



Your ref.: unknown  
Our ref.: JHL  
Date: 30 December 2015

Councillor Reuben Thompstone,  
Chairman, Children's, Education, Libraries and Safeguarding Committee  
London Borough of Barnet  
North London Business Park (NLBP)  
Oakleigh Road South  
London  
N11 1NP

and by e mail to: [cllr.r.thompstone@barnet.gov.uk](mailto:cllr.r.thompstone@barnet.gov.uk)

cc. [chris.munday@barnet.gov.uk](mailto:chris.munday@barnet.gov.uk), [val.white@barnet.gov.uk](mailto:val.white@barnet.gov.uk),  
[duncan.tessier@barnet.gov.uk](mailto:duncan.tessier@barnet.gov.uk) and [hannah.richens@barnet.gov.uk](mailto:hannah.richens@barnet.gov.uk) (officers  
directly concerned with this matter)

Dear Sir,

## Consultation on proposals for the London Borough of Barnet's future library service: proposed claim for judicial review

This firm is has been instructed by Save Barnet Libraries which is a coalition of campaigning groups and individuals based at 2 Britannia Road, N12 9RU. They include East Finchley Library Users Group, [REDACTED] (who is a regular, disabled user of libraries in the borough) [REDACTED] (an 11-year-old who in future will not be able to use his local library, East Finchley save during staffed hours or if accompanied by an adult user) and [REDACTED] (a mother of young children who uses East Finchley Library with them). All have standing to bring the judicial review claim proposed in this letter.

As you know, on 20 October 2015 a full Council meeting of the London Borough of Barnet ('the Council') endorsed a recommendation by officers to consult on a proposed reorganisation of local library services to inform a further decision in 2016 on how to proceed ('the current proposals'). The recommendation was controversial and was passed following a formal division and by four votes only. A consultation paper entitled 'Proposal for the Council's Future Library Service' ('the current consultation paper') was then prepared. It develops proposals consulted upon last year but with significant changes.

The consultation process based on that paper began on 26 October 2015 and will be concluded on 6 January 2016. The premise is that there should be a new and (for the UK, at least) radical means of providing

### Bindmans LLP

236 Gray's Inn Road London WC1X 8HB  
DX 37904 King's Cross Telephone 020 7833 4433 Fax 020 7837 9792  
[www.bindmans.com](http://www.bindmans.com) [info@bindmans.com](mailto:info@bindmans.com)

Bindmans LLP is a limited liability partnership registered in England and Wales under number OC335189. Its registered office is as set out above. The term partner means either a member of the LLP or a person with equivalent status and qualification.

**SENIOR CONSULTANTS**  
Sir Geoffrey Bindman QC\*  
Katherine Gieve  
Stephen Grosz QC\*

**PARTNERS**  
Tamsin Allen  
Jules Carey  
Saimo Chahal QC\*  
Emilie Cole  
Jon Crocker  
Kate Goold  
Flora Grossman  
John Halford  
Siobhan Kelly  
Shazia Khan  
Lynn Knowles  
Alla Murphy  
Shah Qureshi  
Martin Rackstraw  
Paul Ridge  
Michael Schwarz  
Farhana Shahzady  
Alison Stanley  
Katie Wheatley

**ASSOCIATES**  
Liz Barratt  
Emma Cohen  
Liz Dronfield  
Rhona Friedman  
Laura Higgs  
Jude Lanchin  
Athalie Matthews  
Gwendolen Morgan  
Jamie Potter  
Jessica Skinnis

**SOLICITORS**  
Jessica Black  
Janet Broadley  
Samantha Broadley  
Salima Budhani  
Elizabeth Cape Cowens  
Pearl Carson  
Peter Daly  
Yagmur Ekici  
Abigail Evans  
Chris Evans  
Ashley-Jayne Fleming  
Nicholas Fry  
Robert Haslam  
Charlotte Haworth-Hird  
Laura Hobey-Hamsher  
Catherine Jackson  
Tammy Knox  
Sara Lomri  
Kathryn Macken  
Anna Moore  
Najma Rasul  
Amy Rowe

**CONSULTANTS**  
Philip Leach  
Anna Mazzola  
David Thomas

\*Honorary

*Contracted with  
the Legal Aid  
Agency*

*Specialist  
Fraud Panel*



**Lexcel**  
Practice Management Standard  
Law Society Accredited

Regulated by the  
Solicitors  
Regulation  
Authority

access to libraries in Barnet. This involves opening library buildings to most registered library users using a barrier and pin card system at times when there will be neither paid staff nor volunteers present (such times are referred to compendiously as ‘unattended’ below). In this way the Council hopes to maintain, and in some cases improve upon, library opening hours whilst saving a significant part of the current budget which is spent on staff salaries. Coupled with this, there are plans to raise limited amounts of further funds through relatively minor changes to fines and charges and to increase income by letting various parts of the library estate out for public and commercial use. The proposals envisage significant spending on reconfiguration and refurbishment of existing library buildings to make this possible.

