

## LAW AND GOVERNANCE MONTHLY NOVEMBER 2023

Produced for local councils and parish meetings in North, South and West Yorkshire.  
Clerks – please circulate this bulletin to all councillors upon receipt. Thank you.

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(NALC = National Association of Local Councils. LTN = Legal Topic Note).

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### Co-option when there is only one candidate

We have had a number of enquiries about this since we published our October edition of Law and Governance. In that edition we conveyed the advice of the solicitors that are employed by the National Association of Local Councils regarding the situation where there is one qualified candidate for co-option to one seat. This advice is given in NALC Legal Topic Note 8, as written by the solicitors. The relevant legislation is:

*The Local Elections (Parish and Communities) (England and Wales) Rules 2006 SI 2206/3005 Rule 5:*

*(5) Subject to paragraph (6) below, where a casual vacancy in any such office is not required to be filled by election, the parish or community council must, as soon as practicable after the expiry of the period of 14 days referred to in paragraph (2)(c), co-opt a person to fill the vacancy.*

*(6) In the case of a casual vacancy occurring in the office of a parish or community councillor within six months before the day on which that councillor would regularly have retired, paragraph*

*(5) shall have effect with the substitution of the word "may" for "must"; and any vacancy not so filled must be filled at the next ordinary election.*

The legal opinion of the NALC solicitor team is that, applying the strict letter of the law, assuming that it is not within six months of the next local elections, the parish council **must** fill the vacancy by co-option '**as soon practicable**'. It is therefore difficult to see how a council could refuse to co-opt any legally qualified person given the wording of the Rules (as stated above), without leaving the council open to legal challenge.

## **The Biodiversity Duty from 1 January 2024**

Public authorities who operate in England must consider what they can do to conserve and enhance biodiversity in England. This is the strengthened 'biodiversity duty' that the Environment Act 2021 introduces. The definition of a public authority for this duty does include a parish sector council.

This means that, as a public authority, a parish sector council must:

1. Consider what it can do to conserve and enhance biodiversity.
2. Agree policies and specific objectives based on its consideration.
3. Act to deliver its policies and achieve its objectives.

A council must complete its first consideration of what action to take for biodiversity by 1 January 2024. The council must agree its policies and objectives as soon as possible after this. Additionally, it must reconsider the actions it can take within five years of completing its previous consideration. A council can also decide to review its policies and actions more frequently if it wishes to do so.

Gov.uk has produced a very helpful guide to compliance with this duty, please go to: [Complying with the biodiversity duty - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/complying-with-the-biodiversity-duty)

YLCA has created a simple template biodiversity policy for member councils with information taken from the .gov.uk site. This is attached and can also be found on the YLCA website.

## **The convening of ordinary and extraordinary meetings**

It is the duty of a parish sector council to appoint a Proper Officer (usually the clerk), as it is only the Proper Officer that can summon councillors to an *ordinary* meeting of the council. Ordinary meetings are those that are agreed in advance, ie the usual annual schedule of meetings (Local Government Act 1972, Schedule 12, paragraph 10(2)(b)). In the absence of a clerk, any member of the council can be appointed, at a meeting of the council, the Acting Proper Officer until such time a clerk is appointed. This is a good practice action as it ensures that ordinary meetings can be convened in accordance with Schedule 12 and will be lawful.

An *extraordinary* meeting of a council is convened by the Chair. By 'convened' we mean that the Chair is the person that will sign the summons to the councillors. There is no power in legislation for a clerk to convene an extraordinary meeting. An extraordinary meeting of the council can be called at any time by the chairman of the council (Local Government Act 1972, Schedule 12, paragraph 9(1)).

The 1972 Act, Schedule 12, paragraph 9(2) states that if the Chair refuses to call an extraordinary meeting of the council after a requisition for that purpose, signed by two member of the council, has been presented to the Chair, or if, without so refusing, the Chair does not call an extraordinary meeting within seven days after such a requisition has been presented to the Chair, any two members of the council, on that refusal or on the expiration of those seven days, as the case may be, may forthwith convene an extraordinary meeting of the council.

If a meeting is not convened properly a council may be open to challenge.

## **This is just a small council – why do we have to comply with the legislation for parishes?**

Under the Local Government Act 1972, a parish sector council is defined as a local authority. Councillors are unpaid for their work, but a parish council is not a voluntary body and councillors are not volunteers in the charitable sense of the word. Councillors are statutory office holders and even the smallest council with the minimum five councillors, must comply with legislation. There is a degree of formality to the administration and proceedings of a local authority, many of which are defined in legislation which all councils, no matter what their size, have to comply with. The best councillors learn to work with the legislation and within it.

## **Climate change powers**

The National Association of Local Councils has produced a list of legal powers available to parish sector councils to enable them to tackle climate change. The list is attached and can also be found on the YLCA website.

