

# An opportunity for change

## Exploring the trust option for museum services

A practical guide to the feasibility stage

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## Foreword

The constant challenge for local authorities is to continuously improve public services with limited resources. With conflicting priorities and demands for local authorities, cultural services do not necessarily get all the attention, commitment and drive that they need.

In 2001, the City of York Council asked me to chair an Initiation Group to investigate the option of establishing a new charitable trust to take over the Council's key museum and arts facilities: the Yorkshire Museums and Gardens, the York Art Gallery and the York Castle Museum, which was ultimately agreed.

These facilities remain in Council ownership but the Trust has total responsibility for their management and development.

Some elected members at the time objected to what they perceived to be the 'privatisation' of the services. However, a charity is not a private body: it is publicly accountable and legally answerable.

Indeed the new charitable trust, York Museums Trust, has gone from strength to strength in its now six years of operation. Relations with the Council, at both officer and councillor levels, are good. There are fresh staff, fresh energy, fresh funds from external sources, and new and imaginative programmes. Each side has kept to their original commitments.

Joanna Bussell and Sandra Bicknell have now produced this excellent report, which sets out clearly and fully how such transfers can be set up, monitored and be successful. Their personal experience in York, I like to think, has contributed to their thinking and what they have written here. I warmly recommend this report to any group or local authority who might be thinking of such a change, and indeed to those of us who have already embarked on the transformation. We all have much to learn.



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# 1. Introduction

## A practical guide

This is a practical guide targeted at local authority officers who have responsibility for, or who are involved in, a local authority museum service and who are considering the transfer of services from the local authority to a Trust.

It is intended to be a practical document to help you to think about what might be involved in transferring a local authority museum service to a Trust. The critical focus of this guide is the first stage of the transfer process – the feasibility stage.

The transfer of services to a Trust is a major organisational change. It is imperative, therefore, to the success of an initiative of this nature, that you undertake a thorough, objective and professional approach to the feasibility stage of the transfer process.

The aim of this guide therefore, is to highlight the key issues you need to consider when exploring the Trust option. We have not given you all the answers, as your answers will be specific to you and they will depend upon your own circumstances. We have focused instead on the issues and the process involved. The contents of this guide does not necessarily offer you a blueprint but should offer enough detail, with examples, to help you with your own planning.

You will see that throughout this guide we stress the importance of communication. This is because of the very simple fact that how you communicate possible changes will make or break the possibility of initiating those changes.

The experience offered within this document comes from two main sources: legal teams who have extensive experience of transferring local authority services to Trusts and people who have headed local authority museum services both pre- and post-transfer.

## Other sources of information

This practical guide to the feasibility stage of a transfer of museum services to a Trust is intended to compliment other sources of information published in recent years looking at the advantages and disadvantages of the Trust Option for museum services and the key legal, financial and operational issues involved. Most significantly key sources of background information on the Trust Option for museum services includes the MLA's publication 'Moving to Museum Trusts: Learning From Experience' (2006) in (the 'MLA's Report') and the 7th Edition of Lawrence Graham LLP's publication 'Culture in Trust' (2007).

This guide focuses in particular on the feasibility stage of the transfer process, that is determining whether the Trust Option is the right option for your museum service and the critical issues to be addressed during the implementation stage to ensure the transfer is a long term success for all parties involved.

Transferring a service to a Trust will not in itself transform the service. It is essential, therefore, that the feasibility stage identifies the critical success factors and most importantly resources are put in place to deliver the required change programme.

Quick wins are important. However, the real measure of success must be sustainability and continuous service improvements.

This practical guide will help all those involved in the change programme to identify and put in place the platform for a successful transfer of museum services.

## The 'Trust Option'

The 'Trust Option' referred to in this guide is a generic term for arranging for the delivery of the services by a 'non profit distributing organisation' (NPDO).

The Trust Option would involve therefore:

- establishing a new NPDO (or identifying a suitable existing NPDO);
- transferring the existing services including staff to the NPDO; and
- entering into new partnership arrangements with the NPDO for the delivery of museum services.

NPDO's take a number of different legal forms including a:

- unincorporated charitable Trust;
- company limited by guarantee (charitable or non-charitable);
- industrial and provident society (charitable or non-charitable);
- charitable incorporated organisation; and
- community interest company.

Whatever its legal form the key distinguishing features of an NPDO is that its profits cannot be distributed (eg to shareholders) but must be reinvested back into the organisation to further its objectives.

This is the fundamental difference between a private sector share company and an NPDO. It means that all of the profits generated by the organisation are continually reinvested to improve the services provided.

We set out the advantages of the Trust option in Appendix A of this guide. However, it must be emphasised that these potential advantages do not arise automatically from the legal status or the structure of the organisation alone.

Success will depend on the leadership, commitment and culture of the new organisation and importantly in this context, the willingness of the staff involved to embrace the organisational change and opportunities the NPDO presents.

### **An overall process model**

We recommend a four stage process. This is summarised as the flow chart overleaf (Table 1).

The chart is intended to model the overall process of transferring a local authority museum service to a Trust. This is followed by short descriptions of each stage. As stated above, the main narrative of this guide concentrates on the first stage of this overall process: the feasibility stage.

We have focused primarily on the feasibility stage of the process because careful consideration of issues during this stage is essential to establishing a sound basis for any further development of a Trust option.



Table 1

## Key stages for a transfer of museum services to a trust

Issues to be addressed

Stage	Legal	Business	Communications/ relationships (Section 6)
1 Feasibility (Sections 2-4)	Assess existing arrangements	Define aim/intention (Section 2.2) Assess present position (Section 2.3) Identify options (Section 3) Assess options (Section 4) Develop recommendation for future governance (Section 4) IN PRINCIPLE DECISION	Identifying stakeholders and their concerns Inform stakeholders of key stages Keep stakeholders informed in an appropriate manner Discuss findings with stakeholders
2 Detailed planning (Section 5)	Prepare necessary documentation Establish shadow board with chair-designate	Develop detailed business plan with 5-7 year horizon APPROVAL	Involve stakeholders in the development of the detail
3 Transfer (Section 5)	Establish full Trustee Board Initial training of Board Finalise suite of documents Establish legal entities	Deliver any pre-transfer organisational changes TRANSFER DATE AND PARTY	Maintain and build relationships
4 Post-transfer	Ongoing Trustee training	Implement business plan	Maintain and build relationships

### Stage 3: Transfer

The transfer itself comes with costs and needs careful planning. Like all change management, if it is not planned well, and communicated effectively, then it can easily flounder and fail. The level of legal work required to secure a transfer is significant (see Appendix E for a guide list of the documentation required). From an organisational and business point-of-view this is about ensuring as smooth a transition as possible. This includes a mutually beneficial outcomes-based partnership agreement between the Trust and the local authority.

### Stage 4: Post-transfer

The organisational changes of moving to a Trust can be challenging and need ongoing support and review. These changes can be supported by the ongoing training of staff and Trustees.

### Some key principles

Although, generally, we are convinced of the merits of the Trust Option, we do not assume that this is the right option in all circumstances. It is imperative therefore to undertake an objective analysis of the advantages and disadvantages of the Trust Option as applied to each local authority's particular circumstances.

The MLA Report highlighted some of the key advantages of Trust status for museums. These included:

- greater financial stability and sustainability;
- greater sense of direction and ability to focus on core business;
- access to additional resources – from rate savings and reallocation of central service costs and greater attractiveness of a stand alone body to potential donors and funders (and lenders);
- greater flexibility and freedom to develop according to audience needs;
- management structures that allow for timely decisions;
- opportunity for organisational culture change; and
- develop new connections and partnerships.

In addition, a survey of existing Trusts conducted by Lawrence Graham LLP ('Culture in Trust' 7th Edition September 2007) highlighted a number of other advantages of Trust status including:

- the speed of decision-making when freed from local authority bureaucracy – fleet-of-foot;
- being a single-focused body;
- a customer-first improved quality of service;
- the opportunity for improved investment by recycling surpluses and NNDR savings;
- a more focused and business-like management team; and
- more able to control own destiny.

### Stage 1: Feasibility

This stage is about exploring what might constitute the best governance option for securing an effective museum service. It needs an assessment of the existing legal status of the service, its collections and its properties, and needs a broad look at the organisational and business implications. Key questions for this first stage of the process include the following:

- Does the principle of establishing a Trust for the museum service make sense?
- Is it viable?
- What's the best overall portfolio for transfer?
- Are there any insurmountable legal, financial or operational obstacles?

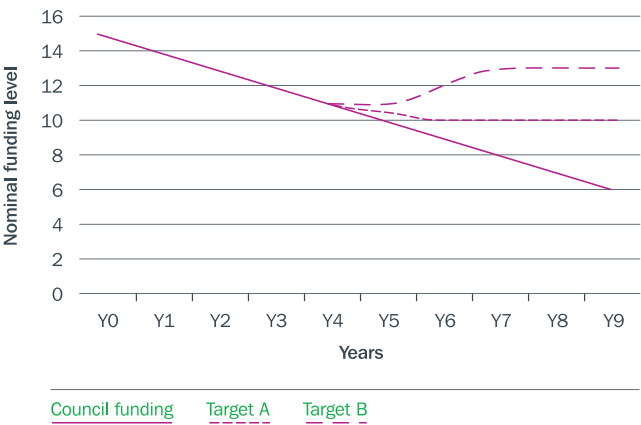
As inferred by the last question, this stage should also explore what might make a transfer impossible at the present time. This could be a legal issue, a political one, a timing one, a capacity one, or it could be that disentangling from the local authority's central services is perceived to be too difficult.

### Stage 2: Detailed planning

If an in-principle decision to look further at a Trust option has been given then a far more detailed set of work will be needed. From the organisational and business planning side this means developing a full business plan for the Trust with 5–10 year financial projections. The aim being to ensure financial surety: you know what the new organisation will cost to run, you have taken into account your aspirations for service delivery, addressed any issues of capital need (dilapidation, and/or match funding for a major grant application, and/or means of dealing with cash flow projections), developed robust income projections and you know what the transfer costs will be.

Table 2

Theoretical model: funding projection



As noted in the MLA Report on Trusts, whilst there can be a number of reasons for transferring a museum service to a Trust, often the key driver is a financial one – savings to the local authority, or a means of stabilising costs, or a means of securing alternative (previously inaccessible) sources of funding.

It is not unreasonable to assume that any museum service that continues to be delivered through the organisational mechanism of a local authority will continue to be challenged to offer efficiency savings and cut costs to support the overall imperative to reduce expenditure – particularly in areas that are non-statutory. The pressure and expectation to do more for less is inescapable – with the danger that the time will come when costs have become so significantly reduced that the delivery of services is so compromised that more radical solutions are required. This could include very difficult decisions about closures and cessation of provision.

This legacy of reduced costs is modelled in Table 2, using a nominal year-on-year reduction in budgets.

This is overlain by two other financial projections for re-engineering. One scenario plots a projection that suggests the financial position plateaus based on the funding level at Year 5 – and that through a range of means no further reduction in annual income is seen. The ways of maintaining financial levels might be through an inflation-proofed fixed budget, or through securing other sources of revenue via other grant-funders, or by means of increased income generation. The other scenario implies not just a plateauing of funding but growth, again by means of a range of mechanisms.

If a museum service were to be reformed within a Trust framework what is the likely projection? One of continual financial decline, one of stabilisation, or stabilisation followed by growth?

More than money

One of the questions that must be posed prior to any outsourcing option is whether the organisation is viable in financial terms. Some local authority services have been pared down too far to be viable in terms of growth and even maintaining the status quo is problematic.

We strongly agree with conclusions in the MLA report which states that the key objective for moving to Trust status should be the intention to develop the service and improve its quality of delivery. We see the move as primarily one of organisational development, such that the continuous improvement of services for public benefit can be most efficiently, effectively and economically delivered.

Many museum services have responded to the challenges of CAA, CPA, and Best Value and have shown, and are continuing to show improvements – although as with all improvement issues the law of diminishing returns will impact at some point. Key questions upon which to assess the merits of a service transfer are:

- Will the service improvements continue?
- What is the likelihood of even greater improvements?



Table 3

### Theoretical model: continuous improvement



This basic premise is modelled in Table 3 above.

This sort of graph could be expected for any of the following measures of success:

- general effectiveness;
- general efficiency measures, such as costs per user, or costs per programme;
- user numbers;
- satisfaction ratings;
- value for money measures;
- numbers of services delivered;
- number of partnerships secured; and
- public awareness of services.

The above suggests that it is important to assess the reasons for considering moving the services to a Trust:

- What is the motive for the move: financial or continuous improvement?
- Do all the stakeholders agree with this or do they have other reasons for encouraging thinking about a transfer?

Understanding and stating the reasons for considering a transfer can be critical to its development as a realistic option. This is because problems will arise if different stakeholders have different reasons and motives for the potential change. Mutually agreed reasons are essential; or at least an understanding of each others perspectives even if they are not fully congruent.

As has been identified in the MLA Report on Trusts, there can be a number of reasons which can mitigate against the establishment of a Trust regardless of the overall outcome of an options assessment. According to the MLA Report these can include the following:

- legal – complex legal issues to overcome;
- financial – insufficient savings for the local authority;
- local authority-wide impact – the effects on the corporate centre and perceived difficulties in disentangling support services;
- political – opposition to devolution in any form;
- emotional – strong ties to the museum and its collections (equivalent to ‘selling the family silver’);
- opposition from stakeholders – eg friends groups;
- current success – outsourcing is often seen as an option for failing services only;
- other priorities – better to focus resources on other development opportunities;
- lack of capacity – staff already committed to other activities;
- change of key personnel lack of a ‘champion’ to drive the project through at officer or member level; and
- unhappy previous experience.

Throughout this guide we stress the importance of good communications – the need for honest information, for consultation and generally involving people in the process and the thinking and discussing impact. Many of the issues noted above can be alleviated with proactive, timely communications. We discuss this further in Section 6. The next section explores assessing where your service is at the present time, so you can assess strengths, weaknesses, opportunities and threats and thus develop a range of possible options for change.

## 2. Your present position and aspirations

### Introduction

As with all possible major changes to an organisation, it is crucial to assess where you are at present as well as where you wish to be.

Part of this analysis of the present and thinking about the future could include the fundamental questions of:

- What matters to you?
- Why do you do what you do?

### Aims and intentions

Being clear about what matters to your museum service and why you do what you do will help with setting overall aims and intentions for any governance changes. As noted earlier, different stakeholders can have different reasons for pushing (or resisting) the Trust option. Ideally agreement is needed, but if the drivers for change are varied then they need to be articulated and understood. This is essential or the results of your deliberations are less likely to be openly received as the various stakeholders risk disappointment as their expectations are not met. For example, the range of aims could include:

- to secure a sustainable future for the museum service;
- to provide savings to the local authority;
- to ensure continuous improvements to services;
- to encourage effective partnership working;
- to reach new audiences;
- to achieve freedom to operate in an entrepreneurial and timely manner such that opportunities can be seized; or
- a mix of these.

In addition to these aims there will be underlying issues associated with a transfer which may matter greatly to your service's key stakeholders. These issues must be

carefully considered and addressed within your deliberations as their resolution (or lack of resolution) will have an impact upon your stakeholders reactions to your proposals and recommendations.

We have listed some of these issues below:

- having regard to the interests and concerns of staff;
- the need for ongoing democratic accountability;
- the protection of the collections;
- the creation of a true partnership with the local authority with due recognition of the authority's strategic vision for services;
- continuing to work with local communities, responding to customer needs and the delivery of social inclusion agendas; and
- ongoing involvement with existing interest groups (such as existing trustee bodies, or friends groups).