We have advised members of Save Barnet Libraries that the ongoing consultation process is riddled with legal errors, open to challenge and that neither the process nor the products of it can withstand scrutiny by the Administrative Court.

In summary, that is because:

1. in breach of well-established public law principles governing consultation processes, the Council has not adequately explained its current proposals to consultees, preventing them from making an informed response (**‘Ground 1’**);
2. the adverse effects of the current proposals will be felt by some more than others, yet inadequate measures are being taken to ensure the views of those who will be worst affected are sought so the nature and extent of this impact cannot be understood by the Council when a final decision is made (in fact, the current consultation process is less thorough than the last) (**‘Ground 2’**);
3. a single question is asked about an obvious, cost-saving alternative to the current proposals (co-location of libraries and other Council services which would have obvious advantages over, say, letting part of the library estate, because the Council would be in control of its own assets and not subject to market pressures) but, despite a commitment from the Council to explore it, this has never been properly developed, still less consulted upon in a meaningful way (**‘Ground 3’**);
4. having sensibly decided to trial unattended library services, the Council has failed to reproduce the conditions under which an unattended library would operate and neither has it conducted an adequate risk assessment making the products of the trial wholly unreliable (**‘Ground 4’**); and
5. these failures, individually and compendiously, make it impossible for the Council to lawfully discharge its obligations to guard against risks to public safety under the Health and Safety at Work etc Act 1974 (**‘the 1974 Act’**), assess local need for library services under the Public Libraries and Museums Act 1964

(‘the 1964 Act’) and to have due regard to the equality consequences of restricted access associated with the proposed unattended service for the purposes of the Equality Act 2010 (‘the 2010 Act’) (‘Grounds 5, 6 and 7’).

This letter is written in accordance with the Judicial Review Pre Action Protocol. It represents an opportunity for the Council to withdraw the current consultation paper, reconsider its position and then, if it wishes to continue with its proposals, take steps to consult and assess safety risks, need and impact lawfully.

If the Council is unwilling to withdraw the current consultation paper and begin again, it should provide the information and documents requested below so the proposed claim can then be pleaded in a focussed way, issued and determined by the Court. Your substantive response is required no later than 1.00 PM on 11 January 2016.

That said, provided the Council is willing to suspend the current decision making process and a satisfactory agreement is reached about the consequences for timing of any claim so the parties’ positions are not compromised, our clients are willing to embark on a process of ADR to establish whether litigation can be avoided and, if so, on what basis. They formally propose independent mediation. The Council is asked to respond to this proposal bearing in mind the conclusions of Briggs LJ in *PGF II (PGF II v OMFS Company 1 Limited [2013] EWCA Civ 1288*.

### **The details of the matter being challenged**

The Council’s ongoing:

1. actions in consulting in an unlawful manner; and
2. failure to gather sufficient information to make a lawful decision on reorganisation of the library service including by:
  - a. assessing public safety risks arising from unattended libraries for the purposes of the 1974 Act and associated secondary legislation;
  - b. assessing need for the purposes of section 7 of the 1964 Act; and
  - c. having due regard to the factors listed in section 149(1) the 2010 Act.

### **Action the Council (as proposed Defendant) is being asked to take**

As above, it is asked to withdraw the current consultation paper, reconsider its position and then, if it wishes to continue with its proposals, undertake to take steps to consult and assess safety risks, need and impact lawfully in line with the obligations described below.

**The details of the legal advisers, if any, dealing with this; their reference details; address for reply and service of court documents**

Our details are given on the letterhead above. This matter is being dealt with by John Halford, a Partner in the Public Law and Human Rights Department, under reference “JHL”, together with Jessie Brennan, a trainee.

Please advise us whether you will be using internal or external legal advisors and of their identity.

**Interested parties’ details**

Actual and potential users of the library service are interested parties, as are current paid staff. It is not practical to provide all of them with this letter, but steps will be taken to publicise its contents to enable those who wish to actively participate in any claim to do so.

**Background**

The Council faces a significant budget deficit thanks to central government cuts to local government allocations, pressure to avoid significant increases to Council Tax and, it says, changing demographics. This has prompted a spending review. Cuts to the libraries service have been under consideration since 2014, although the library service itself was under review before then.

Various options for reorganisation of the library service were proposed in a consultation that ran between November 2014 and February 2015. This consultation involved questionnaires, focus groups, panel discussions and some meetings at affected libraries to discuss the then proposals. Publicity about these meetings and the consultation was not perfect, but there was at least some.

The idea of unattended libraries appears to have been first floated in the decision-making materials that prompted this consultation. They say that such services are widely used “in Scandinavia”. This statement is unsourced and, it appears, unsupported by evidence.

