



Belfast City Council

Report to:	Strategic Policy & Resources Committee
Subject:	ROYAL MATERNITY HOSPITAL LIAISON GROUP
Date:	21 November 2008
Reporting Officer:	Director of Legal Services, Ciaran Quigley – Ext 6038

Purpose of the Report

To provide advice to the Committee as to the ways in which the Council can support the campaign for the provision of a new regional hospital for children and women at the site of the Royal Group of Hospitals, either financially or otherwise as requested by the Committee at its meeting of 22 August 2008.

Relevant Background Information

The Council, at its meeting of 1 July 2008, unanimously passed the following Notice of Motion :

“Belfast City Council calls on the Minister for Health, Social Services and Public Safety and the Northern Ireland Executive to make the completion of the new regional hospital for children and women, on the site of the Royal Group of Hospitals, a matter of top priority in the next comprehensive spending review.

The Council calls on the Minister of Health and the Executive to secure the resources now for clearing the site, which is an essential first step in progressing the new hospital for children and women.

The Council agrees to work in partnership with the Royal Maternity Hospital Liaison Group to lobby the Northern Ireland Executive and Assembly to secure the capital funds necessary to build the new regional hospital for children and women.”

At its meeting of 22 August 2008, the Strategic Policy & Resources Committee noted that a response had been received from the Minister for Health in which he had indicated that his Department had not received adequate funding in the current budget allocation for the new regional hospital. However he had commissioned a review of capital priorities over the next ten years. Also, a revised business case for the new hospital, which would include phased options for the proposed development, including the possibility of advance site clearance and enabling works, was being developed by the Belfast Trust in the context of the Review. Only when the business case had been submitted and scrutinised could a decision on the funding and timing of the project be taken.

The Committee received a presentation from representatives of the Royal Maternity Hospital Liaison Group (“the Liaison Group”). After hearing that presentation, the Committee agreed that the question of the business case for the new regional hospital could be raised with the Chief Executive Officer of the Belfast Health & Social Care Trust, Mr William McKee, who had requested permission to address the Committee on health issues at a future meeting, and the Committee further agreed that ways in which the Council could support the campaign either financially or otherwise be investigated and that a report thereon be submitted for the Committee’s consideration in due course.

Key Issues

The Director of Legal Services has now obtained advice from leading Counsel, Mr David Scoffield BL, in relation to the legal issues which arise in relation to the proposal that the Council should support the hospital campaign, and a full copy of Mr Scoffield’s advice is appended to this report. Mr Scoffield’s advice is detailed, but essentially makes the following points

- Belfast City Council, as a district council, is subject to the *ultra vires* rule which means that it must restrict its activities to those for which it has statutory authority and, subject to the special expenditure power in Section 115 of the 1972 Act of the Local Government Act (NI) 1972, it cannot incur expenditure for any purpose for which it is not authorised to exercise
- the Council does not have any direct role in the provision of health care
- district councils have a limited power to contribute to the funds of any voluntary body, but the voluntary body must be one which provides a “public service in Northern Ireland” – and the Liaison Group could not be considered to be providing such a service
- Section 115 of the 1972 Act gives a power of special expenditure to district councils in Northern Ireland. Under this section, a council may make any payment for any purpose which in its opinion is in the interests of, and will bring direct benefit to the council, or its district, or the inhabitants of its district (or part thereof)
- the exercise of the special expenditure power in Section 115 is however subject to certain constraints and, in particular the constraint that a payment cannot be made under the Section by way of assistance to a voluntary body (which would include the Liaison Group) where that payment is primarily intended for publicity
- the proposals which have been put forward by the Liaison Group to the Council were clearly stated to be in relation to providing financial assistance for publicity purposes – and accordingly the Council is not legally able to make payment for such purposes
- the Council does, however, have the power to incur limited expenditure under Section 115 by way of assistance to the Liaison Group in circumstances where no publicity is primarily involved. Counsel has mentioned that, for example, the Council facilitate meetings with the Minister and apply political pressure (see paragraph 40).

