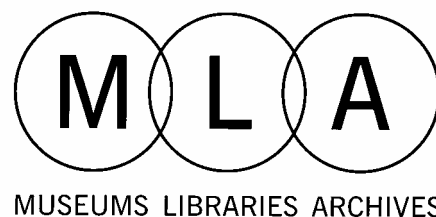


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Moving to Museum Trusts: Learning from Experience

Advice to Museums in England & Wales

Part 2: The Process of Devolution

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CONTENTS

1	Introduction	1
2	Charities & Museums	3
	➤ The Charitable Purpose of Museums	3
	➤ Trading	5
	➤ Charities & Taxation	6
	○ Income Tax	6
	○ Gift Aid	7
	○ Corporation Tax	8
	○ Inheritance Tax	8
	○ Capital Gains Tax	8
	○ Stamp Duty Land Tax and Stamp Duty	8
	○ National Non-Domestic Rates	9
	○ Value Added Tax (VAT)	9
3	The Road to Devolution – Review & Implementation	11
	➤ A Strategic Approach to Review	11
	➤ The Review Process	12
	○ Stage 1	13
	○ Stage 2	13
	○ Stage 3	15
	▪ Finance & VAT	15
	▪ Set-up costs	18
	▪ Employees	19
	▪ Chair and Board	20
	▪ General Consultation	20
	▪ State Aid	21
	○ Final Report	22
	➤ Implementation	22
	○ The Director/Chief Executive	24
	○ Appointment of Additional Board Members	26
	➤ Timetable	27
4	Legal Transfer Issues	33
	➤ Powers to Establish Museum Trusts	33
	➤ The Nature of Transfer Documentation	34
	➤ The Governing Instrument	35
	○ The Charitable Company Limited by Guarantee	35
	○ The Charitable Incorporated Organisation (CIO)	37
	○ Names of Museum Trusts	37
	○ Objects of Museum Trusts	38
	○ Powers of Museum Trusts	39
	○ Subsidiary Companies	40
	○ Remuneration of Trustees	42

○ The Board	42
○ Nominated Members of the Board	45
○ Board Size	46
○ Indemnity & Exoneration	48
➤ The Funding Agreement	48
➤ The Transfer Agreement	55
○ Charitable Trusts	65
○ Employment Rights	66
○ Intellectual Property and Copyright	68
➤ Leases & Licences	68
○ Lease or Licence ?	68
○ Term	69
○ Rental	70
○ General Covenants	70
○ Repairing Obligations	71
○ Insurances	71
○ Usage	71
○ VAT	72
➤ The Collections Agreement	72
➤ Other Agreements/Licences	77
Bibliography	78

CHAPTER 2.1 – INTRODUCTION

- 2.101 This is the second part of a report commissioned by the Museums, Libraries and Archives Council (MLA), following the recommendation of the Goodison Review¹ that it should make available to local authorities and museums a summary of the means by which local authority museums were devolved to museum trusts, the reasons for doing it, their agreements for continued local authority or other public funding, and their experience as independent entities since they were set up.
- 2.102 Besides fuller information on the genesis of this study and its management, the first part of this Report:
- *reviews* the factors that have led to a change of status, whether from direct provision to trust, or from trust to direct provision, or to a decision to retain the status quo;
 - *evaluates* the experience of those former local authority museums that have adopted the charitable trust style of governance;
 - *assesses* the overall impact of trust status, both financial and practical, on institutions where change has taken place;
 - *suggests a methodology* for the assessment of the effectiveness and efficiency of such bodies in relation to other means of governance and what constitutes ‘a successful museum’;
 - *makes recommendations* based on identification of the strengths and weaknesses of trust governance in relation to other options, giving special attention to practical issues connected with funding, trustee recruitment and longer-term sustainability; and
 - *identifies* any further work that may be necessary or desirable.
- 2.103 This second part is by way of practical help and guidance for those considering moving a museum from a local authority management to a specially-created museum trust. It includes chapters that:
- provide background information on charities, their application to museums and the benefits of charitable status;
 - describe organisational issues concerning the process of transfer; and
 - explain the legal and practical issues relating to the process of transfer.
- 2.104 The scope of our Report is limited to England and Wales. Since Devolution in 1998 the Welsh Assembly Government has been the competent authority for local government in Wales. Where the legislative powers in Wales differ from

¹ Goodison (2004)

those in England these are noted. Though many of the issues in the Report are applicable in Scotland and Northern Ireland, they have different legal structures. Some of the key legal issues relevant to the Scottish position have been dealt with elsewhere.²

2.105 The scope of this part of the Report is limited to circumstances where museum trusts have been created as special purpose vehicles to deliver a local authority's museum service. It does not include arrangements where operation of a museum has been outsourced to an existing charitable body (which may or may not be operating museums), or where the museum is only one of a range of cultural services that are being devolved as a whole. While many issues in the pages that follow may be relevant to such situations, they will invariably be constrained by past policies and practice. The guidance that follows supposes that the vehicle being established to operate the museums is free from such influences.

2.106 The following conventions have been adopted throughout the Report:

- The term 'museum' is taken to mean all those institutions (including art galleries) that meet the Museums Association's definition of a museum, which is:

Museums enable people to explore collections for inspiration, learning and enjoyment. They are institutions that collect, safeguard and make accessible artefacts and specimens, which they hold in trust for society.

- The term 'museum trust' is used in a loose sense to include any museum operated by an organisation whose primary purpose is the operation of a museum, and has been registered as a charity with the Charity Commission or with HM Revenue & Customs, rather than in the narrow sense of a charity created by Trust Deed. Its charitable status is implicit, in view of its role as a 'trustee for society', in the Museums Association's definition.
- 'Trustee' is a member of the governing body of a museum trust, whether or not titled as such.

2.107 It is expected that new charities legislation will be enacted during the summer of 2006. At the time of publication it has passed through the House of Lords and its first stages in the House of Commons. This section has therefore been written in anticipation of the passage of the Act's successful completion of its remaining parliamentary stages, while also indicating the position at time of writing.

² Scottish Museums Council (1997)

CHAPTER 2.2 – CHARITIES & MUSEUMS

The Charitable Purpose of Museums

- 2.201 A charity is an institution which is established solely for charitable purposes and is subject to the control of the Courts in respect of those activities³.
- 2.202 The law has formally recognised the charitable status of museums since 1826.⁴ Within the four heads of charity defined by Pemsel's case⁵ they fall either under 'the advancement of education' or (where the museum and its exhibits have some other merit in their own right) 'as other purposes beneficial to the community'.
- 2.203 The Charities Bill 2005-2006⁶ proposes to define 'charitable purposes' as being an activity that falls within thirteen heads of charity, and is for the public benefit. Within these thirteen heads those that are specifically relevant to the provision of museums include 'the advancement of education', 'the advancement of the arts, culture, heritage or science', 'the advancement of environmental protection or improvement' and 'the promotion of the efficiency of the armed forces of the Crown'. This is not an exclusive list: other heads might cover museums in some way or another.
- 2.204 The Charity Commission considers that, in order to demonstrate that their purpose is charitable, museums should be able to show that their collections or exhibits:
- a) *are set up for the benefit of the public*, in that:
 - 1) there is sufficient access for the public;
 - 2) any private benefit gained by individuals is incidental and properly regulated;
 - 3) they are not used for non-charitable purposes, such as non-primary purpose trading⁷; and
 - b) *they satisfy a criterion of merit* by demonstrating that the collections and exhibits and the use made of them either will educate the minds of the public whom the museum intends to serve (by conveying an idea, emotion or experience which is enlightening and which is, or is capable of being, of value to them), or at least will be capable of doing so.⁸

³ Charities Act 1993 s 96 (1); Charities Bill 2005 -2006 clause 1 (1)

⁴ *British Museum Trustees v White* (1826) 2 Sim & St, 594

⁵ *Comrs for Special Purposes of the Income Tax v Pemsel* [1891] AC 531

⁶ Charities Bill 2005 - 2006 Part I

⁷ See paras 2.208 – 2.213 below

⁸ Charity Commission, *Museums and Art Galleries (RR10)* (August 2002)

2.205 It follows from this that charities are not private entities, but one element of the public sector, and as such both regulated and open to public scrutiny. All charities (unless excepted by law) must submit an annual return and accounts to the Charity Commission, which also regulates the requirement for these accounts to be audited or independently examined in most cases. The Commission has the power and authority to investigate charities. Where there is serious mismanagement it can intervene and make alternative arrangements for running the charity, and take legal action against the charity, the members of its governing body and/or its employees.

2.206 Charitable status brings both obligations and benefits. The principal obligations are:

- a) to register the charity where its gross income is over £1,000⁹ (this is set to increase to £5,000 under the Charities Bill 2005-2006¹⁰) though charities with a lower income may register voluntarily;
- b) to file annual returns with the Charity Commission;
- c) to prepare and publish annual reports and accounts in the form required by the Charity Commission;
- d) to follow the laws relating to fundraising from the general public;
- e) not to do things outside the purposes and objects specified in the charity's constitution (its 'governing instrument'), such as non-primary-purpose trading;
- f) to ensure that its trustees:
 - 1) give proper time and attention to their duties;
 - 2) act only to the charity's advantage, without illegitimate regard to private interests or those of others;
 - 3) manage the museum's affairs prudently, taking a long-term view;
 - 4) take professional advice in areas where they are not competent; and
 - 5) do not derive unauthorised financial gain from their office.

2.207 The advantages that come with charitable status are:

- a) fiscal benefits that increase the value of gifts by the public and relieve the charity of certain taxes;

⁹ Charities Act 1993 s 3(3)(5)

¹⁰ Charities Bill 2005 - 2006 clause 3A (2)(d)

- b) the credibility, probity and political neutrality associated with this designation encourages people to support it, both morally and financially; and
- c) access to sources of funds that are generally only available to charities.

Trading

2.208 Not all the activities that the public expects of a modern museum are necessarily charitable and, as has already been noted, trading - the manufacture, and buying and selling, of goods, or the provision of services – is one of these, even when the result is the acquisition of funds to help the charity meet its object. This is because:

- a) charity law does not recognise that trading in itself is charitable and, as all a charity's activities have to be wholly and exclusively charitable, undertaking such activities beyond the charity's powers would lead to the charity's activities ceasing to be wholly and exclusively charitable; and
- b) as trading involves risk, the application of a charity's resources to such ventures is necessarily speculative, which might be an improper use of a significant part of the charity's resources.

2.209 The exception to this general rule is when trading activities fulfil the charity's objects or are within its powers to fundraise (and are not permanent trading) or are necessary and incidental to fulfilling the charity's object. Examples of this 'primary purpose' trading are:

- a) *Fulfilling the charity's objects*, such as
 - (1) charging for admission;
 - (2) fees for services, and for the use of facilities used in connection with the museum's charitable purposes;
 - (3) sales of books and other educational materials that relate to the museum's aims;
 - (4) sale of products made as part of the museum's day-to-day charitable activities, such as items manufactured by way of demonstration of historic crafts or techniques.
- b) *Trading of a non-permanent nature for fundraising* – such as one-off trading events, not in competition with other traders, that are supported because the public is aware that the profits gained from them will be donated to a charity.
- c) *Necessary and incidental*, such as the sale of light refreshments (but not substantial meals) to museum visitors.

- 2.210 The following activities are not considered to be ‘primary purpose’ activities:
- a) sale of general merchandise and souvenirs that bear no relationship to the museum’s charitable purpose;
 - b) catering for non-museum users, or the provision of restaurant-style meals, or corporate hospitality;
 - c) fees for services, or hire of facilities, for uses other than meeting the museum’s primary objects.
- 2.211 Where trading activity of this type is planned, the usual practice is to establish a separate company limited by shares, wholly-owned by the charity, to conduct trading activities that it would be unlawful for the charity to conduct, with the trading company giving some or all of its profits to charity, using the Gift Aid scheme to enable its taxable profits to be reduced or eliminated.
- 2.212 However, it should be noted that the Charity Commission takes the view that charities should not bear the cost of setting up a trading company; and investment in trading companies by charities is only permissible where it does not represent a high level of speculation; and that the charity should in no way subsidise the operations of the trading subsidiary. It is therefore important that:
- a) the trading company pays the charity, on an arms-length basis, for the premises it occupies and any services it receives and at never less than cost; and
 - b) any financial input from the charity should be limited to commercial investments, undertaken on the basis of expert advice, and not extend to reimbursing, underwriting or guaranteeing any losses by the trading company.
- 2.213 Failing to observe these rules, and thereby acting outside the charity’s powers, could represent a breach of trust for which the charity’s trustees might be personally liable.

Charities & Taxation

- 2.214 Charities are subject to a favourable tax regime, subject to their using both their income and capital to fulfill their charitable object. The fiscal advantages they enjoy are as follows:

Income Tax

- 2.215 Broadly speaking, charities are exempt from Income Tax if they do nothing other than undertake charitable activities.¹¹ However, though tax rules reflect

¹¹ though, of course, like any other employer they are required to collect PAYE and National Insurance contributions. This also provides an opportunity to support the museum by

charity law concerning trading,¹² they differ in its detail. Thus, while all primary purpose trading is exempt¹³, by practice this exemption extends to:

- a) ancillary activities (such as, in the case of museums, benefits due to sponsors of an exhibition where admission is charged);
- b) 'mixed' trading, which is where primary purpose and non-primary purpose activities are carried out side-by-side (eg the museum shop that sells both educational material (primary purpose) and souvenirs (non-primary purpose)), provided that:
 - (1) the non-primary purpose trading is small in absolute terms; and
 - (2) its turnover is less than 10% of the total trading turnover;
- c) all trading activities that are not already exempt from tax, provided that:
 - (1) the total turnover from all of the activities does not exceed the annual turnover limit (currently £5,000, or if the turnover is greater than £5,000, 25% of the charity's gross income (ie the total receipts of the charity for the year from all sources) up to a limit of £50,000); or
 - (2) if the total turnover exceeds the annual turnover limit, the charity had a reasonable expectation that it would not do so, and
 - (3) the profits are used solely for the purposes of the charity.

Gift Aid

2.216 Donors to charities who are UK taxpayers can benefit from Income Tax relief on the money they pay. Payment by individuals who are UK taxpayers through the Gift Aid scheme enables the donee charity to reclaim the basic rate tax due on the amount of the gift, which (in 2005/6) would add 28% to its value. Where the donor is a higher rate taxpayer, they can benefit personally from relief on the difference between the basic rate and the higher rate of tax.¹⁴

2.217 Charities that operate buildings that are open to the public may claim Gift Aid on admission charges (whether to the whole attraction or parts of it) paid by individual visitors if either:

remitting part of their pay through the Give As You Earn scheme. There may also be some liabilities to the charity relating to investments and land.

¹² paras 2.208 and following

¹³ Income & Corporation Tax Act 1988 s 505(1)(e)

¹⁴ Finance Act 1990 s 25

- a) the visitor makes a donation that is at least 10% more than the appropriate admission charge; or
- b) the donation secures unlimited admission to the property, whenever it is open, for a twelve-month period, such as through a season ticket or a membership scheme, with a proviso that the right of admission may be excluded for up to five days in each twelve-month period when the property is otherwise open to the public.

2.218 These rules come into force on 6 April 2006, and will replace the previous special exemption that allowed some charities to claim Gift Aid on admissions to view heritage property or wildlife.

2.219 Relief can also be claimed by donors on gifts of UK land (ie the whole of any beneficial interest in freehold or leasehold land or buildings), shares and securities¹⁵ (including units in an authorised unit trust), or on the sale of such assets to a charity at less than market value. A company may get tax relief on gifts of stock (though not for gifts of its own shares) and on the costs of staff that have been seconded to charities.

Corporation Tax

2.220 Charities that are incorporated as companies are exempt from Corporation Tax (broadly tax on their income and gains) on the same basis as described elsewhere.¹⁶

Inheritance Tax

2.221 Outright and unconditional gifts to a charity, regardless of amount, or whether made during lifetime or after death, are free of Inheritance Tax.

Capital Gains Tax

2.222 Charities are exempt from Capital Gains tax on disposals of their own assets. Gifts they receive are also entirely free of tax, with the liability for any unrealized gain passing to the charity, and thence being 'washed out' by their own exemption if they dispose of the gifted property. The gain accrued must be both applicable to, and applied to, the charity's object.