A trial of an unattended service in Barnet was started in Edgware Library in June 2015 and is ongoing. That trial involves offering additional hours beyond those during which the library was previously, and remains, staffed. The additional hours are subject to certain restrictions, however, including that children under 16 using the library must be accompanied by an adult user, and that the library toilets are closed. A security guard is present at hours when the library is not staffed by paid staff or volunteers and so it is never actually unattended. The cost of the guard is not mentioned in the October 2015 interim report on the trial. It is not proposed that a security guard will be present at Edgware or any other library once the unattended service begins.

An interim risk assessment was produced of the trial separately from the October 2015 report in the sparse form of a two page 'Project Management Risk Register'. Several health and safety risks are noted, but the mitigating effect of the Security Guard's presence on those risks is not. The words "tolerated during pilot" also appear against most risks. "User education" is also mentioned repeatedly as a means of mitigating risks from users and other persons, which is hard to understand as is the suggestion the "feedback cards" be completed in the event of a theft or the building becoming unsafe. There is no indication about how any risks save those that are annotated "closed" are to be acceptably managed in the long term.

In October 2015, as noted above, the Council considered an interim report on the trial, a report on the outcome of the consultation, a needs assessment report and an interim equality impact analysis document purporting to describe the consequences of the different proposals for groups of library users delineated by their protected characteristics (i.e. the features identified in the Equality Act 2010 as possible bases for unlawful discrimination or inequality of opportunity such as age, gender, pregnancy, disability and race).

Although the papers before the Council were voluminous, there were some striking omissions. The risk assessment of the trial was not made available, for example. There was no analysis of the indirect costs of unattended libraries, such as increased insurance premiums and replacement of stolen or vandalised stock. There was no discussion of contingency plans in the event there were insufficient volunteers at partnership and community libraries or if sufficient income was not generated by the letting of parts of the libraries estate. Also absent from the October 2015 materials were the products of an exercise the Council had committed itself to in parallel with public consultation, which was to explore "opportunities" for "the co-location of libraries with other public services and community facilities": see paragraph 1.13 of the October 2014 Library Options paper and the 28 October 2014 officers' report. The sole reference to co-location is at paragraph 4.3.8 of the Future of Barnet Libraries paper.

The Council noted the broad thrust of what consultees had to say, which was that they were opposed to library closures and drastically reduced opening hours. This apparently had prompted the Council's officers to rethink the proposals and formulate the single, hybrid option which was endorsed by the majority of the full Council and is currently being consulted upon.

Under this option, the libraries currently making up the service will be designated differently and the amount of staffing will vary. In some cases there will be no staff at all because the libraries will effectively be handed over to 'partner' organisations to be run in future by them with little or no input from Council staff. Some have very limited hours indeed. These will be known as 'partnership' and 'community' libraries.

Some remaining 'core' libraries will have very limited staffed hours. Others, known as 'core plus' libraries will have more staffed hours, but in all cases, staffed hours are to be reduced drastically under the proposal (and far more than was originally proposed). The current proposals state that, as staff costs form a very significant part of the libraries budget, the reduction in staffing will, in combination with the Council's revenue generation plans for the libraries, mean a net sum of £1.731 million will be saved, which approaches its original target. It seems that the Council is content to make that lesser saving, but says it will revisit the reorganisation if the revenue raised is not as expected. The position is not clear, however, hence the questions posed below.

The library staff cuts will have two immediate consequences. First, the special, skilled services which are available only from librarians, including assistance in accessing the paper-based and other library stock, guidance and recommendations, will be available only during very limited hours at core and core plus libraries. Whilst making information about the stock more accessible (for example by means of online catalogues) may be helpful, this plainly cannot be a substitute for a librarian's expert assistance. Just as importantly, librarians curate, monitor and maintain stock.

Secondly, for reasons it has not made clear, the Council has decided to propose that the service during unattended hours will be restricted in two other main ways, as in the Edgware trial: public toilets situated within libraries will not be open and child users under 16 will not be permitted to access unattended libraries unless accompanied by an adult user.

### **Legal framework**

There are four relevant legal regimes to be considered: public law principles; the 1974 Act; the 1964 Act; and the 2010 Act.

#### *Public law principles*

Three basic principles are relevant here.

First, when taking any discretionary decision, decision-makers must take reasonable steps to acquaint themselves with relevant information (see *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014, 1065 B), so that the decision has an adequate, objective evidential foundation (see, e.g., *R (Beresford) v Sunderland City Council* [2003] UKHL 60, at §§1, 8, 51, 60 and 83). The relevant information must be accurate, otherwise a mistaken impression may play a material part in the reasoning, flawing the decision: see *E v Secretary of State for the Home Department* [2004] EWCA Civ 49 at §63.

