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11 January 2013 (First letter)

BY FAX & POST
FAX NUMBER: **020 8489 3599**

URGENT

Dear Sirs

RE: HARINGEY COUNCIL'S COUNCIL TAX REDUCTION SCHEME
OUR CLIENTS: RM AND AO

We are instructed by RM and AO in relation to a possible legal challenge against Haringey's Council Tax Reduction Scheme (CTRS). We have written to you in a separate confidential letter setting out the names and details of their circumstances.

We understand that the matter is to be decided at an extraordinary full Council meeting on Thursday 17 January 2013. As is set out in detail below, our clients are extremely concerned that the Council have not carried out a lawful consultation and that it is irrationally proposing not to take advantage of the funds made available by the Department for Communities and Local Government Transitional Grant Scheme of over £700,000. Our clients are also concerned that, if the decision is taken in line with the proposals, the Council will have failed to have due regard to the needs specified under section 149 of the Equality Act 2010 (the Public Sector Equality Duty) in relation to the impact of this scheme on disabled children and pregnant and nursing mothers.

We also note however that were the Council to reconsider the matter and make an application under the Transitional Grant Scheme, which would allow the Council to at least reduce the amount of Council Tax that the poorest residents have to pay and potentially maintain the current 100% exemption, this application would need to be submitted after 31 January but before 15 February 2013. Accordingly, any legal challenge by way of Judicial Review which seeks to challenge the legality of Haringey's CTRS, and thereby allowing for Haringey to still apply to the scheme, would appear to need to be resolved (that is

issued and considered by the High Court) before 15 February 2013. As a result we consider this matter to be extremely urgent, and have therefore taken the decision to send this letter in advance of the Council sitting on 17 January 2013.

We hope that the contents of this letter, which we invite the Council to circulate to all Members, will result in a decision not to adopt the proposed CTRS but instead to quickly review the position and impose charges on the poorest residents sufficiently low to trigger eligibility for the Transitional Grant Scheme. We do however put the Council on notice that should the Council decide to adopt the scheme as set out in the report for full Council on 17 January 2013, we are likely to be instructed to send a formal letter before court action which will include an abridged time for a response, so that this matter can be heard by the courts before 15 February 2013 if need be.

Given the urgency of this matter, we are copying this letter to the Council Leader, the Lead Member for Finance and the senior officers specified at the end of this letter. We confirm for the avoidance of doubt that our clients and ourselves are willing to enter into any discussions the Council may wish to propose to avoid the need for legal proceedings – although for the reasons set out above we do not consider that any more time can be allowed before the lawfulness of any decision taken by the Council which does not recognise our clients' concerns is tested in Court.

1. Background

The Council sets out at paragraph 2 of the report for the meeting on 17 January 2013 the decision by the Government to abolish Council Tax Benefit in favour of a local rebate scheme, and that when transferring responsibility to local authorities the funding made available was reduced by 10%. Authorities are required to maintain a full rebate for anyone of a pensionable age, and so Haringey have calculated that the shortfall is in fact therefore nearer to 17%. It is clear that there is no dispute between the Council and our clients that any additional form of taxation will hit the Council's poorest people extremely hard. Councillor Goldberg states at paragraph 2.8 '*It goes without saying that the actions of the Government with regards to the abolition of Council Tax Benefit are extremely misguided, both in practice and principle. It is important to note that this new tax on the lowest paid households will hit them on the same day as many will be impacted by the overall benefits cap and further cuts to tax credits and other benefits.*'

Our clients are extremely concerned about their ability to meet their essential household expenses if a further tax is placed upon them. We have set out their position in more detail in the confidential letter accompanying this letter, but it is vital that it is understood that this additional burden is coming at a time when state benefits are frozen at a rate below inflation and caps are being applied to overall benefits and housing benefit, leading to potentially devastating consequences to the poorest citizens within Haringey.