Stamp Duty Land Tax & Stamp Duty

2.223 Stamp Duty Land Tax (SDLT) – broadly speaking, a tax paid by buyers on land transactions where the value exceeds £120,000 - is not payable by charities on the acquisition or lease of land or buildings, nor is Stamp Duty on legal documents such as financial contracts, or on the purchase of shares.

¹⁵ subject to these being shares and securities listed or dealt in on the UK Stock Exchange (including the Alternative Investment Market), or in recognised foreign stock exchanges, shares in an UK open-ended investment company, or holdings in certain foreign collective investment schemes.

¹⁶ paras 2.215 and 2.222

National Non-Domestic Rates

- 2.224 National Non-Domestic Rate (NNDR) is levied on the occupiers of properties in use other than for domestic purposes. The Local Government Finance Act (LGFA) 1988 enables local authorities to grant relief from NNDR to charities and other not-for-profit bodies.
- 2.225 Mandatory relief of 80% of NNDR is allowed where premises are occupied by a charity and those premises are wholly or mainly used for charitable purposes.¹⁷ Discretionary relief¹⁸ can be awarded to 'top up' the mandatory relief to 100%. All the costs of mandatory relief are met from the National Rates Pool; but only 75% of costs of discretionary relief come from the Pool. An award of the mandatory 80% relief therefore has no financial implications for the council making the award, but if it awards 100% relief, its NNDR income would be reduced by a sum equivalent to 15% of the NNDR payable on the property. Application of discretionary relief varies between councils, depending on their budgetary or strategic policies.
- 2.226 It should be noted, however, that shops and cafeterias, where they occupy a substantial space and depending on their size and the nature of their business, might cause a property to fall outside of the relief, as not being 'wholly or mainly used for charitable purposes'. This is more likely if such facilities were to be managed through a trading subsidiary of the charity. In this case, it would be expected that any external operator - including a wholly-owned trading company - should be liable to meet the NNDR payable due to the space they occupy.

Value Added Tax (VAT)

- 2.227 In general, charities are fully liable to the VAT regime, though there are several specific reliefs of potential benefit, including zero-rating or exemption for:
- a) adapting premises for access by people with disabilities;
 - b) advertising (including recruitment advertising) inviting donations or publicising the work of a charity in programmes, brochures, posters, the press or other media;
 - c) goods and services provided in connection with one-off fundraising events that benefit the charity; and
 - d) sales of donated goods.
- 2.228 It is a requirement of EU law¹⁹ that '*certain public services and goods closely linked thereto supplied by bodies governed by public law or by other cultural*

¹⁷ Local Government Finance Act 1988 s 43(5) and 45(5)

¹⁸ Local Government Finance Act 1988 s 45

¹⁹ EC Sixth Directive Article 13(A)1

bodies recognised by the member State concerned should be exempt from VAT in the public interest.

2.229 A consequence of implementing the Directive has been the VAT-exemption of admission charges levied by both public authorities (ie government departments, local authorities and non-departmental public bodies) and other eligible bodies. These have the following characteristics:

- a) they are non profit-making organisations;
- b) any profits made from exempt admission fees are applied to the continuance or improvement of the facilities to which the admission charge relates; and
- c) they are managed and administered on an essentially voluntary basis by people who have no direct or indirect financial interest in the activities of the body'.²⁰

2.230 VAT issues feature large in any discussion of transfer of museums from local authorities to museum trusts, and are discussed in detail below.²¹

²⁰ Value Added Tax Act 1994, Schedule 9, Group 13

²¹ paras 2.319 – 2.331

CHAPTER 2.3 – THE ROAD TO DEVOLUTION - REVIEW & IMPLEMENTATION

A Strategic Approach to Review

- 2.301 Guidance issued by the Museums & Galleries Commission in 1997²², suggests that the main reasons for moving to a museum trust would be to make financial savings or to provide a remedy for a failing museums service. The experience described in Part 1 of this Report suggests that in most cases it is indeed these scenarios that have driven the devolutions to date.
- 2.302 However, the statutory basis for Best Value in local authorities²³ makes it clear that services that are performing well should also be considered. The Act²⁴ expects local authorities to:
- *challenge* why, how and by whom a service is being provided;
 - secure *comparisons* with the performance of others across a range of relevant indicators, taking into account the views of both service users and potential suppliers;
 - *consult* local taxpayers, service users, partners and the wider business community in the setting of new performance targets; and
 - use fair and open *competition* wherever practicable as a means of securing efficient and effective services.²⁵
- 2.303 These ‘four Cs’ form an integral part of Best Value reviews, the form of which is determined by the English and Welsh governments through Regulations. It is the ‘challenge’ stage which requires local authorities to be able to produce ‘*evidence that they have considered the underlying rationale for the service(s) under review and the alternative ways in which it might be provided*’.²⁶ In Wales, the Welsh Assembly Government’s guidance was that local authorities should consider different forms of provision and providers across the whole range of council services.²⁷
- 2.304 In England, the government considers that these reviews need to:²⁸
- a) *take a long-term perspective*, looking far enough ahead to anticipate prospective changes in demand and the means of delivering such services, and ensuring that longer-term values are sensible in relation to the costs of change, risk and the necessary investment;

²² Babbidge & Loughbrough (1997), 6

²³ Local Government Act 1999 Part I

²⁴ s 5(4)

²⁵ DETR Circular 10/99 (December 1999)

²⁶ DETR Circular 10/99, para 26

²⁷ National Assembly for Wales Circular 14/2000 (March 2000), para 74

²⁸ DETR Circular 10/99, para 17

- b) *involve Elected Members*;
- c) *seek advice from outside the authority*, whether from local partners, expert panels or user groups, as well as from Members and Officers of the council who are not otherwise involved in the review;
- d) *involve staff* (especially frontline staff) who deliver the services;
- e) *question existing commitments*;
- f) *engage with users and potential users of the service*;
- g) *address equity considerations*, to ensure that the needs and expectations of all parts of the community are addressed; and
- h) *give effect to the principles of environmentally-sustainable development*.

2.305 Thus the situations in which a review is appropriate clearly extend further than a museum deemed to be failing or with financial difficulties as described in the MGC advice. Further, the examination should be both thorough and robust. Given these characteristics, it will also be necessary to take into account benefits and impacts other than those that are solely financial. In terms of museum trusts, these might be:

- a) *a single purpose*, so that the governing body can give their total attention to the museum and its operations, compared with the many activities and functions to which councillors necessarily give their time, and removing the museum from the perception of being a 'fringe activity' in many councils;
- b) *community involvement*, whether represented by membership of the governing body taking the museum trust forward, and/or a wider group of people willing to devote their time voluntarily to manage and develop the museum, and increasing the feeling of ownership and support for the museum within the community;
- c) *financial and managerial autonomy*, and the ability to make more responsive and timely decisions than is normally possible within local authority procedures; and
- d) *enabling change in organisational culture*, with the potential to provide continuing opportunities to those staff committed to the museum and its work, and to create a working environment where staff can feel a higher level of responsiveness, engagement and job satisfaction.

The Review Process

2.306 The development of Best Value in local authorities has led to options reviews and appraisal of service delivery becoming a routine feature of life for local

councils. However, as has been noted in Part 1²⁹, relatively few museums have had any substantive review, whether or not this has led to them going down the museum trust route, so the process commonly represents a steep learning curve irrespective of how much knowledge has been gleaned from past experience elsewhere.

2.307 Consideration of a move to trust status normally involves three stages. The first is a preliminary analysis of the information for council officers; the second an initial assessment of all the available options for service delivery sufficient to demonstrate which one is most appropriate 'in principle'; and, if this is accepted, this is followed by more detailed feasibility work at the third stage that leads to the final decision whether or not to transfer.

2.308 It is important that both Stages 2 and 3 reflect the features described above³⁰, including sufficient consultation with all stakeholders – whether within the council (elected members, corporate management, affected staff (not all of whom may necessarily work within the museum) and their representative trades unions; or external (Friends, local groups, past and present funding bodies as well as the local community). The time necessary to ensure good communication needs to be balanced by a sense of urgency, to avoid the museum stagnating from planning blight and staff suffering the inevitable effect of uncertainty about their futures.

Stage 1

2.309 This tends to be limited to initial discussions between Officers (sometimes involving the responsible Cabinet member) with possibly some external assistance from a consultant to scope the nature, size and implications of the options being considered, perhaps leading to the exclusion of some options as being impracticable.

Stage 2

2.310 Options, beside the devolution to museum trust, may include:

- to do nothing;
- direct management ;
- commercial tender;
- joint ventures with other local authorities and public corporations;
- management by another (local authority or charitable) museum.

2.311 Each alternative needs to be measured in terms of its organisational appropriateness, financial implications and risks involved. At this stage, the

²⁹ para 1.306
³⁰ para 2.305

review will necessarily consider the strategic and corporate implications for the local authority as a whole, as well as for the museum. At the earliest stage, the authority should confirm that all the options being considered are within its powers.³¹

2.312 It is usual for the options to be appraised using methodologies that have achieved credibility in the public sector, such as HM Treasury's *Green Book*³². Within that context, strategic issues to be taken into account include:

- a) how far the move will enable the council to achieve its corporate objectives and strategies, and the potential risks of these being compromised, especially in relation to service quality and equity of user access;
- b) the financial implications of the different options, especially in terms of NNDR, VAT, capital investment and set-up costs;
- c) a market assessment of the museum trust's sustainability within the likely levels of core funding to be made available by the council, given competition and investment needs;
- d) the position of the staff in any transfer; this should extend beyond the museum and into those other functions that provide corporate or recharged services to the museum;
- e) the impact on corporate structural issues, including whether the transfer would leave the council with unserviceable overheads or lack of professional or managerial expertise;
- f) democratic accountability, as to whether or not the new arrangements would provide greater transparency, public engagement and accountability than if it were to remain within the council;
- g) whether transfer would diminish or enhance the opportunities for collaborations or partnerships, whether with other parts of the council, or the wider community (local, regional and national); and
- h) the implications for the council in the case of failure of the museum trust, including the financial costs.

2.313 Much of this work will be undertaken as desk research, but it is essential that some capacity is deployed to make informal soundings about the options being considered with both internal and external stakeholders, and examination of the impact on the corporate services departments (eg finance, legal, personnel) used by the museum.

³¹ paras 2.401 – 2.405
³² HM Treasury (2003)

- 2.314 Many local authorities feel they do not have either the expertise and/or the time to deal with the Stage 2 process without external support, and it is usual to commission external consultants to assist in the process, especially in legal and financial areas. The scale of the contribution of such consultants is highly variable. In some cases they project-manage the whole process; in others their role is limited to acting as a 'critical friend' and reviewing the work of an internal team. In some examples a single firm of advisers is deemed to be sufficient; in others a range of firms with different expertise advise at different stages of the process. Where consultants are employed, it is usual for them to be retained for Stage 3.
- 2.315 At the end of this stage, reports are prepared identifying the key issues, benefits and risks for initial consideration by the Council's corporate management, and identifying a preferred option. If accepted at this level, they are then discussed with key Elected Members. If their response is also favourable, a consolidated report summarising the conclusions of the process are placed formally before the relevant decision-making committee (now normally the Council's Cabinet/Executive).
- 2.316 The relevant decision-making committee considers the consolidated report and selects its preferred option; if it is other than 'do nothing', it also makes a formal 'in principle' decision, and approves necessary work, budgets and timetable/critical path for Stage 3.

Stage 3

- 2.317 The Stage 2 decision will have more to do with corporate and strategic considerations than with practical issues, which are reserved for consideration at this later stage. While sufficient work should have been done to demonstrate that the preferred option has the potential to be feasible, a degree of uncertainty will remain until the final plan is delivered, and the necessary compromises to creating a new vehicle that meets the requirements of all the interests involved is met. The Stage 3 process represents what is in effect the feasibility study for the museum trust.
- 2.318 Usually Stage 3 is taken forward by an internal task group, whose membership includes Elected Members, Officers and sometimes representatives of staff (or their trades unions) and external stakeholders. Direct lines of reporting to the Council's most senior corporate management, and to the council's political leadership, are essential. Opportunities for involvement during the process by the appropriate Scrutiny Committee of the Council may also be helpful. The remit of the working group will normally focus on legal, financial and staff issues, but operational and accountability matters will also need to be addressed.

Finance & VAT

- 2.319 The Stage 3 work will include a detailed financial analysis, including the development of a financial model for the operations of the museum trust.

Invariably the museum trust will choose to develop its own financial model, probably to be applied from the first day of its operation. The important decision at this stage is that the council establishes the level of core funding it is likely to accept as a long-term commitment.

- 2.320 It is likely that the substantive financial issues to be addressed at Stage 3 will be trading³³, NNDR (taking into account any trading activity³⁴) and VAT. The position concerning VAT is likely to be the most complex, and will require careful attention and expert advice.
- 2.321 VAT is a tax on turnover, with 'output' tax³⁵ collected on goods, supplies or services being remitted to HM Revenue and Customs, less any 'input tax' paid out on goods, supplies and services used to make the taxable supply. Where transactions are not of a business nature they are outside the scope of VAT.
- 2.322 VAT applies as much to local authorities and charities as to any commercial organisation, though local authorities have a unique VAT status³⁶. This provides for certain activities of a local authority to be regarded as 'non-business'³⁷ for VAT purposes, although the council may recover the input tax relating to these activities. Councils are also allowed to reclaim their input tax attributable to exempt supplies, subject to a 5% ceiling. If more than 5% of the tax paid on goods and services by a council is attributable to exempt activities, then its ability to reclaim the input tax on all the expenditure incurred in the exempt activities is lost.
- 2.323 The amount of output tax generated by a museum is normally conditioned by whether or not it charges admission. Admission charges are a taxable supply, and would normally carry standard-rate VAT. However, where the admission charge is by a cultural institution operated by a public or other eligible body, this is within the scope of a VAT exemption³⁸. While this removes the need to levy VAT on admission charges, it can also preclude the recovery of the VAT paid on the day-to-day expenses incurred in running the museum. This also applies to VAT on capital expenditure for its refurbishment, development and expansion.
- 2.324 This exemption applies to all museums that are:
- a) public bodies (eg government departments, their non-departmental public bodies and local authorities); and
 - b) eligible bodies, which are those that satisfy all the following conditions:

³³ paras 2.208 – 2.213

³⁴ para 2.226

³⁵ at Standard Rate (17½% in the UK), Reduced Rate (5%) and Zero Rate

³⁶ VAT Act 1994, s 33

³⁷ In the VAT sense, 'non-business activity' is very difficult to define – though a relevant example would be an organisation in receipt of a grant using those funds for something other than making of taxable supplies in return for a commercial payment.

³⁸ HM Revenue & Customs VAT Notice 701/47: *Culture*

- (1) it must be an organisation with a constitution that does not permit the distribution of profits to members, shareholders or others;
- (2) the profits arising from exempt admission must be applied to the continuance or improvement of facilities made available through those admission charges; and
- (3) it must be managed and administered on an essentially voluntary basis, and by people who have no direct or indirect financial interest in the activities of the organisation.

2.325 However, the exemption does not apply where it would distort competition to the disadvantage of a commercial supplier of similar services, or in the case of a joint venture between a public body and any other organisation that is not another public body, or an eligible body under this exemption. Local authorities may also elect whether or not they wish to take up the right of exemption.

2.326 The position for local authorities is broadly that:

- a) where admission is not charged, the provision of museum services would be treated as non-business activity and the council would be able to recover the input tax on this activity;
- b) where admission is charged, the local authority may treat the charges as exempt from tax, resulting in it retaining the gross admission receipts, and continuing to recover the input tax (subject to it not leading the council exceeding the 5% ceiling - a risk which is increased by the development of large capital projects); or
- c) where admission is charged, the authority may elect not to exempt, with the consequence that VAT on admission charges is remitted, and the input tax expended in providing those services is recovered.