Secondly, whenever a public authority undertakes a consultation exercise to help discharge its *Tameside* duties and/or because it is obliged to do so by statute, it must comply with certain established

public law principles. These were summarised in *R v Brent London Borough Council ex. p. Gunning* [1985] 84 LGR 168, at 189:

“First, that consultation must be at a time when the proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third... that 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.”

See also *R v North and East Devon Health Authority ex. p. Coughlan* [2001] QB 213 per Woolf LJ at §108. At §112 he added that the public authority’s obligation was:

“to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response.”

Consultees’ ability to make an intelligent, informed response will depend on them being given “candid disclosure of the reasons for what is proposed” (*R(Lloyd) v Dagenham London Borough Council* [2001] EWCA Civ 533) and sufficient information to understand the impact on them.

Thirdly, whilst public authorities are entitled to be inclined towards one option, or a series of options, over others even when the decision making process is at a formative stage and consultation is occurring they are not entitled to alight on one or more so that other options become, in effect, academic. See *R (Montpeliers and Trevors Association) v City of Westminster* [2005] EWHC 16 (Admin) at §29 where Munby J stressed that fairness requires “that all the various options be put to the consultees” and, *R (Partingdale Lane Residents Association) v the Council London Borough Council* [2003] EWHC 947 (Admin), [2003] All ER (D) 29, at where Rabinder Singh QC sitting as a Deputy High Court Judge remarked at §47:

“consultation must take place at a stage when a policy is still at a formative stage ... a proposal cannot be at a formative stage if the decision maker does not have an open mind on the issue of principle involved.”

Last, in *R (Moseley) v Haringey LBC* [2014] 1 WLR 394 the Supreme Court decided that meaningful public participation in a decision-making process about Council Tax reduction scheme, a context with which the general public could not be expected to be familiar, required that the consultees should be provided not only with information about the draft scheme but also with an outline of the realistic alternatives, and an indication of the main reasons for the authority’s adoption of the draft scheme. That followed, in this context, from the general obligation to let consultees know “what the proposal is and exactly why it is under

positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response”: see §§36-42.

In the context of library reorganisations, these principles chime with *R (Draper) v Lincolnshire CC* [2014] EWHC 2388 (Admin) where a consultation process was held to be flawed because the authority had closed its mind to alternatives.

As to the means of consultation, the Council’s Consultation and Engagement Strategy says materially at section 7:

“The council will use various methods depending on the subject matter, the level of engagement required, and the type of stakeholders we are trying to reach, and in some cases this will require a multi method approach.

In summary these methods include:

- paper surveys
- online surveys
- social media - face book, twitter
- focus groups
- citizens panel
- youth board
- area forums
- deliberative conferences
- workshops
- budget consultation tools (simulator, simalto)
- consultative workshops
- in-depth interviews
- peer research
- user panels
- customer care journey mapping
- mystery shopping
- experts by experience
- ethnographic research
- road shows.

When selecting which consultation and engagement method is the most appropriate to use, the council will consider a number of factors including accessibility, equality, cost, effectiveness and timeliness.

On request, and within reasonable limits such as cost and timeliness, the council will provide individuals or organisations with an alternative method of consultation where the chosen method prevents them from being able to participate. An example of this would be providing on request an easy read version of a survey for a resident who has learning difficulties, or for an internet survey, to provide a paper survey to residents who are unable to access the internet.”

This document also refers to a consultation ‘toolkit’ which does not appear to have been published.

---

*The 1974 Act*

Section 4 of the 1974 Act provides materially:

“4.— General duties of persons concerned with premises to persons other than their employees.

(1) This section has effect for imposing on persons duties in relation to those who—

(a) are not their employees; but

(b) use non-domestic premises made available to them as a place of work or as a place where they may use plant or substances provided for their use there,

and applies to premises so made available and other non-domestic premises used in connection with them.

(2) It shall be the duty of each person who has, to any extent, control of premises to which this section applies or of the means of access thereto or egress therefrom or of any plant or substance in such premises to take such measures as it is reasonable for a person in his position to take to ensure, so far as is reasonably practicable, that the premises, all means of access thereto or egress therefrom available for use by persons using the premises, and any plant or substance in the premises or, as the case may be, provided for use there, is or are safe and without risks to health.”

These obligations are enhanced by secondary legislation. For example, under the Regulatory Reform (Fire Safety) Order 2005 the Council is required to carry out and maintain a fire safety risk assessment of publicly accessible premises. Further, the Management of Health and Safety at Work Regulations 1999 provide materially:

“Risk assessment

3.—(1) Every employer shall make a suitable and sufficient assessment of—

... (b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking,

for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions and by Part II of the Fire Precautions (Workplace) Regulations 1997.”

Guidance on compliance with these duties is issued by the Health and Safety Executive.

