

**NOTE FOR CAMPAIGN FOR BETTER TRANSPORT
ON LOCAL AUTHORITIES' KEY STATUTORY DUTIES
REGARDING BUS SUBSIDIES AND RELATED SERVICES**

Introduction

1. This note is intended to set out the main statutory duties on local authorities (and their related powers) in relation to the provision of bus subsidies and related services. I understand that the Campaign for Better Transport wishes to ensure that it can pass on to other parts of the organisation the knowledge gained during the judicial review of Cambridgeshire County Council in relation to their decision to cut all bus subsidies. Cambridgeshire conceded the claim before the permission stage and are currently reconsidering the question of how to approach their bus subsidies. I have therefore proceeded on the basis that those reading it may have little or no knowledge of the relevant issues.

General public law duties

2. By way of background for those not well versed in public law, when exercising their statutory functions, local authorities are subject to normal public law obligations to act fairly, rationally and lawfully, and for proper purposes, as well as in accordance with the specific statutory duties under the legislation addressed below. A challenge by way of judicial review must relate to a failure to comply with these public law duties: often this is framed in terms of unlawfulness on the grounds that the body has failed to take into account all material considerations or has failed to comply with its statutory duty (as was argued in the Cambridgeshire case), or that the consultation process was unfair, for example.
3. It is also important to note the key distinction between a statutory duty and a power: a power gives the body a discretion as to whether to act (which must be exercised in accordance with the principles above, but ultimately the exercise of the discretion is a question for the body in question in the first instance), whereas a duty imposes a statutory obligation on the body to act in accordance with its terms, failing which the court can compel the body to act. In some cases the difference between the two is not clear cut because the duty is not an absolute duty to act in all cases but in effect a duty which involves the exercise of a discretion as to whether it applies – as in fact in terms of the key duty at play here. This is covered in more detail below.

Transport Acts 1968 and 1985: duty to secure appropriate public transport to meet area's requirements

4. The key statutory duties at issue here are section 63 of the Transport Act 1985 (in relation to non-metropolitan county councils) and section 9A of the Transport Act 1968 (in relation to integrated transport authorities (ITAs), i.e. metropolitan counties, see s 9 of the 1968 Act).¹

5. Section 63(1)(a) provides that:

“(1) In each non-metropolitan county of England and Wales it shall be the duty of the county council-

(a) to secure the provision of such public passenger transport services as the council consider it appropriate to secure to meet any public transport requirements within the county which would not in their view be met apart from any action taken by them for that purpose.”²

6. There is a corresponding duty in exactly the same terms on ITAs under section 9A(3) of the 1968 Act.³

7. Thus both non-metropolitan county councils and ITAs have a duty to secure such provision, whereas district councils have a power in the same terms to do so (s 63(4)). The duty will also apply to unitary authorities⁴ who have taken on the transport functions of non-metropolitan county councils

¹ Both acts have been substantially amended by both the Transport Act 2000 and the Local Transport Act 2008. Integrated Transport Authorities were previously known as Passenger Transport Authorities; their names were changed pursuant to section 77 of the 2008 Act.

² “Public passenger transport services” is defined in section 63(10) as:

- a. all those services on which members of the public rely for getting from place to place, when not relying on private facilities of their own, including school transport;
- b. but not excursions or tours; and
- c. not services provided by public service vehicles by educational and other bodies under a permit under section 19 of the Act, except where there services are provided wholly or mainly to meet the needs of members of the public who are elderly or disabled.

³ The only difference is that in the case of an ITA, the duty is on the ITA's Executive to secure the services that the Authority considers appropriate for the Executive to secure. The view as to what is appropriate is to be taken by the Authority; but the Authority is under a duty to seek and have regard to the advice of the Executive in deciding what is appropriate: section 9A(3A).