2.327 Museum trusts have fewer options:

- a) where the board includes trustees that receive any form of remuneration, or have any financial interest in the museum trust (such as a loan of money or property) they fall outside of the exemption, and so their charges are standard-rated;
- b) the activities of free admission museums, whether eligible bodies or not, are deemed to be non-business and recovery of the relevant input tax (whether on revenue or capital expenditure) is not allowed;³⁹

³⁹ HMRC accept that, for the purposes of VAT, Gift Aid donations are supplies when a right of admission is granted. It should be noted that National museums, and some university and independent museums, are allowed to recover their input tax by means of a refund (s 33(A) Value Added Tax Act 1994). The eligible museums were designated by The Value Added

- c) where the museum trust is an eligible body, and it charges admission, those charges are exempt from VAT, with the museum trust retaining the gross charge but unable to recover the relevant input tax (whether on revenue or capital expenditure).
- 2.328 Where other activities are undertaken in the museum premises for which there is charge that attracts VAT, then a portion of the input tax relating to that activity can be charged. As both museum trust and trading subsidiary can be registered for VAT as a group, this brings corporate hire and other events within the equation, and it might be possible to recover substantial elements of input tax on this basis.
- 2.329 There is also the longstanding practice of some museum trusts that treats some or all of their council funding as a fee for the provision of services which is a taxable supply and enables recovery of the relevant input tax. Such activities might include a payment for curatorial services, or making the museum's collections accessible, or providing free admission to local schools. As VAT is a tax on turnover, this proportion of the grant treated as a fee does not need to represent the full cost of those activities, but it does need to be sufficient to stand the test of being a business activity. Caution also needs to be taken so as not to imply there is an infringement of European Union regulations concerning procurement and State Aid.⁴⁰
- 2.330 A VAT Tribunal judgment, accepted by HMRC,⁴¹ confirms that any payment which can be linked to admission charges or parties using the facilities is, for VAT purposes, regarded as a consideration for a supply. The basis of these arrangements is specified in a Memorandum of Understanding between CIPFA and HM Revenue and Customs.⁴²
- 2.331 It can be seen that the VAT implications of transfer is one of the most complex issues that has to be addressed, and needs to be weighed against the benefits of charitable giving and relief on business rates. This demands careful consideration and good advice that takes into account future plans as well as historic circumstances.

Set-up Costs

- 2.332 The costs of transfer from council to museum trust can be substantial. Not only will it be essential for the council to have sufficient resources, but these will need to be duplicated in the museum trust. The museum trust will need to be seen as independent to meet the requirements of the Charity Commission, rather than be unduly influenced or directed by the council.

Tax (Refunds of Tax to Museums & Galleries) (Amendment) Orders SI 2001 No. 1871 and SI 2004 No. 1709. No other museums are eligible for such a refund.

⁴⁰ paras 2.341- 2.345

⁴¹ *Edinburgh Leisure, South Lanarkshire Leisure and Renfrewshire Leisure v The Commissioners of Customs & Excise* Edinburgh Tribunal Centre EDN 03/22, 03/29 and 03/30 No 18784

⁴² *VAT Treatment of Contracted-Out Local Authority Leisure Services* VAT Guidance V1-3, 119 - 122

2.333 In essence, start-up costs are likely to include:

- a) consultancy advice, potentially throughout the process, but particularly in respect of VAT issues;
- b) legal costs for both the council and museum trust, including in connection with the preparation of the necessary governing instrument(s), Agreements and leases;
- c) ICT costs of disengaging current telephone and computer systems and creating a new network for the museum trust;
- d) occupation of additional accommodation to house staff undertaking resources previously at corporate centre;
- e) costs of admission to Local Government Pension Schemes (LGPS), including any actuarial assessment;
- f) redundancy and redeployment costs (including deficiency payments to the LGPS), whether within the museum services or the council's central support services affected by the change;
- g) recruiting the museum trust's chair, board, chief executive and other senior management, and servicing pre-transfer meetings;
- h) commissioning and implementing the museum trust's corporate identity (including signage and stationery);
- i) launch costs, including promotional print, induction events for transferred staff.

2.334 Many of these costs can be absorbed by the council's corporate budgets or in the museum trust's first-year expenses. They also vary depending how much the council chooses to do in-house, and what is outsourced to external providers and consultants, as well as to the scale and complexity of the operations. These costs should be established at Stage 3.

Employees

2.335 Good communication with staff is vital throughout the process. There should be formal consultation with staff and their representative trades unions at this stage. Museum employees – both direct and indirect – should be re-assured about their employment and pension rights under TUPE, and that this provides a degree of certainty. However, it also needs to be made clear that, in some cases, their best long-term career prospects may not lie in the museum trust. Where employees indicate that they do not wish to transfer to the museum trust, councils may have processes that enable internal transfer to other posts or early retirement, depending on the circumstances. What is important is that staff are treated with consideration and respect, as their

continuing support for the museum trust will be essential if it is to make a strong first impression.

Chair and Board

- 2.336 Recruitment of an appropriate chairman, supported by a group of like-minded board members, is essential for the museum trust to be effective. They are so important to the success of the new organisation that it is unwise to wait until after the Stage 3 decision, as whether that decision is positive or not will rely substantially on having the core of the board signed up, and ready to take the process forward immediately the green light is given.
- 2.337 Recruiting these people represents a substantial challenge. The public sector view of recruitment to such positions is strongly influenced by the Committee on Standards in Public Life ('the Nolan Principles'), with the emphasis on open recruitment on the basis of skills and ability, the need for diversity in governing bodies, and transparent process. Much information is also available from the National Hub for Governance for the Voluntary Sector.⁴³
- 2.338 There are clear advantages in museum trusts moving in that direction once formed. However, it is a characteristic that none of the devolutions have come about in this way, and the general approach has been for the council's political or officer leadership to solicit the support of a person with the skills and experience, time, drive, local connections and influence to take the process forward. With that person becoming the 'chair designate', they then take the responsibility for putting together a small group who will constitute the museum trust's 'Shadow Board', and the core trustees after incorporation.
- 2.339 Museum trusts are partnerships between the local authority and the individuals and other interests represented on its board. It is important, therefore, that once the core of the board has been identified they become bound into the process by a process of regular confidential briefings. It is also useful if a Letter of Intent can be agreed confirming acceptance to join the Shadow Board and take office after incorporation.

General Consultation

- 2.340 It is also worthwhile, at this stage, to consult with other stakeholders, including past and present funders and suppliers, and trustees of collections and other trusts owned or managed by the council. This should be associated with a review of the terms and conditions of grant contracts to which the council has been party and under which it has obligations. Soundings should be taken as to whether the funder would be prepared to assign or novate those contracts in favour of the museum trust.

⁴³ www.governancehub.org.uk

State Aid

- 2.341 The European Union's State Aid rules apply when public monies or privileges are granted by government to other organisations. State Aid is banned as being incompatible with the common market in circumstances where it could distort competition and affect trade by favouring certain undertakings over others. State Aid⁴⁴ has four characteristics:
- a) it is granted by the State (which includes local authorities); and
 - b) it favours certain undertakings or production of certain goods (including charitable, voluntary and not-for-profit organisations when they engage in activities where they have commercial competitors, or where they provide services that are not open to competitive tendering);
 - c) it distorts or threatens to distort competition (and the EU's view is that almost all government subsidy will have the potential to distort competition, regardless of the scale of the potential distortion or market share of the aid recipient); and
 - d) it affects trade between Member States (and again, the case law suggests that even very small amounts of State Aid can affect trade).
- 2.342 The Treaty acts as a general ban on State Aid, but then allows for certain aid to be considered as compatible with the Treaty. This includes the possibility of approving State Aid for promoting culture and heritage conservation,⁴⁵ subject to prior notification by the government to, and approval by, the European Commission.
- 2.343 Until 2003 the State Aid position concerning not-for-profit organisations delivering council services was unclear, and this was sufficient to deter several local authorities considering devolution to museum trusts from further investigation. However, the Altmark judgment of the European Court of Justice⁴⁶, has now clarified the position, and established that State Aid does not exist where the following four conditions are met:
- a) the recipient of the State Aid should have a clearly-defined public service mission;
 - b) the parameters for calculating its funding must be established in advance in an objective and transparent manner;
 - c) the funding given must not exceed the costs incurred by the recipient in providing the public service less the income it generates, with an allowance for a 'reasonable profit'; and

⁴⁴ European Community (EC) Treaty Article 87(1)

⁴⁵ *ibid*, Article 87(3)

⁴⁶ C-280/00, 24.07.03

- d) the recipient is chosen by public tender, or the funding does not exceed the 'costs of a well-run undertaking that is adequately equipped with the means to provide the service'.

2.344 To provide further clarity, the European Commission has announced a package of measures that address many of the practical difficulties that arose from the Altmark judgment. These include:

- a) a draft *Decision*⁴⁷, based on Article 86 (3) of the EU Treaty, that will remove the obligation for undertakings to secure advance consent from the Commission, subject to:
- their having an annual turnover of less than €100 million;
 - the annual funding for the service does not exceed €30 million; and
 - they meet the definition of the conditions under which public services may be delivered based on the Altmark criteria.
- b) A *Framework*⁴⁸ that specifies the conditions under which funding not covered by the Decision is compatible with State Aid rules. These cases have to be notified to the Commission due to the higher risk of distortion of competition.
- c) An amendment to the Commission's '*Transparency Directive*⁴⁹ clarifying that undertakings receiving funding and operating in both public service and other markets must have separate accounts for their different activities, so that the absence of 'over-funding' can be confirmed.

2.345 While it is unlikely that any devolution to a museum trust will exceed the thresholds beyond which the Commission is required to be notified, it is important that any transfer takes into account the Altmark requirements that the funding has a clear public service mandate, and that the level of funding is compatible with the rules on how the costs attributable to the discharge of the public services are determined.

Final Report

2.346 The foregoing assessments lead to a comprehensive report on the options and their implications. This is then considered promptly by the decision-making body, and if the 'in principle' option continues to appear to be best suited, final and formal agreement is made to move to implementation.

Implementation

2.347 The implementation stage sees the move from the existing arrangements (the council) to the new arrangements (the museum trust). While this needs to be undertaken expeditiously (and certainly should not take longer than a

⁴⁷ available at http://www.europa.eu.int/comm/competition/state_aid/others/interest/en.pdf

⁴⁸ EC DGCOMP/D(2005)179

⁴⁹ 80/723/EEC

year), and not all the elements have to be completed before transfer, the needs of effective consultation and sufficient negotiation demand that no less than six months is allowed for this stage.

- 2.348 Implementation involves a number of technical issues that are described and discussed in Chapter 2.4. What follows here relates to general principles and operational activities.
- 2.349 The importance of the museum trust's independence has already been noted.⁵⁰ Thus throughout this stage there needs to be an evident distinction between the respective interests of council and museum trust, to avoid the perception that the trust is inappropriately influenced by the council, and thereby risking the success of the application to the Charity Commission registration as a charity. This will be represented by two separate implementation teams – one for the museum trust, and one for the council.
- 2.350 The key decisions that affect the council's interests will be taken by its Cabinet/ Executive, with a corporate director charged both with ensuring it receives the necessary advice (including the appropriate involvement of the council's finance, legal, and personnel teams) and acting as the link with the museum trust.
- 2.351 The key tasks that will fall on the council during the implementation phase will be:
- a) confirming the participation of the persons already identified as the Shadow Board;
 - b) negotiating with that Shadow Board over all aspects of the transition, including agreement of a transfer date;
 - c) making arrangements for the indemnification and compensation of the Shadow Board should the devolution fail to take place, so that they face no liability for their work during the period to transfer date;
 - d) developing the information about the museum's current cost base into forward plans for the council's future funding;
 - e) drafting Funding and Collections Agreements, and leases/licences, including consideration of term(s) of Agreements, targets and monitoring;
 - f) preparing information for use by the Shadow Board in its transfer documentation (eg asset lists, staff details, building condition surveys); and
 - g) working with staff and unions to ensure good communication about the transition and putting arrangements in place to safeguard staff interests.

⁵⁰ para 2.332

2.352 The museum trust interests would be represented by its 'Shadow Board', who act as an implementation group. This will exist only until such time as the museum trust is incorporated, when its members will become the first trustees. It would comprise the chair-designate and those people recruited to provide the core of the board.⁵¹ This small team should bring a range of skills and experience that will be necessary once the trust begins its operation, but in particular the knowledge about the workings of the organisation that will be vital during the implementation phase. As with all trustees, this will be an unpaid role, but the council should reimburse their out-of-pocket expenses and provide appropriate support, either by seconding its own staff to support the process or by securing external consultancy support. These costs might be met by the council directly or by a grant to another facilitating organisation with charitable status (eg civic trust) empowered to undertake such a role.

2.353 The tasks to be undertaken by the Shadow Board will include:

- a) consultation with all stakeholders (including the council, staff and trades unions, and funders);
- b) commissioning the drafting of the Transfer Agreement (unless it is decided that this work will be undertaken by the local authority), incorporating the information about assets and employees provided by the council;
- c) presenting that Agreement for consideration by the council and negotiating any outstanding issues, together with the Funding and Collections Agreements;
- d) negotiating and confirming the financial arrangements with the council;
- e) establishing the museum trust as a charitable body, including the application to the Charity Commission;
- f) arranging the transfer arrangements of the appropriate staff from the council;
- g) designing arrangements for the recruitment of further trustees⁵²; and
- h) undertaking the recruitment of a director (chief executive) for the museum trust.

The Director/Chief Executive

2.354 Recruitment of the museum trust's chief executive will be the key decision taken by the museum trust during the implementation phase. Experience suggests that the person appointed will come from outside the transferred organisation, therefore bringing a fresh perspective.

⁵¹ para 2.336

⁵² para 2.365

- 2.355 In recruiting for this post, the museum trust can expect to pay a package that will be between 75% and 100% greater than the head of a local authority museum service – reflecting more the relative position and responsibilities of the posts than the calibre or capabilities of those who fill many of them.
- 2.356 It should be noted that the package on which the director is employed is likely to set the tone for the museum trust's terms and conditions for all new employees⁵³. This requires an early decision on whether or not the museum trust will offer either LGPS, or a comparable pension scheme linked to final salary. If the person appointed is an LGPS member, it is likely that such a scheme will be expected as part of their package, and if this is available for the Director, equity suggests it should be available for all staff, where transferred or new starters. If, on the other hand, the successful applicant comes with a personal pension, or past participation in a money-purchase plan, then they may be more likely to favour these alternatives, which may (other than for transferred staff) offer additional options for consideration by the museum trust.
- 2.357 It is also to be expected that the Director-designate is likely to be on an extended period of notice. In some circumstances it may be possible to negotiate waiver of the full term of notice to enable an earlier start date, or transitional arrangements which enable the person appointed to begin to work for the museum trust on a part-time basis in advance of leaving their previous appointment, with the employer being reimbursed for the arrangement.
- 2.358 This appointment is critical in timetable terms, as the person appointed would expect to make a contribution to the key business plans and policies being negotiated between the council and the trustees. As a consequence, it is helpful if the post-holder could take up their appointment on a full-time basis at least three months before Transfer Date, which means the recruitment process must begin as soon as the Shadow Board are in place.
- 2.359 In this situation, the appointment of the director (if not already an employee of the council) may cause some practical difficulties. If the museum trust has yet to be incorporated, then who is to be the employer? The local authority may volunteer to act in this capacity, with the post-holder moving to the Trust under TUPE, but it may be that the trustees do not want automatic implementation of local authority conditions of service, which might be difficult to resist unless the director was employed on the strict understanding that other terms and conditions would be applied, or negotiated to apply from, transfer date. It is important that the contract of employment offered to the director takes such transitional issues into account.
- 2.360 Similarly, the director is also taking a risk by taking up post in anticipation of the execution of the transfer Agreements. It is open to either party – council or trust - to withdraw at any time up to execution of the transfer Agreements.

⁵³ Staff transferred from the council have statutory protection of their employment conditions and pension rights (see paras 2.471 – 2.479)

While such action may be improbable, it is only fair that the director's contract should reflect a generous element of compensation should it be decided, subsequent to appointment, but before transfer, that the devolution is not to proceed.