---

*The 1964 Act*

Section 1(2) of the Public Libraries and Museums Act 1964 ('the 1964 Act') imposes a statutory duty on 'library authorities' (of which the Council is one) as follows:

"(2) Every library authority shall furnish such information, and provide such facilities for the inspection of library premises, stocks and records, as the Secretary of State may require for carrying out his duty under this section."

Since 1998 all library authorities have been required to produce information to discharge this duty in the form of 'library plans' that include reviews of past performance and strategies and targets for the current and future years.

Section 7(1) requires authorities to:

"provide a comprehensive and efficient library service for all persons desiring to make use thereof, provided that although a library authority shall have power to make facilities for the borrowing of books and other materials available to any persons it shall not by virtue of this subsection be under a duty to make such facilities available to persons other than those whose residence or place of work is within the library area of the authority or who are undergoing full-time education within that area."

Subsection (2)(a) provides further statutory instructions as to the factors that a library authority must take into account in order to fulfil its duty under section 7(1):

"(2) In fulfilling its duty under the preceding subsection, a library authority shall in particular have regard to the desirability—

(a) of securing, by the keeping of adequate stocks, by arrangements with other library authorities, and by any other appropriate means, that facilities are available for the borrowing of, or reference to, books and other printed matter, and pictures, gramophone records, films and other materials, sufficient in number, range and quality to meet the general requirements and any special requirements both of adults and children..."

There is an implied duty under section 7 of the 1964 Act to conduct an adequate assessment of local needs. That requirement is an inherent component of the duty to provide a comprehensive and efficient library service. This point was made in clear terms in the statutory public inquiry ordered by the Secretary of State into Wirral Metropolitan Borough Council's decision to restructure its library service ('the Wirral Report'):

"The Inquiry has accepted the implicit and explicit interpretation of the 1964 Act that a comprehensive and

efficient service is one that is based on local needs (hence why there can be no single definition which is true to all library authorities in England), and if those needs are not fully assessed and taken into account, it becomes a rational impossibility for a library authority to design a service which comprehensively and efficiently meets those needs in a demonstrable way.”

The Wirral Report also stated:

“Because the Council did not demonstrate that it had made an adequate assessment of local needs, I also conclude that the Council did not act reasonably in meeting such needs through their proposals, either in meeting their statutory obligations, or in the context of available resources; as, in the absence of such assessment or demonstrable knowledge of local needs, it was incapable of identifying a reasonable option for meeting such needs both comprehensively and efficiently.”

This needs assessment approach was commended by the then Secretary of State to library authorities on 3 December 2010. The implied duty was also confirmed by the Administrative Court in *R (Green) v Gloucestershire County Council* [2011] EWHC 2687 (Admin), §29.

#### *The 2010 Act*

Whenever there is an issue which needs at least to be addressed under that section (see *R (Elias) v Ministry of Defence* at first instance [2005] EWHC 1435 (Admin), §98) section 149(1) demands:

“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 persons who do not share it...”

Section 149(7) provides that the seven relevant protected characteristics are: age, disability, gender reassignment; pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

The duty to have due regard has been variously described as “a test of the substance of the matter” which must be discharged with “vigour” (*R (Domb) v London Borough of Hammersmith and Fulham* [2009] EWCA 941 Civ at §52), “rigour” (*R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) at §92 and which imposes “a heavy burden on public authorities...in ensuring that there is evidence available, if necessary, to demonstrate that discharge” (*R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 at §59).

In order to discharge their statutory obligations under section 149 of the Equality Act 2010, public authorities must do three things.

First, they must undertake a sufficiently thorough information gathering exercise. In *R (Rahman) v Birmingham City Council* [2011] EWHC 944 (Admin) at §35 Blake J referred to the need to collate:

“relevant information... in order to have evidence based decision-making”.

Similarly, in *R (Brown)* at §83 Aikens LJ explained at that in order to discharge its equality duty:

“the public authority will... have to have due regard to the need to take steps to gather relevant information in order that it can properly take into account disabled persons’ disabilities in the context of the particular function under consideration”

Secondly, once a public authority has gathered relevant information it must analyse it to identify whether disproportionate adverse impact will be experienced by people on account of their protected characteristics. In *R (Lunt) v Liverpool City Council* [2009] EWHC 2356 (Admin) Blake J observed at §44 that, when considering a proposal to maintain a policy that presented problems for wheelchair users, a:

“lawful exercise of discretion could not have been performed unless the Committee properly understood the problem, its degree and extent”

Thirdly, if it is apparent that the proposal will have such an impact, the public authority must then satisfy itself that this can be justified (in order to discharge section 149(1)(a)). This element of the duty was explained in *R (Eisai) v National Institute for Clinical Excellence and others* [2007] EWHC (Admin) 1941 by Dodds J at §93:

“With regard to the question of justification, the Appeal Panel needed to give close scrutiny to the reasons given for lack of specific provision in relation to the atypical groups and properly test whether they were proportionate and pursued a legitimate aim.”

