

Update on Governance; the Devolution Bill

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1. Local government is likely to experience some dramatic changes if the Cities and Local Government Devolution Bill is enacted. In this paper, I shall highlight the key aspects of the Bill.
2. I will also discuss a key case concerning members' misconduct. This has not been a busy year for litigation involving councillors, and news stories about misconduct have been relatively few. There is one big exception – the election court case involving Tower Hamlets Mayor, Lutfur Rahman. This provides a cautionary tale for those promoting the merits of elected mayors. Although elected mayors may be said to promote direct democracy, Mr. Rahman's case highlights the practices that might be employed to gain, or maintain, the levers of power that come with being mayor.

Councillor misconduct

3. The keywords associated with the *Erlam v. Rahman* judgment ([2015] EWHC 1215 (QB)] on the *Westlaw* website are quite an eye-opener, and not something that has been seen in local authority democracy for many years:

“Bribery; Canvassing; Elected mayors; Election petitions; Electoral offences; False representations; Fraud; Local elections; Personating voters; Polling stations; Undue influence”.

4. Looking at the detail: in a rather lengthy judgment (686 paragraphs), election judge Richard Mawrey QC found as follows:

(1) In the election for the Mayor of the London Borough of Tower Hamlets in May 2014, Mr. Rahman was guilty personally and/or by his agents of corrupt and illegal practices. Those practices amounted to a large number of contraventions of the Representation of the People Act 1983 (“the 1983 Act”): personation

(section 60); postal vote (section 62A); the illegal provision of false information (section 13D(1)); illegal voting (section 62A); making false statements about candidates (section 106); illegal employment of paid canvassers (section 111); and bribery (section 113).

(2) A letter signed by 101 spiritual leaders of the Bengali community and published just before the election constituted 'undue spiritual influence' contrary to section 115 of the 1983 Act.

5. As a consequence, the election judge declared Mr. Rahman's election to have been avoided by corrupt or illegal practices contrary to section 159(1) of the 1983 Act, and also on the ground of general corruption pursuant to section 164(1)(a) of the 1983 Act.

6. With respect to the finding of bribery, the election judge made damning findings about the way in which Mr. Rahman, as elected mayor, had allocated grant monies. This provides a cautionary tale for those advising on the proper distribution of a local authority's discretionary funds.

a) the administration of grants was firmly in the personal hands of Mr Rahman, assisted by his two cronies, Councillors Asad and Choudhury;

b) in administering the grants policy, Mr Rahman acted in total disregard of the Council's officers, its members and, almost certainly, the law;

c) grants were increased, substantially and unjustifiably, from the amounts recommended by officers who had properly carried out the Council's investigation and assessment procedure;

d) large grants were made to organisations who were totally ineligible or who failed to meet the threshold for eligibility;

- e) grants were made to organisations that had not applied for them;
- f) the careful attempts of PwC to marry up grants to ascertainable levels of deprivation and need in the Borough had resulted in the conclusion that it was impossible to do so: grants were not based on need;
- g) the lion's share of grants went to organisations that were run by and/or for the Bangladeshi community;
- h) the main thrust of Mr Rahman's political campaigning both as leader of the Council and later as Mayor was to target the Bangladeshi community and to convince that community that loyalty to the community meant loyalty to him;
- i) even within the Bangladeshi community, grants were targeted at the wards where support for Mr Rahman and his candidates was strongest while wards where their chances of success were slim lost out.

(see paragraph 484).

7. On behalf of Mr. Rahman, it had been argued that his conduct amounted merely to 'pork-barrel' politics, and was not illegal. The election judge disagreed, explaining that the difference between 'pork-barrel politics' and bribery is that

"the former is not in the hands of a single individual or directed to the election of an individual candidate. The reason why Mr Rahman's conduct is on the wrong side of the line is because he was, in reality, the sole controller of the grant funds and he manipulated them for his own personal electoral benefit.