- 2.361 In the past, directors have been appointed to contracts for fixed periods of time (normally five years). However, the law changed in 2002 to prevent persons employed on short-term contracts from suffering less favourable treatment than permanent employees.⁵⁴ As a consequence, every individual term of a fixed-term employee's employment package contracted after 10 July 2002 should be completely the same as that of a comparable permanent employee, unless a difference in one or all of those terms can be objectively justified. The impact of the Regulations is to limit the use of successive fixed-term contracts to four years unless there has been collective agreement at local level to increase or decrease the period.
- 2.362 Rights under the Regulations include:
- a) to treat a contract as permanent if it is successively renewed for a period that is longer than four years;
 - b) qualification for statutory redundancy payment where employment has been for the necessary period (normally longer than two years);
 - c) to claim unfair dismissal at the end of the fixed term contract if it is not renewed, and to receive a written statement from the employer with reasons for the dismissal;
 - d) access to the employer's occupational pension schemes; and
 - e) to receive a written statement from their employer (to be provided within 21 days of the request) that sets out the reasons for less favourable treatment.
- 2.363 The rights under (a) and (d) can be denied if they can be justified on objective grounds. The employer must simply show that they have considered and balanced the rights of the employee against business objectives, and as long as they can show the treatment was necessary and appropriate to achieve those objectives, then the treatment will be justified. Nonetheless, as from 1st October 2002, it is no longer permissible for a fixed-term employee to contract out of their right to redundancy by signing a 'redundancy waiver'.
- 2.364 Fixed-term contracts need to be considered in terms of these Regulations, and a decision taken whether these remain the best-suited, and if so whether the package can meet the test of objective justification. Even in this situation, redundancy payments to the formula indicated in the museum trust's conditions of service can no longer be avoided.

⁵⁴ The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 SI 2002 No. 2034

Appointment of Additional Board Members

- 2.365 While the first trustees may have been appointed on an informal basis, thereafter recruitment should take place on an open basis.⁵⁵ While not a legal requirement, this represents good practice. The process of recruitment might include:
- a) advertising for expressions of interest in local (and perhaps, depending on the size of the operation) in national newspapers and other printed media;
 - b) soliciting the help of Arts and Business, which maintains a register of people interested in such appointments;
 - c) promoting the vacancies at the museum's site(s) and through its supporters' organisations (eg the Museum Friends);
 - d) soliciting interest from other people identified by trustees, the council and others as being potential candidates;
 - e) offering all those interested a 'trustee pack' that includes details of the board and its work, a trustee specification, and appropriate background papers; and
 - f) interview by existing trustees and external assessors.
- 2.366 It is essential that the trustees appoint the additional members to increase their number at the earliest opportunity. Not only does this provide a higher level of accountability and shared decision-making, it is also necessary to ensure that the number of council nominees, when appointed after Transfer Date, do not represent such a large proportion of the board as to bring it within Part V of the Local Government & Housing Act 1989.⁵⁶ The museum's governing instrument should reflect these issues, contemplating a developing board of trustees.

Timetable

- 2.367 Exhibit 2.3.1 provides an indicative timetable for the total review and implementation process. This suggests that, even with a non-pressured timetable, the process should take no longer than eight months.

Exhibit 2.3.1: Indicative Timetable for Change

Stage	Q1	Q2	Q3	Q4	Q5	Q6	Q7	Q8
1	Officer Review							

⁵⁵ paras 2.442 – 2.445

⁵⁶ paras 2.450 - 2.455

Stage	Q1	Q2	Q3	Q4	Q5	Q6	Q7	Q8
2		Options Appraisal						
3			Feasibility Study					
4						Implementation		

2.368 Exhibit 2.3.2 gives a more detailed work plan for the tasks to be achieved during the Stage 3 feasibility study and the implementation phase. It should be noted that this is only for indicative purposes, and local circumstances should dictate the critical path of each transfer situation.

Exhibit 2.3.2 Workplan for Feasibility Study

		Month														
		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
1	<i>Council</i> agrees in principle															
2	<i>Council</i> undertakes Feasibility Study															
3	<i>Council</i> confirms VAT position															
4	<i>Council</i> identifies prospective Chair															
5	<i>Council</i> secures agreement of prospective Chair															
6	<i>Council and prospective Chair</i> identify and agree other Shadow Board members															
7	<i>Council and prospective Chair</i> secure agreement of other Shadow Board members															
8	<i>Council</i> begins staff consultation															
9	<i>Council</i> begins Initial general consultation															

		Month														
		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
10	<i>Council</i> gives formal agreement/approval to transfer															
11	<i>Council</i> announces decision and Shadow Board membership															
12	<i>Council</i> internal team in place															
13	<i>Council</i> confirms funding and other support to prospective Chair and shadow board															
14	<i>Prospective Chair and shadow board</i> confirm they are prepared to serve															
15	<i>Shadow board</i> holds first meeting															
16	<i>Shadow Board</i> appoints prospective Chair as Chair-designate of the museum trust															
17	<i>Shadow board</i> appoints legal and other advisers															
18	<i>Shadow board</i> advertises for Director (chief executive)															
19	<i>Shadow Board</i> commissions drafting of trust's governing instrument															
20	<i>Council/ & Shadow Board</i> consult with staff/unions															
21	<i>Shadow board</i> holds second meeting															
22	<i>Shadow board</i> applies for admission by museum trust to LGPS Fund															
23	<i>Shadow Board</i> appoints Director-designate															

		Month														
		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
24	<i>Council and Shadow Board</i> hold first joint meeting															
25	<i>Council</i> prepares asset list															
26	<i>Council</i> prepares staff list															
27	<i>Shadow Board</i> holds third meeting															
26	<i>Shadow Board</i> applies for registration as a charity/incorporation															
28	<i>Council</i> drafts Heads of Terms for Agreements															
29	<i>Council and Shadow Board</i> consult with stakeholders															
30	<i>Council & Shadow Board</i> agree governing instrument															
31	<i>Shadow Board</i> holds fourth meeting															
32	<i>Council & Shadow Board</i> agree Heads of Terms for Agreements															
33	LGPS Admission agreed															
34	<i>Shadow Board</i> holds fifth meeting															
35	<i>Shadow Board</i> commissions drafting of Transfer Agreement															
36	<i>Council</i> commissions drafting of Funding & Collections															

		Month														
		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
	Agreements leases and licences															
37	<i>Director</i> takes up appointment															
38	<i>Director</i> drafts Business Plan, key policies and staff structure															
39	<i>Shadow Board</i> holds sixth meeting															
40	<i>Shadow Board</i> arranges procurement of auditors and bankers															
41	<i>Shadow Board</i> holds seventh meeting															
42	Museum Trust registered/ incorporated															
43	<i>Trustees</i> of museum trust hold inaugural meeting															
44	<i>Trustees</i> appoint Secretary, auditors, and bankers															
45	<i>Trustees</i> commission recruitment of additional board members															
46	<i>Trustees</i> agree Business Plan, key policies and staff structure															
47	<i>Trustees</i> advertise vacancies in structure (if any)															
48	<i>Trustees</i> agree pensions policy for new starters															
49	<i>Council</i> approves Business Plan															

		Month														
		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
50	<i>Council and Trustees agree Transfer documentation</i>															
51	<i>Council and Trustees hold final joint meeting between to review progress and deal with any outstanding issues</i>															
52	Completion Date															
53	Transfer Date															

CHAPTER 2.4 – LEGAL TRANSFER ISSUES

Powers to Establish Museum Trusts

- 2.401 The Public Libraries & Museums Act 1964 gives local authorities wide powers in the operation of museums and galleries. They may '*make contributions towards the expenses incurred by any person in any place within England and Wales . . . providing a museum or art gallery*⁵⁷ and 'do all things as may be necessary or expedient for or in connection with the provision or maintenance thereof'.⁵⁸
- 2.402 The Local Government Act 2000 provides local authorities with wide-ranging specific powers⁵⁹ to promote or improve the economic, social and environmental well-being of its area, whether or not those activities are located within it⁶⁰. These include:⁶¹
- a) incurring expenditure;
 - b) giving financial assistance to any person;
 - c) entering into agreements or arrangements with any person;
 - d) co-operating with, or facilitating or co-ordinating the activities of, any person,
 - e) exercising on behalf of any person any functions of that person, and
 - f) providing staff, goods, services or accommodation to any person.
- 2.403 The Act also provides⁶² that a local authority '*shall have power to do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to the discharge of any of their functions*'.⁶³
- 2.404 For the local authorities establishing the earliest museum trusts, the provisions of the Public Libraries and Museums Act appeared to be sufficient, and have never been challenged. It is reinforced by the Local Government Act 2000. It is also clear that the government generally favours the approach, and has proposed that local authorities be given a general power '*to form and participate in corporate bodies, whether there are companies limited by share, companies limited by guarantee, trusts, industrial provident societies) or other corporate bodies*'⁶³. To implement this, the government is currently drafting a Section 16 Order of the Local Government Act 1999, that will enable councils subject to the Best Value regime to enter into agreements or arrangements for the purpose of exercising the council's functions.

⁵⁷ s 14

⁵⁸ s 12

⁵⁹ s 2 (1) (1)

⁶⁰ s 2 (1) (5)

⁶¹ s 2 (1) (4)

⁶² s 111 (1)

⁶³ DTLR (2001)

2.405 Some local authorities have decided not to pursue museum trust status as they believe that so to do would be to contravene local government procurement requirements, whether specified by European Directives or UK national regulations. As has been noted before, this is not the view of the government, and arrangements with the voluntary sector are seen as an appropriate alternative option for delivering public services.⁶⁴ The scale of the council funding of the museum trust would establish it as a 'contracting authority' within the Public Services Contract Regulations 1993⁶⁵, and its relationship with the council would exclude it from the requirements of those Regulations.⁶⁶

The Nature of Transfer Documentation

2.406 There is a wide range of practice between the museums that have moved from local authority to trust status. Hybrid arrangements in small organisations are usually characterised by a limited number of, sometimes semi-formal, documents, while for larger transfers the documentation is formal, detailed and extensive.

2.407 The extent of the legal documentation rests on the following:

- a) the complexity of the museum's structure, arising in part from its history, extent and scope;
- b) an assessment of the risk falling onto both the local authority and trust consequent upon the change; and
- c) the degree of mutual trust between the council and trust.

2.408 The relative scale and size of the local authority to the trust will always mean that the more limited the legal documentation, the greater the power retained by the local authority. As matters not dealt with at the transfer stage are unlikely ever to be satisfactorily resolved, a diligent assessment of requirements at an early opportunity is essential.

2.409 Irrespective as to the detail of the legal documentation, the following will always need to be put in place:

- a) an appropriate constitution ('governing instrument') for the trust;
- b) agreement on funding between the council and the trust, defining the scale of the council's funding support over the time of the agreement, and agreeing what the trust will provide in return, whether in terms of services to be delivered, standards to be met, targets to be achieved and arrangements for reporting compliance with these terms;

⁶⁴ HM Treasury (2004)

⁶⁵ SI 1993 No. 3228 s 3(1) (r)

⁶⁶ s 6 (k)(ii)

- c) agreement to formally transfer the activity of providing museum and gallery services from the local authority to the trust, together with any staff and assets to be moved in support of that function;
 - d) agreement relating to the management and use of the collections; and
 - e) leases for any council property to be occupied by the trust.
- 2.410 While the constitution and leases will invariably be freestanding documents, the other agreements may be separate or combined into one, depending on the nature and size of the transfer, the degree of connection between the provisions they include, and their respective durations. For larger institutions these agreements will normally take the form of separate documents, executed as Deeds, so as to ensure enforceability irrespective as to whether or not they can be defined in law as contracts.

The Governing Instrument

2.411 The governing instrument sets out the trust's purpose, powers and rules. Most museum trusts are created as incorporated organisations, which gives them both legal personality and permanent succession, so that they can enter into legal agreements and take legal action in their own name. Without incorporation legal actions will be in the name of the individual members of the museum's governing body⁶⁷, so when a museum regularly enters in contracts (such as in the employment of staff, or as a leaseholder) incorporation provides a more useful, flexible and secure constitutional form than those created by Declaration of Trust or by an agreed set of rules and regulations.

The Charitable Company Limited by Guarantee

- 2.412 The most usual form of incorporation for museum trusts has been the charitable company limited by guarantee⁶⁸. It is a form of private company, with the following characteristics:
- a) there is no shareholding, rather its members promise to contribute the same nominal sum if the company becomes insolvent and is wound up – this is the limit of their personal liability;
 - b) it has a legal personality of its own, and so can enter into contracts, and sue and be sued, in its own name;
 - c) its board members are both company directors, with obligations under the Companies Acts, and charity trustees, with duties and responsibilities under charity law;

⁶⁷ though they can be indemnified out of the association's assets in respect of those actions

⁶⁸ See also Part 1 Annex

d) it is regulated by both Companies House and the Charity Commission, and has to make annual returns and file accounts with both; and

e) its governing instrument is its Memorandum & Articles of Association.

2.413 The constitutional form of the Memorandum & Articles is similar to that of companies limited by shares, though to ensure their charitable character they include a number of restrictions that:

- a) require all the museum's income and property to be used only in the fulfilment of its charitable purpose;
- b) bar any of the museum's money or property being paid or given as any form of profit to any member of the organisation;
- c) require any remaining assets after winding up to be paid to another charitable organisation with purposes similar to that of the museum'
- d) require the Charity Commission's consent to amending parts of the museum's governing instrument,⁶⁹ in addition to Companies Act requirements.⁷⁰

2.414 The *Memorandum of Association* is drafted on standard models derived from the Companies Acts but approved by the Charity Commission in relation to charitable status. It:

- a) names the organisation, and the country where its registered office will be located;
- b) defines, in intentionally-broad terms, the purpose for which the museum is established (its '*objects*'), the geographical area of benefit (if any), and its beneficiaries (normally the general public and particularly the residents of any area of benefit);
- c) specifies the powers necessary for it to achieve those objects;
- d) states the limit of the liability of members;
- e) restricts its powers to ensure that the organisation maintains its charitable status.

2.415 The *Articles of Association* provide the rules and regulations for the conduct of the organisation. They include:

- a) matters relating to the members of the organisation, including admission, retirement, the requirement for, and administration of general meetings;

⁶⁹ Charities Act 1993 s 64(2)(a)

⁷⁰ Companies Act 1985 s 2(7)

- b) the composition, appointment, retirement and rotation of the organisation's governing body (normally referred to as the 'board of trustees'), its powers and duties, the conduct of trustees' meetings;
- c) the appointment of a Secretary and other officers;
- d) the custody, maintenance and use of the organisation's Seal (if any);
- e) accounting, audit and annual reporting requirements;
- f) a framework for organisation rules and bye-laws;
- g) indemnity provisions; and
- h) arrangements on winding-up (re-iterating the provisions in the Memorandum).

2.416 While the governing instruments of most companies give a general competence to act, the governing instruments of charitable companies are more narrowly defined and, contrary to the normal company law rule, contracts and other acts outside of charity's specified powers may not be valid.⁷¹

The Charitable Incorporated Organisation

2.417 The roots of the Memorandum & Articles in company law has meant that its fit to charitable organisations has always been difficult, and the need to match the requirements of both Companies and Charities Acts, and their respective regulators, to the realities of operating what are invariably small organisations has not always been easy. Thus the introduction of a new form of incorporation - Charitable Incorporated Organisation (CIO), to be regulated solely by the Charity Commission - in the Charities Bill 2005-2006⁷² is likely to provide future opportunities for more appropriate constitutional frameworks.

2.418 The Charity Commission has undertaken to produce model constitutions for CIOs, which are promised to be simple and written in plain English. Irrespective of the exact terms of the models, as CIOs will need to match the requirements of company law in a number of key areas, the issues discussed hereunder as are likely to be relevant under any new dispensation as to what has gone before.

Names of Museum Trusts

2.419 There are strict rules that prohibit the use of names that are the same (or too like) names already on the Register of Companies or Register of Charities. The Charity Commission seeks to avoid the risk of confusion in the public's mind, in every respect. In the case of a company, applications for incorporation that use the following terms should, where appropriate, be accompanied by statements from relevant authoritative organisations

⁷¹ Charities Act 1993 s 65 (1)

⁷² clause 34

supporting their use, and special permission has to be obtained from Companies House for their use:

- a) words that suggest that the organisation is connected with national or local government;
- b) the use of '*British*', '*English*', '*Welsh*' and similar national and international words;
- c) the use of '*board*', '*council*' or '*authority*' because they imply government patronage or sponsorship;
- d) '*association*', '*federation*', '*society*', '*institution*' or '*institute*' because they imply pre-eminent or representative status;
- e) words that imply specific objects or functions, including foundation, trust and group.