### Current position – 'business' issues

In general terms you need to assess four areas:

- your strategic context;
- your operational performance;
- your financial performance; and
- your legal position

These are all interlinked, especially the operational performance and financial position but the latter is perhaps the area that needs most careful consideration hence we list it as a separate element.

Another way of looking at your present position is to think about your 'assets' with an associated question:

- Are your assets actually assets or in are they in fact liabilities?

This suggests thinking about the following key areas:

- collections;
- buildings (and grounds);
- staff (and volunteers);
- money (income and expenditure, revenue and capital); and
- governance and leadership.

#### **Your strategic context**

Whether your museum service is a Trust or not it will need to respond to, and contribute towards, meeting the goals of key funders. This could be the local authority's core objectives, or DCMS's targets, HLF's strategic goals or MLA's goals.

This is part of the process of determining what matters to your museum service and its funders. It is also part of the process of thinking about the environment within which you operate, the agendas to which you need to respond and identifying changes on the horizon that may be coming your way. It again suggests issues to which you may need to respond.

An assessment of this context is necessary as it is a critical element in weighing up the benefits of your options (key stakeholders' strategic aims should influence the drafting of your options assessment criteria). The suggested changes to your governance can then be assessed in terms of their effect upon meeting the expectations of your strategic context – will the changes improve the service's ability to contribute to these strategic goals?

#### **Operational performance**

You are likely to have a range of information already available to help with a reflective review of your current position. This could include:

- CPA and audit-related assessments;
- customer satisfaction surveys;
- other market and audience research;
- evaluation studies;
- complaints feedback; and
- benchmarking studies.

All of these can be used to help identify where you might offer improvements to services and the implications these changes might have on the organisation and the costs of running the service. They may suggest that a change in governance might also need to be accompanied by capacity building, developing new skills, greater expenditure on programming, re-focusing budgets, and so on. All of this can help with developing and assessing options for the service.

#### **The full costs of providing the present service**

Part of assessing your current position is a detailed interrogation of the full costs of providing the museum service. Local authority museum services' annual budget break-downs rarely cover the full extent of all of their costs.

Support for the running of the service will be coming from a number of other service areas, groups, individuals and service contacts, whose costs may be borne by other departments or other service providers.

Some of this support will be more transparent than others and may be listed as 'central services'.

**Table 4****Example of indirect costs of museum services**

Strategy development  
 Senior management support (ie support from management tiers above the head of service)  
 Personnel support/HR (including health and safety, policy development, negotiation)  
 Training  
 Accountancy services (including payroll)  
 Internal audit  
 External audit  
 ICT provision and support (including helpline support)  
 Legal support  
 Insurance  
 Postal services  
 Print services  
 Asset management support (including maintenance, condition surveying, architectural services)  
 Centralised procurement  
 Marketing and press  
 Market research

To get to the true costs to the local authority of providing the museum service all of these costs need to be quantified. Table 4 shows a list of the types of support areas to be assessed and, as different local authority's can have different arrangements, we have listed these by task areas rather than budget headings, departments or service areas.

**Funding sources**

A key issue for many services is the level of unsustainable funding support they rely upon. This may relate to specific staff posts or project/programming activities. There needs to be a distinction between the ongoing revenue costs of the museum service and time-limited funding. It may be that some of the time-limited funding needs to become 'core' funding and so the costs of running a sustainable service may be higher than the present budget allocation suggests. For example, at the time of writing this guide some Hub museums have education posts funded by Renaissance. These are posts that can be argued to be 'core' as without them the education service would be severely compromised.

An assessment of recent capital projects might also be useful in terms of thinking about future opportunities and partnerships.

**Condition of the buildings**

Many local authority museum services have to deal with a legacy of dilapidation and a lack of capital investment in the fabric and infrastructure of the buildings and grounds within which the service operates. An assessment of this legacy is important and needs to include:

- the capital needs: in a prioritised format, perhaps as a capital asset plan, with the costs of putting defects right. It will be extremely helpful to commission condition survey's at this early stage to inform the feasibility study and pre-empt negotiations

concerning future landlord/tenant repair and maintenance responsibilities and associated costs;

- maintenance needs: an assessment of what is needed as well as what is actually provided and forward projections for the next five years or so;
- conservation plans: consider whether a conservation plan is more appropriate to your circumstances than a condition survey and maintenance programme; and
- the consequences of non-investment in the short, medium and long term.

**Legal issues****Potential restrictions on transfer**

There may be legal issues which impact on the ability to transfer the service to a Trust including for example:

- **prohibition on alienation or restrictive covenants on the museum properties:** it is likely that there will be restrictions on leasing all or part of the buildings to another party or restricting the use of the building;
- **restrictions on assets/collections:** it is also likely that there will be certain collections that are subject to specific terms and conditions which might restrict alternative management options eg, special trusts, permanent endowments or specific terms attached to gifts;
- **existing Trusts:** it is common for collections or particular items within a museum to be held on special trusts which again may restrict management options for the collections; and



- **ownership of assets:** it is possible that the local authority does not own the museum buildings freehold and/or have legal title to the collections for example where the collections have been loaned to the local authority. Similarly, certain items have been purchased by a 'friends group' and donated to the museum. What is the status of this gift?

None of these legal issues are insurmountable. However, it will require additional work and consultation with legal advisers and potential parties to agree a way forward.

A lease, for example, is not fundamental to a museum transfer and a licence would be sufficient. However the significance of a lease is that it creates a presumption of occupation. In other words by granting a lease to the Trust, the Trust is presumed to be in occupation of the building and thus liable to business rates. As a charity (or a 'not-for-profit' organisation) it can apply for rate relief thus releasing potential resources currently applied by the local authority to meet the rates liability. These 'released resources' can be used to reinvest in the museum service to help drive service improvements. However, a similar argument can be structured around a licence if a leasehold interest cannot be guaranteed.

#### **Safeguarding the collections**

In a transfer of museum services to a Trust, it is imperative that the collections are safeguarded in perpetuity. If legal title to the collections is transferred to the Trust as part of the service transfer, then the collections will be in the ownership of the Trust. The significance of this is that if the Trust got into financial difficulties, then the collections would be treated as an asset of the Trust and could potentially be seized by the insolvency practitioner to settle outstanding debts and other liabilities. This would therefore put the collections at risk.

The recommended way forward therefore is that the local authority retains legal title to the collections or, where the collections are loaned to the local authority by a third party, the local authority remains as 'custodian trustee'.

The local authority then loans the collections to the Trust for the duration of the partnership arrangement.

The Trust would be responsible for the management of the collections and the local authority would set out its expectations in this regard in a 'Loan Agreement' which the parties would enter into.

The Trust would also be responsible for the maintenance of the collections and there would be express obligations in the Loan Agreement dealing with:

- third party loan arrangements;
- acquisitions;
- disposals;
- special displays;
- use by the local authority;
- inventory;
- security;
- insurance; and
- storage.

Most importantly, in the event that the Trust ceases to exist or to provide museum services to the local authority (for whatever reason) then the Trust would be under an obligation to deliver up the collections to the local authority and would cease to have any right to manage the collections. In such circumstances it is anticipated that the lease for the museum facilities will also automatically terminate.

Of particular relevance here are the powers to:

- enter into arrangements or agreements with any person;
- provide financial assistance to any person; and
- provide staff, goods or services.

In exercising the power a local authority must consider the objectives and priorities contained in their Community Plan.

Whilst Section 2 of the 2000 Act provides a robust statutory basis for this initiative, it is essential that:

- the local authority considers the objectives in its Community Plan to satisfy itself that the use of the wellbeing powers in relation to this initiative are consistent with the Plan's broad objectives; and
- the local authority is satisfied that the initiative is likely to promote the wellbeing of their area or their inhabitants and specifically that it will promote one or more of the three objects in the 2000 Act; and
- the primary purpose of the initiative is not to raise money and that the action is not explicitly prohibited on the face of other legislation.

Here it is argued that the use of the powers is not to raise money or prohibited by any other legislation but rather to secure the significant advantages of working with a Trust as highlighted in Appendix A of this guide.

It is strongly recommended that you review your Community Plan during the feasibility stage of the options appraisal to ensure that it contains express reference to "working in partnership with not-for-profit organisations to improve service delivery" and specifically identifies looking at alternative management options for museum services.

Details relating to local authority powers are set out at Appendix J.

### Local authority powers

Clearly it will be necessary to satisfy the local authority's in-house legal team that the local authority has the power to support alternative delivery options for museum services and specifically to enter into partnership arrangements with a Trust.

Local authorities have both general powers (Section 2 of the Local Government Act 2000) and specific powers (Section 145 of the Local Government Act 1972). This 'power base' provides the local authority with sufficient powers to enter into contractual arrangements with a Trust and to provide financial (and other assistance) as required in relation to providing the services.

Local authorities will be aware of the recent case\* (the *Brent Case*) which considered the extent and use of the 'wellbeing powers'. Whilst the 'wellbeing powers' are widely drawn and intended to facilitate innovative projects, the case helpfully provides guidance on the use of the power and most importantly reinforces the extent of the power. This particular case found that the argument that potentially lower insurance premiums for the authority could result in additional resources being available for reinvestment in services, was not sufficient to justify the use of the wellbeing powers.

Section 2 of the Local Government Act 2000 (the '2000 Act') provides that a local authority has the power to do anything which they consider is likely to achieve any one or more of the following objects:

- the promotion or improvement of the economic wellbeing of their area;
- the promotion or improvement of the social wellbeing of their area; and
- the promotion or improvement of the environmental wellbeing of their area.

\*R (on the application of Risk Management Partners Ltd) v. Brent London Borough Council also known as Risk Management Partners Ltd v Brent London Borough Council and Others (2008) All ER (D) 302 (Apr) (2008 EWHC 692 (Admin))

### 3. What are your options?

To help with exposing the advantages and disadvantages of any major organisational change a cold look at options can be useful; this is a key part of the first stage of assessing the potential of a transfer.

Starting from why a transfer is being considered, your strategic context, where you want to be, and where you are at present, then you can sketch out descriptions of the types of organisations to be considered within an options appraisal.

We recommend four or so options be described – you could do more but the more you have, the more they tend to be sub-sets of another. As the first step is to look at the principle of which type of governance model offers most in terms of meeting public benefit, too much detail can be unnecessary. One of the options must be the status quo.

#### Possible options

Your options need to fit the opportunities offered by your local environment. However, past experience suggests that there are a number of common options others have considered and we have described these below:

- **Option 1:** The status quo ie no change to the governance arrangements.
- **Option 2:** A new stand alone Trust ie where a new local Trust is established to manage the museum service. The staff would transfer to the new Trust and the local authority would enter into various contractual arrangements with the new Trust setting out the terms and conditions of any funding, the management arrangements for the collections and key operational issues relating to staffing matters and performance standards.

- **Option 3:** An arrangement with an existing Trust to manage the local authority's museum service. The staff would transfer to the existing Trust. The existing Trust would already have in place an executive team and support service function so there would be no need to duplicate these functions (and costs). The local authority would enter into various contractual arrangements with the existing Trust relating to the funding, management and operation of the service.
- **Option 3a:** An arrangement with an existing Trust but where the existing Trust establishes a new local Trust for that particular local authority's museum services (as part of a group structure). Staff would therefore transfer to that local Trust entity and the local authority would enter into various contractual arrangements with the new Trust setting out its funding, management and operational requirements. There would be a sharing of overhead costs and 'head office' services.
- **Option 4:** Transfer of the services to a new or existing cultural Trust involving a wider portfolio of cultural services including arts, heritage, cultural, leisure as well as museum services.
- **Option 5:** A contract with a private sector operator.

#### Describing the options

You need to describe the options with enough detail such that any underlying assumptions (and potential costs or savings) can be exposed and made explicit rather than be implicit.

We offer three examples below:

### Example 1: The status quo option

This option is based on the present service provision. The assumptions associated with this option could include the following:

- ongoing budget pressures and a potential decline in allocation over time;
- dilapidation issues unlikely to be comprehensively addressed;
- potential rationalisation of the number of sites due to increasing financial pressures and their impact on service provision;
- no significant increase in earned income;
- external project funding uncertain; and
- potential impact on ability to retain/attract good staff.

### Example 2: A new stand alone trust

This option is based on the assumption that a Trust is established for the running of the museum service. The advantages and disadvantages of the Trust option and different Trust vehicles are set out in full in Appendices A and B.

It is important to stress that any benefits of Trust status do not arise automatically from the legal status or the structure of the organisation alone. They depend on leadership, organisational culture and people's willingness to embrace change more than on legal and organisational structures.

The assumptions associated with this option could include the following:

- a new Trust is established through a high profile/professional trustee recruitment board;
- its primary objective or 'business focus' is to develop museum services in your particular locality (either by express reference to the museums themselves or the geographical area or potentially both);

- the Trust is a charitable organisation (registered charity if a company limited by guarantee or an exempt charity if an industrial and provident society) to maximise potential NNDR, VAT and tax savings;
- the properties are leased to the Trust resulting in NNDR savings;
- the Trust acts as principal for the services thus maximising VAT exemptions;
- lease arrangements allow the Trust to keep capital receipts from the sale of sites (or agreed proportion of capital receipts) to enable redevelopments (and linked to the capital needs noted above);
- the existing museum staff transfer under TUPE to the new Trust. The new Trust seeks status within the local government pension scheme to protect the staff's existing pension provision;
- a grant, with an inflation allowance, is provided by the local authority and is in the form of a rolling three to five-year programme with regular annual reports to the local authority;
- the grant is based on the current baseline and also includes the transfer of savings from rates and allocation from central charges to allow the museum service to secure the support services it needs (based on Best Value criteria);
- the partnership agreement with the local authority is based on outcomes (rather than activities or processes);
- external project funding is secured for the first three years of operation but cannot be assumed beyond that time;
- other externally funded projects are increased slightly from present levels;
- dilapidation issues are significantly addressed;



- expenditure is increased due to need for designated skills and services: these include the additional costs of a Chief Executive Officer as compared to a Head of Service, financial services (including a senior manager, payroll, and audit), HR, ICT support, legal, estate and building management and uplifts to the marketing, audience development and training budgets;
- a central charge reallocation is included within the grant to the new Trust; this is based on present (and/or recent) costs of services from the local authority to support the running of the museums (this includes management support, HR, finance and payroll, ICT, asset management, legal costs, marketing and research). The Trust agrees to 'buy back' some or all support services from the local authority for an agreed period of time and subject to a service level agreement. The Trust will, however, have to independently source financial and audit advice and have a firm of solicitors who can provide independent legal advice (and if necessary represent the Trust's interests in deliberations with the local authority);
- set-up costs including legal fees, business planning support, recruitment of a Chief Executive and Trustees and Trustee training; and
- the savings (all or part) are reinvested back into the service.

Clearly this narrative description needs to be quantified, albeit it as estimates, to help inform the assessment process. (If an in-principle agreement for a transfer is secured then a full business plan would need to test these estimates and develop more robust cost projections for the new Trust.)

### **Example 3: An arrangement with an existing Trust**

This option assumes a partnership arrangement with an existing museum Trust. Clearly there are now a number of Trusts providing museum, arts and heritage services. It is possible therefore that an existing Trust could operate a wider portfolio of services and extend its existing area of operation to include another local authority's museum service.

This option seems most likely where an existing Trust is operating in an adjoining local authority area or even in a geographical region but strictly this is not a requirement provided you are satisfied that the existing Trust has sufficient resources and can put in place adequate operational arrangements to deliver the required quality of services in your local authority area.

The assumptions associated with this option could include:

- a partnership with an existing charitable Trust (to maximise potential NNDR, VAT and tax savings);
- a proven track record in delivering high quality museum services;
- an opportunity to realise significant savings from a reduction or sharing of overhead costs and economies of scale;
- an opportunity to attract external funding with the help of an organisation with experience and a proven track record;
- an opportunity for staff to join a larger organisation with career progression;
- robust contractual arrangements to ensure the existing Trust delivers your requirements and addresses local issues; and
- governance arrangements which address issues relating to local representation.

