

APPENDIX 4 – ADOPTION WEST DELIVERY MODEL OPTIONS APPRAISAL

ADOPTION WEST
OPTIONS APPRAISAL FOR DELIVERY MODEL

[date]

Contents

Item	Page
1 BACKGROUND / PURPOSE.....	4
2 THE OPTIONS	4
3 EXECUTIVE SUMMARY.....	4
4 OPTION 1: HOSTED SINGLE LOCAL AUTHORITY	7
1 ADMINISTRATIVE/CONTRACTUAL STRUCTURE	7
2 GOVERNANCE.....	8
3 SERVICE CONSIDERATIONS	9
4 PROCUREMENT	9
5 STATE AID.....	11
6 EMPLOYMENT AND PENSIONS.....	12
7 TAX	14
8 CONSULTATION	14
9 BRAND/IDENTITY	14
10 SET-UP STEPS, COSTS AND TIME.....	14
11 ADVANTAGES OF THIS MODEL	15
12 DISADVANTAGES OF THIS MODEL	15
13 CONCLUSION	15
OPTION 2: JOINT VENTURE BETWEEN LOCAL AUTHORITIES (LOCAL AUTHORITY TRADING COMPANY).....	16
1 CORPORATE AND CONTRACTUAL STRUCTURE	16
2 GOVERNANCE.....	17
3 SERVICE CONSIDERATIONS	17
4 PROCUREMENT	18
5 STATE AID.....	19
6 EMPLOYMENT AND PENSIONS.....	19
7 TAX	22
8 CONSULTATION	22
9 BRAND/IDENTITY	23
10 SET-UP STEPS, COSTS AND TIME.....	23
11 ADVANTAGES OF THIS MODEL	23
12 DISADVANTAGES OF THIS MODEL	24
13 CONCLUSION	24
OPTION 3: CREATION OF NEW VOLUNTARY ADOPTION AGENCY (JOINT VENTURE BETWEEN VAA & LAS).....	25
1 CORPORATE AND CONTRACTUAL STRUCTURE	25
2 GOVERNANCE.....	25
3 SERVICE CONSIDERATIONS	26
4 PROCUREMENT	26

5	STATE AID.....	26
6	EMPLOYMENT AND PENSIONS.....	27
7	TAX.....	30
8	CONSULTATION.....	30
9	BRAND/IDENTITY.....	30
10	SET UP STEPS, COSTS AND TIME.....	30
11	ADVANTAGES OF THIS MODEL.....	31
12	DISADVANTAGES OF THIS MODEL.....	31
13	SUMMARY AND CONCLUSION.....	31
14	RECOMMENDATION IN LIGHT OF OPTIONS APPRAISAL ASSESSMENT CRITERIA.....	32
	SCHEDULE 1 - OVERVIEW OF CORPORATE STRUCTURES.....	33

1 BACKGROUND / PURPOSE

- 1.1 In June 2015 the Department for Education ("DfE") published their paper "Regionalising Adoption" setting out their proposals to local authorities to move to regional adoption agencies ("RAAs"). They believe they will help speed up matching and markedly improve the life chances of neglected and damaged children, improve adopter recruitment and adoption support and reduce costs. The DfE state that they want the sector to develop proposals that work for those involved and respond to the characteristics and needs of the local area and that regional adoption agencies should explore a range of new approaches to delivery models such as local authorities joining together, voluntary adoption agencies joining local authorities or services operating outside of local authority control.
- 1.2 In September 2015 an expression of interest was submitted to join the Regional Adoption Agencies development programme sponsored and funded by the Department for Education. The partners to the bid are Bath & North East Somerset, Bristol, Gloucestershire, North Somerset, South Gloucestershire, Swindon, Wiltshire local authorities along with Action for Children, Adoption UK, After Adoption, Barnardos, CCS Adoption and PAC UK Voluntary Adoption Agencies.
- 1.3 The DfE agreed the expression of interest in principle and funded the partnership to be called Adoption West Regional Adoption Agency to scope and define the proposal. Phase 1 of the project which is to be delivered by 31st March 2016, is to set out the preferred delivery model and outline business case for the Adoption West RAA, along with the transition plan to develop and deliver next phase of the project.
- 1.4 Adoption West RAA has considered four models of delivery but have excluded the option to outsource to any of the existing Voluntary Adoption Agencies ("VAAs") after soft market testing
- 1.5 The purpose of this paper to advise Adoption West RAA in detail of the three preferred delivery model options and make a recommendation as to the delivery model we consider the most appropriate after consideration of this legal advice and the criteria by which the partners of Adoption West propose to evaluate each option.

2 THE OPTIONS AND OBJECTIVES OF THE AUTHORITIES

- 2.1 The Options Appraisal is considering three delivery models for the RAA:
 - 2.1.1 Hosted Single Local Authority;
 - 2.1.2 Joint Venture between the local authorities;
 - 2.1.3 Joint Venture between the local authorities and the Voluntary Adoption Agencies.
- 2.2 The objectives of the authorities in evaluating the options are:
 - 2.2.1 [to identify the preferred delivery model option using and agreed set of criteria];
 - 2.2.2 [to include any other agreed objectives].

3 EXECUTIVE SUMMARY

Hosted Single Local Authority

- 3.1 This will usually be a combination of both an administrative and contractual structure but can be purely a contractual arrangement. Where an administrative arrangement is utilised the local authorities may delegate certain functions to each other, to a specific officer or to a joint committee under Local Government Act 1972. In addition to the administrative arrangement, or alternatively on its own, a contractual arrangement will exist between the authorities which will identify the Lead Authority to host the Regional Adoption Agency. The benefit of using a Joint Committee is that members can be involved and encourages greater transparency and more effective decision making

for this delivery model. The other local authorities will commission services under a service contract from the Lead Authority who in turn may commission additional services from the VAAs.

- 3.2 The Hosted Single Local Authority RAA would follow traditional shared service arrangements and will be relatively easier to establish than the other two corporate delivery model options and accordingly is likely to be the least costly option. There is less legal documentation to draft, negotiate and finalise neither is there a need to form or register a new entity with multiple regulators as no new legal person is created under this option. This in turn means that the state aid and tax issues which apply to the two corporate options will not apply. TUPE and pension considerations apply to all three options. Here only certain of the employees will TUPE and this will be to a local authority employer.
- 3.3 In terms of procurement the "Hamburg" exemption can be relied on but this could be argued to present a technical risk to this option given the application of the 2015 regulations. VAAs only have an opportunity to participate in a contractual arrangement such as "Alliance Contracting" which may in turn add a layer of decision making to the governance arrangements. As no new entity is created it may be more difficult to establish an identity distinct from the Lead Authority and innovation and growth may be limited accordingly.

Joint venture between the local authorities

- 3.4 A corporate structure creates a separate legal entity which can operate in its own name and with the benefit of establishing its own identity. In this model it's the local authorities only who are the owner of the corporate structure which operates as the RAA and is therefore a local authority trading company and subject to greater financial control than a company which is not part of a local authority. There is scope to include VAAs on the Board arrangements subject to any procurement implications.
- 3.5 A corporate joint venture between the participating authorities creates a new entity which offers a neutral platform which affords all participating authorities equal status within the arrangements and avoids the perception of control which the required role of a "lead authority" can create although maintaining local authority control. The governance arrangements could potentially be simpler with all partners sitting on the Board of Directors although the VAAs would have limited voting rights. It will be easy to establish a new identity and brand distinct from the local authorities. The procurement position is more favourable as the Teckal exemption is easier to evidence. Innovation and growth are better facilitated by this model subject to maintaining the RAAs Teckal status. This is likely to involve more cost in setting up and take longer given the requirement to involve regulators in the formation of the company and registration with Ofsted.