2.420 Names must use 'limited' at their end (*cyfyngedig* in Welsh) unless a declaration is made that the company meets the following criteria:

- a) its objects relate to the promotion of commerce, art, science, education, religion, charity or any profession;
- b) its memorandum of association requires that any profits or other income are used solely to advance its objects, and prohibits payments of dividends to members;
- c) its memorandum and/or articles require all the organisation's assets, on winding up, to be transferred to another body with similar objects or to one whose objects are the promotion of charity.

Objects of Museum Trusts

2.421 The definition of 'charitable purposes' has already been discussed.⁷³ In the past, museums have been deemed to be charitable either as being of public benefit in their own right, or in terms of their purpose in the advancement of education, and these terms recur regularly in museum objects clauses. The 2005 2006 Bill⁷⁴ provides for a new charitable purpose - '*the advancement of the arts, heritage, culture or science*' – which may be useful in drafting future objects clauses, either to provide a clearer single primary purpose or to be used in association with the advancement of education head.

2.422 Against this background, the Charity Commission's published model guidance on charitable constitutions continues to be relevant. This suggests⁷⁵ the following examples as being a suitable basis for drafting the objects of a museum charity:

⁷³ paras 2.202 – 2.203

⁷⁴ clause 2(2)

⁷⁵ Charity Commission, *Museums & Galleries RR10* (August 2002)

- a) *'to establish and maintain a museum and/or art gallery for the benefit of the public';* or
- b) *'to promote art for the benefit of the public by the establishment and maintenance of a [museum] [art gallery]';* or
- c) *'to advance education by the establishment and maintenance of a museum';* or
- d) *'to advance education in the arts by the establishment and maintenance of an art museum or art gallery'.*

2.423 These broad terms provide a useful starting point for drafting the museum's objects, and considering their scope. Typically, the aim will be to provide sufficient breadth to enable the museum to seize all the opportunities that present themselves, while not becoming so vague as to create uncertainty about its real purpose, or including activities that are so speculative that it is improbable they will ever be relevant.

2.424 The following elements should be considered in drafting the Memorandum & Articles.

Powers of Museum Trusts

2.425 Model constitutions list the powers that charities generally need to achieve their objects. Charities are only allowed to do those things related to their objects that are expressed in their governing instrument, are given by statute or are implied by case law or common law. If no such power is given, the charity will not be able to undertake the activity in question, and individuals who authorise or undertake such actions may be personally liable to repay all the funds so expended. It is normal therefore to include a general power that gives the charity the right to act other than in the ways specified in the list of powers in the governing instrument, subject to such actions:

- a) not contradicting explicit powers given within, or prohibited by, the governing instrument;
- b) being lawful;
- c) being undertaken for the purpose of achieving the charity's objects; and
- d) falling within the wording of the general power.

2.426 One power not always explicitly stated or covered by general powers is authorisation to hold property subject to special trusts. The following paragraphs explain why the Memorandum should include powers both to declare such trusts, and to enable the museum trust to manage such trusts as sole trustee.

- 2.427 A charitable company, unlike a charitable trust, cannot distinguish between income and capital, so that it cannot have a permanent endowment, and all its assets are corporate property to be used for the charity's general purposes. While the council normally retains ownership of its collections on transfer, and thereafter the museum trust acts on its behalf in acquiring additional material and making such disposals as are agreed, there have been instances where the museum trust has wished to acquire collections outside of its agreement with the council. Such a situation may arise in meeting the requirements of a donor who is happy to give to the trust but not to the council, or where the trust wishes to acquire a specialist collection that falls outside of the agreement. The trust may also wish to establish an endowment fund for its future work, and ensure that these funds are reserved and not available to meet day-to-day expenditure.
- 2.428 In the case of winding-up, non-trust assets are available to meet the trust's outstanding financial liabilities. This can be avoided by distinguishing such assets/collections from general corporate property by the creating a 'special trust' over that property which establishes that these assets are not held on trust for the charity's general purposes, but for a more specific intent⁷⁶.
- 2.429 While the need for powers to maintain special trusts may not always be immediate on incorporation, it should always be included at that time as special trusts are open to challenge in the event of insolvent winding-up if it appears to the creditors that the creation of the special trust was a means of depriving them of access to the value of the company's assets that would normally be open to them. This means that any transfer/special trust arrangement needs to take place at a time of financial stability, when there is no foreseeable risk of insolvency. In most cases, the financial circumstances at incorporation invariably make this the best time. Further, it has to be recognised that, when looking at debts incurred, there may well be difficulties in distinguishing between debts incurred as a company and those incurred as a trustee.
- 2.430 In this sense, the frequent situation where the museum trust holds on loan the collections transferred by the local authority and any items acquired after transfer are collected on behalf of the council and pass directly into its ownership, has much to commend it, though items that are the council's corporate property can never be regarded as absolutely secure from undesirable disposal.⁷⁷

Subsidiary Companies

- 2.431 Charity governing instruments invariably prohibit significant commercial trading activities⁷⁸. They should give sufficient powers to enable primary

⁷⁶ 'Property which is held and administered for or on behalf of a charity for any special purposes of the charity, and is so held and administered on separate trusts relating only to that property' (Charities Act 1993 (s 97(1)).

⁷⁷ Babbidge (1991), 259

⁷⁸ para 2. 206(e)

purpose trading⁷⁹ and, if the museum has commercial ambitions, even in the long term, authority to own and/or invest in other companies created to enable the museum trust to raise funds through trading. The difficulties of charities investing in trading companies means that establishing such a subsidiary is more than a matter of routine. Sufficient business planning and risk analysis needs to be done to ensure that it has the potential to be profitable. Otherwise developing primary purpose trading and room hire, or franchising the operation of retail and catering operations, might be a more appropriate strategy.

- 2.432 Trading subsidiaries are normally in the form of a company limited by shares, with the shareholding held entirely by the charity. The recent introduction of the 'Community Interest Company' (CIC)⁸⁰ creates an opportunity to emphasise their difference from other commercial concerns. While its liability would continue to be limited by shares and have those other characteristics of a commercial concern (eg payment of dividends, remuneration of board members, and ability to borrow money on a commercial basis, paying market interest rates and providing security) they differ from 'normal' companies in two ways. Like a charity⁸¹, they have an 'asset lock' that requires the retention of both income and assets (if not disposed of for full value or for the benefit of the community served) within the CIC, or their transfer to another body that also has an asset lock, such as another CIC or a charity. On winding-up, surplus assets cannot be distributed to investors, but have to be transferred so that they continue to have a community and/or charitable purpose.
- 2.433 The other major difference is that applications to create CICs (or special resolutions to convert an existing company to a CIC) have to be accompanied by a Community Interest Statement. This certifies that the company is formed to serve the community rather than operate for private profit, and describes its intended activities. Thereafter, each year the company is required to file with its annual accounts a report describing how it meets that community purpose.
- 2.434 The practical benefits of CICs are limited to enabling joint ventures with commercial investors through the payment of dividends. Even when this may not be relevant, there may be public-relations benefits. The suffix designation 'cic', denoting the pursuit of profits for social good, rather than 'ltd', may enhance a trading company's brand, and the annual community interest report is a means of formally accounting the contribution of those activities to the museum's public service. This may reinforce the public service ethos of the museum trust, and help rebut claims that the trading subsidiary is a form of back door privatisation.

⁷⁹ para 2.209

⁸⁰ Companies (Audit, Investigations and Community Enterprise) Act 2004 and the Community Interest Company Regulations 2005 SI 2005 No 1788

⁸¹ but CICs cannot be registered as a charity, and a charity which (subject to regulatory consent) converts to a CIC will lose its charitable status

Remuneration of Trustees

- 2.435 It is a fundamental legal requirement that individuals should not benefit personally from acting in the role of trustee. Thus governing instruments have generally included provisions that bar trustees from being paid for acting in that capacity, and preclude employees from being trustees unless, as a consequence, the charity would be unable to function.
- 2.436 While market research suggests that the general public dislikes the idea of remunerated trustees⁸², and such appointments may be a deterrent to donors, there appears to be movement away from an absolute principle that trustees should not be paid nor be employees of the charity. In some situations there may be a financial benefit to the charity, as a single remunerated trustee would take the museum trust outside of the VAT exemption relating to cultural admissions,⁸³ thereby enabling it to recover its input tax.
- 2.437 The Charities Bill 2005 - 2006, while restating the presumption against paid trustees, defines the circumstances where it is proper for payments to be made for specific tasks, where the whole board believes this to be in the best interest of the charity, and there are clear arrangements to avoid conflicts of interest.⁸⁴

The Board

- 2.438 If constituted as a company, the museum trust will necessarily have members, each of whom will be a guarantor to the extent specified in the Memorandum. An early decision to be made is whether the charity's membership will be a body to whom the board of trustees are accountable at general meetings of the charity, or whether the members and trustees will be one and the same group of people. If the latter (and this is the route adopted by the majority of museums that have moved out of local authorities to charitable trusts) it is important (unless there is a conscious decision to the contrary) that the Articles make it clear that membership of the company ceases on an individual ceasing to be a trustee, lest a class of members comprising former trustees be established inadvertently.
- 2.439 The invariable practice on foundation of a museum trust has been to identify a person to chair the board with the reputation and political clout to provide high-level leadership and direction during the negotiations with the Council, in recruiting the senior management, and developing the organisation's culture. Initially this person has gathered together a group of like-minded and trusted people who together constitute a 'Shadow Board'. Subsequently, this small group is reinforced by additional members, some of whom are nominated by other bodies, and some recruited for the special contribution they can bring to the board's deliberations.

⁸² MORI *A Survey of Public Attitudes to the Charity Commission* (February 1999)

⁸³ para 2.323 and following

⁸⁴ clause 36

2.440 Thereafter, the conduct of the boards should take into account the recommendations of the Higgs Report⁸⁵. While many are more appropriate to companies with shareholders, and especially public limited companies, the following good practice established by that report has been considered by many museum trusts, and in many cases adopted:

- a) boards should appoint an audit committee, responsible for the oversight of the internal audit process, and for recruitment and contact with the external auditors - the membership of the committee should not be less than three independent⁸⁶ members at least one of whom should have significant, recent and relevant financial experience;
- b) new board members should be appointed on the recommendation of nomination committees, working to a formal and transparent recruitment process approved by the Board, the process requiring:
 - (1) the nomination committee evaluates the current balance of skills and experience on the board, and prepares a description of the role and capabilities required for a particular appointment (s);
 - (2) all potential board members are interviewed formally, rather than relying on personal contacts;
 - (3) the annual report contains a statement detailing the process used for making appointments – an explanation should be given if external advertising/advice is not used;
 - (4) prior to appointment, potential board members satisfy themselves that they have the knowledge, skill and experience required and are able to commit the time needed to perform the role, and disclose to the chairman the nature and extent of their other appointments and confirm they will have enough time for the role;
 - (5) board members should receive a formal letter of appointment setting out the ambit of their responsibilities;
 - (6) when the appointment of a board member is put to the membership (if any) for approval, the board should explain why the individual should be appointed and how the role's requirements are fulfilled;
 - (7) a comprehensive induction programme is provided for new board members;
 - (8) the nomination committee must satisfy itself that procedures are in place to plan for succession; and

⁸⁵ Higgs (2003)

⁸⁶ independent in the case of a museum trust is taken to mean a person not remunerated by the charity, and who is not an office-holder (chairman, vice-chairman (if any) secretary, treasurer (if any)).

- (9) the senior board member should lead the process of appointing a new chairman.
- c) it notes the following situations where a board member's independence may be compromised, and requires that these connections/interests be specified in the annual report;
- (1) where the individual is a former employee: they will only be regarded as independent five years after the employment has ended;
 - (2) where there is a material business relationship with a company either directly, or as a partner, shareholder, director or senior employee of a body that has such a material relationship;
 - (3) where the board member has close family ties with any of the company's directors, senior employees or advisers;
 - (4) where the board member has significant links with other board members through involvement in other companies or bodies;
 - (5) where the board member has served on the board for more than 10 years; or
 - (6) the board member represents a significant funder.
- d) board members should normally be expected to serve two three-year terms unless exceptional circumstances make a longer term appropriate; any extension beyond six years must be justified, and after nine years should be subject to annual re-election; and
- e) board members must inform the chair before any new appointments are accepted; the board must also be informed.
- 2.441 The creation of a National Hub for Governance by the National Council for Voluntary Organisations⁸⁷ provides much guidance and information designed to improve governance in the not-for-profit sector.
- 2.442 The process of recruiting Board members is always a challenge. Inevitably, the pool of appropriately skilled and experienced people in any community is small, and the demand for voluntary sector leaders of high calibre greater than the supply. Securing the first Chair and inaugural board will always take time and care, and succession planning and their replacement requires equal attention.

⁸⁷ www.governancehub.org.uk, which includes a *Code of Governance for the Voluntary and Community Sector* developed by a coalition of leading organisations in the charity and voluntary sector.

- 2.443 There is general acceptance that there is advantage in having a board that is diverse not only in its skills and experience, but in gender, cultural background, age and physical capacity. Standards of probity in the public service also encourage the advertising of vacancies for trustees, and filling them by open competition.
- 2.444 However, experience suggests that:
- a) the people best-suited for appointment usually require persuasion to give up their time, and are unlikely to come forward through an open recruitment process;
 - b) as trustee appointments will usually be unremunerated, the pool of people who feel able to seek appointment will be limited;
 - c) for those actively seeking appointment to public bodies, other opportunities (Health Trusts, School Governors) may appear more attractive in terms of the scope and range of the work involved;
 - d) in the initial stages at least, joining the board of what may be perceived as a failing organisation can represent more of a challenge than some other trustee opportunities; and
 - e) the smaller the community, the greater the impact of these factors.
- 2.445 On this basis, recruitment processes are likely to be less effective than the trustees taking personal responsibility (both collectively and individually) for board renewal, and put in place arrangements to cultivate regular opportunities for contact with, and stimulating interest in, potential recruits. While public advertising will play a role in this, it can never be the full answer.

Nominated Members of the Board

- 2.446 Typically, a museum trust is composed of members appointed by the organisation's members, and a number of nominated trustees. These usually come from the local authorities that provide core funding, but can also include local learned societies (as at York) or National museums (as at Sheffield Galleries and Museum Trust).
- 2.447 The position of these Nominated members is a difficult one. Their duties as charity trustee require them always to act in the best interests of the charity, and not to blindly follow the instructions of the nominating body. However, their duty to the nominating body is likely to demand a reciprocal recognition of conflict of interest which will limit contributions to the debates of the nominating body when matters concerning the museum trust are discussed. Where this is a local authority, the Model Code of Conduct⁸⁸ suggests that

⁸⁸ The Local Authorities (Model Code of Conduct) (England) Order 2001 SI 2001 No. 357; The Conduct of Members (Model Code of Conduct) (Wales) Order 2001 SI 2001 No. 2289 (W.177)

they would have to declare a personal, non-prejudicial interest at Council meetings on any matters concerning the museum trust, thus preventing them from speaking or voting at the meeting.

- 2.448 It is also the case that nominated members may not always have any real interest in the museum trust, and as a consequence of that, or of other commitments, their attendance at trustees' and other necessary meetings may not always be relied on. In some cases, they make no contribution to fulfilling the museum trust's purpose.
- 2.449 It is sensible, therefore, that protocols be established at the outset which safeguard against these problems and, if necessary, appropriate provision made in the Articles of Association. Issues for resolution should be:
- a) agreement that the person nominated will be for a term that corresponds with the board's own three-year membership, irrespective of any political change in the composition of the Council;
 - b) whether the nominating organisation would, as a matter of course, appoint persons for whom conflicts of interest are less likely to arise;
 - c) whether the museum trust could be sounded out in advance to ensure that the nominee was likely to be a good fit within the board, and bring additional skills and experience rather than duplicating what already existed; and
 - d) whether the nominating body would provide a list of potential nominees for selection for appointment (possibly following interview).