Counsel has noted that the City Council could of course conduct its own campaign in relation to the establishment of a hospital but this would require a resolution that the Council is satisfied that any expenditure to be incurred by it in relation to the matter would bring a direct benefit to the City and that the expenditure to be incurred would be “commensurate” with that direct benefit. Such expenditure could only be incurred, where publicity is involved, provided that the Council is not perceived to be publishing material which, in whole or in part, appears to be designed to affect public support for any particular political party.

Recommendations

It is a matter for the Committee to take into account the advice which has been received from Mr Scoffield BL and, having taken that advice into account, decide whether or not the Council should:

1. decline to provide any financial assistance to the Liaison Group
2. agree to provide assistance, either financially or otherwise, to the Liaison Group, but on condition that any financial assistance given is not used for publicity purposes
3. decide that the Council itself should mount some form of campaign in support of the proposed hospital.

Should the Council elect for Option 3 above, then it will be necessary to determine an appropriate level of expenditure to be incurred in the context that the Council is satisfied that such expenditure will bring direct benefit to the Council and will be “commensurate” with the benefit to be achieved.

Documents Attached
Advice of David Scoffield BL

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BRIEF TO ADVISE

BELFAST CITY COUNCIL

Querist

**In relation to the proposed assistance
for the campaign for a Royal Maternity Hospital**

COUNSEL'S ADVICES

INTRODUCTION

1. I am asked to advise Belfast City Council ('the Council') in relation to the legality of potential assistance which might be given to a campaign for a Royal Maternity Hospital for Belfast.

FACTS AND INSTRUCTIONS

2. The Council's Strategic Planning and Resources Committee ('the SP&R Committee'), at its meeting on 20 June 2008, agreed to hold an informal meeting in the form of a briefing session with representatives of the Royal Jubilee Maternity Liaison Committee (RJMLC).
3. The RJMLC is a lobby group seeking support for the proposal to build a new regional hospital for children and women on the Royal site. The group's short-term aim is to secure by late Autumn 2008 a commitment from the Minister of Health and the Executive to prioritise in the Infrastructure Budget 2008-2011 the funds required to clear the site at the Royal Hospital Complex; and then to secure a commitment to source the funding and commence building works at the start of the next Comprehensive Spending Review in 2011.
4. However, before this meeting occurred, Councillor Tim Attwood brought a motion to the Council, which was passed unanimously on 1 July 2008, in the following terms:

"Belfast City Council calls on the Minister of Health, Social Services and Public Safety and the Northern Ireland Executive to make the completion of the new regional hospital for children and women, on the site of the Royal Group of Hospitals, a matter of top priority in the next comprehensive spending review.

The Council calls on the Minister of Health and the Executive to secure the resources now for clearing the site, which is an essential first step in progressing the new hospital for children and women.

The Council agrees to work in partnership with the Royal Maternity Liaison Group to lobby the NI Executive and Assembly to secure the capital funds necessary to build the new regional hospital for children and women."

5. Subsequently, the SP&R Committee agreed to look at ways in which resource assistance could be given to the Group and in which a lobby could be built for the purpose set out in the motion.
6. In the meantime, a copy of the motion was forwarded to both the Northern Ireland Assembly and the Minister for Health. The Minister responded on 29 July 2008 indicating that his Department had not received adequate funding in the current budget allocation for the new regional hospital. However, he had commissioned a review of capital priorities over the next 10 years. Also, a revised business case for the new hospital, which would include phased options for the proposed development, was being developed by the Belfast Trust in the context of the review. Only when the business case had been submitted and scrutinised could a decision on the funding and timing of the project be taken.
7. The SP&R Committee received a delegation from the RJMLC on 22 August 2008. I have been provided with a copy of the minutes of this Committee meeting. These also indicate that the Committee have asked the Chief Executive of the Belfast Trust (who wished to address the Committee on the delivery of health care in Belfast in any event) to update them on the preparation of the business case for the new hospital.
8. The Committee agreed that a report be submitted for its consideration in due course in relation to the question of how the Council could support the campaign either financially or otherwise.
9. The cause certainly appears to be a popular one. RJMLC have indicated that they have received letters of support from every political party. As to Council support, they are seeking:
 - Continued political support on a cross or all party basis (supporting statements for campaign etc)
 - Financial support to run the campaign
 - Practical support eg. the use of local Council facilities to distribute campaign materials or hold publicity events or advice of Council staff to the RJMLC.
10. In relation to financial support, the Group project their costs to be in the region of £14,000, made up as follows:
 - (i) £8,800: Poster and postcard campaign: 'Freepost' postcards to the Minister for Health and the First and Deputy First Minister's Office (design, printing and freepost costs for 40,000 cards and 2,000 posters);
 - (ii) £2,300: General publicity and information events (including 3 PVC banners and 10 'pop-up' stands); and
 - (iii) £3,900: other costs such as administration, general postage and paper, transport, etc.
11. The Director of Legal Services met with members of the Royal Jubilee Maternity Liaison Committee (RJMLC) on 18 September 2008. Further to this, the Chairperson of RJMLC wrote to the Director of Legal Services by letter dated 30 September 2008 asking the