2. Details of the matter being challenged

Transitional Grant Scheme

The Council launched a consultation on 29 August 2012 seeking views on its proposal, the main plank of which was to reduce payments to all working age claimants by an equal flat proportion in line with the reduction in Government funding, which the consultation stated was at the time expected to be around 20%.

Significantly, the consultation document states under the heading 'what's changing' that '*we estimate the shortfall could be as much as £5.7m next year and this could rise in later years.*' Consultees were asked whether they agreed that the Council should apply the Government's reduction in funding equally to all recipients.

On 18 October, almost exactly one month before the consultation closed, the Department for Communities and Local Government issued details of its Transitional Grant Scheme. This scheme, initially only available for one year, offered a grant of slightly over £700,000 to Haringey on 3 conditions, the most significant being that those who would be entitled to 100% support under the current scheme pay between

zero and no more than 8.5% of their council tax liability (as opposed to the 20% being consulted upon). Unfortunately, this information does not appear to have been made available to consultees at any point.

Paragraph 4.1.2 of the report for the Council meeting states that Haringey's shortfall, were it to maintain the existing scheme would be £3.846m, not the maximum figure of £5.7m which was the only figure provided to consultees. It is not clear to us when this reduced figure was arrived at. Applying the £700,000 transitional grant, the shortfall would therefore be approximately £3.15m. In order to maximise the income whilst still accessing the grant, Haringey would have to limit the increase in payments to 8.5%. As stated at paragraph 4.5.4 of the report to cabinet, applying an increase in payments of 8.5% and applying for the grant of £700,000 would leave Haringey with a shortfall of £1.489m, over £4.2m less than the maximum figure quoted in the consultation document.

In our submission, in order for the consultation exercise to be lawful, it was incumbent upon the Council to inform consultees when this information was known in mid-October that:

1. In fact the actual shortfall were the Council to maintain existing arrangements (disregarding the transitional grant) was not £5.7m but £3.8m;
2. A grant had been made available from central government so the actual shortfall was closer to £3.1m; and
3. The terms of the grant were such that instead of applying a 20% increase for those currently in receipt of 100% discount, an increase of up to 8.5% could be applied which would leave a shortfall of less than £1.5m

Consultees should then have been invited to state whether they thought that the Council should have taken one of three available options:

1. To proceed with the previously preferred option, increasing Council Tax bills by the proposed figure of roughly 20% and not taking up the transitional grant;
2. Taking up the transitional grant, increasing Council Tax bills by the maximum permissible 8.5% and making up the £1.5m shortfall from reserves, cuts to services, an increase in the headline rate of Council Tax or any combination of the above; or
3. Taking up the transitional grant, retaining the current level of exemptions and reductions and making up the larger shortfall (which we assume would be £3.1m) from any combination of the measures outlined at 2 above.

The fact that the Council did not include this in the consultation is unsurprising when reading the report to Council on 17 January 2013, as it appears from that report that the authors of the report have not themselves properly considered whether in fact to adopt any of these policies. Paragraph 10 and in particular Paragraph 10.11 refers to the availability of the grant, and states '*Given the overall financial pressures that the Council faces in the short term future it is difficult to make the case for accepting the transition grant in terms of the Council's financial position*' but there is no analysis at all to explain why the Council is not limiting the cut to a maximum of 8.5%, thereby enabling the Council to the grant of over £700,000 and seeking to make up the reduced shortfall in other ways. Put simply, it appears to have been rejected out of hand and in a very cursory way.

We consider that the approach the Council has taken to these matters both renders the consultation unlawful and would make any resulting decision to adopt the proposed CTRS irrational, for the reasons set out below. The Council should have both consulted upon and then carefully considered the merits of limiting the increase to a maximum of 8.5% given the sizeable transitional grant that could then have been applied for. If, as the officers appear to have feared, the transitional grant was not available in 2014/15, then the Council would have been entitled to review the matter and potentially adopt a different scheme for that year. At the very least the poorest residents of Haringey could have been protected (partially or fully) for a further full financial year.