Board Size

- 2.450 Board size tends to be larger than private sector comparators, partly as a result of tradition, partly to reflect the broad range of skills, experience and background that needs to be represented at board level, and partly as a result of the provision of the Local Government & Housing Act 1989 (LGHA) and the Local Authorities (Companies) Order 1995.⁸⁹ Charitable companies (but not other types of charitable constitution) are subject to regulation by this legislation, which was designed to ensure that local authorities do not evade financial and propriety controls by establishing controlled or influenced companies to discharge their functions.
- 2.451 The consequence of this is to diminish the financial benefit of charitable status to the local authority unless the arrangements fall outside of the legislation, which is when the local authority:

⁸⁹ SI 1995 No. 849

- a) has the power to control less than 49% of the votes at general meetings of the company, or to appoint or remove under half of the directors, and provided that any grant it makes is less than 50% of the turnover; or
- b) provides over 50% of the grant funding, but has the power to control less than 19% of the votes at a general meeting; or
- c) leases premises at market rent.

2.452 Exhibit 2.4.1 summarises the ceiling of allowable local authority nomination rights for both unincorporated charities and charitable companies:

Exhibit 2.4.1: Local Authority Nomination Ceilings

	Unincorporated Charity	Charitable Company
Lease at less than market rent	100%	20%
Revenue funding in excess of 50% of turnover	100%	20%
Lease at market rent <u>and</u> revenue funding at less than 50%	100%	49%

2.453 As a consequence, in situations where company members and trustees are synonymous, the board of trustees usually has to be five times the number of local authority nominees to ensure compliance – two local authority nominees means a board with a minimum size of ten members, three nominees means fifteen trustees, and so on. While this avoids potential conflicts of interest between an individual acting as a member or officer of the council on the one hand, and as a director/trustee of the museum trust on the other, it tends to lead to larger boards than are necessary.

2.454 Where less than half the directors are associated with a single local authority (whether elected members or officers) and that council has not provided the company with an indemnity or guarantee against future liability or loss, the Office of the Deputy Prime Minister may exempt companies from the provisions of LGHA 1989, but this has rarely happened in the case of museum trusts. For the future, the difficulty might be avoided by using the constitutional model of the Charitable Incorporated Organisation, which falls outside of the LGHA 1989.

2.455 However, even without LGHA 1989 and local authority nominees, there will be a tendency for museum governing bodies to be larger than their commercial counterparts because, besides including a range of relevant skills, they frequently feel the need to represent the many constituencies that have a stake in the organisation – funding bodies, support groups, learned societies and education bodies. Such voices can enhance connections with, the communities of interest they serve.

Indemnity & Exoneration

- 2.456 Trustees cannot be exonerated for acting dishonestly. The directors of a charitable company are entitled to the usual indemnity out of the assets of the company allowed by company law. In addition, the Charities Bill 2005-2006⁹⁰ will provide the Charity Commission with the power to give trustees the same relief from liability that the High Court has the power to give under charity and company law. In essence, trustees will be able to apply for relief from personal liability where they have acted honestly and reasonably and ought fairly to be excused. This should reduce the need for the charity to exercise powers to purchase trustee liability insurance. The previous position of local authorities, which were not permitted to indemnify their elected members or employees for defaults committed by them in the course of their serving as a member of external boards, has been modified to the extent that this has ceased to be a matter of general concern.⁹¹

The Funding Agreement

- 2.457 The Funding Agreement establishes how the Council will fund the museum. Generally, it follows one of the following formats:
- a) a basis of annual funding, with the Agreement rolling-on year-by-year until such time as it is determined by either side; or
 - b) fixed-term Agreements, with annual negotiations over the funding to be provided by the council; with, at the end of the fixed-term, the option for both sides to renew, at which time a new Funding Agreement will be agreed; or
 - c) Agreements for a fixed-term longer than a single funding period, specifying the annual funding for each successive year (or the means by which that funding will be calculated), and the date when both parties will settle a further funding cycle – in this arrangement there may be several funding cycle within a single Agreement.
- 2.458 The detail of funding periods is less significant than the fact that the Agreement anticipates a long-term relationship between the council and the museum trust, and that should the arrangement fail at any stage the museum and its assets revert to the council, at its cost.
- 2.459 While the Funding Agreement will inevitably include terms and conditions, these must not be so onerous as to fetter the discretion of the board of the museum trust.

⁹⁰ clause 38

⁹¹ The Local Authorities (Indemnities for Members and Officers) Order 2004 SI 2004 No. 3082; The Local Authorities (Indemnities for Members and Officers) (Wales) Order 2006 SI 2006 No. 249 (W.37)

2.460 Exhibit 2.4.2 provides a summary of the matters that might constitute the heads of terms for a Funding Agreement though, as is noted elsewhere,⁹² not all situations may require inclusion of each head:

Exhibit 2.4.2: Exemplar Heads of a Funding Agreement

	Head	Content
1	Preamble	<p>a) Statement of parties to the Agreement (normally only the council and the museum trust)</p> <p>b) Background summarising the circumstances which have led to the Funding Agreement</p> <p>c) Statement that any Schedules to the Agreement form part of it</p> <p>d) Definitions of key words and expressions used in the Agreement, including the museum trust's aims and objectives</p>
2	Term	<p>a) The date when the obligations upon the council and the museum trust commence, and the date of termination</p>
3	Financial Information	<p>a) The form of the financial information to be provided to the council by the museum trust (eg management accounts)</p> <p>b) The content of that information (eg income and expenditure account, cashflow and balance sheet)</p> <p>c) A requirement that the financial information be capable of comparison with any other financial records prepared (ie annual accounts and business plan)</p> <p>d) The frequency of submission of information to council and date to which the information should be made up</p> <p>e) The museum trust to disclose to the council material variances to business plan and forecasts should they arise</p> <p>f) The museum trust to provide statutory accounts within a specified period from the year-end to which the accounts relate</p>

⁹² para 2.462

	Head	Content
		<p>g) The museum trust to furnish the council with such other financial information as it might require, and to authorise the trust's bankers to provide financial information to the council</p> <p>h) The museum trust to follow appropriate accounting standards and practice</p>
4	Business Plan	<p>a) The museum trust to produce an annual business plan stating its aims and objectives for the coming [three-year⁹³] period to which the Funding Agreement relates, with proposed operational programmes and financial forecasts for that period</p> <p>b) The museum trust to include other details in the business plan (eg development projects, temporary exhibition and educational programmes, marketing proposals and pricing strategies)</p>
5	Reports	<p>a) The museum trust to provide the council with a copy of its annual report, and deliver copies elsewhere (eg local libraries, museum sites for inspection by the public) and other tiers of local government</p> <p>b) Representatives of the museum trust to attend periodic meetings with the council to report on its work, stating the minimum frequency of those meetings</p> <p>c) The museum trust to provide performance information to the council (eg admission numbers, visits by schools, and the frequency of those reports)</p>
6	Council Grant	<p>a) The initial base grant payable by the council</p> <p>b) Where base grant is being committed for a period longer than a single financial year, the base grant payable by the council in subsequent financial years (or the means of calculating it), either to the end of the Agreement or any break point specified in the Funding Agreement <u>or</u></p> <p>c) Where the base grant is negotiated on the basis of business plan forecasts, the arrangement and time</p>

⁹³ The period of the Business Plan will depend on the duration of the Funding Agreement and the nature of financial provision made within it, but three years should be the minimum planning period for the business plan.

	Head	Content
		limits for those negotiations, and arbitration arrangements in the case of non-agreement; d) The procedure whereby the museum trust may determine the Agreement in the case of non-agreement over funding between the council and the trust
7	Determination	a) In the case of determination by either party, and the consequent transfer of the museum trust's assets to the council, the council to indemnify the museum trust against any costs arising from that transfer and (if appropriate) its winding-up
8	Grant Payments	a) Payments of base grant by the council to the museum trust are in no circumstances to be repayable, subject only to the museum trust solely using the grant in accordance with its aims and objectives b) Arrangements for payment (eg quarterly in advance) c) Arrangements for supplementary grants (eg contributions to capital projects) or loans made to provide working capital, including ceilings on such payments and details of how they are to be repaid
9	Property	a) Arrangements to fund the maintenance of property transferred from the council to the museum trust, including any residual obligations on the part of the council, and arrangements to be made by the council to meet those obligations b) The council to lease property to the museum trust at nominal or peppercorn rentals.
10	Existing Arrangements	a) The museum trust to maintain any services and informal partnerships previously performed by the council
11	Education Programmes	a) Arrangements for free or discounted admissions ⁹⁴ by schools in the council's administrative area and further afield, and any other services that may be agreed

⁹⁴ while noting the requirements of European law that requires all EU nationals to be subject to same tariff of charges, and prohibits advantageous rates of admission to be given to local people (European Court of Justice Case C-388/01 N^o 4/2003 : 16 January 2003)

	Head	Content
12	Museum Trust's Obligations	<p>a) The museum trust to maximise the efficient use of its resources</p> <p>b) The museum trust to comply with its aims and objectives, and to secure council approval for their amendment (such consent not to be unreasonably withheld)</p> <p>c) The museum trust to maintain appropriate insurances</p> <p>d) The museum trust to advise the council of any activities or events which may be expected to be controversial</p> <p>e) The museum trust not to use the museum premises for other than providing museums and galleries and ancillary activities designed to maximise the achievement of the museum trust's aims and objectives</p> <p>f) The museum trust not (unless identified by it in its business plan) to fund other bodies to provide exhibitions or activities, or to make loans or give guarantees without the council's consent</p> <p>g) The museum trust not to dispose of any material part of the museum trust's operations or assets without the council's consent</p> <p>h) The museum trust to allow the council's representative (in addition to any nominated members) to attend board meetings as non-voting observers</p> <p>i) The museum trust to notify the Council of any significant litigation that might affect the museum trust</p> <p>j) The museum trust to conduct its affairs in a prudent and businesslike manner</p> <p>k) The museum trust not to change the governing instrument without the consent of the Council</p> <p>l) The museum trust not to do anything that might lead to it becoming a regulated company for the purposes of Part V of the Local Government & Housing Act 1989⁹⁵</p>

⁹⁵ see paras 2.450 – 2.455

	Head	Content
		<p>m) The museum trust to maintain the opening arrangements specified in the business plan</p> <p>n) The museum trust to retain or achieve appropriate standards (eg Museum Accreditation) and use its best efforts to maintain its status (eg museum with Designated Collections, member of Regional Hub)</p> <p>o) The museum trust to establish criteria for appointment as trustees, and advertise vacancies</p> <p>p) The museum trust to follow standards of propriety, equality of opportunity, freedom of information, and public interest disclosures of information such as those generally adopted by local government</p> <p>q) The museum trust to operate a complaints procedure of the same type and form as any operated by the Council</p> <p>r) The museum trust to co-operate with the investigations of any statutory regulator (eg Audit Commission, Commission for Local Administration)</p> <p>s) The museum trust to put in place appropriate arrangements to reflect the council's obligations under the Freedom of Information Act 2000</p>
13	Default & Termination	<p>a) The council to take action on material breach by the museum trust by issuing notice of breach and required remedy</p> <p>b) The museum trust to remedy on receipt of notice and, if it fails so to do, the council may move to terminate the Agreement</p> <p>c) The council may also terminate where in its reasonable opinion no remedy is possible or the museum trust passes a resolution for winding-up, or is declared insolvent</p> <p>d) Termination not to affect the rights or liabilities of either the trust or council accrued since termination</p>

	Head	Content
14	Warranties	a) The council and museum trust to warrant separately, that, to the best of their knowledge, information and belief, they have the powers to enter into the Agreement and that it is legally enforceable on them, that they are not the subject to any relevant legal action, and there is no other circumstance which would be expected to affect either party's willingness to sign the Agreement.
15	Council's Statutory Role	a) Nothing in the Agreement to affect the right of the council as local planning authority or in any other capacity, nor to relieve the Trust of any obligation to secure approvals or consents from the council in any of its statutory capacities.
16	Variations	a) No variation to be valid unless in writing and signed on behalf of both parties b) The Agreement and any Schedules to form the whole Agreement
17	Waiver	a) No failure or delay to exercise or enforce rights, or partial action, to constitute a waiver or preclude later enforcement.
18	Governing Law	a) The Agreement to be governed by English law and within the jurisdiction of the English courts
19	Notices	a) All notices under the Agreement to be in writing, and delivered as specified
20	Assignment	a) The Agreement to be binding on successor bodies but not assignable to other bodies
21	Counterparts	a) All counterparts of the Agreement to constitute a single instrument

2.461 A Funding Agreement of this type is a substantial and detailed document. Where frequent renegotiations of its terms and conditions are expected (and the fluid state of local government makes this true in most circumstances) a single document, perhaps to be renegotiated every three or five years, can be unwieldy.

2.462 An alternative is to limit the Funding Agreement to those matters that are likely to remain in place unchanged for its duration. These would include:

- a) the start and termination of the Agreement;
- b) the guaranteed base level of funding and arrangements for establishing increases;
- c) business planning requirements;
- d) arrangements for payment of grant;
- e) payment of additional monies by way of capital contributions or to facilitate cashflow, whether grants or loans;
- f) requirements to deliver accounts and make them available locally;
- g) a framework for monitoring and reporting;
- h) default and termination provisions;
- i) warranties and waivers; and
- j) continuing obligations on the part of museum trust.

2.463 The remaining elements, which may be the subject to renegotiation or amendment during the period of the Funding Agreement could be dealt with in a free-standing document (sometimes called a 'Partnership Delivery Plan'⁹⁶), which is formally an annex to the Agreement, and whose status would be confirmed by it.

2.464 Typically, a Partnership Delivery Plan would set out:

- a) the locus of the museum trust in acting as agent for the council in delivering museum services, and advising it on museum issues;
- b) how the museum trust will provide museum services delivering outcomes within the Council's key corporate objective areas., and setting out the obligations of both parties in enabling these outcomes to be delivered;
- c) the key targets for the museum trust within the context of the council's Best Value Performance Plan;
- d) performance indicators agreed between council and museum trust both to reflect the national Best Value Performance Indicators and local priorities for both council and museum trust; and
- e) detailed monitoring and reporting arrangements that build on the requirements of the Funding Agreement.

The Transfer Agreement

2.465 This document formally transfers to the museum trust the activity of providing museum and gallery services together with the staff and the assets. It is

⁹⁶ Lawrence Graham (2003)

similar in form to the transfer Agreement prepared on purchase of a business. Exhibit 2.4.3 provides a summary of the matters that would normally be included in a Transfer Agreement:

Exhibit 2.4.3: Exemplar Heads of a Transfer Agreement

	Head	Content
1	Preamble	<p>a) Statement of parties to the Agreement (normally only the council and the museum trust)</p> <p>b) Background summarising the circumstances which have led to the Transfer Agreement</p> <p>c) Statement that any Schedules to the Agreement form part of it</p> <p>d) Definitions of key words and expressions used in the Agreement, taking into account the Schedules that list the rights, assets and equipment and contractual commitments</p> <p>e) The date and time of transfer from the council to the museum trust</p>
2	Assets to be transferred	<p>a) The transfer to include Goodwill as well as all assets relating to the museum (listed in Schedules),</p> <p>b) The museum trust to enjoy the benefit of rights and claims including sums due to the council from third parties and insurers in respect of damage or injury to those assets</p> <p>c) The museum trust to enjoy the benefit of existing contracts and pre-payments made by the council in relation to the museum</p> <p>d) The council to transfer to the museum trust all original documentation and records relating to the museum</p> <p>e) The council to transfer to the museum trust other property and assets wholly or mainly used by the council in connection with the provision of the museum</p>
3	Exclusions from Transfer	<p>a) The items not specifically referred to in clause 2 and the relevant Schedules to fall outside of the transfer</p>

	Head	Content
4	Consideration	a) Consideration for the transfer to be the trust's obligations in the Funding and other agreements (including the transfer agreement)
5	Creditors	a) Council to be responsible for payment to creditors and other claims in respect of transactions or services provided whether to the trust or in operating the museum until the transfer date b) Council to give notice to the museum trust of any claims made against it, and not take action on that claim is the consequence might be to damage the museum trust
6	Assumed Contracts	a) Council to assign to the museum trust all existing contracts (except those requiring third party consent) b) Council and museum trust to have a mutual obligation to indemnify each other against loss due to acts, defaults or delays in respect of the transfer of these contracts
7	Non-Assignable Contracts	a) The Transfer Agreement not to constitute assignment or novation where consent of another party required b) The Council to use best efforts to secure assignment or novation if requested by museum trust c) If assignment or novation not possible, the Council will co-operate with museum trust to secure the benefits arising from the contract incapable of assignment or novation d) Where new arrangements cannot be made, neither council or museum trust to have further obligations to each other in that regard e) Council to transfer possession but not ownership of items that are subject to operating or finance leases, those items to be enjoyed by the museum trust until the expiry or determination of those leases f) These provisions to be without prejudice to the museum trust's rights in respect of any contract or rights which the council has warranted is assignable.