Joint Venture between the local authorities and the Voluntary Adoption Agencies

- 3.6 A corporate vehicle where both the local authorities and the voluntary adoption agencies participate as owners. This enables all parties to participate equally. As with option 2, a corporate structure creates a separate legal entity which can operate in its own name and with the benefit of establishing its own identity.
- 3.7 The JVCo RAA where both local authorities and VAAs participate on equal terms may seem an attractive proposal to achieve DfE aspirations for RAAs however this is the most complex and costly model to establish and will require a procurement exercise in the first instance which may not identify any willing JVCo partners or may only encourage larger and more established VAAs to tender. Whilst public private partnership can lead to successful outcomes and each party will bring different skills and expertise to the venture there are many issues to work through including the TUPE of staff to an organisation which is neither a local authority or local authority controlled and the resultant pension implications of that. State Aid and tax issues will also need to be examined in detail although these will not be dissimilar problems to the corporate RAA with only local authority owners.

Recommendation

- 3.8 Option 1 and Option 3 do require individual partners to make a commitment at an early stage. In the case of Option 1 one of the authorities has to be willing to be the Lead Authority and in the case of Option 3 one or more VAAs need to be willing to participate in the procurement of a JV partner so

each of these two options could fail on the basis that that neither a local authority or the VAAs are willing to do so.

- 3.9 All three options have the potential to involve all parties either contractually or by participation at different levels within the management structure of the RAA. Each option has a procurement implication with Option 2 more comfortably falling within an exception to the 2015 Regulations.
- 3.10 From an employment and pensions point of view, none of the options can be said to be simpler to implement and/or a better option as compared to the others. This position may change once the local authorities have considered the issues and settled on the approach they would want to take, but for the time being each of the three options is viable and no better or worse than the other.
- 3.11 The VAT position of Options 2 and 3 will need to be addressed and there are potential state aid issues for Options 2 and 3 which given the nature of the services and the status of the RAA are not likely to be a significant obstacle.
- 3.12 A new corporate entity as envisaged by Options 1 and 2 may be better able to adopt a new brand and identity and provides for greater flexibility and ability to innovate and grow outside of the constraints of the culture and regulation of local government.
- 3.13 All three options will require legal documentation drawing up and a timetable which fits within the decision making required by the seven local authorities. Option 2 and 3 will require more complex and documentation and the involvement of the Registrar of Companies and Ofsted and potentially the CIC Regulator dependent on the choice of corporate model chosen.
- 3.14 Each option from 1 through to 2 and then 3 could transform into each other from 1 through to 3 although multiple TUPE transfer would on balance best be avoided.
- 3.15 It is our view and subject to the full evaluation to be carried out by the officers of the participating authorities on the basis of the legal implications of each delivery model option to recommend: **Option 2 - Joint Venture between the local authorities** at this stage.

OPTION 1: HOSTED SINGLE LOCAL AUTHORITY

Overview: This will usually be a combination of both an administrative and contractual structure but can be purely a contractual arrangement. Where an administrative arrangement is utilised the local authorities may delegate certain functions to each other, to a specific officer or to a joint committee under Local Government Act 1972. In addition to the administrative arrangement, or alternatively on its own, a contractual arrangement will exist between the authorities which will identify the Lead Authority to host the Regional Adoption Agency.

1 ADMINISTRATIVE/CONTRACTUAL STRUCTURE

- 1.1 An administrative law structure is one which is established within the statutory scheme of delegation for local authorities. This may involve one authority arranging for the discharge of their functions by another authority under Section 101 of the Local Government Act 1972 (the "1972 Act") as part of a public/public arrangement if the authorities chose to delegate any decision making. Section 102 of the 1972 Act enables local authorities to form a Joint Committee. This is a useful structure common to many local authority shared service arrangements (where delegation of functions is required) to aid joint decision making by all the participating authorities. As detailed in paragraph 2.1 the participating authorities will retain the decision making so it is our understanding that the other participating authorities will not be delegating functions to the Lead Authority.
- 1.2 The formation of a Joint Committee requires the agreement of each of the participating authorities. Once a Joint Committee has been established, each of the participating authorities can decide to withdraw the powers which it had delegated to the Joint Committee, and no longer to participate in the Joint Committee.
- 1.3 The advantages of combining a contractual arrangement with a Joint Committee is that the Joint Committee comprises members from each of the participating authorities and, within the powers delegated to it by each authority, can then take a decision on behalf of each of the participating authorities. So the decision is taken once, by the Joint Committee, and is binding on each participating authority, rather than being taken separately in each participating authority. This can speed up decision-making and eliminate the scope for different authorities taking conflicting decisions. In addition it provides for transparency as the Joint Committee will operate as a local authority committee subject to the same publicity and transparency requirements.
- 1.4 Where authorities come together in a Joint Committee, that Joint Committee can take decisions, but because it is not a separate legal entity it cannot enter a contract, employ staff or hold land in its own name. So it is necessary to arrange for one or more authorities to actually do what is necessary to implement the decisions of the Joint Committee. So, where you have a Joint Committee, one or more Lead Authorities will be required, acting as agents for the other participating authorities.
- 1.5 To underpin the administrative arrangements the participating authorities can enter into a partnership-type contractual arrangement generally described as an Inter Authority Agreement. Such a contractual arrangement will underpin the administrative arrangement. Any contract should set out clearly what the purpose of the collaboration is and should clearly assign roles and responsibilities to each of the participating authorities. It should also deal with governance and other issues such as dispute resolution.
- 1.6 In addition the Inter Authority Agreement will detail the service delivery requirements of the participating authorities and will be the contract by which the other participating authorities commission services from the Lead Authority. Section 1 of the Local Authorities (Goods and Services) Act 1970 enables local authorities to provide to any other "public body", including local authorities any administrative, professional or technical services.
- 1.7 It is envisaged for this option that one of the authorities will elect to be the "Lead Authority and act as an agent for the other participating authorities and the contract between the authorities would need to address this. There may be one of the who is more driven to deliver the project for a number of reasons; for example, they have greater capacity, expertise or experience.

2 GOVERNANCE

- 2.1 Each of the participating authorities will be required to retain certain of its decision making in relation to adoption which has been identified as:
- 2.1.1 The child's journey up to the point at which the decision that the child should be placed for adoption is made;
 - 2.1.2 The provision of post adoption financial allowances;
 - 2.1.3 Duty to fund post adoption support for children; (subject to further advice)
 - 2.1.4 Access to birth records;
 - 2.1.5 Step-parent adoption assessments.
- This will also assist in any contract management functions which can be undertaken by any retained staff of the participating authorities.
- 2.2 Where a Joint Committee is formed this can be used to in relation to oversee the formation and implementation of the RAA and can be used as part of the governance arrangements to monitor the contractual service delivery arrangements.
- 2.3 The Voluntary Adoption Agencies do not have clear and defined role to play in the administrative arrangements (e.g. any Joint Committee formed) as the legislation which underpins the Joint Committee is only applicable to local authorities and does not envisage external participation. Any involvement would be a contractual relationship which traditionally would only cover the delivery of services.
- 2.4 The NHS has however developed models of contracting which could be explored for example "Alliance Contracting". This contract model is usually an arrangement where a number of parties enter into an agreement to work cooperatively and to share risk and reward, measured against set performance indicators. Under Alliance Contracting, traditional contractual legal protection is exchanged by the commissioner and providers for a new form of relationship based on good faith, focused on delivering defined outcomes, which all the parties have signed up to. The alliance will need to be based on clearly documented principles to which all members of the alliance are completely agreed. Principles seen in examples of alliance contracting include members of the alliance have an equal say in decisions for it.
- 2.5 The collaborative nature of Alliance Contracting is appealing but the complexity, time and cost for the alliance approach documentation and management should not be underestimated. Detailed due diligence should be carried out by all the potential alliance members on each other to ensure they are comfortable with the potential arrangements and their partners, on a fully informed basis. This will only be a contractual arrangement and would exist alongside the administrative arrangements potentially creating a complex and governance and decision making framework for the RAA.
- 2.6 This option currently envisages that each participating authority retains its decision making and that this will not be delegated to the lead authority or Joint Committee. However the Education and Adoption Bill 2015 -16 is intended to allow the Secretary of State for Education to give directions requiring one or more English local authorities to make arrangements for any or all of their specified adoption functions to be carried out by one of the named local authorities or by a different adoption agency (either a different local authority or a voluntary adoption agency). The implication for the RAA may be that it will be able to make all required decisions at some point in the future for all the participating authorities. At present its purpose is to motivate local authorities to establish RAAs.