⁴ established initially pursuant to the framework in the Local Government Act 1992 and more recently the Local Government and Public Involvement in Health Act 2007.

such as the duty under section 63 of the Transport Act 1985 (as well as the functions of the relevant former district councils).⁵

8. Non-metropolitan county councils and ITAs' have a power to secure the public transport services by entering into a agreement providing for service subsidies.⁶ This power can only be exercised where the service in question would not be provided, or would not be provided to a particular standard without such a subsidy.⁷ The question of whether the services is being provided to a particular includes consideration of:

- a. The frequency or timing of the service;
- b. The days, or times of day, when the service is provided;
- c. The vehicles used to provide the service.⁸

9. Non-metropolitan county councils and ITAs' powers to enter into subsidy agreements are also expressly subject to the detailed provision in sections 89 to 92 of the 1985 Act. These sections impose specific obligations on local authorities:

- a. to co-operate with one another to secure best value in relation to securing public passenger transport services;⁹
- b. to invite tenders for subsidised services (and setting out procedures for such tenders) subject to various exceptions;¹⁰
- c. to have regard to the interests of the public and of persons providing public passenger transport services in their area, when entering into subsidy agreements.¹¹

10. In addition to the duty secure appropriate provision and the power to enter into subsidies for this purpose, there is an additional, more general power on non-metropolitan county councils and ITAs

⁵ Detailed reference may need to be made to the appropriate Structural Change or equivalent Transfer of Functions Order to clarify that the specific county council transport functions have been transferred to any specific unitary authority in any given case. For a list of all unitary authorities and the instruments under which they were created, see *Cross on Local Government* (Sweet & Maxwell), 3-13 – 3-18C.

⁶ Section 63(5) 1985 Act; s 9A(4) 1968 Act.

⁷ Section 63(5(a) 1985 Act; s 9A(4)(a).

⁸ Section 63(5A) 1985 Act; s 9A(4A).

⁹ Section 88(2) 1985 Act.

¹⁰ Sections 89, 90 and 91 1985 Act.

¹¹ Section 92. Section 92 provides for Regulations to be made under the section to regulate the exercise of the subsidy agreement power; no Regulations have yet been made under this section, so far as I am aware.

under section 63(6),(7) of the 1985 Act and section 9A(5), (6). This is a power “to take any measures appropriate for the purpose of or in connection with promoting”:

- a. The availability of public passenger transport services other than subsidised services, so as to meet any public transport requirements the council considers it appropriate to meet; or
- b. The convenience of the public (including those who are elderly or disabled) in using all available public passenger transport services (whether subsidised or not).¹²

11. Councils must in exercising this additional power have regard to “a combination of economy, efficiency and effectiveness.”¹³

12. In relation to the exercise of all these functions, councils must have regard “the transport needs of members of the public who are elderly or disabled”.¹⁴

The duty to secure appropriate public transport provision

13. It is clear that the duty set out above is not absolute; it is a duty to secure such services as the council considers “appropriate” to meet the requirements of the county or area where these would not otherwise be met.

14. The duty on the council in question has been held by the court to a duty 1) to identify public transport requirements which would not otherwise be met and then 2) once identified, to secure what is appropriate. This was the approach taken by Roch J in the case of *R v Herts CC ex parte Three Rivers* 1992 90 LGR 526 (QBD) on section 63 of the 1985 Act (the *Three Rivers* case). A local authority must specifically have regard to the needs of the public who are elderly or disabled; and this will overlap with its equality duty under the Equality Act 2010.

15. Thus the question of what it will be appropriate to secure is a question for the Council, once it has established what the public transport requirements of the county need. In determining what is

¹² Section 63(6) 1985 Act; section 9A(5) 1968 Act.

¹³ Section 63(7) 1985 Act; section 9A(6) 1968 Act.