Council “to take the lead in an awareness campaign to highlight the need for the new Women and Children’s Hospitals to be built on the Royal Hospital site”. The correspondence continues:

“Belfast City Council is a major partner in the Healthy Cities initiative which aims to improve the health and well being of those who live and work in Belfast. What better start on this aim than to improve the conditions of the hospital where children are born as research indicates that this first experience and indeed the experiences of the mother whilst pregnant have a major impact on the lifelong health and well-being of our very youngest citizens.

Based on the discussions at the meeting on the 18th September as to how best to progress this work we would like to officially request Belfast City Council to lead this campaign. RJMLC would of course continue to offer the Council every support as an advisory group.”

12. As to similar precedents:

- (i) I understand that Lisburn City Council organised a campaign in opposition to the reduction of services provided at Lagan Valley Hospital. A motion of opposition was passed by the Council in this regard and, subsequently, a decision was taken to fund a campaign in this regard on the basis of special expenditure under section 115 of the Local Government Act (Northern Ireland) 1972. A public relations firm was then employed to assist the Council in this campaign.
- (ii) Similarly, Omagh District Council raised by public subscriptions monies to fund a campaign to locate a new acute hospital in Omagh – and all costs are met from this fund so that no expenditure is charged to the ratepayer.

13. I am asked to advise on the Council’s powers in the above circumstances.

DISCUSSION

THE VIRES PRINCIPLE

14. The *vires* principle is the legal principle which determines what bodies such as the Council can, and cannot, lawfully do. The nature of the principle is that district councils are statutory bodies whose powers, as creatures of statute, must be within the purview of some statutory authority. Thus Cross¹ states at paragraph 1-02:

“A fundamental feature is that the United Kingdom is a unitary and not federal state. Subject to overriding provisions of European Community law, an Act of the United Kingdom Parliament is the supreme source of law. The existence of the powers of elected local authorities depend on the provisions of Acts of Parliament.”

15. Thus, for a power or function of a council to be lawfully exercised, it must be acting within the bounds of authority delegated by legislation. If it acts beyond or outwith the powers which have been conferred on it, it is said to have acted *ultra vires* (beyond its powers). This doctrine as applied to statutory corporations is stated in Lord Watson’s speech in *Baroness Wenlock v River Dee Co*²:

¹ Cross on Principles of Local Government Law (2nd edn, 1997, Sweet & Maxwell).

² (1885) 10 App Cas 354 at 362.

“Whenever a corporation is created by an Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of the opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions.”

16. Cross expands on the issue again at paragraph 1-20:

“Unlike a natural person who can in general do whatever he pleases so long as what he does is not forbidden by law or contrary to law, a statutory corporation can do only those things which it authorized to do by statute, directly or by implication. If such a corporation acts otherwise than in this way its acts are *ultra vires*. There must in all cases be statutory authority for what is done, and that authority must either be expressly given or reasonably inferred from the language of an Act of Parliament.”

17. Sharland³ makes the same point in these terms:

“Local authorities owe their existence to statute. It follows from this that they owe their powers to statute as well. They are not sovereign bodies. This means that they can do nothing outside the powers given to them by legislation. This is known as the doctrine of *ultra vires*.”

18. The requirements of the *ultra vires* doctrine as regards Belfast City Council and other local authorities in Northern Ireland are evident from section 1(1) of the Local Government Act (Northern Ireland) 1972 (‘the 1972 Act’) which provides:

“For every local government district established in pursuance of the Local Government (Boundaries) Act (Northern Ireland) 1971 or the succeeding provisions of this Act there shall be a district council which –

... (b) shall have such functions as are conferred on the council by any statutory provision.’