## **Terms of reference for committees**

We seem to have done a lot of work recently helping councils to amend the terms of reference that they have adopted when they have appointed a committee. When a council appoints a committee, whether that is a decision-making committee or an advisory committee that only makes recommendations, there is a duty under Section 102 of the Local Government Act 1972 to set the remit in which the committee will operate. It makes sense that the remit is defined in writing and a copy given to all councillors so that everyone is clear what the committee is established to do.

Rather than have to go through terms of reference that are not fit for purpose, please come to YLCA before the terms are set and obtain a template or ask us to look over your draft terms of reference prior to adoption. It is far better to get this right from the outset than to find that they do not work as they should, and an issue has been caused because of that.

## **Please make sure your council is acting lawfully!**

A question asked of us recently is whether it is lawful to give a donation to the church for the maintenance of the structure of the church building. This is not lawful but unfortunately the council had already agreed to give a grant to the church without checking whether to do so was lawful. This is a plea to clerks and chairs to always identify the relevant legislation that empowers and allows the council to do what is being proposed.

Every time the Council is in the decision making process, the councillors and clerk need to consider whether there is a provision in legislation to allow the council to do the action that is being proposed.

There is an important role for the clerk in advising the council and one of the main reasons why clerks need to be trained so that they have the knowledge to advise their council accurately. There is much to learn and training needs to be an ongoing matter; these Associations suggest that a plan for training should be drawn up at the Clerk's appraisal. The matter of whether a decision to be made is lawful is also a matter for the Chair; he/she should ask the question at the meeting. The Chair should not allow a decision to be made until it is established whether the action being proposed is lawful. If no one at the meeting knows the answer, the matter should be deferred until advice can be sought from YLCA.

## **Finding and identifying local council powers**

Information about the legislative powers that enable councils to act can be found in the Good Councillor Guide on pages 64–69. Hard copies of the Guide area are out of print, but it can be

downloaded from our website and the powers pages remain current. Information about powers can also be found in YLCA advice notes 3, 5 and 19. All the YLCA advice notes can be found on our website, and they are a useful reference point for many topics and situations that local councils deal with.

## **What constitutes a majority vote?**

Decisions of a local authority such as a parish council must be made lawfully. Any agreement that a council has reached is a decision. The Local Government Act 1972, Schedule 12, Paragraph 39 says that decisions of a local authority must be taken by those present and voting at a meeting of the authority. That makes it clear that decisions are made at council meetings and those might be full council meetings, committee and sub-committee meetings. A council can also, at a meeting, decide to delegate its decision making to an officer of the council, a committee, sub-committee or another local authority. (note that there is no power in law to delegate decision making to a Chair or individual councillor which is interesting).

Voting must be by show of hands, unless a council has made provision for a different method in its Standing Orders. Show of hands is a perfectly reasonable method. After obtaining a proposer (and a seconder if a council's Standing Orders require it), the Chair will put the matter to the vote. Councillors can choose to vote in favour, against or abstain from voting. There is no situation where someone is forced to vote; if a councillor wishes to abstain in any item, they are permitted to do so.

Back to Schedule 12, Paragraph 39 which requires decisions to be made by a majority of those present and *voting*. If a councillor abstains, they are not voting. Therefore, take the scenario whereby there are fifteen councillors at a meeting; ten abstain from voting, three vote in favour with two voting against. The five who vote are the only ones that are present and *voting*, and of those five, three have voted in favour, i.e. a majority of the five and therefore the motion is approved.

## **Ensure you take reasonable steps to defend your council against claims for discrimination with your policies and procedures**

The Equality Act 2010 (s109(4)) enables councils who have been accused of discrimination by an employee to defend themselves by demonstrating that they have taken all reasonable steps to prevent the problem from happening. To be able to do this a council has to demonstrate that it has policies and procedures, such as Harassment and Bullying, Equal Opportunities, Capability, Grievance and Discipline, which are up to date, appropriate to the size of the council, and that employees and councillors have received training on them. Furthermore, the council should follow its own procedure.

In drafting policies and procedures, one of the most important things for parish sector councils to remember is that they are likely classed as a small organisation where the employment of staff is concerned. Most councils employ less than twenty staff, which according to ACAS fulfils the definition of a small organisation. It is therefore essential that a council's policies and procedures are appropriate to the resource capability of the council and are easy for councillors and employees to follow.

One problem that YLCA's external HR adviser Chris Moses encounters is parish sector councils who believe that the policies and procedures used by the principal authorities in the area represent best practice for them too and should be copied. It needs to be remembered that principal authorities have far more resources and have collective bargaining arrangements with unions. This creates a very different employment environment compared to a town or parish council. Principal councils also have HR officers who can conduct independent investigations and their collective bargaining arrangements enable employees to be accompanied at every stage of a grievance and disciplinary process, including the informal stages. For most town and parish councils this is not possible with their limited resources.

Parish sector councils should ensure their policies and procedures are appropriate to a small organisation. ACAS states that tribunals will take the size and resources of an employer into consideration when deciding what procedural steps need to be followed.