A man in control of a fund of money, not his own, who corruptly uses his control to make payments from the fund for the purposes of inducing people to vote for him is, in the judgment of the court . . . guilty of bribery."

(paragraphs 498-499).

8. Away from the *Rotten Borough* of Tower Hamlets, and on a far less serious note -- but big news in Stoke-on-Trent -- late last year former Stoke-on-Trent Council deputy leader, Paul Shotton, was found by his authority's standards hearings panel to have breached the members' code of conduct by sending texts concerning the council to a local radio station under false names: the text praised council policies, such as the HS2 bid, and criticised opponents who were calling for a town council. The panel found that the member's actions had brought the authority into disrepute. They decided to censure him for his actions and refer him for additional training. They also recommended that Mr. Shotton be barred from any cabinet positions or committee chairs until after the next elections.
9. One observer highlighted the limited sanctions that were imposed on Mr. Shotton, commenting that as the councillor has been in his role for a long time, 'He must have known this was wrong, so I'm not sure what good more training will do.'¹

II. The Cities and Local Government Devolution Bill

10. Making its way through Parliament is the Cities and Local Government Devolution Bill. The Bill has completed its progress through the House of Lords. Its Second Reading in the House of Commons is due to take place on October 14th 2015.
11. The Bill has been described by the Government as "intended to support delivery of the Government's manifesto commitment to "devolve powers and budgets to boost local growth in England". The Bill will "devolve far-reaching powers over economic development, transport and social care to large cities which choose to have elected mayors" and "legislate to deliver the historical deal for Greater Manchester".² The devolution of additional powers will, in general, be accompanied by the election of

¹ Stoke Sentinel, 14th October 2014.

² Cities and Local Government Devolution Bill [HL]: Explanatory Notes, paragraph 1. The DevoManc deal devolved to the combined authority control of a new £300 million Housing Investment Fund; potential to earn back up to £30 million per annum for growth created through improvements to infrastructure; and (the subject of most publicity) control of £6 billion of the NHS budget.

mayors. In the Government's view, 'it is necessary for the people of the area to have a single point of direct accountability', and elected mayors will 'ensure the continuation of strong democracy.'³ It is also a practical – English -- response to the calls for independence in Scotland and greater devolution in Wales.

12. Currently, the Secretary of State has powers under the Local Democracy, Economic Development and Construction Act 2009 ("the 2009 Act") to establish combined authorities. A combined authority is a corporate body which enables local authorities to work jointly to deliver improvements in economic development, regeneration and transport across a functional economic area. There are currently five such authorities: Greater Manchester; Barnsley, Doncaster, Rotherham and Sheffield; Durham, Gateshead, Newcastle Upon Tyne, North Tyneside, Northumberland, South Tyneside and Sunderland; Halton, Knowsley, Liverpool, Sefton, St Helens and Wirral; and West Yorkshire. The Bill will broaden the scope of powers that it is possible to confer on a combined authority. It will also change the governance structures available to those combined authorities.

13. Taking the Bill's clauses one by one: clause 1 will require the Secretary of State to lay a report about devolution for all areas within England before the Houses of Parliament on an annual basis. This will explain the areas of the country where 'agreements [for combined authorities] have been reached' and where 'proposals have been received by the Secretary of State and negotiations have taken place but agreement has not yet been reached', as well as information about 'additional financial resources and public functions which have been devolved as a result of agreements'.

14. Clause 2 will oblige a Minister of the Crown who has introduced any Bill to make a 'devolution statement' before the second reading stage of that Bill 'to the effect that in his view the provisions of the Bill are compatible with the principle that powers

³ Explanatory Notes, paragraph 5.

should be devolved to combined authorities or the most appropriate local level except where those powers can more effectively be exercised by central government'. This is analogous to the statement under section 19(1)(a) of the Human Rights Act 1998, in which the Minister is obliged to state that in his view 'the provisions of the [Bill] are compatible with Convention rights'. The effect of the 'devolution statement' requirement will be to embed in Government thinking questions of devolution; recognising that the devolution agenda is important.