THE PROVISION OF FUNDS BY THE COUNCIL

19. The requirement that the Council must restrict its activities to those for which it has statutory authority is re-emphasised in section 60 of the 1972 Act which makes provision for the application of council funds in the following manner:

“A council shall not directly or indirectly apply any part of the district fund, or any money under its control, for any purpose not authorised specifically or generally by some statutory provision...”

20. A key concern for the Council (and, no doubt, individual councillors who vote to approve such expenditure) is that where expenditure is unlawful, the Local Government Auditor can become involved and the possibility of surcharge becomes live. In the present

³ Sharland, *A Practical Approach to Local Government Law* (2nd edn, 2006, OUP) at paragraph 6.01.

circumstances, therefore, the Council is quite correct to ensure that it has a firm legal basis for doing so before deciding to provide the RJMLC with the financial assistance it is seeking.

THE RELEVANT STATUTORY PROVISIONS

21. One then turns to try to find statutory authority for the Council lending assistance to the RJMLC. Such authority may be express within the terms of legislation or may be implied from the terms of the legislation.
22. Express authority is usually in the form of the conferral of a power or the provision of a duty (with a coexistent power to perform the duty). An implied power will usually be a power which is a necessary implication of the functions of the Council provided for by the legislation. In addition, the Council will have power to do things which are “reasonably incidental” to the doing of things for which there is express or implied authority. In *Attorney-General v Great Eastern Railway Co*⁴ Lord Selborne commented at that:

“It appears to me to be important that the doctrine of *ultra vires*... should be maintained. But I agree... that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction to be *ultra vires*.”
23. This common law rule is given statutory force in respect of local authorities in England and Wales by virtue of section 111(1) of the Local Government Act 1972 which provides:

“Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do any thing (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.”
24. Unfortunately, this provision does not appear to be replicated in the Northern Irish legislation. However, the common law rule that the doing of things reasonably incidental to the Council’s functions will be permissible is still applicable. The absence of a specific provision in similar terms to section 111 of the English legislation is not a terrible difficulty therefore. Indeed, section 17 of the Interpretation Act (Northern Ireland) 1954 provides that where an enactment empowers any person or authority to do any act or thing, all such powers shall be deemed to be also given as are reasonably necessary to enable that person or authority to do that act or thing or are incidental to the doing thereof. There is also recent authority in this jurisdiction to the effect that whatever may be fairly regarded as incidental to, or consequential upon, those things which the legislator has authorised ought not (unless expressly prohibited) to be held to be *ultra vires*⁵.
25. I should say that I have helpfully been furnished with advices which were previously provided to the Council in relation to a similar issue by Nicolas Hanna QC. These advices were sought in 2002 when the Policy and Resources Committee of the Council (what is now the SP&R Committee) was asked to provide funding to the Mater

⁴ (1880) 5 App Cas 473 at 487.

⁵ See *Re Local Government Auditor* [2005] NIQB 52 at paragraph 15.

Infirmorum Trust to enable it to undertake public campaign and also to undertake a consultation exercise to ascertain the views of the public in relation to the proposed closure of certain services at the Mater Hospital. In the event, the Committee resolved to provide funding to the Trust in the sum of £5,000 providing that it would not be used to fund publicity. The advices which are set out below broadly accord with the views expressed by Mr Hanna.