### **Exposing your assumptions**

As noted above each option will have a range of underlying assumptions, some of which will be shared across all the options and some will be unique to an individual option. These need to be articulated for a number of reasons:

- they may have cost implications;
- they may have operational implications; and
- they will affect the scoring of the options against key strategic and operational criteria (see section 4).

We have described some typical assumptions and their impact below:

### **New costs**

These include any new resources needed by a Trust as compared to a local authority's museums service, such as:

- new posts and their costs; and
- the cost of providing new services to be purchased from others.

These could include the costs of a Chief Executive (generally at a salary higher than that of the head of museums service), a senior finance post, HR support, ICT support, uplift in marketing provision, training budget, estate management, and so on.

These new costs can be off-set by the cessation of the local authority's central (and departmental) service costs associated with the provision of the museum service. This requires that the local authority takes on board the consequences of reduced central service provision. However, the benefit is that the potential central service cost savings and the rate rebate savings are generally greater than the additional costs of running the museum service as a Trust, providing a net saving to the local authority.

### **Improvement initiatives**

Ideally any partnership agreement will be outcomes based, rather than being based on activities or processes. So, for example, the agreement might include building audiences including the increased use of the service by community groups by 15% over three years, not providing ten community events a year.

The outcomes may have cost implications. So, for example, if one of the agreed partnership outcomes is to increase level of use then this is likely to have programming, marketing and possibly staffing implications, all of which can have associated costs. In other words the aspirations for the service need to be matched with suitable resources including staffing levels, training, programming and marketing.

### **Leasing arrangements**

Any assumptions about the leasing (or free-hold transfer) agreements with the local authority for the buildings and sites need to be made explicit. This could be linked to a rationalisation programme and could include an agreement about capital receipts for any sales to be used by the Trust in the pursuit of its charitable objectives.

### **Earned income**

This could include assumptions about levels of spend per head, franchise arrangements with caterers, room hire fees and so on. Benchmarking with others might help with this set of assumptions. You might also do two sets of assumptions: one based on a readily achievable projection, and the other a realistic target. It can be difficult for museum Trusts to create income generation as, unlike leisure, there are fewer opportunities to do so. However, Trusts which invest in staffing, improved training and qualifications for staff, management development programmes and customer care programmes have seen real results in terms of improving the service and so maximising any potential at the facilities for income generation.

### **NNDR savings transferred to the new Trust**

The local authority will currently pay business rates or National Non Domestic Rates ('NNDR') on all of its properties including the museums. Charities and certain 'not-for-profit' organisations are relieved in all or part from NNDR thus reducing this cost of delivering the service. This generates a potential saving that can be reinvested in the service. The arrangements need to be carefully structured to maximise these potential savings. There are principally two types of NNDR relief relevant to these types of projects:

- mandatory rate relief; and
- discretionary rate relief.

Details relating to these different types of relief are set out in Appendix L. A summary of the potential reliefs is set out below:

#### **Mandatory Rate Relief**

Section 43 of the Local Government Finance Act 1988 provides that charities pay only one-fifth of the rates that would otherwise be due, if the rate payer in occupation:

- is a charity or Trustee for a charity; and
- the property liable to be rated is wholly or mainly used for charitable purposes.

Where the rate payer is a registered charity under the Charities Act 1960 (as amended) it will be entitled to mandatory rate relief automatically. However, non-registration under the Act is not conclusive as to the non-charitable status of the rate payer and the charging authority has to determine whether the rate payer qualifies for the relief, applying appropriate case law and statutes.

If the new NPDO is a registered charity, it would therefore be entitled to 80% relief from the business rates levied on the premises.

#### Discretionary Rate Relief

A charitable NPDO would also be entitled to further relief from rates if the Council decides to exercise its discretion under Section 47 of the Local Government Finance Act 1988. There are three instances where discretionary rate relief is available:

- 1 where the rate payer is a charity or Trustee for a charity and the hereditament (the property liable to be rated) is wholly or mainly used for charitable purposes. If granted, relief may be given beyond the mandatory 80% rate relief;
- 2 where the rateable property is occupied for the purposes of one or more institutions or organisations, none of which is conducted for profit and each of which main objectives are charitable or otherwise philanthropic, religious, or concerned with education, social welfare, science, literature or the fine arts; and
- 3 where the rateable property is wholly or mainly used for purposes of recreation and all or part is occupied for the purposes of a club, society or other organisation, not established or conducted for profit.

This will be determined by reference to the local authority's discretionary policy.

The crucial issue, however, is whether or not the property can be regarded as being 'occupied' by the NPDO for the purposes of the rate relief. The issue of occupation applies to both mandatory and discretionary rate relief.

#### VAT and tax savings

For most local authority museum services the transfer to a Trust is generally treated as a VAT neutral issue. This is because the level

of trading activities are rarely large enough to see a significant benefit. However, if major capital works are likely in the near future then recouping VAT can become an issue. As part of the options assessment VAT implication needs to be noted and as a Trust the service would be able to benefit from other reduced rates and relief as follows:

- trusts only pay VAT at 5% on fuel and power. This could well be a significant saving for all the facilities on the basis that although at present the local authority can recover the VAT, the Trust will be able to recover only part of it. The reduced rate means that the irrecoverable amount is less;
- trusts do not have to pay the climate change levy;
- trusts are eligible for zero rates of VAT on purchases of all advertising, including recruitment advertisements and other publicity which could amount to an additional saving of £10,000 to £20,000;
- trusts are eligible for zero rates of VAT on adaptations to allow disabled access to buildings; and
- trusts (registered charities) do not pay corporation tax and can reclaim tax on gift aid donations from individuals. This could provide additional benefits through (say) an annual membership arrangement for your museum service.

Should a local authority be minded to consider further the transfer of a museum service to a Trust then the implications of the above will need to be incorporated into a full business plan as part of the detailed planning phase. This would require an in-depth analysis of VAT implications for both the Trust and the local authority.

A key VAT issue will be whether the funding from the local authority is treated as a VATable supply. This could potentially improve the Trust's VAT position and thus should be examined carefully. Most Trusts have successfully agreed that the funding received from the local authority is a VATable supply.

A detailed examination of the VAT position in relation to the Trust option is set out at Appendix K.

#### Maintenance backlogs and capital commitments

This needs to expose any assumptions about a local authority's ongoing commitment to dealing with any outstanding building dilapidation issues. It could be that a commitment is offered over an agreed time period and could be used to secure match funding from other potential funders, such as HLF or the Arts Council.

## The sites

Any assumptions about the new organisation's ability to control the transferred portfolio of sites need to be exposed. For example, there are times when the buildings and sites instead of being assets are liabilities; it could be that some sites cost far more than others to run, or it could be that some sites have far fewer visits than others. The new organisation might need to make some fundamental decisions about the more costly, less well used sites and the mechanisms for resolving these issues need to be described. There might also be an assumption that the Trust can use receipts for the sale of one site to develop others; if so the mechanisms for dealing with this in an equitable and agreed manner with the local authority also need to be described.

## The overall portfolio

Although in this guide we are talking solely about museum services, it is recommended that when undertaking the options appraisal consideration is given to a wider range of cultural services. This could be for two strategic reasons:

- Synergies in customer needs, operational needs or collection areas; and
- subsidising museum costs by incorporating a more 'profitable' but linked service area.

Others have considered a broader portfolio of services to be transferred to a Trust. This could incorporate some or all of the following services:

- Leisure
- Cultural
- other historic/heritage sites
- parks and open spaces
- theatres
- archives
- contemporary arts programming/public art
- tourism

In our experience, local authorities are increasingly considering transferring a wider portfolio of cultural services to a Trust.

Whilst a wider portfolio has the advantages highlighted above, the most significant potential disadvantage of a wider portfolio is the potential loss of focus. Having said that there are examples of Trusts combining arts, heritage, leisure and culture working extremely well.

## Economies of scale

Any assumptions about working with others such that economies of scale can be offered need to be explained; this might be shared stores, shared HR activities or shared ICT support.

## External funding

This needs to look at what is presently provided by external funding sources and the likelihood of this continuing (eg Renaissance in the Regions) and the opportunities for other similar support.

Care is needed when thinking about a new organisation's potential to secure private and other finance. There has been a degree of misplaced optimism about securing funding from private donors and charitable givers. Many of the recently devolved museum services have found securing funding from these sources to be harder than they anticipated. However, they acknowledge that these are potential sources of additional funding and are still actively developing their relationship with such potential givers.

The new Trusts do show success in gaining additional funding from public funds. This is the result of a mix of factors: quicker response times; more focused responses; building upon proven success; and developing very positive relationships with their funders.

We set out below other sources of external funding, beyond the local authority:

- A Trust can borrow funds independently of the local authority. A Trust would have access to loan finance from banks and building societies on the same basis as private commercial companies. The Trust would also have access to shorter-term loan finance such as an overdraft facility. This would be useful in meeting pressures on cash flow, which may occur due to seasonal changes in trading or through having limited cash reserves.



- Without a track record, a new Trust may experience some difficulty in obtaining a loan in its early days. However, organisations with charitable objectives may also access alternative sources of loan finance such as Community Development Finance Institutions. These institutions provide investment for social purposes (social investment) and provide finance for projects that would not always be supported by commercial lenders. This is rapidly growing as a new source of finance to charities and social enterprises through support from Government.
- Charitable Trusts have access to a wide range of new sources of funding available only to charities. Grant-making Trusts and foundations will fund work with particular client groups, new projects and specific areas of work, such as visual arts. Part of the Big Lottery Fund is distributed only to charitable organisations and a Trust would be eligible to apply to the Big Lotteries Fund, and the successor merged body. The Association of Charitable Foundations reports that UK Trusts and foundations number almost 10,000 and contribute an estimated £2 billion in grants annually to charities.
- The Government is looking for initiatives which will assist them to deliver public services in the areas of health and social care, crime and social cohesion, education and learning, and support for children and young people. One of these is future builders, a one-off investment fund, specifically to assist voluntary and community sector service providing organisations in their public service work.
- Companies, particularly high street stores, banks and building societies, have an active involvement in their local communities and provide grant support to the voluntary sector. There is also potential for generating funding from the business sector through commercial sponsorship arrangements.
- Gift aid is available on donations to a charitable activity. Museums are a key component of a vibrant city, or region, and a Trust may well be able to gain further support from individuals to increase its voluntary income (through donations) as suggested in the MLA report. In addition a Friends organisation for any Trust could utilise gift aid to fund discrete areas of work.
- More emphasis is placed on fundraising from sponsors, donors and charitable Trusts. Although local authority museums and galleries nationally have been successful in raising such funds via Friends or similar organisations, a charitable Trust is generally better placed to attract such funding. However competition is fierce and large sums have to be worked for, particularly as there is significant regional competition.

### Set-up costs

The transfer of the museum service to a Trust would have significant set-up costs, including:

- legal costs (for the Trust and possibly the local authority) for the preparation of the governing document, the funding agreement, the asset transfer agreement, the collections agreement and any leases and/or licences. Also advising on the TUPE process and pension issues;
- business planning support including detailed VAT assessments;
- restructuring costs;
- recruitment of a Chief Executive and other staff (if required);
- recruitment of Trustees and chair of Trustees;
- actuaries fees;
- development of a new corporate identity and costs of uniforms/signage/stationery etc;
- launch costs; and
- trustee training.

If a local authority wishes to pursue a transfer further then these costs, and an agreement as to who pays for them, would need to be addressed in the next phase of a transfer (the detailed planning phase).

In our experience, set up costs are in the region of £75k to £125k depending on the level of external legal, financial and business support required. These will be 'one off' costs in year 1 only and can be set against year 1 savings.

## 4. Options assessment – is a trust the right option?

The aim of doing this sort of options assessment is to offer a degree of objectivity to the process and provide information to help with sound decision making. The basic aim being to see if transferring the museum service to a charitable Trust makes good sense, fits your circumstances and will allow the service to better meet its potential for your audiences. Key questions are therefore to ask yourself (and others):

- What matters to you?
- Why are you considering a Trust?
- Will the new arrangement build upon your internal strengths and mitigate against your weaknesses?
- Will the new arrangement enable you to exploit external opportunities and mitigate against threats?
- What are the advantages and disadvantages of any new arrangement?

### Assessment criteria

Basically the criteria will be a list of what matters to you: what matters to the museum service, what matters to the local authority, what matters to the sector.

In past assessments we have found the following questions can help with the initial feasibility stage assessments as they can be used to expose areas of concern, and/or unexpected benefits (see Table 5).

It is likely that this long list of criteria can be grouped into key headings. For example it may be that what mattered most is a series of development and improvement issues that can be grouped into the following four headings:

- Strategic context
- The heritage in your care
- Organisational development
- Outcomes and impact

### A scoring method

To help with this process of assessing the core options available to you we have offered an example that allows you to see the relative merits of each option in a systematic manner. This uses grouped criteria (as noted previously), a scoring method and a weighting method (both described below). The aim being to offer an objective, cold assessment of the options.

The options, once described, can be compared against each other by means of a scoring system. The scores can be based on thinking about how each of the options might be performing in five to seven years' time in relation to your criteria. With the scores being 0 for no change from present, -5 being the worst possible outcome, and +5 being the best possible outcome.

Each option can then be assessed based on a series of questions (Table 5). So, for example, an assessment of the options in terms of, say the heritage in your care, could be based on the following questions:

Will this governance arrangement enable the museum service to:

- maintain and improve the stewardship of the collections?
- maintain and improve access to the collections?
- maintain and improve the knowledge management of the collections?

The status quo option might result in a score of -2 for stewardship because your stores have poor environmental control and no improvements are planned for the foreseeable future, so in five to seven years time the condition of the collections is likely to have deteriorated.

The scoring sheet in Table 6, as an example, includes a weighting for each of the key criteria headings. We have done this so that the relative scores for each option can be seen and can be considered in a little more detail than just an overall score.

**Table 5**

**Key questions**

1. Will this option offer value for money?
2. Will it offer added value and in what way?
3. Does it involve closures?
4. How well will it handle any current problems with the service?
  - will it create new problems?
  - such as?
5. Will it deliver partnerships?
6. Will it deliver capital investment?
7. Will it ensure the best possible staffing arrangements?
8. Will it deliver high quality customer services?
9. What will be the reactions of?
  - the public?
  - the politicians?
  - the museum/art/heritage sectors?
  - pressure groups?
10. Is there evidence that this works elsewhere?
11. Will it enable audience development?
12. Does it protect the service from ongoing budget reductions?
13. Does it offer opportunities for developing other ongoing revenue streams?
14. Do all the elements of the present service fit?
15. Does it make sense for other service areas to be included within the transfer portfolio?
16. How well does the option meet the vision for the service in seven years time?
17. Will it help meet targets?
18. What are the revenue implications for the next five years (on a year-by-year basis)?
19. What are the capital investment requirements?
20. Is investment required from
  - the local authority?
  - the private sector?
  - other public sector?
21. When could this option be implemented?
22. How long will it take?
23. Who needs to be involved?
24. What external help do you need?
25. Are there any HR implications?
26. Are your present operational budgets sufficient?
  - based on what benchmarking?
27. Is a restructuring needed?
  - and if so when?
  - and at what cost?
28. What will be the impact on visitor numbers?
  - What are the projections for the next five years (on a year-by-year basis)?
29. Can income be increased?
  - secondary spend?
  - events?
  - other commercial developments?
30. Does it offer opportunities for partnerships?