If, and only if, the adverse impact can be justified, the authority then moves to the second stage which is to identify the means by which it can be mitigated (in order to discharge section 149(1)(b) and (c)). See further *Eisai* at [92] and *R (Kaur and Shah) v London Borough of Ealing* [2008] EWHC Admin 2026 at §43. Once Ealing had:

“identified a risk of adverse impact, it was incumbent upon the borough to consider the measures to avoid that impact before fixing on a particular solution.”

There is no statutory prescribed way of discharging the duty, but many public authorities do so by means of an impact assessment or another similar tool.

Where impact assessments are used (as one was in *Lunt* in relation to the local authority’s taxi licensing functions) they must show how due regard has been had to material “with the specific statutory

considerations in mind”: see *R (Harris) v The London Borough of Haringey* [2010] EWCA Civ 703 at §40.

## **Analysis / proposed grounds of claim**

### *Ground 1: the legally inadequate current consultation paper*

The current consultation paper and questionnaire are critical documents. In some respects they are clear. However, five things are strikingly missing.

First, although the Council explains which libraries will have greater staffed opening hours, which will have less, and which will become partnership or community libraries, the paper does not include a timetable for the proposed staffed and unattended hours. Readers are referred back to the material put before the October 2015 Council meeting for further information, but even if they look there, the timetable is not immediately accessible. In fact, it forms an appendix to supplementary report, does not clearly identify which libraries will be open when on staffed basis and is in any event described as “indicative”. In short, even the most dogged consultee will not be able to understand when their local library will be open on staffed basis and when it will be unattended. Given the huge variations in service available at these times and the restrictions on user age and toilet use, this information is critical. Ironically, the consultation paper recognises the relationship between unattended hours and access by making this point at page 12:

“How can we minimise the impact of this proposal?

- we will offer a clear timetable of staffed hours at each site”

But if that “clear timetable” is needed once the proposals are implemented, it is all the more necessary now to enable consultees to understand the impact on them and to comment.

Secondly, the Council does not explain why there will be no toilet access during unattended hours under its proposals. In fact, the consultation paper itself does not even mention this restriction. Though question is asked about it in the questionnaire, the reason is not clear.

Thirdly, the Council does not explain its thinking behind the proposed age restriction for unaccompanied children. Again, a specific question is asked about it in the questionnaire, but without understanding why the Council is proposing the restriction in the first place, it is impossible to respond or comment meaningfully.

Fourthly, the Council does not explain what will happen if any of the three fundamental but untested assumptions about the current proposals prove to be incorrect. Those assumptions are that unattended libraries can be safely operated, that there will be sufficient volunteers for partnership and community libraries to operate as part of a

“comprehensive and efficient” service to meet needs and that enough income will be generated by letting part of the library service to sufficiently cross subsidise the existing service in the long term. The first of these assumptions is speculation, given the inadequate trial and lack of any legally adequate risk assessment (see below). The second is also speculative; there can be no assurance of sufficient volunteers until they are recruited, inducted and a pattern of service is established. As to the third, the financial assessments behind the cross subsidisation plan have not been made public or, as far as were aware, shared with members.

Fifthly, the consultation paper does not explain the reasons why particular libraries have been designated as core plus, core and partnership libraries.

The current consultation paper therefore falls far short of the legal standards set in *Gunning*, *Coughlan* and *Lloyd*. Consultees cannot respond on an informed basis because the reasons for key elements of the proposals are obscure, as is the impact library by library. This in itself means the process cannot lead to a lawful final decision.

*Ground 2: the unlawful failure to utilise other necessary means of consultation*

As briefly mentioned already, the current consultation process differs from the first one in that it is shorter, there is a single proposal and the primary means of consultation is a paper accompanied by questionnaire that may be completed in hardcopy form or online. There have been ‘drop in’ sessions at libraries too, but these were poorly publicised and under attended. Those who attended got the impression that their primary purpose was to reiterate the proposals, not seek views on them.

There has been very little publicity about the consultation questionnaire. In some libraries, publicity has consisted of a small photocopied notice and erratic provision of paper copies of the current proposals and questionnaire. The Council does not propose to meet with users to the same extent and in the same way that it did last time around. There is no explanation whatsoever for the difference in approach.

This approach is not adequate in common law terms or in line with the Consultation and Engagement Strategy. The drastic effects of the proposals, both in terms of librarian availability and the restrictions associated with unattended hours mean that, at the very least, all of the same consultation methods ought to have been used as with the earlier consultation. However, the particular impact on children, older and some disabled people, pregnant women and those with young children called for in-depth consultation direct with the schools, youth board and user panels, along with deliberative conferences and in-depth interviews to properly understand the impact. Customer journey mapping for child users that will be caught by the unattended hour restrictions is also critical.