3 SERVICE CONSIDERATIONS

- 3.1 The Project Brief for the Adoption West Regional Adoption Agency describes the services which the RAA will deliver and those which the local authorities will retain which includes the decision making in relation to the placement for adoption. The services will be delivered by the Lead Authority who will as required commission services from VAAs. Dependent on the nature of existing contractual arrangements these can either be assigned or novated to the RAA which may in some cases need to be the subject of a new procurement exercise.
- 3.2 Local authorities are already able to undertake adoption functions as are VAAs so there will be no requirement for the Lead Authority under this option to register as a new Registered Adoption Agency as it is already empowered to provide adoption functions under the Adoption and Children Act 2002.
- 3.3 The Lead Authority may need additional back office functions to deal with the increased business. Arrangements could be agreed with the those authorities not taking the lead to provide additional support services and the provision of such services might assist in ensuring this arrangement complies with procurement requirements of the public to public co-operation which are discussed below.
- 3.4 Conflicts of Interest are less likely to be an issue in this model as the decision makers will be employed only by their home authority although could be subject to Section 113 secondment arrangements if required.
- 3.5 All the local authorities and the VAAs will be subject to Ofsted inspections as before .
- 3.6 The arrangements may be expanded to other local authorities, RAAs or VAAs on the similar terms although the procurement implications described in paragraph 4 below will equally apply . Any Joint Committee will need to be dissolved and reconstituted as it is not possible to add new local authorities to any Joint Committee. It is possible to add local authorities to the contractual arrangements provided the terms of the original IAA permits this. If a Joint Committee exits this is decision which could be within their remit unless reserved to each of the participating authorities.
- 3.7 Although it is envisaged that RAAs are the way forward it would be advisable to include exit provisions in the IAA which deal with the transfer of staff in the event either one or more of the participating authorities wish to leave the RAA and terminate the IAA. The exiting authority will want to ensure that it has the necessary staff, access to data and information and assets to continue performing its adoption functions upon termination.

4 PROCUREMENT

Procurement position on setting up RAA

- 4.1 A key consideration when exploring models for public bodies purchasing from, or sharing services with, other local authorities is the application of the Public Contract Regulations 2015 ("the 2015 Regulations") and EC Treaty principles. These will apply to the participating authorities when it is entering contracts for services. The extent to which the 2015 Regulations imposes requirements on the way a shared services project is set up and structured will depend on the specific nature of the project. There are likely to be different requirements depending on the type of shared services structure adopted. In order to avoid any procurement risk (i.e. the risk of a potential contractor successfully arguing that one of the participating authorities should not have done a bilateral or multilateral deal with another authority for the Services but should have competed them openly in the market) the terms of any shared services arrangements must meet the required legal tests set out in the 2015 Regulations.
- 4.2 One of the key changes to the existing procurement regime under the Public Contract Regulations 2006 ("the 2006 Regulations") is the removal of the distinction between Part A and Part B services.
- 4.3 Under the 2006 Regulations, contracts for services listed in:

- 4.3.1 Part A of Schedule 3 of the 2006 Regulations were subject to the full regime if they were valued at the relevant EU threshold which is currently £164,176.
- 4.3.2 Part B of Schedule 3 of the 2006 Regulations were subject to very few provisions, and only if they exceeded the threshold. Contracting authorities were only obliged to advertise such contracts if they were of cross border interest. In that case, the authority must award the contract in compliance with the EU Treaty principles of transparency and equal treatment.
- 4.4 This has been changed by the 2015 Regulations. Under the 2015 Regulations all services contracts are subject to the procurement regime, where they meet the applicable threshold, unless they are expressly excluded from the 2015 Regulations. The full regime will apply unless the services are listed in Schedule 3 of the 2015 Regulations, in which case a "light touch" regime will apply. A different threshold of EUR 750,000 (or £625,050, sterling equivalent) also applies to contracts subject to the light touch regime.
- 4.5 Adoption would fall within the category of health, social care and related services which are included in Schedule 3 and therefore subject to this light touch regime if the value exceeds £625,050 which we assume to be the case here. The light touch rules require that contracting authorities intending to award a public contract for these services shall make known their intention by publishing either a contract notice or prior information notice in the OJEU. Following award, a contract award notice must also be published. Contracting authorities are free to determine the procedures applicable to the award of light touch regime contracts, but these must be at least sufficient to ensure compliance with the principles of transparency and equal treatment. Time limits should be reasonable and proportionate and the authority should not depart from the conditions for participation, time limits and award procedures set out in the OJEU notice unless to do so would not breach principles of non-discrimination and transparency.
- 4.6 Moving to the second main issue for consideration in relation to the application of procurement – are there any other circumstances where contracts can be awarded without the EU procurement regulations applying – the key "exemptions" are different depending on whether the shared services model involves a corporate entity or not. In a non-corporate shared service model such as the Councils now propose, the most relevant argument to take the arrangement outside the procurement regime is that it is a co-operation agreement between public bodies, not a service contract.

Public to Public Co –Operation (formerly “Hamburg” Co-operation Arrangements).

- 4.7 Local authorities regularly enter into collaborative arrangements with each other and with other public bodies. The general rule is that public contracts between contracting authorities are subject to the procurement rules (Commission v Spain [2005] ECR I-139). However, two exceptions have been established in case law:
- 4.7.1 The in-house, or Teckal, exception (Discussed in Option 2).
- 4.7.2 The cooperation, or Hamburg, exception.
- 4.8 These exceptions are now enshrined in the 2015 Regulations. The exceptions are based on the principle that a public authority can perform a public interest task conferred on it using its own resources and that it may do so in co-operation with other public bodies without triggering the need for competition.
- 4.9 In the ECJ “Hamburg” Case (Case C-480/06 Commission v Germany (2009)), a contract that was co-operative in nature was held not to be a public contract for procurement law purposes. It involved co-operation between a number of local authorities in relation to their waste services but there were certain generic characteristics recognised by the courts which led them to a view that the arrangements were not contracts for services which were caught by the procurement regulations. These were:
- 4.9.1 There was no private sector party to the agreement;

- 4.9.2 The cooperation was governed solely by considerations and requirements relating to the pursuit of objectives in the public interest;
 - 4.9.3 The character of the agreement was that of real co-operation aimed at the joint performance of a common task, as opposed to a normal public contract;
 - 4.9.4 It enables the public service activity to be carried out more effectively;
 - 4.9.5 There were mutual requirements for co-operation with “give or take” between the parties;
 - 4.9.6 Payment was related to the reimbursement of costs (and was not based on the generation of profit);
 - 4.9.7 The arrangements were not contriving to circumvent the procurement rules.
- 4.10 The principles of Hamburg have been codified in regulation 12(7). Regulation 12(7) states that a contract concluded exclusively between two or more contracting authorities shall fall outside the scope of Part 2 of the 2015 Regulations where all of the following conditions are fulfilled:
- 4.10.1 The contract establishes or implements a co-operation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common.
 - 4.10.2 The implementation of that co-operation is governed solely by considerations relating to the public interest.
 - 4.10.3 The participating contracting authorities perform on the open market less than 20% of the activities concerned by the co-operation. (Regulation 12(8) provides that turnover will be calculated using the average total turnover, or an appropriate alternative activity-based measure such as costs incurred by the relevant legal person or contracting authority with respect to services, supplies and works for the three years preceding the contract award).
- 4.11 Where the Lead Authority is effectively providing the adoption functions on behalf of the other six authorities such co-operation is harder to establish. Whilst participation in the Joint Committee will go some way to establishing this genuine co-operation does need to be established. The structure of the contractual arrangements will need to address this. Given the nature of the services and the limited market there is a very low risk of challenge however the participating authorities will technically be in breach of the 2015 Regulations unless a level of co-operation is established.