Table 6

## Options scoring matrix

Criteria	Option 1 (status quo)	Option 2	Option 3	Option 4
<b>Strategic – will this arrangement enable the museum service to:</b>				
Better meet its vision, mission and core objective? (focus and fit for purpose)	-2	2	3	2
Better meet the core objectives of the local authority? (List the local authority's objectives)				
Objective 1	0	2	2	3
Objective 2	-3	2	2	3
Objective 3	0	2	2	3
Objective 4	0	1	2	3
Objective 5	0	1	1	2
Strategic score total (maximum of $\pm 30$ )	-5	10	12	16
Strategic score weighted (maximum of $\pm 100$ )	-17	33	40	53
<b>Heritage – will this arrangement enable the museum service to:</b>				
Maintain and improve the stewardship of the collections?	-2	2	3	1
Maintain and improve access to the collections?	-2	2	3	1
Maintain and improve the knowledge management of the collections?	-2	2	3	1
Heritage score total (maximum of $\pm 15$ )	-6	6	9	3
Heritage score weighted (maximum of $\pm 100$ )	-40	40	60	20
<b>Organisational development – will this arrangement enable the museum service to:</b>				
Be suitably resourced with freedom to use to best effect?	-3	3	2	2
Develop a more secure and sustainable revenue base?	-2	3	3	2
Offer opportunities for further capital developments?	0	3	3	2
Respond quickly to opportunities?	0	3	3	2
Develop an adaptable 'can-do' culture?	0	3	3	3
Develop new services as well as maintaining existing?	0	3	3	2
Develop new partnerships as well as maintaining existing?	0	3	3	3
Organisational development score total (maximum of $\pm 35$ )	-5	21	20	16
Organisational development score weighted (maximum of $\pm 100$ )	-14	60	57	46
<b>Outcomes and impact – will this arrangement enable the museum service to:</b>				
Maintain and broaden its audiences?	-2	3	3	3
Contribute to the wider social, economic, educational and cultural agendas?	-2	3	3	3
Enhance meaningful engagement that will make a difference to people?	0	3	3	3
Better meet personal, community, specialist, and social needs?	0	2	2	3
Secure its role as a key agent for social and economic regeneration?	-2	2	2	3
Outcome score total (maximum of $\pm 25$ )	-6	13	13	15
Outcome score weighted (maximum of $\pm 100$ )	-24	52	52	60
Total weighted score for the option (maximum of $\pm 400$ )	-95	185	209	179

So from this example you can see that the overall score for Option 3 places it as the best option. However looking in more detail at the main groupings, it scores less well than Option 4 for the 'Strategic' criteria. This suggests it may be worth exploring whether positive elements from Option 4 can be incorporated into Option 3 to further strengthen the benefits of that option.

### More issues to consider

#### Reality checks

An options assessment alone is not enough as there can be critical issues, beyond the control of the museum service, that means that no matter how good an option might score it cannot actually happen. This means that a reality check is needed and this can include an assessment of political will as well as assessing financial implications such as capital need and revenue uplifts. The following table offers a way of summarising some of these issues. We have included some example figures to show how the table might look.

	Option 1 (status quo)	Option 2	Option 3	Option 4
Reality check – is this feasible?				
Now?	N/A	×	×	×
In a year with consultation?		✓	×	✓
In two to three years with a communication plan and detailed planning?		✓	?	✓
In five years?		✓	?	✓
Never?		×	?	×
Capital investment needed	£5m	£5m	£5m	£5m
Expenditure increase (annual)		£250k	£250k	£250k
Income increase (annual)		£100k	£100k	£100k
Annual savings compared to Option 1 (including rate relief and VAT)		£100k	£100k	£100k
Central charge potential annual savings		£250k	£250k	£250k
Set-up costs		£120k	£100k	£80k

### Reserves

Reserves are described as the unrestricted funds of a charity which the charity trustees can make available to apply for all or for any of its purposes.

Whilst there is no specific legal rule about the amount or proportion of the charity's income that it is allowed to hold as reserves, it is strongly recommended that all charities retain some income in reserves.

It will be appropriate therefore for a new Trust to develop a reserves policy and build into its business plan a level of reserves having regard to the reserves policy and in particular the charity's aims, needs and objectives and most importantly the potential risks that it faces.

The concept of reserves can be sensitive during the business planning phase.

However, it should be emphasised the significance of reserves is to:

- help absorb setbacks;
- help mitigate against short-term fluctuations;
- help the Trust plan for growth and/or take advantage of opportunities as they arise; and
- enable the Trust to plan for specific investment projects.

In summary a reserves level should be set after careful consideration of risks and opportunities of the service but most importantly will enable the organisation to operate in a more dynamic and entrepreneurial way and thus deliver better value for money in the long-term.

The Charity Commission produces an excellent guide with regard to establishing charity reserves and clear guidance on determining the level of reserve.

### Board members

A preliminary assessment of potential for establishing an effective Board needs to be made at this feasibility stage. This should include a list of the skills needed and perhaps the range of the people who could be considered. This is discussed in a little more detail in the next section.

### Recommendations

Any recommendations that you develop as a result of your assessments need to take account of both the option scores and reality checks – sometimes the best score is not actually feasible because there is no will (political or otherwise) to do it.

In general, your conclusions need to be measured and transparent with realistic initial/provisional cost projections.

## Cost projections

It may be wise to model the financial assumptions over a five to seven year horizon because the initial set-up costs will affect the first year, income projections will take time to deliver, and disentangling from the local authority's central service provision may take time.

The following sets of figures can be adapted and used to show the net cost implications of running the museum service as a charitable Trust.

Using the figures from the Reality Check table on the previous page and adding a bit more detail, a worked example is offered in Table 7 below:

**Table 7**

### Cost projections

#### PART 1: Costs within the local authority:

Museum service budget	£2,700k
Central (and departmental) service costs	£300k
Full cost of the service	£3,000k

#### PART 2: Trust cost projections:

Base budget (excludes rate rebate)	£2,600k
Additional costs (for direct purchase of services and enhanced capacity)	£250k
Additional income	(£100k)
Grant allocation from local authority	(£2,750k)
Net cost	0

#### PART 3: Council cost projections:

Ongoing local authority costs (contract monitoring, liaison, etc)	£50k
Grant to Trust	£2,750k
Full cost of transferred service	£2,800
Net saving to the local authority	£200k

These savings, as noted above, are unlikely to be fully available immediately upon transfer. A five year cost projection can be used to show how the savings might be recouped: (Table 8).

Table 8

## Five year cost projection

	Year 0	Year 1	Year 2	Year 3	Year 4	Year 5
<b>The Trust's costs:</b>						
Base budget		2,600	2,600	2,600	2,600	2,600
Additional running costs		250	250	250	250	250
Additional income		(20)	(60)	(80)	(100)	(100)
Grant from local authority		(2,830)	(2,790)	(2,770)	(2,750)	(2,750)
Local authority costs						
Set-up costs	120					
Additional costs of Trust (grant to the Trust as compared to Museum Service base budget)		130	90	70	50	50
Rate rebate and VAT savings		(100)	(100)	(100)	(100)	(100)
Central services savings		(150)	(150)	(200)	(250)	(250)
Transition and ongoing central service costs		150	150	100	50	50
Services brought by the Trust		(100)	(100)	(50)	-	-
Annual (savings)/costs	120	(70)	(110)	(180)	(250)	(250)
Cumulative (savings)/costs	120	50	(60)	(240)	(490)	(740)

This particular example offers favourable savings to the local authority (and it can be argued that some of these savings be shared with the Trust for the establishment of its 'reserves'). Unfortunately, as noted earlier, this exercise can expose that a particular service is not viable as a stand alone organisation. If the service's budget has been cut too severely over the past years, or is being subsidised by other unsustainable funding streams, then there will be a serious risk of financial failure as a Trust, or major closures, or redundancies, or all of these.



## 5. Next stages

### Next stages

After an in-principle 'yes' following the feasibility stage of the process, then detailed planning is needed. This includes:

- checking and validating all assumptions; and
- developing the detail of the transfer: the business plan, the legal documentation and the new legally established entities.

The aim of this work is to offer the greatest possible surety about the needs and shape of the new organisation based on its aspirations and what it is expected (and intends) to achieve.

### Organisational change

This can be the most challenging area to explore and expose when considering any transfer of a museum service. It is however also a critical factor to the long-term success of an externalised service. The assumptions (backed by evidence) are that an externalised organisation can be more responsive, more entrepreneurial, more effective, more efficient, offer greater value for money, be joined-up, be focused on delivering excellence of service and be very customer aware so that audience development is implicit in everything the service does.

There are some critical questions associated with these assumptions; questions that may have uncomfortable answers and difficult solutions.

- Is the present organisational structure appropriate to the new organisation and the services it will be providing?
- Is the present skill-base appropriate? What new skills might be needed? What training is needed?
- Is the present capacity appropriate? Are more (or less) people needed?

The answers to these questions will have cost implications. Costs that need to be quantified.

If fundamental change is needed a decision will then have to be made as to whether changes happen prior to transfer, or after transfer. If changes are to be made post-transfer then a decision is needed as to whether the costs of the changes are included within the funding agreement. If the costs are not included then a careful assessment of the viability of the new organisation must be made.

### The Board

Selecting and appointing the right Board members will be critical to the success of the initiative. Time and effort must be put into this aspect of the transfer. It is essential that the authority puts in place a high profile and professional Trustee recruitment programme to ensure that the highest calibre of Trustees are appointed.

Ideally Trustees should not only be knowledgeable of the arts, museum or educational services but also have business, professional or management experience. In particular, it is ideal if the Board can harness additional added value skills including:

- Finance
- Legal
- HR
- Commercial property

Details of a Trustee recruitment programme, together with a draft Trustee advertisement and person specification are set out in Appendices F, G and H.

As part of the Trustee recruitment campaign, careful consideration should be given to identifying a potential chair for the new organisation. The chair will play a critical role in the success of the initiative – particularly in the early years of operation. In addition the chair is likely to be involved in the final negotiations for the transfer and approval of the project documentation including the business plan. Ideally therefore the chair should have corporate or management experience and experience in conducting board meetings. He/she will be the principal point of contact for email, stakeholders, the executive and media. He/she should therefore have a highly credible track record and leadership skills.

### Funding arrangements with the local authority

This needs to note the time period of the funding agreement and its re-negotiation and the basis of that funding agreement: the core budget with uplift related to extra costs (off-set by the savings and reallocation of central charges).

Ideally you should aim for a rolling programme of funding, over a three to five year time span. A five year funding regime would mean that as the funding for Year 1 ends then Year 6 is set, so that the new Trust always has a five year financial planning horizon. This is not an easy option for local authority to agree but the minimum viable option a three year package – with negotiation for the next three starting in Year 2 of the agreement.

As noted in Section 3, it is essential to assess the full costs of the local authority's central (and other support) service recharges. This can be critical to the success of a

transferred service as an agreement is needed such that all, or a large proportion of these costs, are transferred to the Trust so it can buy the services it needs. Examples of central support recharges are set out below (Table 9). Some of these services are easier to disaggregate than others and it may be that some form of phased transfer of funds will need to be agreed. The table below can be used as a tool for assessing a phased approach and this could be adapted to fit the circumstances of any particular museum service and its sponsoring local authority.

### Partnership agreement between the local authority and the Trust

Linked to a funding agreement will be some form of performance expectation from the local authority. This is best configured as a mutually beneficial partnership agreement

such that it recognised shared responsibilities, shared aspirations, shared liabilities and establishes a framework for working as partners in the delivery of excellent museum services. As noted earlier, this means that the partnership agreement should be couched in terms of outcomes rather than activities so that the Trust can develop the best solutions and be flexible in the way it achieves its goals.

### Up to date records

Another series of activities needed during the planning and transfer stages is to ensure that all records are as up to date and complete as possible. This applies to buildings, collections and staff. Some of this will be driven by the detail needed to support the legal documents, and some of this is simply good management and enabling the Trust to start off on as good a footing as possible.

**Table 9**  
**Central support recharges**

Service area	Phase 1: Initial direct transfer of funds to the Trust (£)	Phase 2: Second transfer of funds – within 2–3 years (£)	Service supplied by local authority for agreed period of time
Personnel			
Accountancy			
Payroll			
Internal audit			
External audit			
IT hardware, development & support			
Postal services			
Insurance			
Telephones			
Legal			
Marketing and press			
Market research/consultation			
Strategy development			
Senior management support			
Procurement			
Asset management			
Member support <sup>1</sup>			
Scrutiny <sup>2</sup>			
Transport			
Grounds maintenance			
Totals			

<sup>1</sup>The new Trust will need to provide support for its Trustees so it can be argued that 'member' support costs be transferred to Trustees support costs

<sup>2</sup>The new Trust will need to report to the local authority as the local authority is likely to be the Trust's main funder and as such it is accountable and open to public scrutiny.

## 6. Communicating possible change

Throughout this guide, we have tried to emphasise the importance of open communications both about the process of assessing potential change and the conclusions you are drawing. Failure to communicate these potential changes effectively may impact on the success of any recommendations you may make.

It is crucial that careful consideration be given to the impact of an organisational change of this nature on each stakeholding group. Each group will have different information needs and potentially different 'takes' on a potential transfer and its impact upon them either as individuals, or groups. This will include employees, their representatives, funding bodies, professional organisations, and friends groups, as well as local authority members and officers, not only those involved in museum services, but also employees from service areas whose jobs could be affected by a transfer.

We set out below a suggested communications programme (Table 10). It identifies:

- your key stakeholders;
- what matters to them;
- at what stage you need to communicate with them; and
- what you need to communicate.

We would emphasise however that this is an example only and needs to be tailored to your particular circumstances.