	Head	Content
8	Employees	<p>a) The Council to indemnify museum trust against any acts by or liabilities incurred by the council before the transfer date where that act is deemed to be done by the Trust under TUPE (Regulation 5)</p> <p>b) Council generally to indemnify museum trust against any acts by or liabilities incurred the council before the transfer date</p> <p>c) the council to bear all costs of employment until and including the transfer date</p> <p>d) The museum trust to exercise the requirements of TUPE and the government's Code of Conduct on transfers</p> <p>e) The council to monitor the museum trust's compliance with the Code of Conduct</p>
9	Intellectual Property & Copyright	<p>a) The provisions concerning copyright and intellectual rights in the Collections Agreement to be acknowledged</p> <p>b) The council to license the museum trust to manage the other intellectual property and copyright that falls within the assets to be transferred</p> <p>c) The museum trust to benefit from any income it generates from exploiting that copyright</p> <p>d) The museum trust to be able to licence any trading subsidiary wholly-owned by it to exploit copyright and intellectual property assets</p> <p>e) Intellectual property and copyright created by the museum trust under the Funding Agreement to pass to the council on termination</p>
10	Completion	<p>a) The arrangements for completion of the Agreement, including location and business to be transacted</p> <p>b) The council to give possession of assets to the museum trust, and deliver the books and other records on completion</p>

	Head	Content
		<p>c) All leases, licences, Funding and Collections Agreements to be executed on completion</p> <p>d) The council may execute all other necessary documents after completion, until which time the council shall hold any relevant assets that are the subject of those documents on trust for the museum</p>
11	Post-Completion Obligations	<p>a) The museum trust to retain any accounting or other records passed over by the council for such period as the law requires, and shall make these available to the council during normal office hours, and provide such copies as the council requires (at the council's expense)</p> <p>b) The council to pay to the museum trust any monies received by the council after completion and due to the museum trust under the Agreement</p>
12	Post-Completion Services	<p>a) The council to provide the museum trust with the services specified (and detailed in Schedule) after the transfer date, and the notice to be given by the museum trust to the council to terminate provision of those services</p> <p>b) The museum trust to pay for these services monthly in arrears on receipt of an appropriate VAT invoice, other than payroll costs which are to be paid within seven days of receipt of a VAT invoice</p>
13	Warranties	<p>a) The Council to warrant completeness and accuracy of statements relating to its position relating to taxation, the museum and the consequences of its transfer to the museum trust, employees, title to assets, contracts, pensions and other benefits, insurances and collections, subject to agreement that the museum trust will not pursue any remedy for breach where there is no loss to the museum trust or the council agrees to indemnify it from the consequences of that breach</p>
14	Trust's Remedies	<p>a) Where the warranties are found to be untrue or misleading before the transfer date the museum trust may rescind the Agreement, with Council indemnifying it against any costs and expenses incurred by it in the preparation of the Transfer Agreement</p>

	Head	Content
		b) The council to indemnify the museum trust against all loss and claims arising out of the warranties being untrue or misleading
15	Litigation and Disputes Indemnity	a) The council to indemnify the museum trust against all claims arising out of the operation of the museum prior to the transfer date and any assets transferred, whether before or after the transfer date
16	VAT	a) The council and museum trust to state that both parties believe/do not believe the transfer constitutes a supply for VAT purposes, and VAT is therefore chargeable/not chargeable b) If deemed to be non-chargeable, the Council to account for whole VAT payment due in the event that VAT is chargeable on the transaction
17	Confidential Information	a) The council to agree that after the date of the Transfer Agreement it will not communicate other than to officers and employees of the museum trust any information that the museum trust considers to be confidential, or which might materially affect the museum trust's interests, subject to its statutory obligations
18	Pensions	a) The council and museum trust to enter into pension arrangements (detailed in Schedule) in respect of staff transferred from the employment of the staff to the museum trust
19	Announcements	a) Formal announcement of transfer to be made by a single press release jointly issued by council and museum trust on the transfer date b) Other announcements by either council or museum trust to be agreed in advance by both parties, with neither side to unreasonably withhold consent
20	Variations	a) No variation to be valid unless in writing and signed on behalf of both parties b) The Agreement and Schedules to form the whole Agreement

	Head	Content
21	Waiver	a) No failure or delay by council or museum trust to exercise or enforce rights, or partial action, to constitute a waiver or preclude later enforcement.
22	Governing Law	a) The Agreement to be governed by English law and within the jurisdiction of the English courts
23	Notices	a) All notices under the Agreement to be in writing, and delivered as specified
24	Assignment	a) The Agreement to be binding on successor bodies but not otherwise assignable
25	General	a) Warranties and indemnities (other than those already performed) to remain in place notwithstanding Completion b) Unenforceability or invalidity of any single provision of the Agreement not to affect the remainder of the Agreement
26	Counterparts	a) All counterparts to constitute one and the same instrument
	Schedules	
	1 – Assets	List of Furniture and Equipment Assumed Contracts eg <ul style="list-style-type: none"> ➤ Loans and exhibitions ➤ Rental agreements for office equipment ➤ Standing Orders for supply of good and services ➤ Communications equipment ➤ Picture Library Agency ➤ Arrangements with casual and freelance staff Finance and operating leases eg <ul style="list-style-type: none"> ➤ computer and office equipment ➤ motor vehicles ➤ plant and equipment
	2 – Properties	List of properties and land occupied by the museum
	3 – Employees	List of employees transferring under TUPE, showing <ul style="list-style-type: none"> ➤ name, address date of birth, NI and payroll number; ➤ job title and place of work;

	Head	Content
	<p>4 – Pension scheme</p> <p>5 – Services to be Provided by the Council</p> <p>6 – Warranties⁹⁷</p>	<ul style="list-style-type: none"> ➤ date of start of continuous service in local government; ➤ date of start of employment with council; ➤ whether union member and, if so, name of union; ➤ grade and salary; ➤ holiday entitlement/ TOIL owing; ➤ outstanding claims against the council: <p>Council to use best efforts to secure admission to Local Government Pension Scheme, and take responsibility for all liabilities up to transfer date</p> <ul style="list-style-type: none"> a) Financial and accounting services b) Payroll c) Personnel d) Facilities (council courier and cash collection) e) ICT support f) Legal services <ul style="list-style-type: none"> a) The council to warrant that the Schedules are true, complete and accurate, and b) It has not withheld any information that might affect the museum trust's willingness to enter into the Agreement, and c) None of the provisions of the Agreement are contrary to the law and d) There are no legal circumstances that preclude the transfer and e) It has complied with all its obligations in respect of taxation, including the stamping of legal documents relating to the museum, and whether or not elections to waive VAT exemptions have been exercised, and f) There has been no material change in the nature of the museum's operations of which the museum trust is not aware within the preceding period, and the council has all the necessary permissions and consents necessary for carrying out its museum function and has complied with all legal and other requirements, and

⁹⁷ Where the Council is aware of issues that make it unable to enter into these warranties as stated the museum trust should be advised of these circumstances, which should be listed as a Schedule and acknowledged in the main part of the Agreement

	Head	Content
		<p>g) The council is not withholding from the museum trust any records or data relevant to the museum on transfer, and</p> <p>h) The council is not aware of any circumstance that would damage the operation of the museum by the museum trust, cause it to lose any right or benefit, or result in any financial penalty and</p> <p>i) The schedule listing present employees together with their remuneration is complete and</p> <p>j) No employee is subject to more than three month's notice on either side and</p> <p>k) No employee is eligible for money or benefits other than their contractual emoluments and there are no contingent liabilities for loss of employment, and</p> <p>l) There are no arrangements for payments on retirement, death or disability other than those of the Local Government Pension Scheme, and</p> <p>m) The council has complied with its statutory obligations to its employees, and</p> <p>n) The council is not engaged in any industrial disputes that concerns the operation of the museum, and</p> <p>o) There are no matters concerning remuneration of employees, or representation by trades unions, other than those disclosed to the museum trust, and</p> <p>p) The council has advised the museum trust of all matters relating to employees including recruitment, conditions of service, grievance and disciplinary procedures, and</p> <p>q) All assets are owned by the council, not subject to lease or other deferred terms, and in its possession, and available for the use of the museum trust on the transfer date, and</p>

	Head	Content
		<p>r) All equipment, machinery and plant is in good repair, and none of the utilities necessary to operate them is in danger of discontinuance, and</p> <p>s) No property occupied by the museum is subject to any circumstance that precludes its use by the museum trust, there is no claim or liability in respect of any property and nor are there are current or anticipated disputes, the use of the property is lawful under planning legislation, and no compulsory purchase situation is foreseen, and</p> <p>t) No assumed contract has any onerous or unusual conditions and any permissions or consents have been obtained, and</p> <p>u) There are no unusual or long-term contracts involving obligations or a nature or magnitude that call for special mention, and</p> <p>v) The information concerning pensions is full and complete, all regulations concerning the LGPS have been disclosed to the museum trust, and no discretion or power has been exercised by the council to augment or provide additional benefits, and all outstanding matters concerning early retirements and other pension matters, including <i>ex gratia</i> payments, will be determined by the council in advance of the transfer date, and</p> <p>w) The council has made full disclosure on all matters concerning insurances, including those relating to museum collections, and provided details of claims or potential claims including those which may give rise to litigation, and</p> <p>x) The council has disclosed full details on the collections, including those not on display.</p>

2.466 Where the museum trust proposes to establish a wholly-owned trading subsidiary, this needs to be reflected in the transfer process. There are two means of dealing with this: a tripartite approach between council, museum trust and trading subsidiary; and a bipartite approach between the museum trust and subsidiary, where the council only has powers of influence through its agreement with the museum trust.

2.467 In most circumstances, the tripartite approach will be more suitable, for the following reasons:

- it would provide an opportunity for clarity in stating the role of the trading subsidiary in relation to the museum trust;
- it would provide an opportunity to ensure that property leases/licences and intellectual property rights licences are held by the appropriate parties;
- it would bind the subsidiary trading company in such a way that its arm's length from the museum trust does not give it opportunity to do things in contradiction of the council's funding and other agreements with the museum trust;
- it would enable stock and equipment⁹⁸ to be transferred directly from the council to the trading entity, and in so doing the trading company will acquire its initial capitalisation in such a way that avoids the difficulties that may otherwise arise.⁹⁹
- when the stock value represents insufficient capitalisation, then as part of the financial settlement the local authority might directly pay the trading company¹⁰⁰ an appropriate sum on transfer, thereby mitigating the difficulties of charities investing in their subsidiaries.¹⁰¹
- it would crystallise that, following transfer, the museum trust and the trading company should be conducted as separate entities.

Charitable Trusts

2.468 In some cases the local authority may be acting as sole trustee of a charitable trust, whether represented in museum buildings or parts of its collection. While in such cases it might appear appropriate (where the governing instrument allows) for the museum trust to take over the role of trustee from the council, this has to be seen in the context of the relationships between these collections and the trust's corporate assets.¹⁰²

2.469 It may be preferable, therefore, for the council to retain trusteeship, while making formal arrangements to delegate its day-to-day administration to the museum trust, by means of a management arrangement which would rehearse any specific terms and conditions. It would also describe how the museum trust is to discharge them on the council's behalf, and the reporting and accounting mechanisms that will be necessary so that the council can be seen to fully and properly discharge its duties as trustee.

⁹⁸ but probably not staff, who might more conveniently fit within the scope of the main agreement, and who would be seconded by the museum trust to the trading company

⁹⁹ para 2.212

¹⁰⁰ Local Government Act 2000 s 2(1)

¹⁰¹ para 2.212

¹⁰² Part 1 para 1.209

2.470 Where the charity's current governing instrument does not give powers to make such a management agreement, it is open to the council to approach to Charity Commission to make a Scheme so that it better suits the new circumstances.

Employment Rights

2.471 A key element of the Transfer Agreement relates to transfer of staff. The Transfer of Undertakings (Protection of Employment) Regulations 1981 (as amended) ('TUPE') applies to 'all public and private undertakings engaged in economic activity whether or not they are operating for gain'.¹⁰³ Museums devolved from local authorities to museum trusts would be an undertaking in terms of TUPE, so the Regulations would apply automatically to the transfer of all staff employed in those museums.

2.472 The essence of TUPE is that employees being transferred would carry with them all of their existing terms and conditions of employment, including any accrued redundancy and other benefits, and the new employer will have all of the rights, powers, obligations and duties formerly held by their former employer. In effect, the employees will be treated as if their contracts of employment had originally been made with the new employer.

2.473 Statutory guidance for local authorities transferring employees to another body providing local public services confirms that employees transferring from a local authority retain their general terms and benefits under TUPE, and this protection extends to pensions¹⁰⁴ (which now have weaker protection under parallel provisions of the Pensions Act 2004).

2.474 The Code states that for future transfers, new recruits must be offered 'employment on fair and reasonable terms and conditions which are, overall, no less favourable than those of transferred employees'.¹⁰⁵ There is, though, flexibility for the museum trust: the Code does not preclude non-pension terms and conditions that differ from those of transferred staff, as long as this does not result in a less favourable package overall. The Code requires consultation with recognised trades unions on the terms and conditions to be offered to new recruits.

2.475 As for pensions, new recruits must be offered either:

- membership of the Local Government Pension Scheme (LGPS); or
- membership of a good-quality employer pension scheme, whether a contracted out, final-salary based defined benefit scheme, or a defined

¹⁰³ EC Directive 95/50/EC

¹⁰⁴ published as Annex D to ODPM Circular 03/2003 - *Local Government Act 1991 Part I Best Value and Performance Improvement*; these terms are similar to the government's *Code of Practice on Workforce Matters in Public Sector Service Contracts* (2005)

¹⁰⁵ ODPM Circular 03/2003, 48

contribution scheme – in the latter case, the employer must match employee contributions of up to 6%, though either side could pay more if they wished; or

- membership of a stakeholder pension scheme with an employer contribution.

2.476 LGPS Regulations¹⁰⁶ allow employers who are carrying out work in the public sector or similar to local government to contract with the administering authority to allow its employees to join the Local Government Pension Scheme as an Admitted Body. Such Bodies must agree to its employees becoming members before they are allowed to join the Scheme. Thus LGPS membership would only be available if the museum trust had successfully applied to the appropriate local Pension Fund and become an Admitted Body, and then nominated the employee for LGPS membership.

2.477 There is no legal requirement for the local Pension Fund to admit a museum trust into LGPS, and where this does not happen the museum trust would be expected to purchase a package for transferred employees (and those other employees to whom it wishes to extend the option of membership) on the open pension market.

2.478 Each LGPS Pension Fund has its own rules. Although most Admitted Bodies join the provider's main Fund, some operate Funds that are specifically for Admitted Bodies. Although the rate of employees' contributions is the same across LGPS as a whole (currently 6%), there is substantial variation in the rate of employers' contributions. Some are actuarially assessed on scheme membership as a whole, while others are valued on an employer-by-employer basis. While some are fully-funded to meet likely future claims as they fall due, most are not.