¹⁴ Section 63(8) 1985 Act; section 9A(7) 1968 Act.

appropriate to meet the identified needs, a council will be entitled to take into account the funds available.¹⁵

16. In the *Three Rivers* case, Roch J gave the following guidance as to the bounds of a council's discretion in such a case (at page 544-545):

“I would accept that if the Council had simply looked for a number of service cuts which would save them £75k in the financial year, they would have failed to discharge their duties under section 63(1) and section 63(8) of the Act. Equally, the decisions might have been flawed if it were to be demonstrated that a community within the district having an established public transport requirement had been left without any public passenger transport service at all.”

17. In the *Cambridgeshire* case, one of the grounds of challenge was that the council had failed to discharge its statutory duty under section 63. The starting point here was that the council had failed to refer to its duty at all, either expressly or impliedly anywhere in the budgetary papers or the officer's reports to cabinet. In fact the only reference in the papers was to the council's "discretionary role" in providing bus subsidies. The council tried to argue that they had been aware of their duty even though they had not mentioned it expressly; but they then became forced to argue that the decision in question had not required a full consideration of the public transport needs of the county because they had not referred to these either.

18. Nevertheless, because of the discretionary nature of the duty, it would be difficult to challenge a local authority on this basis where it:

- a. had considered its duty under section 63, and
- b. had had regard to the needs of its area but had then decided
- c. that the available funding was such that it would have to reduce certain of the subsidies according to certain criteria – and (as explained below) this was based on a prior understanding of the impact of doing so on the elderly, those with mobility problems and the disabled (and any wider necessary Equality Impact Assessment) and of options available to mitigate those impacts.

¹⁵ *R v Hertfordshire County Council ex parte Three Rivers District Council* (1992) 90 LGR 526 (Roch J). NB This case was decided prior to wider amendments under Transport Act 2000, but effect of provisions still broadly the same – now have Local Transport Plans rather policies under repealed s 63(2).

19. Moreover, it is important to bear in mind that the duty is not a duty to fund subsidies; the duty is to secure the provision of the appropriate public transport services. If the council were able to find other ways to do this (many appear to be considering community transport options) which would meet needs, then it would be difficult to challenge a local authority's exercise of its discretion not to provide subsidies instead. Whether there would be a basis for challenge would depend on the circumstances and whether the council had had proper regard to the needs in question and the impacts of not meeting these needs to the same extent or in the same way.

Transport Act 2000: Local Transport Plans

20. Each local transport authority - a non-metropolitan county council, ITA or otherwise¹⁶ - is under a duty to develop policies for the promotion and encouragement of safe integrated efficient and economic transport to, from and within their area, namely a Local Transport Plan (LTP) under the Transport Act 2000 (the 2000 Act¹⁷). There used to be a separate obligation to prepare a bus strategy as well under section 110 of the 2000 Act but this was repealed by the Local Transport Act 2008.¹⁸

21. Local transport authorities are then under a duty by section 108(1)(b) to carry out their functions so as to implement the policies of their LTP. The local authority's LTP will clearly be material to a major decision regarding bus subsidies. Thus, for example, if a local authority makes a decision in relation to how it proposes to secure public transport provision (e.g. by cutting all bus subsidies) which is contrary to, or undermines, a policy in its LTP, there may be an argument that it has failed to comply with its duty to implement the policies of the LTP and/or that it has failed to follow its policy without good reason. There is a related argument that in doing so the council may in effect be taking a policy decision which has the effect of altering its LTP and thus would be required to go through the statutory process of review and consultation set out below. This was one of the arguments being taken in the Cambridgeshire case.

22. Government policy on climate change In developing its policies and in carrying out its functions so as to implement those policies, a local transport authority must (a) take into account any policies

¹⁶ Section 108(4) of the Transport Act 2000

¹⁷ Section 108(1), (3) of the Transport Act 2000. There may also be relevant policies in local authorities' sustainable community strategies (required by section 4 of the Local Government Act 2000) or other policies which are central to the local authorities' approach to public transport, although it is unlikely that such policies will be as specific as LTP policies on the subject.