Table 10 Suggested communication programme

Who – the groups	Areas of interest/concern – the assumptions	Key messages to be shared	Why you need to say it	How it needs to be said and by who	When it needs to be said
<b>Elected members</b> <i>Notes: need to gain understanding and involvement rather than presenting a fait accompli</i>	Significant impact therefore Members will have a view on relative merits of the options	What the changes will deliver for the local area and its citizens	Cross-party support for the changes may be needed; full understanding of the implications of action (and no action) needed	Personal briefings for the portfolio holder; member briefing sessions	At the most appropriate times based on decision timing and other local factors
<b>Senior local authority officers</b>  <i>Notes:</i>	Financial and organisational implications	That impact is bearable and overall consequences can be dealt with	Impact on other departments and directorates is possible so needs strategic support from highest level (cabinet and executive)	As and when briefings from Head of Service/ Departmental Director/ supporting consultants	When viability of assumptions need checking
<b>Museum service staff</b>  <i>Notes: a consistent and clear message is needed from a senior manager who listens to concerns and addresses them</i>	Their jobs – will have direct impact on their day-to-day working environment and their livelihood	The changes are for the benefit of customers and to secure a sustainable future for the service	There may be deep concerns about the impact of possible changes and misunderstandings about what the changes may mean	Say it how it is, open forum. Staff meeting style	Regular updates
<b>Volunteers</b>  <i>Notes:</i>	Will have a major impact on their work and working lives	Ditto	Ditto	Ditto	Ditto
<b>Steering group for the transition (if there is one)</b>  <i>Notes: Ongoing, open and honest debate needed. Risks exposed and mitigation strategies developed mutually</i>	This group should be advocates for the process and be able to unblock blocks to progress and resistance to change within the local authority	Describe options and consequences fully so understood, debated and owned	Need to understand the possible changes in relation to the local authority's broader agenda, so no surprises and can act as advocates	Informal progress meetings	At least monthly
<b>Any existing Trustee bodies</b>  <i>Notes: if not informed and consulted then could become very resistant to changes they see to be detrimental to the museums and their collections</i>	The collections (and/or buildings/grounds) and their care and their development	Reassure that collections will not be compromised	Because they will care and they have legal responsibilities	Initial forewarning meeting. Formal briefing sessions	a) Very early in the process, and b) When the options have been assessed

Table 10 Suggested communication programme continued

Who — the groups	Areas of interest/concern — the assumptions	Key messages to be shared	Why you need to say it	How it needs to be said and by who	When it needs to be said
<b>Friends groups</b>  Notes:	Ditto	Ditto and that want the best possible outcome for the service as a public facility	There may be deep concerns about the impact of possible changes compounded by misunderstandings about what the changes may mean	Ditto	Ditto
<b>Other local authority staff</b>  Notes:	Impact on their day to day work and capacity	Relate to delivering the local authority's overall objectives	Concerns will be present and may escalate	Steering groups members and local Directors	Either just prior to a formal report, or at the time of a formal report
<b>People who have donated objects</b>  Notes:	Will care about the collections and what might happen to them	Changes are about securing a sustainable future for the museum service	Because they will care and to minimise the potential for misinformed reactions	a) Initial forewarning meeting and b) formal briefing session	a) Very early in the process, and b) When the options have been assessed
<b>Major funders (including sponsors)</b>  Notes:	Proper management of the organisation and judicious use of funds; maintaining partnerships to mutual benefit	Looking to develop the service and build upon past success and support	Ongoing support and good will needed for success of the service regardless of governance arrangements	Focussed briefing session	When options have been assessed and prior to a report being issued
<b>Local Press</b>  Notes:	Local people will care about their museums even if they don't visit so the Press will take an interest in the changes	Positive outcomes being sought to secure the future of the service	Negative story lines may influence political decisions	Briefing from head of service supported by portfolio holder	Prior to any report being issued
<b>Professional bodies (eg MLA) [NB where appropriate use your own personal contacts with national/regional bodies.]</b>  Notes:	Professional standards being met consistently; sustainability; synergies with other cultural providers; national and regional policies being applied	New organisation will meet their expectations	Ongoing support needed so need to keep informed of developments	Short, focussed meeting to outline options and implications	When options have been assessed

## 7. Reflections from existing trusts

Having spoken to a number of senior managers from recently transferred museum services it seems that some elements of a transfer are more crucial than others. We have summarised these below:

### The selection of the Chair of Trustees

This individual is crucial to the success of the new organisation. The Chair's relationship with the local authority (and other organisations and individuals who are influential within the local area) is critical to the success of the set-up of the Trust and its ability, in the early stages, to establish itself. It is also apparent that how this individual goes about their role as Chair can have a huge influence on the development of the culture and approach of the Trust. This person is key to the delivery of the detail of the nascent Trust – as they are likely to be the 'shadow chair' – and will be leading the recruitment of the first set of Trustees.

### The selection and re-selection of Trustees

Again this can be crucial to the success of the new organisation and its ability to operate effectively within its local environment. The skills and experience of the board can be a hugely important resource for the Trust and in supporting the Chief Executive and the staff in delivering the expectations of the new organisation and dealing with organisational change. Mechanisms need to be in place to enable the Board to be refreshed after an agreed period of time (between five to seven years into the Trust being formed). As the Trust matures as an organisation there is a danger of becoming moribund so new energy and faces within the board can help.

### Financial agreements

Clear, medium-term financial agreements with the local authority, as the Trust's main funding body, is absolutely critical, and generally the longer the term of the agreement the better. If the funding agreement is secured for a five year period then renegotiation needs to start about halfway through so that there is no hiatus – and ideally a rolling five-year agreement should be sought.

Care is needed in ensuring that unforeseen and uncontrollable changes in circumstances can be addressed mutually by the Trust and the local authority. For example, major increases in utility bills can have a major impact on expenditure and so a renegotiation of the base grant with the local authority may be needed and mechanisms for this need to be in place.

### Relationships with the Local Authority

Ongoing good relationships are essential to the ongoing success and influence of the Trust. This relationship needs to be built and nurtured at a number of levels within the organisations: Chair of Trustees and leader of the local authority, chief executive with chief executive, portfolio holder and head of cultural services. Direct interest in the Trust's activities needs to be held at the most senior level within the local authority such that advocacy can be more effective and the Trust's contribution to the local authority's agendas is clearly communicated and understood. Added value needs to be proven at every opportunity so that the grant is seen to be good value and the Trust is worth the local authority's ongoing support. The danger of cuts, even with robust financial agreements, will not go away as local authority's are under huge pressure to reduce costs, and non-statutory services are at most risk. An important issue here is the inclusion of local authorities as Trustees.

As part of the thinking about whether a transfer to a Trust is feasible or not will be to offer projections for the service should it stay within the Council. This model can be used as a baseline to show how the Trust is doing in comparison to the projections for the non-transferred service and be used to indicate value for money.

## Leadership

The appointment of a chief executive with strong leadership skills is essential. This person will be driving the change process and it is a challenging one. Being aware of developing issues within the local, regional and national environments can help with identifying and seizing opportunities for funding and partnerships and service developments. The person appointed to the role of chief executive needs to know how the sector works, have good networks and know how to use those networks for the benefit of the Trust's activities.

## People management

The Trust may not have the resources to have large HR support teams so all managers have to develop and hone their people management skills and their management of performance.

## Inward looking to outward looking

Initially a new Trust will tend to be inward looking as it deals with the immediacy and impact of transferring to a Trust; internal processes, structures, and day-to-day management will preoccupy people's time. As these new ways of working become embedded as a new organisational culture then the Trust's focus can change and instead of looking inward it will be ready to look outward. The focus will shift to developing relationships, building audiences and looking outside the walls of the organisations. This means that the balance of skills for both staff and Trustee may need to shift over time. (From an organisational development point-of-view these are signs of a healthy, confident, learning organisation.)

## Looking back

We set out below a comment from Rodney Hill, Chief Executive of Wigan Leisure and Culture Trust. WLCT was established in 2004 to operate the Council's entire cultural portfolio.

As you will appreciate, when we became a Trust, there were three reasons – strategic, operational and financial. The financial aspect was the obvious carrot and, undoubtedly, having an investment fund made out of the NNDR savings has been extremely valuable. However, I would contend that our success has been due to reasons beyond purely finance. Some of these are:

- becoming a Trust was a step change and gave us the energy and focus to make a number of significant changes which might not otherwise have been possible;
- operating our services as a business with the challenge of meeting both social and financial objectives, ie the bottom line, has led to a much keener focus on what we do;
- our Board have been very effective on being business focused and providing a good challenge;
- being at arm's length from the local authority has given us the ability to be more fleet of foot which enables decisions to be implemented more quickly;
- this does not preclude us working closely with the local authority in developing a wider strategy for cultural services and, in partnership, we have been able to make a number of key strategic changes which have helped to transform services; and
- the focus of our first five years has been on increasing participation with improvements in all our main indicators around participation.

## 8. Concluding remarks

We hope that by working through this guide you will be able to undertake a detailed feasibility analysis of the opportunities for changing the governance of your museum service.

We hope the examples are useful (and may also offer you evidence to support your arguments for change) and that the tables can be adapted to help you present your findings to others. The appendices are intended to offer further detail and examples of what can be involved in the process of a transfer to a Trust.

Whether your deliberations result in a recommendation to transfer your museum service to a Trust or not, the process of thinking about this should help with clarifying the challenges, successes and development opportunities for your service.

Please let us know if this guide has helped – or hindered – your thinking; and let us know how we might improve the guide to help others embarking on this process.

Good luck in your deliberations.

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## Appendix A

### The NPDO options

#### Key Advantages of the NPDO Option

The key advantages of the NPDO option are set out below:

- **NNDR** – There is mandatory relief of 80% in respect of national non-domestic rates on property which is wholly or mainly used for charitable purposes and occupied by an institution or organisation established for charitable purposes only. Local authorities also have discretion to grant additional relief to charities in respect of all or part of the remaining 20% of which 25% is funding from the central pool thus involving a net 85% saving overall for the local authority. Thus a charitable NPDO could be 100% exempt from paying the business rates that would otherwise be due in relation to the properties it occupies.

The local authority also has power to grant discretionary NNDR relief up to 100% to voluntary organisations or NPDOs which are not charitable or where the activities are non-charitable in nature at a net cost of approximately 75%.

- **Off balance sheet borrowing** – Provided that the relationship between the local authority and the NPDO is arms length, then any borrowings of the NPDO will not impact on the authority's own prudential borrowing position.
- **Community involvement** – There would be an opportunity for community involvement in the management of the NPDO through Board membership as well as creating local management groups for individual facilities. This has been a particular strength of the NPDOs Lawrence Graham has represented.
- **Staff involvement** – The staff would be able to have greater influence on the direction and administration of a focused NPDO. In addition, many NPDO boards include staff nominees. This is an enormously exciting opportunity for staff to be involved at the strategic decision making level of the new organisation.
- **Social and economic agenda** – An NPDO running leisure facilities could contribute towards the local authority's social and economic agenda for the health and wellbeing of the area.
- **Improvement of the facilities** – An NPDO could access private finance for improving and enhancing any of the facilities. This would enable the NPDO to respond to changing demands and pressures for such facilities.
- **Other fiscal advantages** – Registered charities are in a privileged tax position both in respect of their own tax position and their relationship with those who support them. Charities are generally exempt from corporation tax on their own trading income provided that the activity is pursuant to the primary purposes of the charity (or is ancillary to it) and the income is used only for charitable purposes. There would, therefore, be no tax on the operating profit if the NPDO is established as a charity. Any significant "non-primary purpose" trading or non-charitable activity would need to be handled through a trading subsidiary.
- **Corporate sponsorship, fund-raising and donations** – The fiscal advantage referred to above should attract sponsorship from individuals and companies so that gift aid would enable a charity to claim £22 for every £100 donated to it following active fund-raising activities (based on the pre-April 2008 changes to income tax). It is reasonable to assume that local businesses are more likely to support an NPDO than the local authority although only charitable entities will benefit from the fiscal advantages.
- **National Lottery** – Funding from this source might be more readily available to an NPDO supported by its sponsoring local authority.
- **Other sources of funding** – The NPDO would have access to various sources of public, private and grant funding.
- **Council's continued involvement** – Local authorities can retain a significant strategic role in relation to the future delivery of the services. The local authority will continue to provide significant grant funding to the new NPDO which will be subject to specific terms and conditions. Thus the local authority can ensure that the grant funding is used to deliver the authority's corporate and strategic objectives and in particular is focused on key priorities for participation by target groups. In addition, the authority will remain landlord in relation to the property portfolio and may also seek representation on the board of the NPDO. The new arrangement between the new organisation and the local authority should be described as a "strategic partnership".

## LG survey

### Advantages of Trust status

- speed of decision-making free from local government bureaucracy;
- single focused body;
- customer-first improved quality service;
- opportunity for improved investment by re-cycling surpluses or NNDR savings;
- more focused and commercial management team; and
- able to control own destiny independent from the local authority.

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#### Potential Disadvantages of the NPDO Option:

There are a number of potential 'disadvantages' of the NPDO option:

- **regulation by the Charity Commission** – if the NPDO is registered as a charitable company limited by guarantee, it will be regulated by the Charity Commission and the new entity must have regard not only to company law, but also to the requirements of charity law. There is an argument that Charity Commission registration is a positive advantage and an important means of safeguarding the assets and service provision. Charitable industrial and provident societies are currently “exempt” charities and not subject to regulation by the Charity Commission.
- the position for exempt charities is, however, changing under the Charities Act 2006. Whilst those have always been treated as exempt because it has been assumed that they were adequately overseen by other public bodies, such as the Financial Services Authority or Housing Corporation, there was concern that this was not always the case. Hence, the Act now makes sure that charities set up as IPSs are also monitored for their compliance with charity law. Monitoring will either be through a “principal regulator” (such as the Housing Corporation) or it will be through compulsory registration with the Charity Commission.
- **reversibility** – the assets of a charity can only be used for the charitable purposes of that charity or transferred to another charitable body for similar purposes. Reversibility can be, therefore, difficult.
- **independence of Charity** – the Trustees' overriding priority is to the beneficiaries of the Trust. The Trustees cannot be controlled by any outside organisation or body and their discretion must not be fettered in any way.
- **non-primary purpose trading activities** – any non-charitable or significant trading activities which are not pursuant to the “primary purposes” of the charity could not be carried out by the charity but would be hived off and carried out by a trading subsidiary. The trading subsidiary would be established as a company limited by shares. It would be wholly owned by the parent charity. Any surpluses generated by the subsidiary would be subject to corporation tax. To mitigate the tax liability, the subsidiary can utilise the gift aid scheme and gift all (or part) of the subsidiary's profits to the parent charity. Thus eliminating (or mitigating) any tax liability.
- **administration** – any NPDO will involve statutory and administrative requirements associated with any corporate structure.
- **trustees** – potential difficulty recruiting Trustees of suitable experience and calibre coupled with the considerable obligations upon them. Whilst this is a potential disadvantage, it has not been borne out in our experience – particularly if the right approach is adopted to recruitment.
- **lack of capital** – perceived inability to attract significant capital investment to undertake major work.
- **loss of Council control** – although there would be greater community involvement with an NPDO, there would nevertheless be a loss of local authority control and thus the NPDO could become vulnerable to changes in the political climate.

## LG survey

### Disadvantages of Trust status

The survey revealed a number of different comments, most of which had a bearing on the negotiations prior to transfer – examples included:

- difficulty for the Trust and staff overcoming ‘public’ perception of activities;
- lack of definition of relationship between the Trust and the local authority;
- the local authority can become ‘divorced’ from the leisure/culture service;
- rising insurance costs; and
- unreasonable expectations.

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### The different NPDO models

#### An Unincorporated Charitable Trust:

##### *Key characteristics*

- such a Trust is created by a simple declaration of Trust by the local authority or a constitution. The Trust deed would set out the terms, objects and functions of the Trust, the names of the Trustees, and its area of operation;
- the Trust would need to be registered with the Charity Commissioners using the appropriate head of charity;
- the objects of Trusts created in this way are not easy to amend and require the consent of the Charity Commissioners who also exercises regulatory control; and
- the Trust will benefit from all the advantages of a charitable entity (as detailed below).

##### *Key considerations*

- the Trustees of an unincorporated charitable Trust have unlimited personal liability. The Trustees as individuals would be jointly and severally liable for any liability of the Trust where there were insufficient assets within the Trust, whether or not arising from a breach of duty of that individual Trustee. Although indemnity insurance could be obtained for the Trustees which would protect them from most third party claims, the possibility of personal liability means that this particular NPDO option is not appropriate for a transfer of this nature.