26. I have not been directed to, and have been unable to find, any statutory provision which gives the Council any direct role in the provision of health care within its district. This is plainly a matter for the Department and the relevant Board and/or Trusts making such provision with the Council area.
27. Resort must therefore be had to more general powers of the Council which may permit it to provide funding to the RJMLC. There appear to me to be two powers which are potentially relevant – those contained in sections 108 and 115 of the 1972 Act respectively.
28. Section 108 (contributions to other voluntary bodies) provides:
 - “(1) A council may contribute to the funds of any voluntary body which provides any public service in Northern Ireland.
 - (2) A council may contribute under subsection (1) towards the funds of a voluntary body in respect of publicity only where the publicity is incidental to the main purpose for which the contribution is given.”
29. Section 115 (expenditure for special purposes) provides:
 - (1) Subject to subsections (2) to (5), a council may make any payment for any purpose which in its opinion is in the interests of, and will bring direct benefit to –
 - (a) the council;
 - (b) its district or any part of its district;
 - (c) the inhabitants of its district or any part of its district.
 - ...
 - (3) A council shall not make any payment under subsection (1) –
 - (a) for a purpose for which the council is, either unconditionally or subject to any limitation or to the satisfaction of any condition, authorised or required under any other statutory provision to make any payment or
 - (b) unless the direct benefit accruing to its district or any part of its district or to the inhabitants of its district or any part of its district will be commensurate with the payments to be made.
 - (4) In any case where-
 - (a) by virtue of paragraph (a) of subsection (3) a council is prohibited from making any payment for a particular purpose; and

- (b) the power or duty of the council to make any payment for that purpose is in any respect limited or conditional (whether by being restricted to a particular group of persons or in any other way),

the prohibition in that paragraph shall extend to all payments to which that power or duty would apply if it were not subject to any limitation or condition.

- (5) A council may make a payment under subsection (1) on publicity only by way of assistance to a public body or a voluntary body where the publicity is incidental to the main purpose for which the assistance is given.”

29. As to section 108, the first question is whether the RJMLC is a “voluntary body”. This phrase is defined in section 148(1) of the 1972 Act as meaning “any association carrying on or proposing to carry on any activities otherwise than for the purpose of gain by the association or by individual members thereof”. It is debatable whether the RJMLC in fact meets this definition since the papers disclose that “the RJMLC is made up of users and patient representatives, facilitated by Belfast Trust maternity staff”. It might be thought, therefore, that the constituency comprising the RJMLC does stand to gain from its campaign, unless the term “for the purpose of gain” is interpreted in a narrow way as precluding only the pursuit of direct financial gain.
30. In any event, I think it is also unlikely that the RJMLC is a voluntary body “which provides any public service in Northern Ireland”. It is a lobbying group which no doubt believes that its campaign is in the public interest; but it does not seem to me that it is providing a public service within the meaning contemplated in section 108(1) of the 1972 Act. The Council would be wise to proceed, in my view, on the basis that section 108 does not provide a basis for providing funding to the RJMLC.
31. The ability to incur special expenditure under section 115 is more wide since it can be made “for any purpose” which the Council considers (in its discretion) to be in the interests of and bringing direct benefit to the Council itself, its district or the inhabitants of its district, or any part thereof.
32. Authority suggests that the purpose of this section is to allow a council to spend money for purposes of their own, so as to give them more scope for enterprise and experiment. The question whether the expenditure is in the interests of the district or of its inhabitants is one of fact for the council, not one of law. Anything which relates in any way to the legitimate interests of the district or its inhabitants may be considered to fall within the section, provided that the council satisfies itself that the payment is in the interests of the council or of its district etc., that there will be a direct benefit flowing from the expenditure and that the direct benefit is commensurate with the payment to be made⁶.
33. I have been provided with a copy of criteria adopted by the Council in 2004 to assist it in determining proposed expenditure under section 115. These are:

⁶ See *Re Local Government Auditor* [2003] NIJB 207, especially at paragraph 14. That case concerned expenditure on a staff Christmas party.