<u>Whether residents can pay</u>

As is recognised in the report to Council, this additional tax burden comes at a time when cuts to other benefits place the poorest residents of the borough at real risk of poverty and homelessness. It is noteworthy that it is stated at paragraph 10.14 that, perhaps unsurprisingly, the Council recognises that it may simply not be possible to collect Council Tax in all cases and that other Councils are estimating non-payment could range from 20-50%. The report then simply states that as the scheme is not in operation at this stage it is hard to predict. In our submission that does not sufficiently consider the matter, which could include (for example) actual calculations of the detriment that this will cause 'average' families' currently receiving 100% benefit.

Similarly, in effect what the report is identifying is that the budget figure is unlikely to be realised as residents simply will not be able to afford to pay the tax. Given that scenario, in our submission this simply strengthens the argument that it is irrational for the Council not to accept the transitional grant to assist with this shortfall.

If the CTRS is adopted as proposed, the Council will (on its own evidence) fail to obtain the funds that it needs to meet the shortfall from central Government. As such it will necessarily have to find the missing funds from reserves. We fail to see how it can be beneficial to send hundreds of the poorest residents of Haringey deeper and deeper into debt, as their Council Tax arrears escalate and they are forced to deal with bailiffs, when instead the Council could simply choose now to meet this unexpected liability from its reserves.

Council's Reserves Position

We note that no consideration is given in the report to Council to whether the Council's reserves position allows it to absorb some or all of the reduction in central government support in this area itself without passing the cost on to its poorest residents.

We have considered the Council's Statement of Accounts for 2011/12, which suggests (at p34) that the Council has 'Usable Reserves' in excess of £108m. We would be grateful for confirmation as to whether 'Usable Reserves' means that these reserves can essentially be spent to meet any unexpected liabilities, and also for confirmation of the current 'Usable Reserves' position.

Furthermore, in the Council's 'Medium Term Financial Strategy 2010/11-2012/13, we note the statement on p15 that the Council intends to keep general balances 'at the target level of £10m over the period and there is a separate risk reserve of £10m'. We would suggest that unexpected financial contingencies such as the present sudden reduction in central government support for Council Tax liabilities for the poorest residents is precisely the sort of situation where a risk reserve should be utilised to mitigate the consequences. If we have misunderstood the purpose of the risk reserve please inform us of the correct position.

Equality Act 2010

Furthermore, our clients have significant concerns that the information before Council on 17 January 2013 is insufficient for the Council to comply with its obligations under the Equality Act 2010. Whilst our clients are very pleased to note from the Equalities Impact Assessment (EIA) (Appendix B to the report for Cabinet) that following the consultation 'disabled people' will also be protected from the reduction, this protection in fact appears only to apply to disabled *adults* – there is no equivalent reduction for parents of disabled children.

We enclose with this letter, by way of example, the report 'Counting the Costs 2012 - The financial reality for families with disabled children across the UK' from the charity Contact a Family which states as its key findings that of the survey of 2,312 families with disabled children across the UK:

- 1 in 6 (17%) is going without food.
- More than 1 in 5 (21%) is going without heating.
- A quarter (26%) are going without specialist equipment or adaptations.

- 86% have gone without leisure and days out
- Almost a third (29%) have taken out a loan - 39% for food and heating
- 1 in 5 (21%) have been threatened with court action for failing to keep up with payments – the majority for missing utility bill payments (46%).
- Over one in ten (11%) have already been affected by benefit changes.

In our submission, the total exclusion of the situation of disabled children from the EIA and the report to Council demonstrates a clear breach of the duty to have due regard to the need to advance equality of opportunity for this group. As such we invite the Council to ensure that families with disabled children are also protected from the reduction. The same approach could be applied to these families as to disabled adults, with protection from any increased payments applying if the child is in receipt of any specified disability benefits.