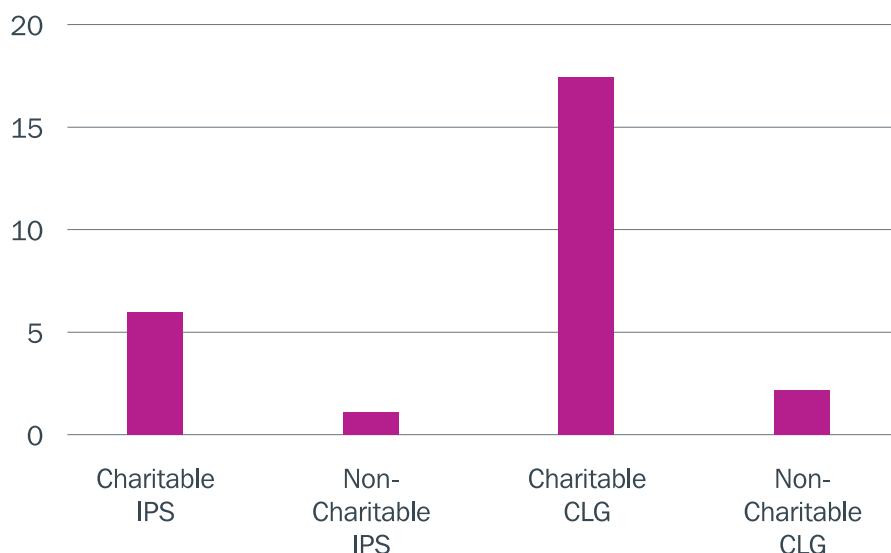
#### Charitable and Non-Charitable Industrial and Provident Societies:

##### *Key characteristics*

- an Industrial and Provident Society is a society registered under the Industrial & Provident Societies Act 1965;

- it is a body corporate with limited liability;
- the IPS qualifies for registration under the 1965 Act if it is within either of the two classes permitted to be registered set out in Section 1 of the 1965 Act. These conditions are that it is an IPS for carrying on an industry, business or trade (including dealing of any description with land) whether wholesale or retail and (i) it is either a bona fide co-operative society or (as would be the case here) (ii) the society is for the benefit of the community and there are special reasons why it should be registered under the Act rather than as a company under the Companies Act;
- IPSs are regulated by the FSA which reports annually to Parliament on the activities of industrial and provident societies;
- to establish an IPS it is necessary to prepare the IPS rules and submit these to the FSA for approval. Three members are required to form an IPS. Registration time very much depends on the current case load of the FSA. The time for registration has, however, significantly improved and current estimates of the FSA are that a society would be registered within a few weeks of the application being received;
- an IPS formed for charitable purposes is currently deemed to be an ‘exempt’ charity (ie exempt from registration) and can still enjoy the fiscal advantages available to charities. The Inland Revenue are responsible for the registration formalities for such exempt charities and the formalities are comparatively straightforward. However, the position has changed under the Charities Act 2006 and, from 2009, charities established as Industrial and Provident Societies which do not have a “Principal Regulator”, will be required to register with the Charity Commission;





## Company Limited by Guarantee

### Key characteristics

- a charitable company limited by guarantee is an entity incorporated under the Companies Act 1985 (as amended). It does not issue shares – instead the members of the company undertake to guarantee to contribute a sum of money (usually nominal) in the event that the company is the subject of an insolvent winding up;
- it is, of course, a body corporate and the liability of the members is limited;
- it is a vehicle familiar to the private sector and the type of NPDO which has been most widely used by local authorities contemplating the charitable Trust route. The table above demonstrates the popularity of this model as opposed to the IPS model;

- a non-charitable IPS can have a significant degree of employee involvement in the running and management of the IPS at Board level; and
- typical IPSs which qualify for registration as an industrial and provident society include village halls, sports clubs and housing associations.

### Key considerations

Although not currently monitored by the Charity Commission in the same way as charitable companies:

- the regulatory regime for IPSs under the control of the FSA is considered to be less flexible;
- the monitoring regime will change from 2009 when many currently exempt charities will need to register with the Commission and so, potentially a higher degree of monitoring will apply;
- this type of vehicle is one with which the private sector is less familiar;
- the 1965 Act provides that each member of the IPS is only entitled to one vote. There is not, therefore, any possibility of weighted voting rights and the ability of the Council to retain some control in the governance of the IPS will be dissipated as membership of the IPS increase. However, it is possible to encourage an open membership within classes and thus exercise some control against 'entryism', and
- a non-charitable IPS would not benefit from the advantageous fiscal regime for charitable entities and thus would be subject to corporate tax on any profits. The non-charitable model would, however, allow significant employee involvement in the management of the IPS if it were a priority to the Council. In addition, a non-charitable IPS (like a non-charitable company) would not need to place any trading activities within its subsidiary.

- to register as a charitable company it would be necessary to have the constitutional documents of the company approved by the Charity Commission. The entity would then be regulated by the Charity Commission as well as being subject, generally, to the requirements set out in the Companies Acts.; and
- a charitable company limited by guarantee ('CLG') does not have to use the word 'limited' after its name.

### Key considerations

- it is considered that the company regime currently offers greater flexibility than other regimes and companies are able to change their rules to meet changing needs more simply than other types of vehicles;
- a provision relating to dissolution and application of assets on dissolution will be provided for in the company's Memorandum of Association. Subject to satisfying the provisions of this clause, an application can be made to the Charity Commission for registration as a charity following the incorporation of the company. Although the Commission undertakes to respond to such applications within 15 working days, this inevitably involves requests for further information;
- one of the key disadvantages of a charitable company limited by guarantee is that it will inevitably involve compliance with company law as well as charitable law. It, therefore, requires a greater degree of sophistication in its administrative arrangements than that required for other NPDO options. The Charities Act 2006 has introduced a new vehicle which will be only be available for charities – the Charitable Incorporated Organisation. This will not be a company vehicle and so will avoid the current difficulty of dual regulation. Further details of this new vehicle are set out below;

- the directors of the charitable company, as the principal decision making body, are the charity Trustees and are responsible for the proper administration of the charity in the same way as charity Trustees of other forms of charity, as well as complying with their duties as company directors under the Companies Act. New codified duties have been brought in under the Companies Act 2006; and
- a company can be established very quickly. As indicated above if a charitable route is selected, once incorporated, an application is made to the Charity Commission to register the newly incorporated company as a charity. We would suggest, however, that between 2-4 months be allowed for this stage of the project if the charitable route is proposed.

### Community Interest Company (CIC)

#### *Key characteristics*

A Community Interest Company (CIC) is a legal entity created by the Companies (Audit, Investigations and Community Enterprises) Act 2004. Key features are:

- it is a corporate body with limited liability with members and shareholders;
- it is available exclusively for use by the social enterprise sector thereby creating a new brand for social enterprise;
- it is regulated by an independent regulator based at Companies House;
- it can be either a guarantee company or a share company;
- it must meet a community interest test;
- it has an asset lock in the memorandum and articles although assets will be available to be used as collateral for raising finance (which means they would be available to creditors in the event of default);
- it can distribute a dividend (subject to a cap);
- if an entity chooses to be a CIC, it cannot also be a charity and, as such, would not be eligible for any of the advantages of being a charity – in particular, the tax reliefs; and
- it is easy to convert an existing CLG to a CIC.

#### *Key considerations*

- our experience of CICs is that they have been predominantly used by social enterprises which either do not meet the tests for charitable status or do not wish to be bound by the constraints of charitable status.
- in most cases, an organisation eligible for charitable status is unlikely to choose to be a CIC because of the loss of the financial benefits that would otherwise be available through charity registration.

- the other key role for CICs has become as trading subsidiaries. Some charities have found the CIC an attractive model for a trading subsidiary as it retains the community and social focus but, because it is able to issue shares, it can attract outside investment and so raise finance in this way.

### Charitable Incorporation Organisation

#### *Key characteristics*

- as stated above, the Charities Act 2006 introduces a new legal vehicle, the Charitable Incorporated Organisation (CIO);
- this vehicle will be registered and regulated by the Charity Commission only and not by Companies House thus reducing the administrative burden on charities;
- the introduction of the CIO will require secondary legislation and is unlikely to be available until later this year. Once available, existing charities will be able to convert to a CIO by following a very straightforward procedure (anticipated to be a single resolution); and
- the CIO will therefore be a bespoke and 'fit for purpose' vehicle for charitable organisations in the future.

#### *Key considerations*

- we envisage that the CIO is likely to be welcomed by the charitable sector and may well become the preferred vehicle for new corporate charities; and
- however, until it is seen how the vehicle is working in practice and the extent of regulation imposed by the Charity Commission, we would suggest some caution in adopting this vehicle. Given the ease with which a company limited by guarantee will be able to convert to become a CIO, this creates flexibility to adopt this structure, once it has been seen working.

## Appendix B Comparison between alternative NPDO options

Legal Structure	Key features	Ownership, governance and constitution	Is it a legal person distinct from those who own and/or run it?	Can its activities benefit those who own and/or run it?	Assets "locked in" for community benefit?	Can it be a charity and get charitable status tax benefits?
<b>Unincorporated Association</b>	Informal structure No statutory regulation of this structure; governed by own rules. No legal personality	Nobody owns an unincorporated association. Run entirely according to own rules.	No, it is an unincorporated entity and, as such, has no separate legal personality. Those running it will have to enter into all contracts and hold all property in their own name. Unlimited liability for those running the association who could be personally liable.	Depends on own rules. If the association is to be charitable, restrictions on some personal benefits will apply.	The rules of the association could provide for this but do not necessarily have to unless charitable status is being sought.	Yes, if it meets the criteria for being a charity.
<b>Trust</b>	Set up by way of Trust deed. Deed will set out the terms of the Trust including the purposes for which assets are held and for whom. Legal ownership is separated from beneficial ownership.	Legal title in all assets is held by the Trustees. Beneficial ownership of the assets is with the beneficiaries of the Trust. The Trustees administer and manage assets for the benefit of the beneficiaries in accordance with the terms of the Trust.	No, it is an unincorporated entity and, as such, has no separate legal personality. Trustees will have to enter into all contracts and all hold property in their own name. Unlimited liability for Trustees who could be personally liable.	If the Trust is not charitable, then Trustees can benefit from the Trust. If the Trust is charitable, then the general rule is that Trustees cannot personally benefit unless the governing document, the Charity Commission or a court has sanctioned such benefits.	Not necessarily. For social enterprises and charities, assets would need to be locked in for community/public benefit.	Yes if it meets the criteria for being a charity.
<b>Company Limited By Guarantee</b>	Incorporated vehicle Board of directors and a membership. Flexible and familiar vehicle. Most commonly used corporate legal structure.	Directors manage business on behalf of members. Some governance requirements are imposed by statute but, within those restrictions, there is considerable flexibility over internal rules.	Yes; it is an incorporated entity and, as such, has a separate legal personality. The company itself enters into contracts and holds all assets. Members' liability limited to amount of the guarantee. Liabilities of the company sit with the company itself although directors may be personally liable in limited circumstances.	If not charitable, then yes, benefits can be paid. If charitable, directors and members cannot benefit unless the governing document, the Charity Commission or a court has sanctioned such benefits.	For a social enterprise or a charity, assets can only be applied in furtherance of the company's objects (which would state that they were for public benefit). In addition, there would be a 'non distribution' clause ensuring that all surpluses were reinvested into the stated objects of the company.	Yes if it meets the criteria for being a charity.

### Community Interest Company (CIC)

Limited company structure specifically for social enterprise.  
Secure ‘asset lock’ and a focus on community benefit. The asset lock means that all assets of the CIC and any surpluses generated by them are used for the benefit of the community.  
CIC ‘branded’.  
Can be a guaranteee or a share company.  
If a share company, can issue dividends to investors subject to a cap.

As for a company limited by guarantee above but subject to additional regulation to ensure community benefits.

Yes; it is an incorporated entity and, as such, has a separate legal personality. The company itself enters into contracts and holds all assets.  
Members’ liability is limited to amount of the guaranteee or the amount unpaid on shares.  
Liabilities of the company sit with the company itself although directors may be personally liable in limited circumstances.

Yes, but must benefit wider community as well.  
Can pay limited dividends to private investors. There is a statutory cap on the amount of dividends payable which is set by the Secretary of State. The current maximum dividend per share is 5% above the base lending rate of the Bank of England. The other cap is on the amount of profits capable of distribution (currently, the aggregate cap is 35% of distributable profits).

Yes, through standard provisions which all CICs must include in their constitutions.

No, a CIC cannot be a charity and a CIC does not benefit from any tax advantages.

### Industrial & Provident Society (Ips) (Community Benefit Society (Bencomm))

Incorporated entity for the benefit of the community generally ie not its own members.  
Board members and shareholders.  
Common model in housing sector.  
Governed by the Industrial and Provident Societies Acts.

Board members manage on behalf of the members. One member / one vote irrespective of the size of shareholdings.

Yes; it is an incorporated entity and, as such, has a separate legal personality. The Society itself enters into contracts and holds all assets.  
Members’ liability is limited to amount unpaid on shareholdings.  
Liabilities of the Society sit with the Society itself although board members may be personally liable in limited circumstances.

Must primarily benefit non-members.  
Asset lock applies.

Yes.

Yes, if it meets the criteria for being a charity. Depending on the particular circumstances, it would either be a registered charity or an exempt charity.

### Charitable Incorporated Organisation (Cio)

Bespoke vehicle specifically for charities.  
Created by the Charities Act 2006.  
Expected to be available in early 2008.  
Will have a board and members.  
Two models available – either members as Trustees or a wider membership.

Similar to a company. Expected to have different terminology to a company (eg there is likely to be no concept of ‘directors’ – instead, ‘charity Trustees’).

Yes; it will be an incorporated entity and have a separate legal personality.  
The CIO itself will enter into contracts and hold all assets.  
Members will have either no liability or limited liability.  
Liabilities of the CIO will sit with the CIO itself although Trustees may be personally liable in limited circumstances.

Charity Trustees can only benefit personally if the constitution, court or Charity Commission permit it.

Yes.

Cannot be anything but a charity, and must meet the criteria for being a charity.

# Appendix C

## Risk matrix

We set out below an **example** of a risk matrix. This can be tailored for each authority’s particular circumstances.

**Table 1**  
**Listing risks with an assessment of likelihood of occurrence and impact of risks**

Risk factor	Likelihood	Impact
Risk A	High/Medium/Low [Describe]	High/Medium/Low
Risk B	High/Medium/Low [Describe]	High/Medium/Low
Risk C	High/Medium/Low [Describe]	High/Medium/Low
Risk D	High/Medium/Low [Describe]	High/Medium/Low
Etc.	High/Medium/Low [Describe]	High/Medium/Low

Table 2 Identifying major risks

Potential impact	High			
	Medium			
	Low			
		Low	Medium	High
		Likelihood of occurrence		

Table 3 Strategies for managing the major risks

Risk factor	Preventative mechanisms	Contingency actions
Major risk factor 1		
Major risk factor 2		
Major risk factor 3		
Major risk factor 4		
Major risk factor 5		
Etc.		

## Appendix D

### Key legal tasks for a museum transfer

Each project is different in terms of the key tasks to be undertaken. However, the following is an outline project plan which sets out the key legal tasks to be undertaken on the implementation of a Trust project of this nature.

Key tasks	Lead	Target date
Prepare a project plan and timetable		
Confirm roles and responsibilities		
Establish staff consultation protocol		
Inform district auditor of project and timetable		
Legal review meeting		
Prepare “advert” in accordance with EU procurement/ EU Treaty requirements if required		
Agree Trustee recruitment process		
Prepare advert for Board members		
Draft Memorandum and Articles of Association		
Prepare Heads of Terms for transfer documentation for discussion with project team		
Review management structure		
Review staffing structure		
Review support service requirements		
Review property portfolio		
Legal review meeting		
Place advert for Trustees; prepare Trustee induction pack; fix date for open evening.		
Agree Memorandum and Articles of Association		
Agree Heads of Terms for project documents		
Legal review meeting		
Review responses to advert for Trustees; confirm open evening; hold open evening; establish selection panel		
Confirm management structure / identify new posts if required		
Confirm support service requirements		
Conduct building surveys		
Legal review meeting		
Interviews for Trustees; selection of ‘core board’		

Key tasks	Lead	Target date
Programme of meetings for shadow Board including briefing on duties and responsibilities		
Prepare schedules for project documents		
Provision of information to pension team to calculate employer's contribution for pension scheme		
Consider any "special funds", "restricted funds", permanent endowment fund issues		
Incorporate company/company secretarial requirements		
Prepare project documents		
Prepare Sub-Lease and/or Licences		
Prepare business plans and services delivery plan		
Consider performance monitoring regime / KPIs		
Legal review meeting		
Approve project documents		
Approve business plan and service delivery plan		
Prepare application to Charity Commission		
Approve admissions agreement		
Set up financial management systems		
Appoint new staff (if required)		
Appoint auditors		
Registration for VAT/Data Protection		
Appointment of bankers/opening bank account		
Set up support services		
Prepare financial procedures/adopt relevant operational policies		
Confirm member final approval to project documentation and resolution of all outstanding issues		
Legal review meeting		
Formal approval of transfer by Council		
Formal appointment of shadow Board		
Formal approval of transfer by Board		
Legal review meeting		
Execution of documents by both parties		
Business transfer		
Application for rate relief by Trust		
Secure Charitable Status for Trust		

## Appendix E

### Schedule of legal documents

We set out below a summary of the likely key documentation which will be required for a museums transfer.