15. Clause 3 will introduce a new provision (section 107A) to the 2009 Act. This will empower the Secretary of State to make an order to 'provide for there to be a mayor for the area of a combined authority.' That mayor will be elected by the local government electors for the relevant area. The mayor will (unsurprisingly) be entitled to call himself/herself 'mayor', and will be a member of, and chair of, the combined authority. A new Schedule 5B to the 2009 Act will set out further provisions about the Mayor, and about elections. (An opposition amendment to the Bill that was successful in the House of Lords provides that an order providing for a mayor of a combined authority shall not be used as a condition for agreeing to the transfer of local authority or public authority functions. In other words, functions can be transferred to a combined authority even without the mayoral model).
16. The Mayor's term of office will be four years, and elections will coincide with elections for local authority councillors for the county council/district councils which make up the combined area. Elections will be conducted according to a version of the 'alternative vote' electoral system: electors will be entitled to express first preference votes and, where there are three or more candidates, a second preference vote. The Mayor will appoint a Deputy Mayor to carry out some of his functions, or to act if the Mayor is unable to act or if there is no Mayor.
17. An order under section 107A can be made if a proposal to that effect has been made by 'the appropriate authorities' (each county council within the area of the

combined authority; each district council within that area; or the combined authority where there is an existing authority). An order under section 107A can also be made without such a proposal if the appropriate authorities consent, or in the case of an existing combined authority the appropriate authorities consent apart from one non-consenting constituent council. In the latter circumstances, the non-consenting authority will be removed from the existing combined authority.

18. A new section 107D of the 2009 Act will set out provisions for the functions of the Mayor. The Secretary of State can, by order, determine that the function of the combined authority should be exercisable by the mayor alone. This can include 'general functions' and 'ancillary functions'. The latter may include powers that are 'similar' to any powers exercisable under section 113A of the 2009 Act (general powers of Economic Prosperity Boards or combined authorities) or incidental powers under section 113D of the 2009 Act. It is expressly provided that the mayor cannot borrow money. An order conferring powers on the mayor can only be made with the consent of the appropriate authorities. This is to ensure institutional support for the arrangements.

19. A new section 107E confers power on the Secretary of State to provide for the mayor for the area of a combined authority to exercise the functions of a police and crime commissioner for the area (as set out under Part 1 of the Police Reform and Social Responsibility Act 2011). The effect of this will be to bring to an end the present arrangements in the relevant area of the police and crime commissioner. This will enhance the powers of the mayor: akin to London's Mayor who also has responsibilities for overseeing the Metropolitan Police Service.

20. So as to finance the operation of the combined authority, an amendment to section 39 of the Local Government Finance Act 1992 will have the effect that the mayoral combined authority will become a major precepting authority: council tax receipts can be levied for the mayor's expenditure.

21. Clause 7 of the Bill will enable the Secretary of State to confer on a combined authority a broader set of functions than economic development, regeneration or transport. (Unlike Economic Prosperity Boards, a combined authority will not be required to “perform functions with a view to promoting economic development and regeneration”).
22. The Secretary of State will be able to transfer to the combined authority functions of a ‘public authority that is exercisable in relation to a combined authority’s area’ (new section 105A of the 2009 Act). For these purposes, a public authority ‘includes a Minister of the Crown or a government department’, but not ‘a county council or a district council’. The transfer of functions may be absolute, or may be shared with the existing public authority.
23. Scrutiny of the workings of a combined authority will be carried out by ‘overview and scrutiny committees and audit committees’ (a new Schedule 5A to the 2009 Act).
24. The Secretary of State will have power to confer on the combined authority the *general power of competence* (as per Part 1 of the Localism Act 2011) (new section 113D of the 2009 Act).
25. The Bill also gives the Secretary of State significant powers with respect to local authorities more generally. The Bill empowers the Secretary of State to make provision about:
- (a) The governance arrangements of local authorities (executive arrangements etc);
 - (b) The constitution and membership of local authorities under Part 1 of the Local Government Act 1972;
 - (c) The structural and boundary arrangements in relation to local authorities under Part 1 of the Local Government and Public Involvement in Health Act 2007.