In addition to this, we are also extremely concerned about the affect of this policy on pregnant women and nursing mothers. The Institute for Brain Chemistry and Human Nutrition at London Metropolitan University is a leading centre of research into the importance of human nutrition and health. Its research is led by Professor Michael Crawford, who has established a relationship between poor maternal nutrition and low birthweight before conception and during pregnancy. By way of example, three wards in Haringey had among the highest rates of low birth weight between 2007 and 2009; compared to a national average of 7.53%, Tottenham Green recorded 12.5%, St Ann's 9.4% and Haringey 11.62%. The average for Haringey is 7.63%

The statement in the EIA that Haringey 'do not collect information about claimants maternity status so the impact on this characteristic is not known' is plainly insufficient for the Council to meet its obligations under the Equality Act, given that no regard at all has been paid to the requirements under s149 of the Act in relation to this protected group. Given that there is insufficient time in relation to this year's scheme to collect the necessary data, we invite the Council to confirm that all pregnant women and mothers with children under one will be protected from any increase.

3. Legal background and Submissions

Consultation

The leading judgment regarding consultation is R v North and East Devon Health Authority ex p Coughlan [2001] QB 213, which established that the consultation must take place at a time when the proposals are at a formative stage; must provide consultees with sufficient reasons in support of particular proposals to allow an intelligent response to be made; must give sufficient time for responses to be made and considered and must ensure that the responses are conscientiously taken into account when the ultimate decision is taken.

As set out above, we do not consider that consultees were provided with accurate information in order to allow them to make an intelligent response to the consultation or with sufficient reasons in support of the particular proposals. In particular, the announcement of the Transitional Grant Scheme was such a material development that the Council should have provided this information to consultees and given the more accurate calculations of the sums now involved, as set out above.

We also contend that the consultation was unfair and unlawful because consultees would have been left with the impression that there was no alternative to the CTRS being proposed by the Council. As such, questions such as 'To what extent do you agree we should apply the Government's reduction in funding equally to all recipients of working age?' could not be answered properly by consultees, because consultees could not know that there was an alternative option whereby either less or none of the Government's reduction in funding needed to be passed on to residents.

Furthermore, it is plain that another alternative option, that of raising Council Tax to meet the shortfall from those who are not presently eligible for any reduction, was simply not put to consultees. We understand from the DCLG website that for the 2013-14 financial year the penalty for any Council which increases

Council Tax is the loss of a 1% grant. We also understand that an increase in excess of 2% would need to be ratified at a local referendum. We appreciate that the prospect of increasing Council Tax may well have been very unpopular, but this option should nevertheless have been provided to consultees.

In the absence of this information, consultees were misled into believing that there was no alternative but to agree to at least the essence of the proposals in the CTRS – that the best outcome available was some mitigation of its worst consequences, eg protecting particularly vulnerable groups. This was simply not the case and as so the consultation was fundamentally flawed.

In JM & NT v Isle of Wight Council [2011] EWHC 2911 (Admin) the Judge stated the following in relation to the flawed consultation in that case:

I consider that the consultation document provided insufficient information to enable those consulted "to give intelligent consideration and an intelligent response", applying the Gunning criteria. It described the proposals which went to Cabinet on 8 February and the Council on 23 February (Version 3). Unfortunately it did not provide any detail about the numbers of users whose support would be reduced, not even giving the figures which were provided in the report to Cabinet on 14 September 2010 (see paragraph 20 above). It did not give any detail about the costs and potential savings. Nor did it explain what types of services would or would not be included under the revised criteria. Consultees, including the parents of the Claimants, were left uncertain as to what impact the revised criteria would have on the assistance they received from the Council. Neither of the Claimants had been provided with an assessment applying the FACS eligibility criteria; these assessments had been carried out by the Council but the results were not shared with users. Therefore they did not know whether their risks, based upon their needs, had been assessed as 'Critical' or 'Substantial'. Finally, there was no consultation in relation to the revised criteria adopted in the Eligibility Review (version 5) which was used as the basis for reassessment of users in 2011.