Document	Parties	Key provisions
<b>Memorandum &amp; Articles of Association</b>		The Trust's governing document setting out the objects, powers, liability, and dissolution provisions, and the provisions for the calling and conduct of board and member meetings, the appointment, removal and disqualification of directors.
<b>Transfer Agreement</b>	(1) Council (2) Trust	<p>This agreement will identify the components of the service to be transferred from the Council to Trust and then, in relation to each aspect of the service, the agreement will set out the terms of the transfer arrangements. The components of the service likely to be transferred are:</p> <ul style="list-style-type: none"> <li>■ employees</li> <li>■ stock</li> <li>■ supply contracts</li> </ul>
	(1) Council (2) Trust	<p>The agreement will also set out which aspects of the service which will not transfer to the new Trust eg debts and liabilities.</p> <p>The agreement will also set out mutual indemnities – protecting each party from liabilities arising from an act or omission of the other party.</p>
<b>Funding and Management Agreement</b>	(1) Council (2) Trust	<p>This agreement will set out the terms and conditions of the funding arrangements between the parties. It will identify the key performance outputs required by the Council (by reference to an output specification to be scheduled to the agreement) and the funding to be provided by the Council to assist the Trust to deliver the required outputs.</p> <p>The agreement will set out in detail the monitoring and review arrangements, an escalation procedure for managing poor performance, termination and, importantly, exit and handover arrangements.</p>
<b>Equipment Agreement</b>	(1) Council (2) Trust	It is proposed that the loose equipment associated with the facilities be 'loaned' to Trust for the duration of the service period. This means that the Council will not transfer the legal title to the equipment to Trust. This means that the Council can recover these assets in the event of Trust's insolvency.
<b>Support Services Agreement</b>	(1) Council (2) Trust	It is anticipated that the Trust may contract back certain support services from the Council. This agreement will formalise these arrangements. It will set out the terms on which the services will be provided and the payment arrangements. It will also set out the termination arrangements. The services to be provided will be set out in detail in the schedules with a service specification for each service.
<b>Leases</b>	(1) Council (2) Trust	The parties will enter into a lease in relation to each of the museum facilities. The lease will set out the lease term, the user clause, repair and maintenance and any early termination provisions eg a break clause for redevelopment.
<b>Admission Agreement</b>	(1) Pension Fund Trustees (2) Council (3) Trust	The Trust will be eligible to be admitted to the Superannuation Scheme. Thus all existing employees pension position will be protected. New employees will be eligible to join subject to the terms of the Scheme.
<b>Collections Agreement</b>	(1) Council (2) Trust	The museum collections themselves will be loaned to the Trust (not transferred) and the terms of such loan will be set out in this Agreement. The collections would be managed in accordance with an agreed Acquisition and Disposal Policy.

## Appendix F

### Trustee recruitment

#### Summary of key steps:

- Agree Trustee recruitment campaign
- Prepare Trustee recruitment pack
- Prepare draft advert to be placed in local, national and specialist press
- Contact local press to get some editorial alongside advert
- Place advert and send advert direct to known potential candidates
- Fix deadline for expressions of interest
- Fix date for an open evening
- Hold open evening
- Fix deadline for submission of CVs and formal application to be a Trustee
- Confirm make up of Trustee selection panel
- Fix date for Trustee interviews (ideally on one day)
- Prepare interview questions
- Selection panel to conduct interviews and shortlist shadow board members
- Inform short-listed candidates
- Fix date for first Trustee meeting.
- Second phase recruitment campaign/interviews if required



## Person specification for trustees

When establishing a new Trust, one of the most important things will be selecting Trustees of the highest calibre. The Trust will need the correct skills and experience at board level to ensure that the Trust is successful and competently run.

The Charity Commission issues best practice guidance on recruiting Trustees which we would recommend is followed. Amongst other things, the Commission recommends a “person specification” is prepared setting out the skills and experience sought in a Trustee and also that the recruitment process follows an open advert procedure.

We set out below ‘person specification’ together with proposed wording for a draft advert to recruit Trustees (Appendix L).

Category	Criteria
<b>Experience</b>	<ul style="list-style-type: none"> <li>▪ Proven track record in business or a relevant profession</li> <li>▪ Involvement in community service (paid or voluntary)</li> </ul>
<b>Skills and abilities</b>	<ul style="list-style-type: none"> <li>▪ Specialist skill, eg financial, legal, corporate, or Trust management</li> <li>▪ Commitment to objectives of new organisation and a particular interest in museums and culture</li> <li>▪ Ability to involve other board members in discussion/debate</li> <li>▪ Communication skills – ability to express balanced opinions and listen to the opinions of others; ability to challenge and debate</li> <li>▪ Analytical skills – ability to read and understand complex subject matter and comment</li> </ul>
<b>Other requirements</b>	<ul style="list-style-type: none"> <li>▪ Must be prepared to give up time to attend evening meetings and possibly some daytime meetings</li> <li>▪ Awareness of local issues and/or awareness and interest in the principal cause of the organisation</li> <li>▪ Appreciation of status and functioning of charitable organisation</li> <li>▪ Not disqualified from acting as a board member/Trustee</li> </ul>
<b>Additional skills for chair</b>	<ul style="list-style-type: none"> <li>▪ Ambassador for the initiative</li> <li>▪ Leadership skills</li> <li>▪ Experience of board meetings</li> <li>▪ Planning and conducting board meetings effectively</li> <li>▪ Ability to involve other board members in discussions/working groups</li> <li>▪ Providing focus</li> <li>▪ Keeping an overview of organisation’s performance</li> <li>▪ Establishing a constructive working relation with and providing support for Chief executive</li> <li>▪ Ensuring the Board monitors use of delegated powers</li> <li>▪ Impartiality, fairness and ability to respect confidences</li> </ul>

## Appendix H

### Draft advert for prospective trustees

#### Future Development of Council's Art Gallery(ies) and Museum(s)

##### Trustees Required!

[Name of Council] is currently considering options for the future management of [list facilities]. Information about all these facilities and the Council can be found at [www.\[ \]](http://www.[ ])

The Council has a preference for promoting the establishment of a charitable Trust to manage the facilities and is currently seeking Trustees to form the board of this exciting new organisation.

This will be a tremendous opportunity for individuals who live or work in [area] and have an interest in arts and culture to become involved at a strategic level in the continued development of these first class facilities and the Council's fantastic [arts and museum collections].

This is a voluntary position although reasonable expenses will be paid. Meetings will take place in [area].

**[We are proposing to hold an open evening for all those interested in learning more about this initiative on [ ].  
For details of the open evening and any other information, please contact: [ ] ].**

Please note you must be over 18 to be considered for this role.

### Model object clause

One of the key clauses in the new NPDO's governing document will be its objects clause.

The objects clauses should be drafted to ensure that the proposed activities of the NPDO are covered by the scope of the objects and, indeed, cover any activities which may be planned in the short to medium term.

Whilst it is possible to amend objects clauses, this does take considerable time and effort (particularly for a charitable organisation where the consent of the Charity Commission will be required). As such, we do recommend building in sufficient flexibility at the outset so as to ensure that the objects are wide enough to allow the organisation to do what it is likely to want to do.

Of course, if the NPDO is a charity, it will be imperative that the objects are drafted in such a way as to be eligible for charitable status.

Objects must be drafted to meet a charitable purpose. In the case of museums, this tends to be either or both "the advancement of education" and/or "promotion of museums" specifically.

Proposed wording is as follows:

*1. The objects of the Charity shall be:*

*1.1 to advance the education of the public and/or to promote arts and culture through, amongst other means, the operation of museum(s) and art galleries); and/or*

*1.2 such other charitable purposes beneficial to the public consistent with the object above as the Trustees shall in their absolute discretion, determine.*

### Local authority powers

#### Powers base

Local authorities have both specific and general powers to provide cultural services. Such provision is made pursuant to its general and specific powers set out under local government legislation. It is necessary to consider the extent of those powers and, in particular, ascertain whether they permit the local authority to arrange for the provision of the services by others eg on NPDO.

#### Specific powers of local authorities to provide cultural facilities

Local authority functions in relation to the provision of entertainment, arts and crafts, theatres, concerts and other such activities are contained in Section 145 of the Local Government Act 1972 ('the 1972 Act'). This Section empowers a local authority to provide these services itself or arrange for the provision of the services by a third party and then contribute towards the expenses of a third party or do anything necessary or expedient for the delivery of entertainment or the arts.

Museums are governed by the Public Libraries and Museums Act 1964.

Local authority powers in respect of museums are contained in Section 12 of the 1964 Act and are far wider: They may "do all such things as may be necessary or expedient for or in connection with the provision or maintenance thereof". Local authorities "may make contributions towards the expenses incurred by any person ... providing a museum or art gallery".

#### General powers of local authorities to establish an NPDO

##### Section 2 Local Government Act 2000 ('the 2000 Act')

The promotion or improvement of well-being power contained in Section 2 of the 2000 Act provides sufficient powers to each Council to establish an NPDO, including incurring costs associated with its establishment. The 2000 Act provides:

"Every local authority are to have power to do anything which they consider is likely to achieve any one or more of the following objects:

- the promotion or improvement of the economic well-being of their area;
- the promotion or improvement of the social well-being of their area; and
- the promotion or improvement of the environmental well-being of their area." (s. 2(4))

"The power under Sub-Section (1) includes the power for a local authority to:

- incur expenditure;
- give financial assistance to any person;
- enter into arrangements or agreements with any person;
- co-operate with, or facilitate or co-ordinate the activities of any person;
- exercise on behalf of any person the functions of that person; and
- provide staff, goods, services or accommodation to any person" (s.2(4)).

Section 3 of the 2000 Act prohibits the Council from doing anything which it is unable to do by virtue of any prohibition or limitation on powers contained in any enactment and also places a restriction on the raising of money by use of the power.

Section 2(3) provides that when determining whether or how to exercise the power or well-being, a local authority must have regard to the community strategy prepared under Section 4 and clearly the Councils' strategies envisage the developments outlined in this study. Further, Section 3(5) requires that before exercising the well-being power, a local authority must have regard to any guidance issued by the Secretary of State.



Guidance was issued by the Secretary of State in March 2001. Section 6 of the Guidance sets out the Government's purpose in introducing the well-being power as "to reverse the traditionally cautious approach, and to encourage innovation and closer joint working between local authorities and their partners to improve communities' quality of life."

Section 10 provides that "the breadth of the power is such that councils can regard it as a power of first resort. Rather than searching for a specific power elsewhere in statute in order to take a particular action, councils can instead look at the well-being power in the first instance and ask themselves:

- is the proposed action likely to promote or improve the wellbeing in our area?
- is the primary purpose of the action to raise money?
- is it explicitly prohibited on the face of other legislation?
- are there any explicit limitations and restrictions on the face of other legislation?"

If the answer to the first question is yes, and the next two questions no, then the Council could proceed with the proposed action, subject to the answer to the third and fourth questions (ie any restrictions or limitation that may apply by virtue of being spelt out on the face of other legislation).

There is no explicit limitation or restriction on the face of any particular enactment which prevents a Council from proceeding with the establishment and assistance in respect of costs for the NPDO. Provided, therefore, that the Council can answer positively that the establishment of the NPDO and the transfer of the services to it is likely to promote or improve the well-being in its area and that the primary purpose of the action is not to raise money then the well-being power provides all the authority necessary for the Councils to proceed. Each Council needs,

therefore, to consider the community strategy it has prepared to ensure that the exercise of the well-being power in establishing and funding the NPDO does not run counter to the aims and objectives of the strategy.

### **Section 111 Local Government Act 1972**

Even if the well-being power was insufficient to enable the Council to pay the preparation and set up costs of the NPDO, the power in Section 111 of the Local Government Act 1972 would provide authority for the Council to do so. What the Council is engaging in is a restructuring of the way the museum services are provided. The underlying premise of this is to provide services to the community in order to best promote the area's museums. This is calculated to facilitate the authority's proposals to discharge their functions, ie the provision of leisure services which is a well-established local authority function by fostering the formation of a voluntary organisation and the payment to set up the voluntary organisation and thereafter to continue to make payment to it would be permissible under Section 111 of the Local Government Act 1972.

### **Provision of services to the new entity**

Section 1 of the Local Authorities (Goods and Services) Act 1970 provides that a local authority may enter into an agreement with another local authority or 'public body' for the supply of goods and materials, the provision of professional or technical services or for the use of vehicles or plant. We suggest that any NPDO established to take transfer could be designated as public body for the purposes of this Act on application to the Department of Communities and Local Government (DCLG).

Alternatively, the Council can rely on the well-being powers in the 2000 Act referred to above and the trading powers in the 2003 Act.

### **Property issues**

Section 123 of the Local Government Act 1972 governs the disposal of land by local authorities and provides that a "council shall not dispose of land [including a lease of more than seven years] for a consideration less than the best that can reasonably be offered."

There is a general consent under Section 19 of the 1976 Act and the General Disposal Consent 2003 in respect of the transfer of cultural facilities allowing authorities to let at any consideration if the value involved is less than £2 million.

In our view, leases of at least 25 years should be granted as this would assist the Trust with any private finance and provide an important degree of security for the new entity. The lease would need to contain provisions dealing with repair and maintenance obligations, alteration, use of facilities and insurance.

# Background to VAT position of NPDO

### Local authority VAT regime

Local authorities are able to recover input VAT relating to non-business activities under a special refund scheme established under section 33 of the VAT Act 1994.

For example, the provision and maintenance of cemeteries by a local authority is a non-business activity, whereas for all other entities, the charges for burial rites etc are exempt. Thus a local authority may recover the VAT on purchases in relation to the upkeep of cemeteries, whereas others operating cemeteries may not recover the VAT. For the reasons set out below, the grant of a lease can be a “non-business” activity, provided that certain formalities are adhered to.

Local authorities also have a special set of rules for the operation of partial exemption, which is more generous than the rules applied to other traders. In general, you cannot reclaim VAT on purchases where these relate to exempt supplies. So if the income to an activity is exempt, then the VAT on related purchases cannot be reclaimed. However, there is a de minimis limit where the amount of exempt activity is small in relation to the whole of the entity’s activities. For local authorities the de minimis limit is set as 5% of the total input VAT. In other words, a local authority may incur exempt input VAT up to a limit of 5% of its total input VAT before it loses the VAT incurred on purchases for exempt activity. If the local authority does breach the 5% limit, then it loses all exempt input VAT.

Because of the structure of these rules, it is in the Council’s interest to plan its activities such that it stays below the 5% threshold in order that it can recover all VAT on purchase. This can be difficult to achieve, due to the following:

- the calculation of the threshold depends on variable factors – the level of purchases and the amount of VAT on them;
- changes in the activities will have an impact on the proportions, such as externalising services;
- significant capital expenditure may have a distorting effect in a particular financial year.

If the leisure activities of the Council are externalised, then this should improve the Council’s partial exemption position, since certain exempt activities (for example, swimming lessons) will not be carried on by the Council. Instead, any expenditure incurred by the Council in relation to a non-business lease can be recovered in accordance with section 33 as discussed above (see section below under ‘Peppercorn rents’).