¹⁸ Section 10 Local Transport Act 2008.

announced by the Government; and (b) have regard to any guidance issued for the purposes of the section by the Secretary of State, with respect to mitigation of, or adaptation to, climate change or otherwise with respect to the protection of or improvement of the environment.

23. LTP guidance The authority must also have regard in exercising its preparing reviewing and implementing its LTP to the Secretary of State’s specific guidance on LTPs.¹⁹
24. Needs of disabled persons/elderly/those with mobility problems In preparing its LTP, the local authority is also obliged to have regard to the transport needs of disabled persons and of persons who are elderly or have mobility problems in developing and implementing their policies.²⁰
25. Review/alteration Section 109 of the 2000 Act provides that a local transport authority is under a duty to keep its LTP under review and to alter it if they consider it appropriate to do so. Whether or not a change requires an alteration will be a matter for the local authority in the first instance; however, if (as in Cambridshire) a decision is made no longer to subsidise any bus services whatsoever when this has previously been a fundamental part of the LTP, there could be a strong argument that the change constituted an alteration to the plan and thus required the statutory procedure set out below.
26. Consultation When preparing or reviewing their LTP, a non-metropolitan county council must consult:
 - a. the Secretary of State (s.109(2A)(a)); and
 - b. the district councils in the county in question (s.109(2A)(b)).
27. An ITA or combined authority must consult the Secretary of State, as above, and in addition, each local traffic authority within the meaning of the Road Traffic Regulation Act 1984, and each county council and district council for any area within its ITA (or combined authority area).²¹
28. In addition, all authorities must then consult “such of the following persons as they consider appropriate”:
 - a. Operators or any network or station, or of any railway services, in their area;

¹⁹ 2009 DfT guidance - <http://www.dft.gov.uk/adobepdf/165237/ltp-guidance.pdf>

²⁰ Section 112(2) 2000 Act.

²¹ Section 109 (2B) 2000 Act.

- b. Operators or providers of other transport services in their area, or organisations appearing to the authority to be representative of the interests of such persons;
- c. Organisations appearing to the authority to be representative of the interests of users of transport services and facilities in their area;
- d. any other persons whom they consider appropriate.²²

29. Publication A new LTP or an alteration to an existing LTP must be published in accordance with section 112(3), (4).

Other provisions of the 2000 Act: sections 114-159

30. Sections 114-159 of the 2000 Act contain provisions relating to bus services and in particular two types of scheme: Quality Partnership and Quality Contracts which were intended to promote cooperation between local transport authorities and bus operators to improve the quality of local bus services and reduce traffic congestion and its related environmental effects. There are also a number of further provisions relating to bus services, such as mandatory travel concessions in and outside London (sections 145-151), ticketing schemes, traffic regulation, enforcement of bus lane restrictions, mandatory travel concessions and the regulation of competition.

31. This detail is beyond the scope of this note but regard should be had to these provisions where relevant in any specific case.

Duty to make information about bus services available to the public: sections 139-140 2000 Act

32. A local transport authority must from time to time determine what local bus information (such as routes, timetables, fares and other accessibility information/concessions etc) should be made available to the public and the way it should be made available: section 139(1). Before doing so, it must consult (a) such organisations appearing to the authority to be representative of users of local services as they think fit, and (b) the area's traffic commissioner: section 139(2). It must then from time to time ascertain whether the information is in fact being provided in the appropriate way: section 139(3).

33. If the local transport authority does not consider that the information is being provided to any extent to in an appropriate way, it must make arrangements with local operators to ensure that they make the information available or do so in the appropriate way: section 139(5). If the authority is unable to

²² Section 109(2C) 2000 Act.

make satisfactory such arrangements, then it is under a duty to do so itself and has a power to recover the reasonable costs of so doing from the local transport operator in question: section 140(1).

34. In carrying out these functions as regard information, the authority must have regard to a combination of economy, efficiency and effectiveness; and must not discriminate against any operator or class of operator, and must co-operate with other authorities: section 141(1), (2).