Procurement position of established RAA

- 4.12 Each of the participating authorities will maintain its contracting authority status and the RAA will under this model enter into contract in the name of the Lead Authority and for contracting purposes will be subject to the Lead Authorities own contract procedure rules and the 2015 Regulations.

5 STATE AID

- 5.1 The four cumulative criteria for State Aid to exist are:
 - 5.1.1 It is granted by the State or through State resources;
 - 5.1.2 It favours certain undertakings or production of certain goods;
 - 5.1.3 It distorts or threatens to distort competition; and
 - 5.1.4 It affects (or potentially affects) trade between Member States.
- 5.2 State Aid will not in our view arise in this option as the criteria is not engaged.

6 EMPLOYMENT AND PENSIONS

6.1 TUPE Position

- 6.1.1 If the Host Single Local Authority route is chosen, then this could give rise to a number of potential employment issues and structures. These could include:
- (a) the employees that are currently employed by the other participating authorities could transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("**TUPE**") to the Host Single Local Authority/Lead Authority;
 - (b) the employees that are currently employed by the other LAs could instead be seconded from the other LAs to the Host Single Local Authority;
 - (c) there could be a combination of both transfers under TUPE and secondments of the employees that are currently employed by the other LAs to the Host Single Local Authority;
 - (d) some employees that are currently employed by the LAs being retained by them to carry out the Retained Services.
- 6.1.2 The scope of any potential TUPE transfers will depend upon the extent to which the delivery of the Adoption Services is transferred to the Host Single Local Authority. Therefore:
- (a) if responsibility for the delivery of all aspects of the Adoption Services are transferred to the Host Single Local Authority, then all employees currently employed by the other LAs in the delivery of those services will transfer under TUPE to the Host Single Local Authority when they become responsible for the delivery of the Adoption Services;
 - (b) alternatively, for example, if the LAs agree that only responsibility for the 'management' of the Adoption Services will be transferred to the Host Single Local Authority with local delivery in each LA area remaining within a locally based team in that area, then it is likely that TUPE would only apply to the employees involved in 'management' of the Adoption Services to the Host Single Local Authority, with the remaining employees staying as employees of their existing LAs;
 - (c) as a further alternative, each LA could decide to transfer different levels of the Adoption Services to the Host Single Local Authority so some could transfer all their services, while others only transfer the management but retain their own local delivery team. If such an approach were adopted, there could be differences as to the impact of TUPE between each LA.
- 6.1.3 Essentially, therefore, the potential impact of TUPE will depend upon the level of service delivery responsibility which will be transferred to the Host Single Local Authority. The LAs will therefore need to consider the approach which they want to take in order for a full assessment of the potential TUPE implications to be undertaken.
- 6.1.4 Where employees do transfer from the other LAs to the Host Single Local Authority, there could be local variations between the terms and conditions on which the employees of those other LAs are employed as compared to those of the Host Single Local Authority. There could therefore be a potential mixture of terms and conditions which would apply across the employees and which would therefore be inherited by the Host Single Local Authority on any such TUPE transfer.
- 6.1.5 We would therefore recommend a due diligence review of the terms and conditions which currently apply to the LAs employees in order to identify what terms and conditions the Host Single Local Authority would inherit on any TUPE transfer. The Host Single Local Authority would need to consider how the variety of terms would fit in with its structure of

terms of conditions. This will also identify any potential issues and/or conflicts which may arise with the Host Single Local Authority's own current terms and conditions of employment for its directly employed employees.

- 6.1.6 Equally, the LAs would also need to undertake a due diligence review of the current and potential risks, claims and liabilities which exist in relation to the LAs employees as these would then be inherited by the Host Single Local Authority on any TUPE transfer (subject to any indemnity provisions which may be provided to the Host Single Local Authority by the other LAs).

6.2 Secondment

- 6.2.1 Following on from the potential TUPE implications, where TUPE does not apply in relation to any of the LAs' employees because of the structure adopted, the LAs could still agree to second employees to the Host Single Local Authority.

- 6.2.2 The parties would need to agree matters such as:

- (a) the basis on which such employees were seconded;
- (b) the duration of such secondments;
- (c) how the necessary commercial arrangements would operate between the Host Single Local Authority and the other LAs for the provision of those employees;
- (d) what obligations would exist between the Host Single Local Authority and the other LAs around recruit of additional employees and/or replacement of any seconded employees were they to leave or their secondment be terminated.

- 6.2.3 Appropriate documentation would then need to be entered into between the Host Single Local Authority and the other LAs to record the terms on which such secondments would take place, together with confirmation of how management responsibilities and liabilities would be addressed between the parties (including indemnity provisions as necessary).

6.3 Position on terms and conditions for future staff

- 6.3.1 As stated above, there could be a mixture of terms and conditions which apply to the other LAs employees which the Host Single Local Authority would inherit on any TUPE transfer. In relation to future staff, we would presume that the Host Single Local Authority would be obliged to offer those new recruits the normal Host Single Local Authority's terms and conditions applicable at the time they were recruited.

- 6.3.2 To the extent that there would also be secondment arrangements adopted as part of the Host Single Local Authority arrangements, the parties would need to agree the basis on which recruitment of future staff was to be dealt with. Depending on the approach agreed this would then dictate whether such employees are recruited on the other LAs terms and conditions or whether they are recruited on the Host Single Local Authority's terms and conditions.

6.4 Pension position on transferring and future staff

- 6.4.1 The pension position for transferring employees will depend on which LA becomes the Host Single Local Authority and the extent of transfers from other LAs to that Host Single Local Authority. While the LA employees are, presumably, all members of or are entitled to join the Local Government Pension Scheme ("LGPS"), there are three different LGPS Pension Funds which are applicable in relation to the LAs (being the Avon Pension Fund, the Gloucestershire Pension Fund and the Wiltshire Pension Fund). Therefore, while the transferring employees would retain their membership of or entitlement to join the LGPS on any TUPE transfer, there could be potential transfer issues to be considered between the LGPS Pension Funds of the transferring employees accrued benefits.

6.4.2 The actuaries of the LGPS Pension Funds would need to be consulted as to the basis of any such transfers. The LAs would no doubt want to ensure that any potential negative effects on them and their participation in the relevant LGPS Pension Fund were minimised.

6.4.3 In terms of the pension position for future staff, if all future staff were recruited by the Host Single Local Authority, then those future staff would become members of or entitled to join the relevant LGPS Pension Fund in which the Host Single Local Authority was a scheme employer. However, the position could be different if the LAs decided that the recruitment of future staff was to be dealt with in a different way, with future staff being recruited to each LA rather than the Host Single Local Authority.

6.5 Equal Pay

6.5.1 As stated above, there could be a mixture of terms and conditions which apply to the current LA employees which the Host Single Local Authority would then inherit on any TUPE transfer under this option. There is a potential equal pay risk whenever two or more sets of terms and conditions exist within a workforce. However, we are not aware of the extent of the difference between the sets of terms and conditions and therefore the extent of the equal pay risk and this would therefore be an issue for the Host Single Local Authority to deal with. This is therefore simply flagged as a risk that the LAs should be aware of under this option at this stage.

7 TAX

7.1 This arrangement will not change the tax position of the participating authorities for VAT purposes.

8 CONSULTATION

8.1 Consultation with staff, service users and other stakeholders will if not required in all cases be recommended. The participating authorities should be mindful of their public sector equality duty in their decision making.

8.2 There has been recent updated guidelines from the Cabinet Office regarding consultations. The principles are the starting point for consultations so local authorities' consultation procedures should reflect these latest guidelines. The purpose of these updated guidelines is to encourage the use of more digital methods and to consult with a wider group of people at an earlier stage in the policy-forming process.

8.3 Any necessary consultation will need to be taken account of in any timetable for establishing the RAA whichever delivery model option is chosen.