- (1) Whether there are sufficient funds remaining in the Council's Special Expenditure budget for the relevant year⁷;
 - (2) Whether the application for financial assistance links to any of the Council's Corporate Objectives;
 - (3) Whether the direct benefit to be obtained is specific to the Council or its district or inhabitants;
 - (4) Whether the activity or initiative in respect of which assistance is being sought is being promoted by a person or organisation living or operating, or otherwise having a direct connection with, the City;
 - (5) Whether the request for financial assistance relates to an event or initiative which falls within the remit and statutory power of any other Committee of the Council (in which case it should be so referred);
 - (6) Whether the request relates to a specific event, activity or initiative as distinct from a request for a contribution to general funds;
 - (7) Whether the benefit to be obtained will be commensurate with the payment to be made.
34. These criteria appear to me to be permissible considerations which the Council can lawfully take into account⁸ in determining a request for special expenditure under section 115 of the 1972 Act.
35. In relation to the RJMLC, it is open to the Council⁹ to make a payment under section 115 assuming that the Council is of the view that the expenditure is in the interests of, and will bring a direct benefit to, the Council, its district, or inhabitants of its district, or any part thereof. This is a matter for the Council to consider and its substantive conclusion is likely to be upset by the Court only on the grounds of *Wednesbury* irrationality. In considering this issue, the Council would also wish to take into account the prospects of RJMLC's campaign succeeding (either with or without the Council's assistance) and reach its own view on this.
36. Discussion of this issue in the present case is simplified, in my view, however, by the provisions of section 115(5) which make clear that section 115 funding can only be attributed towards publicity "[where the publicity is incidental to the main purpose for which the assistance is given](#)"¹⁰. For these purposes publicity is defined in section 148(4) of the 1972 Act in the following terms:

⁷ The amount being limited by virtue of section 115(2), which I have not set out above.

⁸ And, in respect of criteria (1) and (7) must, irrespective of the Council's own policy, take into account.

⁹ Subject to the effect of section 115(5) to which I return below.

¹⁰ It might be argued that section 115(5) does not strictly apply to the provision of funding in this case since it only relates to payments made "by way of assistance to a public body or a voluntary body", neither of which the RJMLC actually is. This is a difficult issue however. If the RJMLC is neither, but is a private organisation with private, it makes it very difficult to justify how providing it with funds would bring "direct benefit" to the Council, its district or inhabitants. If, on the other hand, the RJMLC is a voluntary body, section 115(5) clearly applies.

“For the purposes of this Act references to “publicity”, “publish” and “publication” are references to any communication, in whatever form, addressed to the public at large or to a section of the public.”

37. Assuming the Council was minded, under its discretion to provide funding under section 115(1), to provide monies to the RJMLC, it would have to consider whether that money was being used for publicity and, if so, whether this was incidental to the main purpose for which the assistance was given. Section 115(5) is consistent with the wide-ranging restrictions (contained in sections 115A and following) on councils engaging in party political publicity campaigns. Obviously, these restrictions would be negated if the Council could simply fund external organisations to engage in publicity campaigns, although section 115(5) is not limited to party political publicity. Another obvious reason for a provision such as section 115(5) is that the Council has control over any publicity it provides itself, but does not have similar control where it funds someone else to provide publicity.
38. I am obliged to say that, from the papers with which I have been provided, it seems clear that the RJMLC are seeking funding for the very purpose of publicity. They wish to fund a poster and postcard campaign (including the printing of 2000 posters, three PVC banners and 10 ‘pop-up’ stands) and seek funding towards “general publicity and information events”. These all appear to be addressed to the public at large or a section of the public. Any suggested decision that the funding sought was not for the purposes of publicity appears to me to be highly vulnerable to challenge.
39. Similarly, although it is a matter for the Council to determine, I also think it would be difficult to say that publicity would be incidental to the purpose for which the funding was given – since (as I have said above) the mounting of a publicity campaign appears to be the very essence of the funding request made the RJMLC to the Council. If the Council takes this view, section 115(5) represents, in my view, a clear bar to the funding being granted.
40. This is not to say that the Council cannot support the RJMLC’s cause in other ways. Indeed, the passing of the motion on 1 July 2008 no doubt gave its campaign a boost. The Council can also, for instance, facilitate meetings with the Minister and apply political pressure. Where the question of expenditure arises, however, the constraints of section 115(5) will have to be borne in mind.
41. Mr Hanna QC’s opinion deals with this in some detail. He suggests that exercises such as a consultation exercise could be carried out or funded pursuant to section 115 of the 1972 Act but that “it would, however, be necessary to take care to ensure that the consultation process was not simply being used as a thinly-veiled disguise for what was, in reality, a publicity campaign”. For my own part, I would incline to the view that a consultation exercise (where materials were distributed and addressed to the public or a section of the public) would constitute publicity within the terms of the meaning set out in section 148(4)¹¹ and so be precluded from being funded by the Council through assistance to another body by virtue of section 115(5).
42. The suggestion might, of course, be made that – rather than providing funding to the RJMLC – the Council should simply run its own publicity campaign. I am not convinced this approach would avoid the difficulties discussed above, however. Expenditure of monies from the district fund must still be related to, and underpinned by, one of the

¹¹ Set out at paragraph 36 above. I note that Mr Hanna does not cite this definition of publicity in his advices.