Lack of adequate consultation was not pleaded as a freestanding ground for judicial review in this case. Consultation only fell to be considered as part of the discharge of the s.49A DDA 1995 duty. Looked at from this perspective, the flaw was that the consultation responses did not, and could not, fully reflect the experiences and views of users and their carers, because they were not provided with the information they required to make an informed response. Council Members were therefore deprived of important information as to the potential impact of the proposed changes, which meant that they had insufficient information when they were discharging their s.49A DDA 1995 duties.

In our submission the same criticisms can be made of the consultation undertaken by Haringey.

There is plainly insufficient time for the Council to re-consult this year. As such the Council should simply adopt the default scheme this year, which leaves all existing protections in place and would allow the Council to apply for the transitional grant. If the Council wishes to adopt any similar CTRS for the following financial year it should re-consult in good time to make this decision lawfully.

Disability equality duty

Under s149 of the Equality Act 2010 (EA) a public body must have due regard to the need to:-

(a) Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
(b) Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
(c) Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The second aim (advance) imposes a duty (s149(3)) to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

Subsequent EHRC Guidance entitled 'The essential guide' at p6 states:

The broad purpose of the equality duty is to integrate consideration of equality and good relations into the day-to-day business of public authorities. If you do not consider how a function can affect different groups in different ways, it is unlikely to have the intended effect. This can contribute to greater inequality and poor outcomes.

The general equality duty therefore requires organisations to consider how they could positively contribute to the advancement of equality and good relations. It requires equality considerations to be reflected into the design of policies and the delivery of services, including internal policies, and for these issues to be kept under review.

In JM & NT v Isle of Wight Council [2011] EWHC 2911 (Admin) the Judge summarised the case law regarding the correct interpretation of the act at paragraphs 95 to 107. Applying these principles to the present case, we contend that the Council will be unable to show 'due regard' to the PSED if it approves the proposed CTRS on 17 January 2013 because:

1. There is absolutely no consideration in the papers before the Council as to how the increased payments will impact upon families with disabled children. The Members therefore cannot know how the proposed scheme will impact upon equality of opportunity for this protected group.

2. The Council has admitted in its EIA that it simply does not have any data on the numbers of pregnant woman and nursing mothers who will be affected by the CTRS and what the impact will be on them and their children. The evidence set out above shows that there is a direct link between poverty and poor outcomes for very young children. As such it would be plainly unlawful for the Council to proceed with the proposed CTRS when it simply has no idea what the impact would be on this protected group.

Tameside irrationality

The parallel obligation on the Council under the common law to that imposed by statute under EA 2010 s.149 is to 'ask itself the right question' and obtain the necessary information to answer it correctly; Secretary of State for Education and Science v Tameside MBC [1977] AC 1014 per Lord Diplock at 1065B; "the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"

The *Tameside* approach was applied in R. v Ealing LBC Ex p. C (A Minor) (2000) 3 C.C.L. Rep. 122, a case involved the accommodation needs of a disabled child, where the Court of Appeal stated as follows:

'In my judgment, both the decision and the decision making process were flawed. Unless the repetition of an assertion is to be regarded as a proper manifestation of a reasoning process, there was none here. Certainly there was no analysis of the accommodation problems faced by this disabled boy and his mother and his brother. The decision is therefore susceptible to judicial review on the basis that it is unreasonable in the Wednesbury sense. To adapt Lord Diplock's observation in Tameside: "Did the council ask themselves the right question and take reasonable steps to acquaint themselves with the relevant information to enable them to answer it correctly?"

The answer to the first is no: the right question or questions were not asked. The answer to the second question equally is no: reasonable steps were not taken by the council to enable the question to be answered correctly.
In our submission it is irrational of the Council not to ask itself why it would not adopt a scheme in order to comply with the transitional grant, thereby allowing a further £700,000 to be reduced from the budget deficit without passing this cost on to the poorest residents of the borough. As in Ex p C, the Council has not demonstrated any proper reasoning process here but has merely asserted that it is 'difficult to make the case for accepting the transition grant'. The only reasons given in the report are:

1. A shortfall of £1.49m would remain – but at the very least consideration should have been given to whether this significantly reduced shortfall could have been met by other means, for example using the risk reserve.