9 BRAND/IDENTITY

9.1 The RAA will not be new entity and may easily adopt the identity of the Lead Authority. It is the Lead Authority which will enter a contracts, employ staff or hold property on behalf of the RAA.

9.2 It is possible that the RAA under this model could adopt a brand or style under which its undertakes its activities but it will still need to made clear for legal purposes that its legal identity is that of the Lead Authority.

10 SET-UP STEPS, COSTS AND TIME

10.1 Each local authority will need to make the decision to enter this shared service type arrangement and set up a Joint Committee.

10.2 A Lead Authority will need to be identified and agreed by the participating authorities.

- 10.3 An Inter Authority Agreement will need to be drafted, negotiated and agreed by the participating authorities.
- 10.4 TUPE consultation with staff and consultation with service users and stakeholders. Dealing with pension implications and negotiations and any resulting documentation.
- 10.5 This is potentially the quickest option to set up as no external regulators involved. It will need to take account of multiple local authorities decision-making processes and legal negotiation between multiple local authorities.

11 ADVANTAGES OF THIS MODEL

- 11.1 A familiar model to the participating authorities which may be easier to establish using local government procedures and contracts.
- 11.2 No new separate entity is created.
- 11.3 The employees of the RAA will remain employed by one of the participating authorities.
- 11.4 No state aid issues arise as a result.
- 11.5 There will be no requirement to register as a new Adoption Society.
- 11.6 No change in the VAT position.

12 DISADVANTAGES OF THIS MODEL

- 12.1 Identification of willing authority to be Lead Authority.
- 12.2 The challenge of establishing a public to public co-operation to take advantage of procurement exemption in this model.
- 12.3 Little VAA involvement in decision making without establishing complex governance and contractual arrangements.
- 12.4 Potentially more difficult to establish new identity or brand distinct from the perceived culture of local government or the Lead Authority.

13 CONCLUSION

The Hosted Single Local Authority RAA would follow traditional shared service arrangements and will be relatively easier to establish than the other two corporate delivery model options and accordingly is likely to be the least costly option. There is less legal documentation to draft, negotiate and finalise neither is there a need to form or register a new entity with multiple regulators as no new legal person is created under this option. This in turn means that the state aid and tax issues which apply to the two corporate options will not apply.

TUPE and pension considerations apply to all three options. Here only certain of the employees will TUPE and to a local authority employer.

The availability of the "Hamburg" exemption will be more difficult to establish but could be argued although would present a risk to this option given the application of the 2015 regulations.

VAA's only have an opportunity to participate in a contractual arrangement which may in turn add a layer of decision making to the governance arrangements.

As no new entity is created it may be more difficult to establish an identity distinct from the Lead Authority and innovation and growth may be limited accordingly.

OPTION 2: JOINT VENTURE BETWEEN LOCAL AUTHORITIES (LOCAL AUTHORITY TRADING COMPANY)

Description: Local authorities use corporate vehicles when collaborating with other local authorities on specific long term ventures generally because it assists in what the local authorities wish to achieve. A corporate structure creates a separate legal entity which can operate in its own name and with the benefit of limited liability.

1 CORPORATE AND CONTRACTUAL STRUCTURE

- 1.1 The RAA will be new corporate entity which will be formed and will have a distinct legal person from the participating authorities. As this corporate entity is to undertake adoption functions, it will have to register as a Registered Adoption Society and accordingly in light of the Adoption and Children Act 2002 will need to be a "not for profit" organisation. In the Schedule 1 to this note we provide an overview of different corporate structures available to a "not for profit" company which in addition may also operate as a local authority trading company.
- 1.2 As the corporate RAA only has local authority members (shareholders), it will be a local authority trading company as such "controlled" by each of the participating authorities. Each local authority has a fiduciary duty to look after the funds entrusted to it and to ensure that the taxpayer's money is spent appropriately. For that reason, a local authority must carefully consider any trading venture that it embarks on. The 2009 Trading Order England requires the local authority to prepare a business case. The participating authorities (or their executives) should approve the business plan before trading starts.
- 1.3 As a "controlled" local authority trading company, the corporate RAA will be subject to the following proprietary controls:
 - 1.3.1 All relevant documents must state that the company is controlled or influenced by a local authorities.
 - 1.3.2 The relevant local authorities must be named.
 - 1.3.3 There are limits on the allowances payable to directors of such companies.
 - 1.3.4 Regulated companies are bound by the restrictions on publication of information imposed by section 2 of the Local Government Act 1986. This means that they are prohibited from publishing party political material.
 - 1.3.5 Directors of regulated companies must be removed if they become disqualified for membership of a local authority.
 - 1.3.6 Requirements are imposed relating to the provision of information to the local authority's auditor and members and of financial information to the authority.
 - 1.3.7 Controlled companies that are not arms' length companies must allow for public inspection of the minutes of any general meeting for four years after the meeting, unless disclosure would be in breach of any statutory requirement or obligation owed to any individual.
 - 1.3.8 Any financial support for the company, or possible liability for the local authorities associated with the company, will have to be included in any assessment of the authority's finances under the prudential framework for capital investment by local government.
- 1.4 The formation of the corporate RAA will require additional documentation in the form of Memorandum and Articles of Association which are the constitutional documents of the corporate RAA and will require agreement between the participating authorities.

- 1.5 The participating authorities will be advised to enter into members or shareholders agreement not dissimilar to the type of Inter Authority Agreement which the participating authorities will enter into in Option 1. Any members agreement should set out clearly what the purpose of the collaboration is and should clearly assign roles and responsibilities to each of the participating authorities. It should also deal with governance and other issues such as dispute resolution.
- 1.6 In addition to the Members Agreements each of the seven participating authorities will need to commission services from the RAA and this will require a further Services Agreement to be entered into jointly between the participating authorities and the corporate RAA or singularly between each participating authority and the corporate RAA.

2 GOVERNANCE

- 2.1 Whilst they may be a place for the establishment of a Joint Committee similar to Option 1, each of the participating authorities will also have a role to play in the Board of Director of the Corporate RAA. Statutory company directors are required to have the necessary skills and experience to carry out their duties effectively and to do so in good faith and in a way that would be most likely to promote the success of the Corporate RAA for the benefit of its members as a whole. It is vitally important that all members or officers of a local authority expected to act as statutory directors receive detailed and appropriate training and are given appropriate support.
- 2.2 VAAs can also participate in the Company as non- executive director on the Board of Director although they cannot be an owner of this corporate RAA as only local authorities can participate in this delivery model. However their role and any voting rights should be carefully considered in light of the procurement implications and available exemptions which are described for this model in paragraph 4 below.
- 2.3 Alliance contracting could be considered to encourage wider participation of the VAAS but as in Option 1 it will be a further strand of governance running parallel to the Board of Directors and any Joint Committee.
- 2.4 This option currently envisages that each participating authority retains its decision making and that this will not be delegated to the Corporate RAA. However the Education and Adoption Bill 2015 -16 is intended to allow the Secretary of State for Education to give directions requiring one or more English local authorities to make arrangements for any or all of their specified adoption functions to be carried out by one of the named local authorities or by a different adoption agency (either a different local authority or a voluntary adoption agency). The implication for the Corporate RAA may be that it will be able to make all required decisions at some point in the future for all the participating authorities. At present its purpose is to motivate local authorities to establish RAAs.

3 SERVICE CONSIDERATIONS

- 3.1 The Project Brief for the Adoption West Regional Adoption Agency describes the services which the RAA will deliver and those which the local authorities will retain which includes the decision making in relation to the placement for adoption. The services will be delivered by the Corporate RAA who will as required commission services from VAAs. Dependent on the nature of existing contractual arrangements these can either be assigned or novated to the RAA which may in some cases may need to be the subject of a new procurement exercise.
- 3.2 As a new entity the corporate RAA will be required to register as a Registered Adoption Agency with Ofsted and accordingly be the subject of separate Ofsted inspections. This will inevitably add to the time cost and complexity of this option and further advice will be required as to the procedure can be provided if this is the preferred model.
- 3.3 The authorities will also need to be alert to potential conflicts of interest, which may arise as a result of their representation in any joint body which is created. If a local authority member is to be a director of the joint body, careful consideration will need to be given as to whether that individual's wider (non-commercial) duties owed to the authority present a conflict with their obligations as a director. This will need to be considered in greater detail if this option is preferred.