(clause 16). So as to provide some constraint on the Secretary of State's powers of regulation, any regulatory change will require affirmative resolution of both Houses of Parliament.

26. The Secretary of State will also be able to make provision to transfer public authority functions to local authorities, or to confer a function on a local authority for its area corresponding to a function that a public authority has in relation to another area (clause 17). Where the transfer of a function results in the public authority no longer having any functions, that authority can be abolished.

27. The transfer of functions can only take place if the relevant local authority consents, and the Secretary of State considers that the making of the regulations 'is likely to improve the exercise of statutory functions in the local authority's area' (clause 18). According to the Government, an example of this could be:

'a single county, which may or may not be a unitary authority, covers a functional economic area which may be the basis for a Devolution Deal, and all the constituent councils involved agree that the strong and accountable governance needed for the new powers and budgets to be conferred on the area necessitates simplifying the local government structures for the area. That may involve mergers of councils, moves to unitary structures, or changing the democratic representation of the area with different electoral cycles and fewer councillors.'

28. The various provisions in the Bill for the transfer of public authority functions (whether to a combined authority or to local authorities generally) will include health service functions. Clause 19 provides, however, that even where health service functions are transferred, the Secretary of State for Health

(a) Must remain able to fulfil all statutory duties placed on him under health service legislation;

- (b) Must not transfer health service regulatory or supervisory functions vested in national bodies responsible for such functions (e.g. Care Quality Commission);
- (c) Must ensure that the receiving authorities adhere to the ‘national service standards and the national information and accountability obligations’ placed on all health service bodies.

In other words, devolution of health service powers to a local authority/combined authority does not dilute the Secretary of State’s own duties towards the health service.

29. Without much attention having been attracted to this provision, clause 20 of the Bill introduces an amendment to section 2 of the Representation of the People Act 1983: 16 year olds will fall within the definition of ‘local government electors’, and so will be entitled to vote in local government elections. This may be a further response to the Scottish independence debate.

30. There have been contrasting views on the Bill. For some, it is thought that the Bill will provide exciting new opportunities for local authorities to work together. As one commentator has put it, ‘the Bill has the potential to present City-regions with key opportunities to generate local growth, and promote new, more collaborative and integrated ways of working at the local level, leading to higher quality and more effective delivery of public services.’⁴

31. Concerns have been expressed, however, that

“[L]ocal government in England is likely to become more complicated, as different combined authorities receive different packages of powers. This is a significant departure from past practice which has operated on the basis of a finite number of different council models. The Bill, by contrast, creates the possibility of bespoke arrangements for each combined authority. It might be

⁴ Centre for Local Economic Strategies: The Cities and Local Government Devolution Bill.

argued that the proposed system is a paradigm example of demand-and-supply devolution, responsive to local needs. On the other hand there are real concerns about the complexity of the system that may result, and the degree of asymmetry which these changes may bring about.”⁵

32. Whichever view one holds, it can be seen that the Bill will provide the institutional mechanism and framework to deliver substantial changes in the arrangements for local government. If taken up on a significant scale, the arrangements could provide some of the English response to the sentiments underlying calls for independence in Scotland and greater devolution in Wales.

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⁵ House of Lords Constitution Committee, quoted in “Devolution within England — The Cities and Local Government Devolution Bill”, Public Law for Everyone by Mark Elliott.
<http://publiclawforeveryone.com/2015/09/22/public-law-update-3-devolution-within-england-the-cities-and-local-government-devolution-bill/>