2. The grant may only be available for one year – but as set out above this could at least allow the Council to protect the poorest residents this year and the question could be revisited for 2014-15.

The Council therefore has not asked itself the right question – being 'is there any way that we can avoid passing the cost of the central government cuts onto our poorest residents?' – and has failed to take reasonable steps to give Members the necessary information to answer this question, even if it were belatedly posed.

We further contend that the Council's proposals are irrational because on the Council's own evidence they will not result in the required sums being obtained from the poorest residents, causing the Council to need to make up a significant shortfall in any event and resulting in many hundreds of people being pushed further into debt.

Again, as in relation to the flawed consultation, does not appear to us to be possible for the Council to remedy this flaw in the time remaining before a scheme needs to be adopted on 31 January 2013. As such, the only lawful option is for the Council to adopt the default scheme which both preserves the status quo for its poorest residents and allows the Council to access the transitional grant.

4. Details of the action that Haringey is expected to take

We invite the Council to reconsider this matter and to confirm that it will adopt a scheme in keeping with the transitional grant scheme, thereby allowing a further £700,000 to be reduced from the budget deficit that would not need to be passed on to the residents of Haringey.

We also invite the Council to either absorb the shortfall (as is taking place in many other authorities in London and across the country) or consider other means of accounting for the shortfall, including making reductions in the budget in other areas or increasing Council Tax payments to residents who are not protected from the reduction.

Please also confirm by return what reserves Haringey currently has, and its reserves from the past 3 financial years. Please provide us with a copy of the relevant page of the budget for those years as we have been unable to locate that information on the Council's website.

As set out above, we note that the Council's medium term financial strategy 2010/11 – 2012/13 refers at paragraph 13 (page 15 of 28) under the heading 'Key risk factors' that the council's financial reserves 'remains strong, attracting a good assessment by our external auditors' and there is reference to a target of £10m and a separate risk reserve of an additional £10m. Please explain when responding to this letter exactly what these levels currently are, and why the Council would not consider that this is a scenario where reserves may be appropriately drawn upon to mitigate the consequences for the poorest residents.

Finally, we note in the report to the Council meeting at 10.9(iv) that technical reforms to Council Tax will result in additional funds of £726k being available (across both the GLA and Haringey). We would be grateful for confirmation of what the Council's share of these additional funds will be, and whether these

funds have already taken into account or are also available to act as mitigation in relation to the central government cuts.

5. Proposed reply date

As set out above, this matter is of the utmost urgency given that the matter is to be decided at a full Council meeting on Thursday 17 January 2013 and any challenge to the legality of the decision may need to be resolved before 15 February 2013. For that reason we have been instructed to send this letter in advance of the actual decision being taken.

We invite the Council to respond to this letter no later than **4pm on Wednesday 16 January 2013** confirming with detailed reasons whether in light of what is stated above that the Council will now be invited to adopt a scheme in keeping with the transitional grant scheme, thereby allowing a further £700,000 to be reduced from the budget deficit that would not need to be passed on to the residents of Haringey. We also invite the Council to confirm that if a CTRS scheme is adopted which does not maintain the existing level of protection, both families with disabled children and pregnant women and nursing mothers will be protected as disabled people and pensioners are presently.

We do put you on notice that without a satisfactory response, and if the decision is taken on 17 January 2013 to adopt the scheme as proposed in the report to Cabinet notwithstanding the legal flaws in the decision-making process as set out above, we are likely to be instructed to send a formal letter before claim with an abridged time for a response reduced to a matter of days so that any proceedings can be considered by the court before 15 February 2013.

We look forward to hearing from you by **4pm on Wednesday 16 January 2013**.

Yours faithfully

IM LLP

IRWIN MITCHELL LLP

Cc

Cllr Claire Kober, Council Leader
Cllr Joe Goldberg, Cabinet Member for Finance and Carbon Reduction
Mr Nick Walkley, Chief Executive
Ms Julie Parker, Director of Corporate Resources