- 3.4 The corporate RAA will require back office functions to support the provision of such services. These in the first instance could be acquired from the participating authorities but are unlikely to fall within the Teckal exception given the number of participating authorities so will be subject to future compliant procurement for long term support.
- 3.5 A corporate entity has greater scope to grow and expand than the Lead Authority model including enter in future joint venture arrangements with the VAAs subject to appropriate procurement advice. The Teckal exception does permit a level of trading by the corporate entity.
- 3.6 Participating authorities in a corporate RAA will also want to confirm details of the proposed duration of the joint venture and exit arrangements for all parties, so that transition of responsibility for provision of services can be managed smoothly when the joint venture comes to an end. For example, the participants will want to argue at the outset whether changes to participants will be permitted if one participant wishes to exit. They should also consider how assets (whether people, contracts, physical assets or intangibles such as IP rights) will be managed when the joint venture comes to an end. The corporate entity will need dissolving at the end of the joint venture.

4 PROCUREMENT

- 4.1 The advice set in in option 1 is applicable here save that the exception to be relied on for this Option is the in-house or Teckal exception.
- 4.2 This exception was established by Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia (Case C-107/98) [1999] ECR I-8121 ("Teckal"). Teckal confirmed that contracts awarded by a contracting authority to a legally distinct person will fall within the procurement regime unless both of the following apply:
 - 4.2.1 The contracting authority exercises over the person concerned a control similar to that which it exercises over its own departments.
 - 4.2.2 The person concerned carries out the essential part of its activities with the controlling authority or authorities.
- 4.3 The rationale behind the exemption is that the procurement rules do not apply when a contracting authority chooses to perform tasks using its own administrative, technical and other internal resources. So, nor should they apply when the other party is, for all intents and purposes, another part of that contracting authority, albeit one with a separate legal personality.
- 4.4 The Teckal exemption was codified Regulation 12(1) of the 2015 Regulations which states that:

A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of Part 2 of the PCR 2015 where **all** of the following conditions are fulfilled:

 - 4.4.1 The contracting authority exercises over the legal person concerned a control similar to that which it exercises over its own departments.
 - 4.4.2 More than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority.
 - 4.4.3 There is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.
- 4.5 A contracting authority will exercise the required level of control where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person, or the control is exercised by another legal person, which is itself controlled in the same way by the contracting authority.

- 4.6 Control may also be exercised jointly with other contracting authorities as will be the case for the corporate RAA. Contracting authorities exercise joint control when:
- 4.6.1 The decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities.
 - 4.6.2 Those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person.
 - 4.6.3 The controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities.
- 4.7 However, another important clarification about control is that individual representatives may represent several or all of the participating contracting authorities which rather dilutes the requirement that control be genuinely joint.
- 4.8 It is because of the reliance on the Teckal exemption that VAAs participation on the Board of Directors will need to be carefully defined to ensure Teckal is maintained.
- 4.9 The new corporate RAA will be a contracting authority subject to the 2015 Regulations in relation to its contracting requirements.

5 STATE AID

- 5.1 The participating authorities could potentially be providing funding and assets on less than market terms to the corporate RAA it would be necessary to consider the risk of the funding (or an element of the arrangements) being deemed unlawful State Aid.
- 5.2 The four cumulative criteria for State Aid to exist are:
- 5.2.1 It is granted by the State or through State resources;
 - 5.2.2 It favours certain undertakings or production of certain goods;
 - 5.2.3 It distorts or threatens to distort competition; and
 - 5.2.4 It affects (or potentially affects) trade between Member States.
- 5.3 In summary, State Aid is financial aid or another advantage which is conferred by the state (in this case the participating authorities) on an undertaking (the RAA) which could have the effect of distorting competition and affecting trade between member states. There are a number of exemptions under the General Block Exemption Regulations which may apply to RAA. There is also a de minimis threshold which is €200,000 in a three year period (this is an aggregate figure calculated on the basis of all State Aid received by the undertaking (the RAA).
- 5.4 State Aid need not be a direct payment. It can include, for example, grants, subsidies or entering into contractual arrangements such as leases on favourable terms. It will therefore be important to ensure State Aid is properly considered as part of the final decision making over the structure of the arrangements and that any contractual arrangements do not constitute unlawful State Aid as unlawful aid must be repaid with interest.
- 5.5 There are a number of reasons why State Aid may not be an issue in this context and further consideration will be needed on whether RAA is an 'undertaking', i.e. an economic organisation operating on the market an undertaking economic activity. If RAA is purely providing services for the participating authorities then this is less likely to be the case.

6 EMPLOYMENT AND PENSIONS

6.1 TUPE Position

- 6.1.1 If the Local Authority Trading Company route is chosen, then this could equally give rise to a number of potential employment issues and structures. These could include:
- (a) the employees that are currently employed by the LAs could transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") to the Local Authority Trading Company;
 - (b) the employees that are currently employed by the LAs could instead be seconded from the LAs to the Local Authority Trading Company;
 - (c) there could be a combination of both transfers under TUPE and secondments of the employees that are currently employed by the LAs to the Local Authority Trading Company;
 - (d) some employees that are currently employed by the LAs being retained by them to carry out the Retained Services.
- 6.1.2 The scope of any potential TUPE transfers will depend upon the extent to which the delivery of the Adoption Services is transferred to the Local Authority Trading Company. Therefore:
- (a) if responsibility for the delivery of all aspects of the Adoption Services are transferred to the Local Authority Trading Company, then all employees currently employed by the LAs in the delivery of those services will transfer under TUPE to the Local Authority Trading Company when they become responsible for the delivery of the Adoption Services;
 - (b) alternatively, for example, if the LAs agree that only responsibility for the 'management' of the Adoption Services will be transferred to the Local Authority Trading Company with local delivery in each LA area remaining within a locally based team in that area, then it is likely that TUPE would only apply to the employees involved in 'management' of the Adoption Services to the Local Authority Trading Company, with the remaining employees staying as employees of their existing LAs;
 - (c) as a further alternative, each LA could decide to transfer different levels of the Adoption Services to the Local Authority Trading Company so some could transfer all their services, while others only transfer the management but retain their own local delivery team. If such an approach were adopted, there could be differences as to the impact of TUPE between each LA.
- 6.1.3 Essentially, therefore, the potential impact of TUPE will depend upon the level of service delivery responsibility which will be transferred to the Local Authority Trading Company. The LAs will therefore need to consider the approach which they want to take in order for a full assessment of the potential TUPE implications to be undertaken.
- 6.1.4 Where employees do transfer from the LAs to the Local Authority Trading Company, there could be local variations between the terms and conditions on which the employees of those LAs. There could therefore be a potential mixture of terms and conditions which would apply across the employees and which would therefore be inherited by the Local Authority Trading Company on any such TUPE transfer.
- 6.1.5 We would therefore recommend a due diligence review of the terms and conditions which currently apply to the LAs employees in order to identify what terms and conditions the Local Authority Trading Company would inherit on any TUPE transfer. The Local Authority Trading Company would need to consider how the variety of terms would fit in with its structure of terms of conditions. This will also identify any potential issues and/or conflicts which may arise.

- 6.1.6 Equally, the LAs would also need to undertake a due diligence review of the current and potential risks, claims and liabilities which exist in relation to the LAs employees as these would then be inherited by the Local Authority Trading Company on any TUPE transfer (subject to any indemnity provisions which may be provided to the Local Authority Trading Company by the LAs).

6.2 Secondment

- 6.2.1 Following on from the potential TUPE implications, where TUPE does not apply in relation to any of the LAs' employees because of the structure adopted, the LAs could still agree to second employees to the Local Authority Trading Company.