Council's statutory functions¹². As I have said above, it appears to me that the only basis on which the Council could spend money for this purpose (whether by giving it to another organisation by means of funding or the Council simply spending the funds itself) is likely to be section 115 of the 1972 Act.

43. Put another way, if the Council funded its own publicity campaign and the Local Government Auditor asked what statutory function or provision these funds were being spent in relation to, the Council's best (and probably its only) answer is section 115 of the 1972 Act.
44. If the Council ran its own campaign, the expenditure thereby incurred would still have to be within the cap for special expenditure and the Council would still have to determine (pursuant to section 115(3)(b)) that the benefit accruing was commensurate with what was being spent. The key difference with this approach, however, is that section 115(5) does not appear to apply to the Council spending its own money on publicity. Rather, it relates to the Council making payments "by way or assistance to a public body or a voluntary body".
45. What the Council itself can do by way of publicity is governed by section 115A of the 1972 Act, which precludes party political publicity campaigns. This does not preclude it from mounting other publicity campaigns which are not party political, provided:
 - (i) That this is authorised by some statutory provision, which can include section 115¹³;
 - (ii) That, where the publicity is authorised by section 115(1), the expenditure incurred is considered (in the usual way) to be of direct benefit to the Council, its inhabitants, or its district or any part thereof and commensurate with that interest;
 - (iii) That regard is had to any code issued by the Department in relation to Council publicity¹⁴; and
 - (iv) That any such expenditure is separately accounted for¹⁵.

CONCLUSION

46. I am a conscious that the above advices are lengthy. However, I can summarise my advices briefly as follows:
 - (a) The Council does not appear to have any express power to provide funding to the RJMLC other than its discretionary funding powers in sections 108 and 115 of the 1972 Act.
 - (b) I do not consider that section 108 of the 1972 Act provides an adequate legal basis for the Council to fund the RJMLC in the way in which they have requested.
 - (c) Section 115 of the 1972 Act provides a much wider basis for the incurring of special expenditure in the exercise of the Council's discretion. Provided it was satisfied that the tests in section 115 were met, and this judgment was not

¹² See section 60 of the 1972 Act, set out at paragraph 19 above.

¹³ Section 115D(1).

¹⁴ Section 115B(1). I am unsure whether there is such a code.

¹⁵ Section 115C(1).

Wednesbury irrational, the Council could provide funding to assist the RJMLC in its campaign under section 115.

- (d) Section 115(5), however, prohibits funding being provided under this section where its purpose is for publicity, unless this purpose is merely ancillary to the purpose for which funding is being sought. In my view, the funding being sought by the RJMLC is for the purpose of publicity and it is very difficult to say that this is merely an ancillary purpose in the request.
 - (e) Accordingly, if the Council were to provide the funding sought in the purported exercise of its powers under section 115 of the 1972 Act, I consider that it would be vulnerable to successful legal challenge or action by someone aggrieved by the decision with sufficient interest to bring judicial review proceedings or by the Local Government Auditor.
 - (f) The Council can still provide support to the RJMLC where this does not involve the incurring of expenditure from the district fund by the Council¹⁶.
 - (g) The Council could also mount its own publicity campaign using its own funds¹⁷. This would again have to be under the statutory authority of section 115 (but would have an added advantage since section 115(5) does not appear to apply to the Council spending its own money). In determining to do so, the Council would still have to satisfy itself that the expenditure would be of direct benefit to it, its district or its inhabitants and that the amounts to be spent were commensurate with that benefit. It would further have to ensure that the publicity campaign it mounted complied in all respects with the provisions of sections 115A to 115C of the 1972 Act.
47. I trust the above is of some assistance. If I can be of any further assistance, the Director of Legal Services should not hesitate to contact me.

David A Scoffield
Bar Library
11 November 2008

¹⁶ As in the case of Omagh District Council.

¹⁷ Which appears to be the approach which Lisburn City Council has adopted.

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