### Cultural exemption

Following a Government consultation paper, regulations have been introduced for VAT exemption for certain cultural services. The basis of the Government consultation paper is Article 13A(1) of the EC Sixth Directive; subsection (n) which states that “certain cultural services and goods closely linked thereto supplied by bodies governed by public law or by other cultural bodies recognised by the member state concerned” should be exempt from VAT in the public interest.

In the public sector VAT exemption may apply to admissions to museums, art galleries or theatrical and musical performances provided there is no ‘distortion of competition’ to place commercial enterprises at a disadvantage.

There is no such proviso for not-for-profit bodies or those managed on a voluntary basis by persons having no direct or indirect financial interest.

The recent HMRC Brief 27/07 has helpfully clarified the definition of 'direct or indirect financial interest' which makes it clear that the involvement of staff on the board of Trustees of an arts or cultural Trust will not affect the Trust's eligibility for this VAT relief provided that:

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

### Peppercorn rents

HMRC accept that it is the norm for local authorities to charge a peppercorn rent to charities and NPDOS occupying their premises to undertake related activities.

Renting out the properties at a peppercorn converts the externalised activities into a non-business supply for the local authority. As a consequence, the local authority can recover VAT on purchases, including major works and capital, as these will fall within the scope of claims under section 33 of the VAT Act 1994. This is then compatible with the arrangement whereby the landlord undertakes significant works, retaining ownership of them.

There is a risk that the Government will seek to change the section 33 rules, such that the VAT would no longer be recoverable, however there is no such change in the pipeline at present.

It is important that the lease is genuinely for no consideration (other than a peppercorn). However, we understand that HMRC will usually accept that indemnities contained in a lease will not be consideration for a support for VAT purposes to cover such matters as reimbursements for insurance premiums. This arrangement has been achieved successfully in the NPDO transfers we have undertaken.

### Zero-rating of certain supplies

There is quite a long list of items which can be supplied at the zero rate of VAT when supplied to a charity. In most situations, the charity should provide a certified declaration to the supplier to enable the supplier to charge VAT at zero rate. In addition, the supplier must be registered for VAT. There are a few situations where a charity can save VAT because a lower rate of VAT may apply, such as fuel and power. These situations are also covered below.

Charities can buy advertising and closely related services at zero rate VAT. In order to zero rate the invoice, the supplier must be satisfied that it is a supply of advertising to a charity. Where the charity is claiming the zero-rating for goods that are closely related to the design or production of an advertisement, then the charity must give the supplier a declaration that the advertisement is for a relevant purpose. The supplier may need to check their action with their local VAT office, because if they make a mistake, they will have to account for the VAT. The zero-rating applies to all types of advertising by charities, including recruitment advertisements, attracting new members, pupils or students, advertising events, raising awareness or fundraising.

All media are allowed, including badges, balloons, banners, carrier bags, cinema, TV and radio advertisements, clothing, flags, internet advertising (except for adverts on the charity's own website), all types of printed matter including business cards, calendars, car parking tickets, diaries, greetings cards, lottery tickets, posters, stationery.

Zero-rating is not available in the following cases:

- personally addressed letters and other targeted fundraising activities. Direct marketing and telesales cannot therefore be zero-rated. It may be possible for individual items of the promotional material used to be zero-rated (see also direct mail);
- advertising on the charity's own website, not the creation of the charity's own website, even if the website is being used to raise funds;
- where the charity prepares its own advertisements in house;
- where the supply is not directly to a charity, for example where the supply is to a trading subsidiary; and
- where the advertisement appears in a charity's own magazine, notice board, calendar or other publication.

Charities can pay the reduced rate of 5% on fuel and power supplies used for residential or non-business charitable purposes. If the building has mixed use, then the lower rate can apply to the whole providing at least 60% of the building is used for a qualifying purpose. If the proportion is lower, then there has to be an apportionment and the lower rate will only apply to the non-business element. This also generally entitles the charities to exemption from the Climate Change Levy.

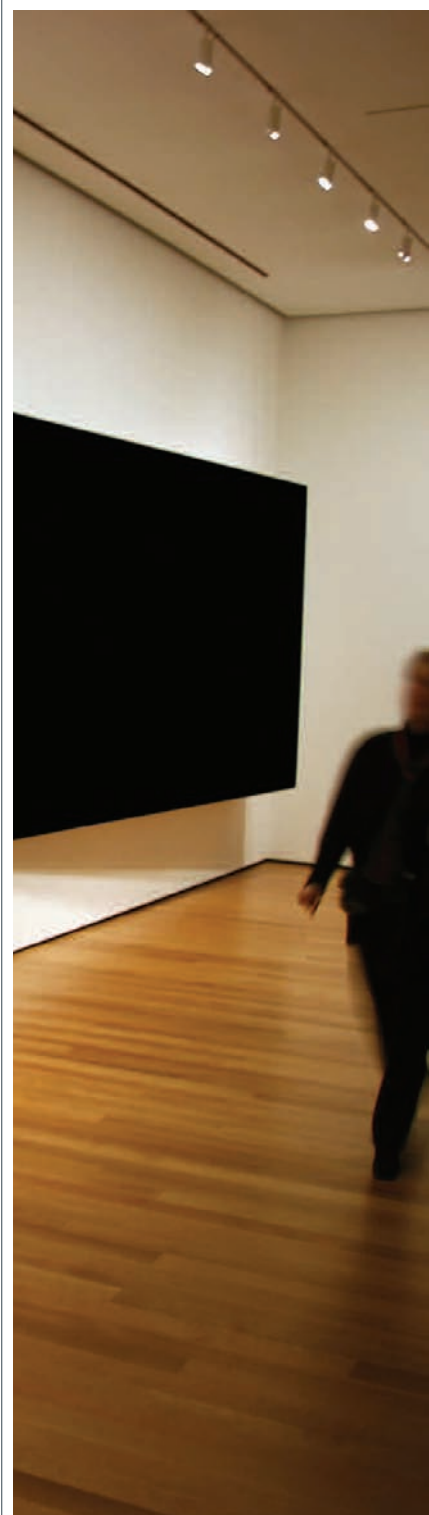
### Other VAT issues

Any VAT which the NPDO incurs will lead to a VAT cost since it will make predominantly exempt supplies (this is to be contrasted with the current position, since the Council will make mainly taxable supplies and will be able to recover the majority of its VAT costs). However, we estimate that the VAT costs incurred by the NPDO may be reduced if the NPDO is able to take advantage of the following:

- reduced rate of 5% VAT on fuel and power supplies;
- zero-rating for charities on all advertising and closely related services; and
- exemption of charities from the climate change levy.

The NPDO and Council may also wish to consider entering into a management arrangement in relation to the museums services supplied by the NPDO. If the NPDO was making chargeable supplies of management services to the Council, then it would be able to recover its associated VAT costs. This would mean that the proportion of irrecoverable VAT incurred by the NPDO would be reduced. This contrasts with the usual position, where the Council simply provides grant funding to the NPDO which is outside the scope of VAT.

However, there is a strong argument that the so-called 'management fee' arrangement does not 'work' in England because the Council does not have an obligation to provide museums activities. This can be contrasted with the position in Scotland, as per the *Edinburgh Leisure VAT & Duties Tribunal 18784* case. The 'management fee' arrangement may also impact on the direct tax position of the NPDO. However we would recommend that all the tax aspects of this proposal are fully considered before proceeding with this route.



## Appendix L

### NNDR briefing

#### Mandatory rate relief

Section 43 of the Local Government Finance Act 1988 provides that charities pay only one-fifth of the rates that would otherwise be due, if the rate payer in occupation:

- is a charity or Trustee for a charity; and
- the property liable to be rated is wholly or mainly used for charitable purposes.

Where the rate payer is a registered charity under the Charities Act 1960 (as amended) it will be entitled to mandatory rate relief automatically. However, non-registration under the Act is not conclusive as to the non-charitable status of the rate payer and the charging authority has to determine whether the rate payer qualifies for the relief, applying appropriate case law and statutes.

If the new NPDO is a registered charity, it would therefore be entitled to 80% relief from the business rates levied on the premises.

#### Discretionary rate relief

A charitable NPDO would also be entitled to further relief from rates if the Council decides to exercise its discretion under Section 47 of the Local Government Finance Act 1988. There are three instances where discretionary rate relief is available:

- where the rate payer is a charity or Trustee for a charity and the hereditament (the property liable to be rated) is wholly or mainly used for charitable purposes. If granted, relief may be given beyond the mandatory 80% rate relief;
- where the rateable property is occupied for the purposes of one or more institutions or organisations, none of which is conducted for profit and each of whose main objects are charitable or otherwise philanthropic, religious, or concerned with education, social welfare, science, literature or the fine arts;

- where the rateable property is wholly or mainly used for purposes of recreation and all or part is occupied for the purposes of a club, society or other organisation, not established or conducted for profit.

This will be determined by reference to the Council's discretionary policy.

The crucial issue, however, is whether or not the property can be regarded as being "occupied" by the NPDO for the purposes of the rate relief. The issue of occupation applies to both mandatory and discretionary rate relief.

#### Occupation

There is no statutory definition for the word "occupied" in connection with rating law. Whether the property is occupied for rating purposes needs to be determined by reference to the body of established case law. Case law has established what are known as the "four ingredients of rateable occupation":

- there must be actual occupation or possession;
- it must be exclusive occupation;
- the possession must be of some value or benefit to the possessor; and
- the possession must not be for a transient period.

All four ingredients must be satisfied.

In respect of "actual occupation or possession", there must be some act of user in respect of the land with a mere intention to use the land not being sufficient. If the ratepayer can exclude all other persons from using the land in question then actual occupation is made out. In respect of "exclusive occupation", this will arise if there is no overriding control or direction on the property exercised by someone other than the ratepayer. The third ingredient is that the occupation must be "beneficial", ie not that there must be a form of profit but that the occupation must be of value to the occupier. Finally, the occupation must be sufficiently "permanent" with the period of tenure being irrelevant.

A lease is a presumption of occupation for these purposes. Hence we recommend if a lease is guaranteed wherever possible, a licence can be sufficient for rate relief in certain circumstances.

A summary of reliefs is set out below:

Property eligible for rate relief	Type of relief	Amount of relief	Financial implications	
			Proportion offset against payments into NNDR Pool	Proportion borne locally by community taxpayers
1 Property wholly or mainly used for charitable purposes which is occupied by a registered charity.	Mandatory	80%	100%	–
	Discretionary	Up to a further 20%	25%	75%
2 Property, all or part of which is occupied for the purposes of a non-profit making:	Discretionary	Up to 100%	75%	25%
a) institution or other organisation whose main objects are philanthropic or religious or concerned with social welfare, science, literature or the fine arts; or  b) club, society or other organisation and is used for the purposes of recreation.				

# Appendix M

## Staffing issues

### Effect of Transfer of Undertakings (Protection of Employment) Regulations 2006

As a general rule the lease of any facilities to an NPDO would trigger Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). In such a case all staff working at the facilities would transfer on existing terms and conditions and there would be no break in their continuity of service. The position for other staff involved with the facilities, but working with other departments, would depend on their individual circumstances.

### Pensions

As far as pensions are concerned case law requires that the transferring employees be offered a “comparable pension”. In practice the staff who transfer could be an “admitted group” under the Local Government Pension Scheme and thus the NPDO group as a whole will need to seek admission from the Area Pension Fund. This arises because a charitable or non-profit making body comes within the category of bodies which can be so admitted. If there is any under-funding of the pension scheme arrangements will need to be made on transfer for some indemnity in favour of the NPDO.

The Best Value Authorities Staff Transfers (Pensions) Direction 2007 (the Direction) came into force on 1 October 2007. The Direction was introduced pursuant to sections 101 and 102 of the Local Government Act 2003 (the Act) and applies to ‘best value authorities’ as defined in

section 1 of the Local Government Act 1999, ie local authorities in England. Sections 101 and 102 confer power on the Secretary of State to require local authorities to deal with matters affecting staff according to directions. The requirements of the Direction set out what has previously been set out in Codes of Practice and guidance. The intention behind the introduction of the Direction is to formalise and give statutory force to the previous Codes of Practice and guidance. It has been introduced by the Secretary of State and must be complied with.

The Direction provides that where a local authority is contracting out services previously provided by the local authority, the contract for those services must secure pension protection for all transferring employees and provide that the pension protection is enforceable by the employee. Pension protection is defined as the right to acquire pension benefits which are the same as or broadly comparable to or better than those rights she had or had a right to acquire as an employee of the authority.

The Direction also provides for subsequent contracting-out situations so that where a local authority is contracting with a subsequent contractor for the provision of services originally provided by the authority, the contract must secure the same level of pension protection for those employees.

### Influence of staff on NPDO management

Staff employed by the respective NPDO could be represented on the Board of that NPDO although, if the transfer is to a registered charity, then staff representation would need to be at a nominal level and restricted to decision-making having no influence upon staffing matters. This is because Trustees cannot generally be remunerated and as staff would be deemed to be a beneficiary of the Trust, there would be a prima facie conflict of interest. There can be a much greater level of staff representation in the non-charitable NPDO model (ie, the non-charitable IPS). This option does, however, raise issues of conflicts of interest and often requires extensive training for those staff members not familiar with corporate management.

### Summary

Any organisational change will, of course, be of concern to staff. It is imperative that any future management options prioritise staff concerns. A transfer of the facilities to an NPDO would have considerable benefits to staff as the new organisation would be a focused entity which would enhance management stability and staff security.

## LG survey

### Effect on staff of Trust status

- Staff are energised and motivated.
- Ability to attract a wider range of staff and skills.
- Pay levels increased and terms and conditions improved.
- Increased staff training.
- More entrepreneurial opportunities.
- New sense of purpose with better customer focus.

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# Appendix N

## Definitions

<b>CCLG</b>	Charitable Company Limited by Guarantee
<b>CIC</b>	Community Interest Company
<b>CIPS</b>	Charitable Industrial and Provident Society
<b>Council</b>	Relevant local authority
<b>CLG</b>	Company Limited by Guarantee
<b>DCLG</b>	Department of Communities and Local Government
<b>FSA</b>	Financial Services Authority
<b>HLF</b>	Heritage Lottery Fund
<b>HMRC</b>	HM Revenue and Customs
<b>IPS</b>	Industrial and Provident Society
<b>LGPS</b>	Local Government Pension Scheme
<b>MLA</b>	The Museums, Libraries and Archives Council
<b>NCCLG</b>	Non-charitable Company Limited by Guarantee
<b>NNDR</b>	National Non-Domestic Rates (business rates)
<b>NPDO</b>	Non-Profit Distributing Organisation
<b>SLA</b>	Service Level Agreement
<b>social enterprise</b>	Business trading in the market with a social purpose with three key characteristics: enterprise orientation, social aims and social ownership
<b>status quo</b>	In-house provision
<b>the 1964 Act</b>	Public Libraries and Museums Act 1964
<b>the 1965 Act</b>	Industrial & Provident Societies Act 1965
<b>the 1976 Act</b>	Local Government (Miscellaneous Provisions) Act 1976
<b>the 1989 Act</b>	Local Government and Housing Act 1989
<b>the 1999 Act</b>	Local Government Act 1999
<b>the 2000 Act</b>	Local Government Act 2000
<b>the 2003 Act</b>	Local Government Act 2003
<b>TUPE</b>	Transfer of Undertakings (Protection of Employment) Regulations 1981 (as amended by the 2006 Regulations)
<b>VAT</b>	Value Added Tax
<b>The MLA Report</b>	Museums, Libraries and Archives “Moving to Museum Trust: Learning from Experience” (2006)



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