- 6.2.2 The parties would need to agree matters such as:

- (a) the basis on which such employees were seconded;
- (b) the duration of such secondments;
- (c) how the necessary commercial arrangements would operate between the Local Authority Trading Company and the LAs for the provision of those employees;
- (d) what obligations would exist between the Local Authority Trading Company and the LAs around recruit of additional employees and/or replacement of any seconded employees were they to leave or their secondment be terminated.

- 6.2.3 Appropriate documentation would then need to be entered into between the Local Authority Trading Company and the other LAs to record the terms on which such secondments would take place, together with confirmation of how management responsibilities and liabilities would be addressed between the parties (including indemnity provisions as necessary).

6.3 Position on terms and conditions for future staff

- 6.3.1 As stated above, there could be a mixture of terms and conditions which apply to the LAs employees which the Local Authority Trading Company would inherit on any TUPE transfer.

- 6.3.2 In relation to future staff, the Local Authority Trading Company would need to determine what terms and conditions to offer those future staff. The Local Authority Trading Company is not necessarily going to be bound to follow the particular terms and conditions of any of the LAs and therefore it may have more freedom to design its own package of terms and conditions for those future staff.

- 6.3.3 To the extent that there would also be secondment arrangements adopted as part of the Local Authority Trading Company arrangements, the parties would need to agree the basis on which recruitment of future staff was to be dealt with. Depending on the approach agreed this would then dictate whether such employees are recruited on the LAs terms and conditions or whether they are recruited on the Local Authority Trading Company's terms and conditions.

6.4 Pension position on transferring and future staff

- 6.4.1 As the transferring employees who would transfer under TUPE from the LAs to the Local Authority Trading Company are going to be members of or entitled to join the LGPS, the LAs will be obliged to ensure that when their employment transfers to the Local Authority Trading Company, appropriate 'pension protection' is provided for them. We anticipate that this would therefore be a case of the Local Authority Trading Company also participating in the LGPS to allow the transferring employees to continue with their membership of entitlement to join following the transfer.

- 6.4.2 Following on from paragraph 2.4.1 above, issues which the LAs would need to consider would be:
- (a) whether the Local Authority Trading Company would participate in only one of the relevant LGPS Pension Funds or whether it participated in all of the relevant LGPS Pension Funds;
 - (b) whether future staff employed by the Local Authority Trading Company were:
 - (i) going to be provided with membership of the LGPS; or
 - (ii) going to be provided with membership of an alternative pension arrangement which satisfies the requirements to be a 'qualifying scheme' in order to comply with auto enrolment requirements.;
 - (c) where future staff employed by the Local Authority Trading Company are to be provided with membership of the LGPS, depending on the Local Authority Trading Company's participation arrangements in the LGPS, which of the relevant LGPS Pension Funds those future staff participate in.
- 6.4.3 If the Local Authority Trading Company were to only participate in one LGPS Pension Fund, there could be potential transfer issues to be considered between the LGPS Pension Funds of the transferring employees accrued benefits. The actuaries of the LGPS Pension Funds would need to be consulted as to the basis of any such transfers. The LAs would no doubt want to ensure that any potential negative effects on them and their participation in the relevant LGPS Pension Fund were minimised.

6.5 Equal Pay

- 6.5.1 As stated above, there could be a mixture of terms and conditions which apply to the current LA employees which the Local Authority Trading Company would then inherit on any TUPE transfer under this option. There is a potential equal pay risk whenever two or more sets of terms and conditions exist within a workforce. However, we are not aware of the extent of the difference between the sets of terms and conditions and therefore the extent of the equal pay risk and this would therefore be an issue for the Local Authority Trading Company to deal with. This is therefore simply flagged as a risk that the LAs should be aware of under this option at this stage.

7 TAX

- 7.1 For the purposes of the applicable VAT legislation, the corporate RAA will be providing "welfare services". This would bring the RAA within a VAT exemption.
- 7.2 The consequences of the VAT exemption are twofold:
- 7.2.1 The RAA will not be required to charge VAT to the participating authorities in respect of the welfare services it provides.
 - 7.2.2 Since it will be making exempt supplies, the RAA may not be able to recover the VAT it incurs in procuring support services from third parties, such as finance, human resources advice and ICT.

8 CONSULTATION

- 8.1 The consultation position will be the same for each of the three delivery model options.

9 BRAND/IDENTITY

- 9.1 There can be a view that moving services into a new organisation (even if still owned by the participating authorities) removes the perceived constraints of a public sector attitude and ethos and creates a more commercial environment and one where it is easier to adopt a new brand as it has a distinct identity from the participating authorities.
- 9.2 On formation the corporate RAA can identify its own name which reflects their aims and aspirations and as new entity it is less likely to be associated with its member local authorities.

10 SET-UP STEPS, COSTS AND TIME

- 10.1 Each local authority will need to make the decision to approve the business case to trade and form the corporate RAA and if required set up a Joint Committee.
- 10.2 The Company structure will need to be agreed with any VAA participation on the Board and the Company incorporated with the appropriate regulator following drafting of the Articles of Association of the RAA.
- 10.3 A Members Agreement will need to be drafted, negotiated and agreed by the participating authorities.
- 10.4 Registration with Ofsted of the RAA as a registered adoption society.
- 10.5 Services Agreements will need to be drafted and agreed between the corporate RAA and the participating authority.
- 10.6 Any contractual arrangements with the VAAs will need to be put in place after due diligence of existing contractual arrangements.
- 10.7 TUPE consultation with staff and consultation with service users and stakeholders. The pension implications will need to be agreed and any necessary pensions agreements drafted and agreed
- 10.8 This is a lengthier option to set up. It will need to take account of multiple local authorities decision-making processes and legal negotiation between multiple local authorities. It will also involve multiple regulators.

11 ADVANTAGES OF THIS MODEL

- 11.1 A new entity jointly owned by the participating councils offers a neutral platform which affords all participating authorities equal status within the arrangements and avoids the perception of control which the required role of a "lead authority" can create although maintaining local authority control;
- 11.2 A new entity jointly owned by a number of local authorities offers an attractive platform for growth through the entry of other authorities into ownership, more flexibility and long term planning;
- 11.3 As a corporate being not governed solely by local government legislation there is an ability to include the VAAs as non- executive directors and have an input in decision making.
- 11.4 A company can trade commercially (within certain limits) and so can be used to generate additional revenue to further enhance the cost effectiveness of the RAA;
- 11.5 Moving services into a new organisation (even if still owned by the authorities) removes the perceived constraints of a public sector attitude and ethos and creates a more commercial environment;
- 11.6 Moving staff into a corporate vehicle which is their new employer may enable them to incentivise and reward enterprise and innovation;

- 11.7 Moving services into a corporate vehicle may protect the home authorities from liabilities in areas of risk.
- 11.8 The authorities are able to directly award contracts to the RAA without conducting a procurement process under the Teckal exception which is easier to establish.

12 DISADVANTAGES OF THIS MODEL

- 12.1 More complex to establish involving lengthy legal documentation which needs to be agreed between the parties and the involvement of regulators in relation to the incorporation of the company and registration of the company as a registered adoption society.
- 12.2 Risks of the venture are borne solely by the local authorities.
- 12.3 Local authorities may need to contract in skills to resource the RAA which would otherwise be available in the VAAs;
- 12.4 VAAs still have a lesser decision making role than the participating authorities.
- 12.5 Governance issues remain complex: members and officers will need specific skills to effectively discharge their functions;
- 12.6 Potential tax and state aid issues which will need to be explored.

13 CONCLUSION

A corporate joint venture between the participating authorities creates a new entity which offers a neutral platform which affords all participating authorities equal status within the arrangements and avoids the perception of control which the required role of a "lead authority" can create although maintaining local authority control. The governance arrangements could potentially be simpler with all partners sitting on the Board of Directors. It will be easy to establish a new identity and brand distinct from the local authorities. The procurement position is more favourable as the Teckal exemption is easier to evidence. Trading and growth are better facilitated by this model as it is independent of the local authorities subject to maintaining the RAAs Teckal status.