Equality Act 2010

35. Since 5 April 2011, the new single public sector equality duty has been in force, replacing the former three separate duties under the Disability Discrimination Act 1995, the Sex Discrimination Act 1975 and the Race Relations Act 1976.

36. Section 149 of the Equality Act 2010 provides that, materially, that:

(1) A public authority must, in the exercise of its functions, have due regard to the need to –

- (a) Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*
- (b) Advance equality of opportunity between persons who share a relevant protected characteristic and those who do not share it; and*
- (c) Foster good relations between persons who share a relevant characteristic and persons who do not share it.*

37. A useful summary of the principles on the duty to give “due regard” under section 49A of the 1995 Act (which continues to be relevant in relation to the new duty) was given by the Divisional Court in *R (Brown) v Secretary of State for Work and Pensions and another* [2008] EWHC 3158 (Admin)(at paras 90-96):

“It is suggested that the following principles apply to the question how a public authority is to fulfil its duty to have “due regard” to the identified goals set out in section 49A(1) .

First, those in the public authority who have to take decisions that do or might affect disabled people must be made aware of their duty to have “due regard” to the identified goals.

Second, the “due regard” duty must be fulfilled before and at the time that a particular policy that will or might affect disabled people is being considered by the public authority in question.

Third, the duty must be exercised in substance with rigour and an open mind and must be integrated within the discharge of public functions of the authority. The fact that the public authority has not mentioned specifically section 49A(1) in carrying out the particular function where it has to have “due regard” to the needs set out in the section is not determinative of whether the duty under the statute has been performed. But it is good practice for the policy or decision maker to make reference to the provision and any code or guidance in all cases where section 49A(1) is in play.

Fourth, the duty imposed on public authorities that are subject to the section 49A(1) duty is a non-delegable duty and will always remain on the public authority charged with it.

Fifth, the duty is a continuing one.

*Sixth, it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered their disability equality duties and pondered relevant questions (post, paras 90–96). *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213, CA and *R (C (A Minor)) v Secretary of State for Justice* [2009] 2 WLR 1039, CA considered.*

38. It is clear from the second principle above and the case law generally that in order to have “due regard” under the legislation, any equalities impact assessment (EqIA) of the potential impact on protected groups must be carried out in advance of making any policy decision which affects them.²³ The statutes set a clear and unqualified requirement which must be met as a precondition for a valid decision; and so, where for example there had been no proper assessment of equalities impact at the initial stage of deciding whether to make cuts of 50% or 80% to a welfare rights service, there had not been “due regard” and the decision was quashed: *R (Meany) v Harlow District Council* [2009] EWHC 559 (Admin).

²³ (*R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213 (CA); *R (Brown) v SSWP* [2009] PTSR 1506 (CA)).

39. It is also clear that once a risk of adverse impact is assessed, it is incumbent upon a local authority to consider the measures to avoid that impact *before* fixing on a particular solution. In *R (Kaur) v Ealing LBC* [2008] EWHC 2062, the council was held to have erred in having recognised the problem whilst merely hoping to assess its extent after it had settled on its criteria.
40. In *W v Birmingham City Council* [2011] EWHC 1147 (Admin), the court held that the council in that case had failed properly to consider the impact on disabled people in its Equality Impact Needs Assessment when deciding to make community care provision which it had previously provided for those with “substantial” needs available only for those with “critical needs” and thus had failed to have the due regard under the legislation (the then s 49A duty under the 1995 Act). This is a good example of a case where a council’s relatively detailed EqIA has been found lacking; in many of the previous cases, the councils had failed to carry out one formally or at all.
41. We argued in the Cambridgeshire case (in tandem with the argument that the council had failed to consider its duty under section 63 and in particular the transport needs it was supposed to be meeting) that the EqIA it had carried out was inadequate. The main issue in that case was that the council had made a strategic budgetary decision to cut its entire bus subsidy budget over a 4 year period; but it had done so without considering which individual routes would be affected. There was therefore a limit to how far the council could consider the impacts on the groups in question at anything other than a macro level. In fact, we argued that they had not even done that adequately – there was no detail of demographics in areas affected and/or any assessment of the alternative options available, there had been no specific consultation with groups affected and so on.
42. However, the main argument was that the EqIA must be done before the decision which will have the impact is taken; therefore it was no answer for the council to say that they would carry out the impact assessments once they reached the stage of making what they called “service-specific” decisions about subsidy cuts to specific routes. By this stage the decision to cut the funding for the route in question had already been made and thus the impact already set in stone before it had been properly assessed. We argued that this was directly contrary to the principles set out above.

