fall within the various descriptions of charitable purposes in the Charities Act 2006, set out below, and any new charitable purposes that might be recognised in the future:

- a) the prevention or relief of poverty;
- b) the advancement of education;
- c) the advancement of religion;
- d) the advancement of health or the saving of lives;
- e) the advancement of citizenship or community development;
- f) the advancement of the arts, culture, heritage or science;
- g) the advancement of amateur sport;
- h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;

- i) the advancement of environmental protection or improvement;
- j) the relief of those in need, by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;
- k) the advancement of animal welfare;
- l) the promotion of the efficiency of the armed forces of the Crown or of the efficiency of the police, fire and rescue services or ambulance services;
- m) other purposes currently recognised as charitable and any new charitable purposes which are similar to another charitable purpose.

Public benefit

There are two key principles of public benefit and within each principle there are some important factors that must be considered in all cases. These are:

Principle 1:

There must be an identifiable benefit or benefits:

Principle 1a – it must be clear what the benefits are;

Principle 1b – the benefits must be related to the aims;

Principle 1c – benefits must be balanced against any detriment or harm.

Principle 2:

Benefit must be to the public, or section of the public:

Principle 2a – the beneficiaries must be appropriate to the aims;

Principle 2b – where benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted:

- by geographical or other restrictions; or
- by ability to pay any fees charged;

Principle 2c – people in poverty must not be excluded from the opportunity to benefit;

Principle 2d – any private benefits must be incidental.

The principles of public benefit apply to all charities, whatever their aims. Each charity must be able to demonstrate that its aims are for the public benefit. Public benefit decisions are about whether an individual organisation is a charity and not about whether particular types of charity or groups of charities, as a whole, are for the public benefit.

(Extracts from the Charity Commission's publication, "Charities and Public Benefit", January 2008 – Crown copyright)

Appendix 2

Key principles of good governance

Introduction

The Charity Commission has promoted six high level principles which are designed to be universal and applicable to all voluntary and community organisations. These are reproduced below. It is the practice and procedures which will vary according to the type and size of the organisation.

Underlying each principle is the additional principle of equality – that of ensuring equality, diversity and equality of treatment for all sections of the community.

Principle 1

An effective board or governing body will provide good governance and leadership by understanding their role.

Members of the board will understand their role and responsibilities collectively as a board and as individual trustees in relation to:

- their legal duties;
- the provisions of the governing document;
- the external environment;
- the total structure of the organisation;

and in terms of

- setting and safeguarding the vision, values and reputation of the organisation;
- overseeing the work of the organisation; and
- managing and supporting staff and volunteers where applicable.

Principle 2

An effective board will provide good governance and leadership by ensuring delivery of organisational purpose.

The board will ensure that the organisation delivers its stated purposes or aims by:

- ensuring organisational purposes remain relevant and valid;

- developing and agreeing a long-term strategy;
- agreeing operational plans and budgets;
- monitoring progress and spending against plan and budget;
- evaluating results; and
- reviewing and/or amending the plan and budget as appropriate.

Principle 3

An effective board will provide good governance and leadership by working effectively both as individuals and as a team.

The board will have a range of appropriate policies and procedures, knowledge, attitudes and behaviours to enable both individuals and the board to work effectively. These will include:

- finding and recruiting new board members to meet the organisation's changing needs in relation to skills, experience and diversity;
- providing suitable induction for new board members;
- providing all board members with opportunities for training and development according to their needs; and
- periodically reviewing their performance both as individuals and as a team.

Principle 4

An effective board will provide good governance and leadership by exercising effective control.

As the accountable body, the board will ensure that:

- the organisation understands and complies with all legal and regulatory requirements that apply to it;
- the organisation continues to have good internal financial, management controls;
- the board regularly reviews and identifies the major risks to which the organisation is exposed and puts in place systems to manage those risks; and
- delegation to sub-committees, staff and volunteers (as applicable) works effectively and the use of delegated authority is properly supervised.

Principle 5

An effective board will provide good governance and leadership by behaving with integrity.

The board will:

- safeguard and promote the organisation's reputation;
- act according to high ethical standards;
- understand and manage conflicts of interest and loyalty;
- maintain independence of decision making; and
- deliver impact that best meets the needs of beneficiaries.

Principle 6

An effective board will provide good governance and leadership by being open and accountable.

The board will lead the organisation in being open and accountable, both internally and externally. This will include:

- open communications, informing people about the organisation and its work;
- appropriate consultation on significant changes to the organisation's services or policies;
- listening and responding to the views of supporters, funders, beneficiaries, service users and others with an interest in the organisation's work;
- handling complaints constructively and effectively; and
- considering the organisation's responsibilities to the wider community, such as its environmental impact.

(Charity Commission's "Key Principles of Good Governance" on Charity Commission website – Crown copyright)



Appendix 3

Definitions and Acronyms

The 1958 Act	Recreational Charities Act 1958
The 1965 Act	Industrial and Provident Societies Act 1965
The 1970 Act	Local Authorities (Goods and Services) Act 1970
The 1972 Act	Local Government Act 1972
The 1976 Act	Local Government (Miscellaneous Provisions) Act 1976
The 1985 Act	Companies Act 1985
The 1989 Act	Local Government and Housing Act 1989
The 1993 Act	Charities Act 1993
The 1999 Act	Local Government Act 1999
The 2000 Act	Local Government Act 2000
The 2003 Act	Local Government Act 2003
The 2006 Act	Charities Act 2006
The 2007 Act	Local Government and Public Involvement in Health Act 2007
The 2010 Bill	Localism Bill
CRB	Criminal Records Bureau
CIPFA	Chartered Institute of Public Finance and Accountancy
DCLG	Department for Communities and Local Government
DCMS	Department for Culture, Media and Sport
DfE	Department for Education
FSA	Financial Services Authority
HMRC	Her Majesty's Revenue and Customs
LGPS	Local Government Pension Scheme
MLA	Museums, Libraries and Archives Council
NNDR	National non-domestic rates
NPDO	Non-profit distributing organisation
Social Enterprise	Any non-profit distributing organisation whether it is a charity, voluntary organisation, co-operative housing association or leisure trust
SOLACE	Society of Local Authority Chief Executives
TUPE	Transfer of Undertakings (Protection of Employment) Regulations 2006
VAT	Value Added Tax



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