None of these special measures appear to have been considered, however. This rendered the process inadequate in *Padfield* terms.

*Ground 3: an important, alternative option has not been explored or adequately consulted upon, breaching the Moseley principle*

As noted above, co-location is mentioned once in passing in the October 2014 materials. Then, bizarrely, the current consultation paper identifies it as an ‘element’ of the proposals. This section of the paper bears quoting in full:

“Element 4: Co-locate libraries with other services

Where possible, libraries would be co-located with other services. Future opportunities for co-locating libraries with other public services would be explored.

For example, the proposal contains an opportunity to explore the co-location of the East Barnet Partnership Library with proposed new leisure facilities in the area and the Mill Hill Partnership Library with other community-led services.

Why are we doing this?

Co-locating libraries and developing library services in partnership with community groups or other organisations, offers an opportunity to retain library services at a lower cost and encourage use of the library.

What impact will it have?

Co-locating library services would enable residents to access more than one service from each location. It would offer the potential for financial efficiencies in relation to sharing building and operational costs.

What feedback do we want from you?

- what is your view on this proposal?
- what impact do you think this proposal will have both on you and others?
- are there any other ideas or approaches that you think we should be considering?”

Superficially, then, it appears the Council is interested in this as an “option”. But that impression would be false for three reasons.

First, in October 2014, the Council committed itself to exploring co-location of other Council services with libraries as a means of efficiently saving staff and premises costs. It appears nothing has been done because nothing generated by such work was presented to members in October 2015.

Secondly, consultees may well favour co-location in principle (some of our clients do), but there is no actual proposal here to comment on, and there should either have been one or co-location should have been rejected as an option and the reasons explained. This renders questions 19-22 of the questionnaire meaningless.

Thirdly, co-location will generally not be compatible with reconfiguring, refurbishing and letting parts of existing library buildings because they will then become unavailable for co-locating other Council services. This lettings plan is a premise of the current proposals.

These points can be tested in this way. Suppose the Council had properly reviewed its estate and services and found that the space it plans to commercially let in existing libraries could be used to co-locate certain advice services. It could then consult on co-location as a genuine alternative to unattended libraries and commercial lets.

*Ground 4: the trial is legally inadequate*

There is no statutory standard for a trial of this kind, but it too needs to be adequate in *Padfield* terms. The current trial is not for three reasons.

First, the presence of the security guard will distort user behaviour in that theft, vandalism and noisiness may well be more likely to occur if there is no one in a position of authority present. Further, non-registered persons might want to access the library for whatever purpose would be far more likely to do so in the absence of a security guard monitoring the entrance from time to time. The Council has not put itself in a position to rationally assess how users or others will behave in circumstances where there are no staff at all.

Secondly, the trial does not involve a reduction of the hours when the library is currently staffed, only an enhancement to those hours. This cannot help inform the Council about usage patterns changing once staffed hours are reduced.

Thirdly, increased insurance costs associated with unattended libraries have not featured in the trial in any way. This makes it impossible for the Council to reach an informed view on savings.

*Grounds 5 and 6: there is no proper assessment of the safety risks of an unattended service*

Compounding the inadequacies of the trial, the risk assessment, such as it is, is completely unfit for the purposes of the Regulatory Reform (Fire Safety) Order 2005 and the Management of Health and Safety at Work Regulations 1999. This can be tested by comparing the two-page Project Management Risk Register document, which is flawed on its face as noted above, with the HSE's assessment templates and guidance. The risk assessment's shortcomings are so serious that the Council cannot have any confidence in its ability to discharge its section 4(2) duty under the 1974 Act.

---

*Grounds 7 and 8: assessments of need and equality consequences cannot lawfully be competed*

Plainly, the current proposals will not affect all library users in the same way. It may help to highlight some examples of differences in the consequences, some of which receive only superficial attention in the needs assessment and equality impact assessment produced for the October 2015 full Council meeting and some none at all. The flaws in the consultation process highlighted above mean that the Council has disabled itself from properly assessing and having due regard to these matters so as to complete an adequate section 7 1964 Act needs assessment and have due regard to equalities considerations under section 149 of the 2010 Act.

First, reductions in staffing with these linked access restrictions will impact on some library users much more than on others. General users may suffer from the effects of others' misbehaviour, in particular noisiness. The needs of those who use libraries for specific research purposes aided by librarians will be compromised. However, users who, for reasons of age, disability or language, need help in accessing the stock will, relatively speaking, have greater difficulties than others. Vulnerable people may be inhibited from using libraries when there are no staff around to regulate others' behaviour. Information about this impact has not been gathered to the standard explained in *Brown, Rahman and Lunt*, nor can it be under the current process, given its shortcomings.