Consultation duties

43. In many cases (such as in relation to LTPs) a local authority has a statutory duty to consult and thus must do so in accordance with the provisions of the statute. It must also comply with the requirements of general fairness.
44. It is settled law that for a consultation process to be lawful, first, consultation must be at a time when the proposals are still at a formative stage; second, the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response; third, adequate time must be given for consideration and response; and finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals: *R v Brent LBC ex parte Gunning* [1985] 84 LGR 168 at 189; *R v North and East Devon HA ex parte Coughlan* [2001] QB 213 at 108. These principles will apply whether an authority is consulting pursuant to a statutory duty or of its own initiative.
45. Even where there is no statutory duty to consult, fairness in any given case may nevertheless require a body to undertake a consultation process so as to enable those persons who are affected by a decision to make representations. Whether there is such a duty in any given case will depend on the circumstances. In many cases, a duty to consult has been found to arise by way of a “legitimate expectation” of consultation, such as in the *Coughlan* case above.
46. In the Cambridgeshire case, the council had commenced a major review of public transport *after* the decision had been made to cut all bus subsidies. We argued that this defeated the purpose of the consultation and was not when the proposals were at a formative stage; this consultation exercise should have been undertaken before the decision was taken. As noted above, we also ran an argument that the decision required full consultation under the Transport Act 2000 because in effect it was an alteration to the LTP.

Environmental issues

47. It is worth briefly mentioning the duty on local authorities under section 3(2) of the Climate Change and Sustainable Energy Act 2006. This requires "*every local authority [in England] must, in exercising any of their functions, [to] have regard to the most recently published energy measures report (if any).*" The most recent report is available on DECC's website here http://www.decc.gov.uk/en/content/cms/what_we_do/lc_uk/local/measure_report/measure_report.asp

x. The section on public transport is particularly relevant (see page 76)²⁴. This is not an issue which arose in the Cambridgeshire case but there may be situations in which this guidance is particularly relevant and/or has not been taken into account by councils.

Conclusions

48. I hope this covers all relevant issues. Please do not hesitate to get in touch if I can be of further assistance.

ZOE LEVENTHAL

Landmark Chambers

31st August 2011

²⁴ “There are three key ways that local transport authorities are able to influence the sustainability of public transport...Another is to ensure that overall, public transport is efficient i.e. services link up together and are easy for the public to use. For example, ensuring that the timing of bus services coincides with the timing of train services, so that those wishing to use the train are able to travel to the station at convenient times. For example Southampton City Council (www.idea.gov.uk/idk/core/page.do?pageId=81113) used the opportunity of a large new in-town development to link the train station to shops and the port via the ‘little green bus’.

Traffic management measures can be applied by local authorities to improve bus reliability. This can contribute towards improving the attractiveness of public transport as a travel option, helping to encourage modal shift away from cars. Guidance on bus priority measures is given in:

1. Traffic Advisory Leaflet 8/00, Bus priority in SCOOT®: www.dft.gov.uk/pgr/roads/tpm/tal/trafficmanagement/buspriorityinscot; and
2. Bus priority: The way ahead: www.dft.gov.uk/pgr/regional/buses/bpf/busprioritythewayahead12/. “