2.479 It has already been recommended¹⁰⁷ that staff employed on trading activities be transferred to the museum trust and seconded to the trading company. This would avoid some practical difficulties that might arise as a consequence of trading subsidiaries being admitted to LGPS under other Regulations¹⁰⁸ than those applying to the main scheme. Not only can this lead to the Fund placing limitations on which employees can be nominated as members, but an indemnity or bond in an approved form would also be required.¹⁰⁹ Such indemnities, even when for only a nominal sum, would need to be made by the local authority, as charities are not allowed to indemnify the actions of a trading company.¹¹⁰

¹⁰⁶ The Local Government Pension Scheme Regulations 1995 SI 1995 No. 1019

¹⁰⁷ para 2.466

¹⁰⁸ Local Government Pension Scheme (Amendment etc) Regulations 1999 SI 1999 No. 3438

¹⁰⁹ though, if the Pension Fund agrees, such indemnities and bonds can be for nominal sums

¹¹⁰ para 2.212

Intellectual Property & Copyright

- 2.480 Details of the general issues to be considered in museum copyright are to be found elsewhere.¹¹¹ Though included in the Exemplar Heads of Terms for both Transfer and Collections Agreements in this Chapter, the transfer documents of many of the museums that have been devolved are silent on these matters. The following issues are critical:
- a) the museum should have full details of the copyright ownerships relating to all its assets and activities, and these should be included in the records that are transferred to the museum trust;
 - b) the museum trust should be granted unencumbered rights to use and exploit those copyrights and intellectual property rights to which the council has title;
 - c) where the museum trust owns a trading subsidiary to undertake activities that do not fall within its charitable purposes¹¹² it should be capable of passing those rights on to the trading subsidiary;
 - d) any copyright and intellectual property created as a result of the Funding Agreement should be passed to the council on termination of the Agreement between the museum trust and the council;
 - e) it should be understood that copyright extends beyond matters specifically related to the collections and into the widest range of other materials, such as educational materials, publications, internal forms, plans and charts, reports and policies, exhibition designs and scripts.

Leases & Licences

- 2.481 Although the Funding Agreement rehearses the bare bones of the relationship between the council and the museum trust in terms of the property occupied by the museum, this does not mean that the preparation of leases and licences is necessarily straightforward. As a consequence, the time taken to resolve property issues should not be under-estimated. The following paragraphs summarise the key issues.

Lease or Licence?

- 2.482 A lease differs from a licence in that a licence is merely a permission to be on land, without security of tenure, while a lease gives the occupier a proprietary interest in it irrespective of changes of in the property's ownership. The statutory security of tenure¹¹³ afforded to business tenants (unless they contract out of the right) does not extend to genuine licensees. This security

¹¹¹ Wienand, Booy and Fry (2000)

¹¹² para 2.211

¹¹³ Landlord & Tenant Act 1954 Part II

of tenure provides comfort to funders that money spent on the building will have a useful life for the purposes for which the funding was provided.

2.483 It is this security that is the main benefit of a lease, and given that museum trusts plan a long term presence within the museum building, it is inevitable that the lease is the preferred form of tenure. However, where museums occupy premises where there is no exclusive right of possession – normally off-site stores or similar premises – a licence is the only simple option. In such circumstances it might be that the Funding Agreement (or indeed the licence for the premises itself) obliges the council to provide alternative equivalent accommodation should it wish to terminate the museum trust's occupation of the licensed property.

2.484 Where premises are to be occupied by the trading subsidiary, a direct lease from the local authority to that company might be considered, as a lease between the charity and a trading company usually represents a disposal to a connected person, requiring Charity Commission consent (though under normal circumstances it is expected that this would be granted without difficulty).

Term

2.485 The leases of existing museum trusts vary in length between 6 and 99 years. Generally, the length of leases should be no shorter than the period of the Funding Agreement, though restricting the term to this minimum period may hamper the museum trust's ability to conduct effective fundraising campaigns for capital programmes as it will not be able to demonstrate security of tenure over a sufficient period of time to justify the investment. It should also be noted that the Charity Commission takes the view that a charity should not be improving a building when it will not get the benefit of those improvements, so length of lease should reflect the investment made by the charity in the property. Provision can be made so that the lease reverts to the local authority (subject to any Charity Commission approvals) in the case of insolvency.

2.486 Thus where development or renewal schemes are planned a lease for a longer period is preferable. For example, the Heritage Lottery Fund requires an unexpired term of 25 years from the date of the project completion. A useful general rule for leases therefore is the length of the Funding Agreement plus 25 years. Alternatively, if there are obstacles to a longer lease (eg the council not being in a position to enter into such a lease, or because of the provisions of the Local Government Act 1972¹¹⁴), this difficulty can be overcome by the local authority being a party to the funding contract, together with the museum trust.

¹¹⁴ para 2.486

Rental

- 2.487 Rentals would normally be for a nominal cost or peppercorn for the whole period of lease, and this position would also be rehearsed in the Funding Agreement¹¹⁵. Leases in excess of seven years fall within the requirement of The Local Government Act 1972¹¹⁶ that where the rental is ‘less than the best which can reasonably be obtained’ the consent of the Deputy Prime Minister should be obtained. Until 2003 there was a general consent for disposals to a named charity at an unlimited under-value, though in most other circumstances consent had to be sought from the First Secretary of State.
- 2.488 The Local Government Act 1972 General Disposal Consent (England) 2003¹¹⁷ and Local Government Act 1972 General Disposal Consent (Wales) 2003¹¹⁸ grants consent in circumstances where the undervalue does not exceed £2 million, and where the disposing Authority considers the disposal is likely to contribute to the achievement of the promotion or improvement of the economic, social or environmental well-being of the whole or any part of its area, or all or any persons resident or present in its area, having regard to the appropriate Community Strategy. It is for the local authority to decide whether any particular disposal meets these criteria or requires specific consent under the 1972 Act.
- 2.489 The upper limit of £2 million under-value may in some cases be more restrictive than the previous 1998 consent, especially where substantial assets are being leased for a long term. In terms of the Consent, the leasehold value is represented by the right to receive the rent and other payments under the lease plus the value of the reversion when the lease expires. This value in the case of a larger city centre museum building might well exceed the £2 million threshold.
- 2.490 Local Authorities must be able to demonstrate that they have acted reasonably in agreeing undervalue transactions, and a fundamental issue will be the ability to demonstrate reasonableness having regard to applicable policy. ODPM guidance to local authorities is that, besides taking legal advice whether the disposal is capable of falling within the terms of the Consent, the view of a professionally-qualified valuer should be sought as to the likely amount of the undervalue. Additionally, a council is encouraged to inform its external auditor of any legal advice it receives and the proposed action it wishes to take.

General Covenants

- 2.491 The covenants in the lease are the terms and conditions agreed by both the council and museum trust as to the occupation of the property. Generally they relate to ensuring that the property is maintained in good condition without

¹¹⁵ para 2.460(9)

¹¹⁶ s 123

¹¹⁷ ODPM Circular 06/03 (August 2003)

¹¹⁸ National Assembly for Wales Circular 41/2003 (December 2003)

loss of value to the landlord, and to avoid contravention of statutory requirements. They provide the local authority (as landlord) with the opportunity to influence the museum trust's activities. However, they should not extend into areas that would shackle the museum trustees' discretion to act in the best interests of the charity, and therefore compromise its charitable status.

Repairing Obligations

- 2.492 Difficulties may arise where a museum trust takes over a building that has suffered a maintenance deficit over an extended period of time, to the extent that it is in such state of disrepair the trustees feel that to take on a repairing lease would not only be onerous but would relieve the council of its responsibilities as a prudent property owner. In these situations discussions over respective liabilities and costs can be time-consuming. However, it is sensible if these can be completed in advance of transfer date, so as to avoid uncertainty in this key area hanging over the relationship between council and museum trust in its formative years.
- 2.493 However, where a museum trust takes over a building in good condition, or with the intention of improving it or putting it into a good state of repair, then it is sensible if it takes on the repairing obligations, and this should be reflected in the Funding Agreement.

Insurances

- 2.494 Insurance arrangements are of three types:
- a) the museum trust arranges appropriate insurance cover, with the council having the right to inspect the policy; or
 - b) the council insures at its own cost, noting the museum trust's interest; or
 - c) the museum trust reimburses the costs of insurance arranged by the council for the trust's benefit, while undertaking not to do anything that renders that policy void or increases the council's premium
- 2.495 None of these is preferable over the others, and individual circumstances might lead to a combination of more than one type. While the council insuring directly may have benefits in lower costs arising from the economies of scale of a large policy, its cover might not match the exact needs of the museum trust, and overlap with the trust's other cover. It is important that the museum trust prepares its own insurance specification, whether its fulfillment comes through the council or its own cover, ensuring that there are no gaps in cover.

Usage

- 2.496 Peppercorn leases generally permit a narrower range of uses than a typical commercial use. They are generally limited to using the buildings for

purposes related to the Public Libraries and Museums Act 1964 and ancillary functions, and alienation, assignments and underlets are prohibited.

- 2.497 It is important that these usage clauses do not limit the commercial activities of the museum, and that they allow subsidiary trading companies to be licensed to occupy parts of the museum premises to conduct their activities. The supply of alcoholic beverages is normally restricted in these leases, and again it is important to ensure that the terms of these covenants do not impair the museum's potential to earn income.

Value Added Tax

- 2.498 VAT is payable on rents unless the council has elected to waive the exemption on these supplies. However, as the rental is small, this is unlikely to have any major financial implications.

The Collections Agreement

- 2.499 Generally, where museums have been devolved from local authorities to museum trusts there has been no change in ownership of the museum collections held by the council on the transfer date - the local authority continues to be the owner. After the transfer date there is no firm practice, and the following options have been pursued:
- a) the museum trust collects on behalf of the local authority, with the council being the owner of all new accessions; or
 - b) the museum trust collects in its own right, but with a provision in the Funding Agreement that the collections in its ownership pass to the council on its winding-up (with council taking a charge over the collections); or
 - c) the museum trust collects in its own right, and manages the council's collection on its behalf.
- 2.4000 A further option has never been implemented – where the local authority declares a trust over its collections passed over to the museum trust, with a named destination (eg a National or Regional Museum) in the event of the museum trust winding-up. This may have proved unpopular for the following reasons:
- the power of a local authority to declare a charitable trust is not clear; and
 - it is unlikely that a museum will be prepared to be named as a destination in this way.¹¹⁹

¹¹⁹ *cf* the recent decision of the National Army Museum to disclaim its role as place of last resort in the Army Museum Ogilby Trust's Model Trust Deed.

2.4001 While all of these options protect the collections, the first (with the museum trust acting as the council's agent) has the most to commend in terms of simplicity and practicably. It:

- provides a perpetual owner for the collections;
- maintains the council's role as guardian of the local inheritance; and
- has the capacity for regular variation to meet changing circumstances through amending a Collections Agreement.

2.402 However, the arrangements need to demonstrate that they are of benefit to the museum trust, and the term of the agreement should be related to the expectation that the museum trust will be adding to the collections. Where the council is in default of the Agreement provision might be made for revaluation of the assets acquired by the trust with any surplus coming to the charity, though this could be self-defeating if it led to the local authority selling those items to fund any payment due to the museum trust.

2.4002 The Collections Agreement could be part of a Funding Agreement, whether in its main body or as a Schedule, but experience suggests it is better detached from it, so as to enable variation and amendment of its content without presenting an opportunity to revisit the terms of the Funding Agreement. Its duration should match that of the Funding Agreement.

2.4003 The purpose of the Collections Agreement is to set out the museum trust's obligations by defining how the collections are to be managed, reflecting appropriate standards, and retaining council control over acquisitions. The agreement would also preclude both museum trust and council from inappropriate disposal of items.

2.4004 Exhibit 2.4.4 provides a summary of the matters that would normally be included in a Collections Agreement:

Exhibit 2.4.4: Exemplar Heads of a Collections Agreement

	Head	Content
1	Preamble	<p>a) Statement of parties to the Agreement (normally only the council and the museum trust)</p> <p>b) Background summarising the circumstances which have led to the Collections Agreement, with specific reference to Transfer and Funding Agreements</p> <p>c) Definitions of key words and expressions used in the Agreement, including those of the museum's separate collections and distinguishing those that are constituted as special trusts</p>

	Head	Content
2	Loan and licensing of the Collections	<p>a) loan and licence the collections to the museum trust for the period of the Funding Agreement;</p> <p>b) the museum trust to keep collections in its possession and control in a reasonable condition and according to good museum practice including (insofar as is possible) appropriate environmental conditions</p> <p>c) the museum trust to comply with the council's acquisition and disposal policy, standards (eg Museum Accreditation) and the terms of any special trust [which may be subject to separate specification of terms and conditions in the Collections Agreement].</p>
3	Acquisition and Disposal	<p>a) The museum trust not to dispose of collections without the council's consent, and disposal to follow requirements of Museum Accreditation scheme</p> <p>b) The council not to dispose of collections without the museum trust's consent, and disposal to follow requirements of Museum Accreditation scheme</p> <p>c) The museum trust to be permitted to acquire items for the collection which shall become the property of the council</p> <p>d) The museum trust only to collect within relevant laws (eg Treasure and Wildlife Laws) and where it can establish good title for the council</p> <p>e) The council to periodically review acquisition and disposal policy in collaboration with, and taking the advice of, the museum trust</p>
4	Lending	<p>a) The museum trust to be authorised to lend material to other museums and (with only with the council's consent) to other organisations and individuals, subject to standard conditions agreed by the council</p> <p>b) The museum trust to be required to make available items from the collections for displays and exhibitions or museums operated by the council</p>

	Head	Content
5	Insurance	<p>a) The museum trust to insure in the joint names of the council and museum trust, and at the cost of the museum trust, all those collections insured by Council up to date of Collections Agreement.</p> <p>b) Otherwise either council or museum trust to be under any obligation to insure or repair or replace in the case of loss or damage</p> <p>c) Insurance only to be effected with the consent of the other party, but both parties responsible for ensuring that policies do not become voidable</p> <p>d) Any insurance monies received to be used for the benefit of the collections</p> <p>e) The museum trust to maximise use of Government Indemnity Scheme</p> <p>f) The museum trust to insure items on loan from third parties</p> <p>g) the museum trust to insure (at its own expense) the council's collections against loss, damage, theft as a consequence of the wilful or reckless acts or omissions of the museum trust and its staff, subject to its liability to the council being limited to the extent of a successful claim on its insurance</p> <p>h) The museum trust to procure any insurance as required by the council</p>
6	Catalogues	<p>a) The museum trust to maintain and develop the catalogue of the museum's collections according to good museum practice</p>
7	Copyright	<p>a) The museum trust [and/or its trading company] to be licensed to manage the copyright and intellectual property rights in the collection and its associated documentation</p> <p>b) The museum trust [and/or its trading company] to retain any income it derives from exploiting copyright and intellectual property rights in the collection</p>

	Head	Content
		<p>c) The council and museum trust to jointly own any new copyright created based on the collection</p> <p>d) The museum trust to indemnify the council from any claims arising from infringement of the copyright of others over items relating to the collection</p>
8	Indemnity	a) The council and museum trust to indemnify each other against losses due to negligence or statutory breach by each other, or the failure of either party to comply with the terms of the collections agreement
9	Termination	a) The Collections Agreement to terminate on the winding up of the museum trust, its becoming insolvent or committing an unrectified material breach of its obligations under the Agreement, or on the termination of the Funding Agreement for whatever reason
10	Assignments and sub-contracting	a) Neither the council nor museum trust to assign or sub-contract any part of the agreement without the other's consent
11	Partnership or Agency	a) Nothing in the Agreement to create a partnership or agency
12	Variations	<p>a) No variation to be valid unless in writing and signed on behalf of both parties</p> <p>b) The Agreement and any Schedules to form the whole Agreement</p>
13	Waiver	a) No failure or delay to exercise or enforce rights, or partial action, to constitute a waiver or preclude later enforcement.
14	Unenforceability	a) Invalidity, illegality or unenforceability of any provision in the Agreement not to affect the remainder of the Agreement
15	Notices	a) All notices under the Agreement to be in writing, and delivered as specified
16	Counterparts	a) All counterparts of the Agreement to constitute a single instrument

Other Agreements/Licenses

2.4004 The council and museum trust will need to ensure that the terms of any licences or statutory consents are met, and obligations transferred. Areas that need to be considered include liquor, entertainment, firearms and vehicles licences; consents under the Wildlife Acts, and Health and Safety and Performance Rights registrations.

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