Chris Moses says, “I appreciate from experience that some councillors believe that what happens at the principal authority must be “best practice”. In this context, that is often not appropriate and can lumber a town or parish council with procedures that are unworkable for it and may cause unnecessary risks if they cannot be followed. The resultant problem is that the council trips itself up by not being able to follow all of the stages defined in its procedures, due to lack of resources. As a result of not following its own procedures it could increase the risk of losing a claim, at a tribunal.

## **Be wary of using AI for HR**

We have recently been aware of councils using artificial intelligence to produce policies and procedures, contracts and letters to employees. It can be a useful tool but needs some prior knowledge. For example, it will produce a contract of employment, but unless you know it is up to date with all statutory requirements, it may cause more problems than it solves. The same applies to policies and procedures and letters, we have seen some bad examples which would have caused trouble if used. AI should be used with caution and the contents checked by an expert, if possible, to avoid potential trouble in the future.

## **The appropriate level of financial reserves**

Remember that if the council has a question about the administration and management of the funds that it holds, the go to place for advice and guidance is The Practitioner’s Guide 2023. All councils are strongly advised to download a copy of this to the council’s electronic files. Recently, YLCA has responded to a number of enquiries about reserves, and we have reproduced the section in the publication that gives guidance on this matter:

5.32. The general reserve of an authority comprises its cash flow and contingency funds to cover unexpected inflation, unforeseen events and unusual circumstances.

5.33. The generally accepted recommendation with regard to the appropriate minimum level of a smaller authority’s general reserve is that this should be maintained at between three and twelve months of net revenue expenditure.

5.34. The reason for the wide range is to cater for the large variation in activity level between individual authorities. The smaller the authority, the closer the figure may be to 12 months expenditure, the larger the authority, the nearer to 3 months. In practice, any authority with income and expenditure in excess of £200,000 should plan towards 3 months equivalent general reserve.

5.35. In all of this it is important that each authority adopt, as a general reserve policy, the level appropriate to their size, situation, risks and plan their budget so as to ensure that the adopted level is maintained. Consideration of the minimum level of reserves requires not only consideration of level of income and expenditure but also the risks to that income.

5.36. Authorities with significant self-generated income (other than the precept or levy) should take into account situations that may lead to a loss in revenue as well as increased costs and adapt their general reserve accordingly.

Earmarked and other reserves:

5.37. None of the above in any way affects the level of earmarked (EMR) and/or capital receipts reserves (CRR) that an authority may or should hold.

5.38. There is, in practice, no upper or lower limit to EMR/CRRs save only that they must be held for genuine and identifiable purposes and projects, and their level should be subject to regular review and justification (at least annually and at budget setting) and should be separately identified and enumerated. Significant levels of EMRs in particular may give rise to enquiries from internal and/or external auditors.

## **Martyn's Law – Potential Actions for Local Councils**

The National Association of Local Councils (NALC) and the Society of Local Council Clerks (SLCC) held a joint, remote session on 16 November 2023 to discuss the current legislative status of Martyn's Law. The event highlighted where the Terrorism (Protection of Premises) Draft Bill (formerly Martyn's Law) is in its legislative journey, outlined the potential actions that parish sector councils might need to adopt if the law is passed, and shared practical insights into how councils can contribute to preventing terrorism in their local communities.

The panel featured Helen Ball, chief executive at Shrewsbury Town Council, Chris Borg, policy manager at the National Association of Local Councils, Lauren Renshaw, head of communications and engagement and Christian Stensrud, head of events and devolved administration engagement at the Home Office.

Chris Borg emphasised the Bill's importance of having a proportionate approach for those within the scope of local councils' premises and events. He highlighted NALC's concern about the additional pressure the new legislation will place on local council budget and resources, stating, "NALC are particularly concerned that the draft Bill's impact assessment overlooks local councils and only includes principal councils".

Home Office representatives discussed policy principles, scope, tier requirements, the extensive process of transforming policy into law, upcoming stages, and available support. They reassured councillors not to be alarmed, emphasising that the policy implementation process is gradual, and support is currently accessible and will remain so. The Home Office is keen to hear from small businesses affected by the Bill and intends to strengthen communication around the consultation to ensure the bill is straightforward to understand. They additionally encouraged everyone to check the latest information and advice on ProtectUK, who provide business and the public with counter terrorism support and guidance for effective protection and preparation - [ProtectUK | Home](#) and the Home Office's Martyn's Law Factsheet - [Martyn's Law Factsheet - Home Office in the media \(blog.gov.uk\)](#)

Helen Ball noted that Martyn's Law is one of the most significant developments for local councils since the General Data Protection Regulation and will impact everyone. She stressed the need for consistent training and support on counter-terrorism across the sector before the Bill becomes legislation. She remarked, "In a clerks poll by the SLCC, only 7% of respondents had received counter-terrorism training, while 96% said they would welcome counter-terrorism training".

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