Secondly, the lack of access to public toilets during unattended hours will impact on users who wish to use libraries for longer periods and/or are generally likely to need the toilet more frequently than others including older people, some disabled people, pregnant women and parents with young children (who are far more likely to be women than men). The extent of this impact will depend upon whether there are other usable public toilets nearby or alternatives such as cafes. This does not appear to have been investigated by the Council. Again, there is insufficient information to assess impact.

Thirdly, the restriction proposed on library use by under 16-year-olds during unattended hours will have particularly significant effects because many children use libraries as a safe, quiet study space after school. Many from poorer families will have no real alternative. It is not immediately obvious why children between the ages of 11 and 15 should not use libraries without an accompanying adult, even if they are unstaffed, whereas children of 16 will be allowed to do so. To be lawful, this obvious discrimination needs justification under section 149 (see *Eisai and Kaur and Shah*). Thus far, no justification of any kind has been offered.

Linked to the second and third of these points is the fact that the current proposals' designation of libraries as 'core' and 'core plus' does not appear to take into account the impact on particular types of users of the elimination of staffing during particular hours and days at particular libraries. So, for example, certain libraries may be very

heavily used by 11-to-15-year-old children from poorer families living in crowded housing between the hours of 4 and 7 PM each day, but others may not be. Whilst it might be lawful for the Council to face up to and live with the consequences of eliminating staffing from the first group of libraries for most of the time that they are open, for the decision to be lawful, it does need to properly inform itself of those consequences first. It has yet to do so.

We stress these are examples only, but each would be fatal to the final decision.

**Details of any information sought and documents that are requested as relevant and necessary**

Please address each of the requests below using the same enumeration when you respond substantively to this letter in the next 14 days. If you are unable or unwilling to do so in respect of any request, please give full reasons why not.

Please:

1. confirm the accuracy of the factual background section of this letter or identify any omissions you consider to be significant or areas of disagreement and the basis for your contrary view;
2. state whether the needs assessment will be revised before any final decision on the current proposals is made and, if not, why not;
3. provide a copy of the Council's consultation and engagement tool kit in its current form can confirm that it was taken into account when the current proposals will formulated or, if it was not, why not;
4. explain why a different, lesser means of consultation was selected for the current consultation, provide the documents explaining the reasons for the method chosen and state what, if any, consideration was given to using the additional means listed in the Consultation and Engagement Strategy document and highlighted above;
5. confirm the income from letting library estate space is to be used exclusively to cross subsidise the library service and so reduce the sums to be cut from the library service budget;
6. provide all documentation setting out the Council's contingency plans in the event the letting income is not as predicted;
7. explain why a security guard was provided at Edgware library during the trial and at what cost;

8. provide all risk assessment documentation generated by the Edgware trial other than that mentioned above;
9. state what, if any, risk assessments are to be conducted in respect of every other library affected by the proposals, by whom, when and using what methodology;
10. provide all documentation setting out the Council's contingency plans in the event the risks of unattended libraries are assessed as unacceptable;
11. provide all documentation setting out the Council's contingency plans in the event there are insufficient volunteers to provide a regular service at partnership and community libraries;
12. explain the basis on which it is proposed that toilet access should be restricted to hours during which libraries are staffed by paid staff or volunteers and provide any documentation taken into account by officers and members when this part of the current proposals was formulated;
13. identify what, if any, monitoring and analysis of toilet use at the libraries has been undertaken, provide any documentation which has been generated by this process and explain how it has been taken into account so far;
14. explain what, if any, special means have been, or are to be, used to assess the impact of the toilet use restrictions on particular groups defined by protected characteristics including those identified above and provide any assessment documentation;
15. state why it is proposed that children under the age of 16 should not be permitted to use libraries when they are unattended save when accompanied by an adult user and provide any documentation take into account what officers and members when this part of the current proposals were formulated;
16. indicate to what legal standard you consider that the discrimination identified at question 6 between children of 16 and above and younger children needs to be justified and the justification/s relied upon by the Council in formulating this part of the current proposals;
17. indicate how, if at all, the Council plans to assess how far child users who cannot use their nearest local library because of the age restriction will need to travel to access a staffed library between the hours of 3.30 PM and 8 PM (according to paragraph 3.1.8 of the October 2015 Future of Barnet Libraries Paper this exercise has been undertaken for library users in general, but there is no indication it has been done for children affected by the age restriction on unattended libraries); and

18. state whether the age and toilet access restrictions will apply during volunteer 'facilitated' sessions at the libraries (mentioned in the October 2015 materials and at page 12 of the consultation paper) and, if they will, why.

**Reply date and time**

Please reply by return confirming receipt of this letter and reply substantively by 1.00 PM on 11 January 2016

Yours faithfully

*Bindmans LLP*

Bindmans LLP