OPTION 3: CREATION OF NEW VOLUNTARY ADOPTION AGENCY (JOINT VENTURE BETWEEN VAA & LAS)

Description: a corporate vehicle where both the local authorities and the voluntary adoption agencies participate as members or shareholders depending on type of structure. This enables all parties to participate equally. As with option 2, a corporate structure creates a separate legal entity which can operate in its own name and with the benefit of limited liability.

1 CORPORATE AND CONTRACTUAL STRUCTURE

- 1.1 In this arrangement, a corporate RAA ("JVCo") is formed between the participating authorities and the VAAs, each of whom becomes a member in the JVCo entity.
- 1.2 The JVCo RAA will be a new corporate entity and will have a distinct legal person from the participating authorities and the VAAs. As this corporate entity is to undertake adoption functions, it will have to register as a Registered Adoption Society and accordingly in light of the Adoption and Children Act 2002 will need to be a "not for profit" organisation. In the Schedule 1 to this note we provide an overview of different corporate structures available to a "not for profit" company.
- 1.3 Dependent on the relative shareholding of the participating authorities and the VAAs will determine whether this company will fall within the ambit of being "controlled" or "influenced" company which will add a layer of local government accountability to this delivery model.
- 1.4 The public and private sector partners who are to become the founding members of the JVCo RAA will need to agree the objectives and governance structures applicable to the joint venture, including:
 - 1.4.1 Relative shareholdings.
 - 1.4.2 Corporate governance or board appointments.
 - 1.4.3 Voting rights and powers of veto.
 - 1.4.4 Funding and exit arrangements.
 - 1.4.5 Details of any people or assets committed by the parties into the venture.
- 1.5 The formation of the corporate RAA will require additional documentation in the form of Memorandum and Articles of Association which are the constitutional documents of the corporate RAA and will require agreement between the participating authorities and the VAAs. The participating authorities and VAAS will be advised to enter into members or shareholders agreement.
- 1.6 Reaching agreement on these documents can be difficult given the competing tensions between the public sector authority as shareholder and the private sector partner as supplier.
- 1.7 In addition to the Members Agreements each of the seven participating authorities will need to commission services from the JVCo RAA and this will require a further Services Agreement to be entered into jointly between the participating authorities and the JVCo RAA or singularly between each participating authorities and the JVCo RAA.

2 GOVERNANCE

- 2.1 Each of the participating authorities and VAAs will be able to appoint to the Board of Director of the JVCo RAA and in its decision making.
- 2.2 This option currently envisages that each participating authority retains its decision making and that this will not be delegated to the Corporate RAA. However the Education and Adoption Bill 2015 -16 is intended to allow the Secretary of State for Education to give directions requiring one or more English local authorities to make arrangements for any or all of their specified adoption functions to be carried out by one of the named local authorities or by a different adoption agency (either a

different local authority or a voluntary adoption agency). The implication for the Corporate RAA may be that it will be able to make all required decisions at some point in the future for all the participating authorities. At present its purpose is to motivate local authorities to establish RAAs.

3 SERVICE CONSIDERATIONS

- 3.1 The Project Brief for the Adoption West Regional Adoption Agency describes the services which the RAA will deliver and those which the local authorities will retain which includes the decision making in relation to the placement for adoption. The services will be delivered by the JVCo RAA. There may be less requirement to procure services from the VAAs dependent on their participation.
- 3.2 As a new entity the JVCo RAA will be required to register as a Registered Adoption Agency with Ofsted and accordingly be the subject of separate Ofsted inspections.
- 3.3 The JVCo as a contracting authority (due to the fact it is publicly funded) will need to procure any back office support although in the short term it could enter into low value contracts with the participating authorities.
- 3.4 The authorities and the VAAs will also need to be alert to potential conflicts of interest, which may arise as a result of their representation in any joint body which is created.
- 3.5 A corporate entity has greater scope to grow and expand than the Lead Authority model subject to any procurement implications.
- 3.6 Participating authorities in a JVCo RAA will also want to confirm details of the proposed duration of the joint venture and exit arrangements for all parties, so that transition of responsibility for provision of services can be managed smoothly when the joint venture comes to an end. For example, the participants will want to argue at the outset whether changes to participants will be permitted if one participant wishes to exit. They should also consider how assets (whether people, contracts, physical assets or intangibles such as IP rights) will be managed when the joint venture comes to an end. The corporate entity will need dissolving at the end of the joint venture.

4 PROCUREMENT

- 4.1 A procurement exercise subject to the 2015 Regulations will be required to identify the VAAs who wish to participate in the JVCo RAA. There is no exemption available although the 2015 regulations now allow for soft market testing which would be advisable to determine whether there is an appetite amongst the VAAs for this option.
- 4.1 Adoption would fall within the category of health, social care and related services which are included in Schedule 3 as described in Option 1 and therefore subject to this light touch regime if the value exceeds £625,050. The light touch rules require that contracting authorities intending to award a public contract for these services shall make known their intention by publishing either a contract notice or prior information notice in the OJEU. Following award, a contract award notice must also be published. Contracting authorities are free to determine the procedures applicable to the award of light touch regime contracts, but these must be at least sufficient to ensure compliance with the principles of transparency and equal treatment. Time limits should be reasonable and proportionate and the authority should not depart from the conditions for participation, time limits and award procedures set out in the OJEU notice unless to do so would not breach principles of non-discrimination and transparency.
- 4.2 The new corporate RAA will be a contracting authority subject to the 2015 Regulations in relation to its contracting requirements

5 STATE AID

- 5.1 The Council could potentially be providing funding and assets on less than market terms to the RAA it would be necessary to consider the risk of the funding (or an element of the arrangements) being deemed unlawful State Aid. One of the specific issues raised is the granting of a lease on favourable terms from the Council to RAA.

- 5.2 The four cumulative criteria for State Aid to exist are:
- 5.2.1 It is granted by the State or through State resources;
 - 5.2.2 It favours certain undertakings or production of certain goods;
 - 5.2.3 It distorts or threatens to distort competition; and
 - 5.2.4 It affects (or potentially affects) trade between Member States.
- 5.3 In summary, State Aid is financial aid or another advantage which is conferred by the state (in this case the Council) on an undertaking (RAA) which could have the effect of distorting competition and affecting trade between member states. There are a number of exemptions under the General Block Exemption Regulations which may apply to RAA. There is also a de minimis threshold which is €200,000 in a three year period (this is an aggregate figure calculated on the basis of all State Aid received by the undertaking (i.e. RAA).
- 5.4 State Aid need not be a direct payment. It can include, for example, grants, subsidies or entering into contractual arrangements such as leases on favourable terms. It will therefore be important to ensure State Aid is properly considered as part of the final decision making over the structure of the arrangements and that any contractual arrangements do not constitute unlawful State Aid as unlawful aid must be rapid with interest.
- 5.5 There are a number of reasons why State Aid may not be an issue in this context and further consideration will be needed on whether RAA is an 'undertaking', i.e. an economic organisation operating on the market an undertaking economic activity. If RAA is purely providing services for the participating authorities then this is less likely to be the case but by establishing a trading company this increases the likelihood RAA is an undertaking carrying out economic activities.

6 EMPLOYMENT AND PENSIONS

6.1 TUPE Position

- 6.1.1 If the JV Company route is chosen, then this could equally give rise to a number of potential employment issues and structures. These could include:
- (a) the employees that are currently employed by the LAs could transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") to the JV Company;
 - (b) the employees that are currently employed by the LAs could instead be seconded from the LAs to the JV Company;
 - (c) there could be a combination of both transfers under TUPE and secondments of the employees that are currently employed by the LAs to the JV Company;
 - (d) some employees that are currently employed by the LAs being retained by them to carry out the Retained Services.
- 6.1.2 The scope of any potential TUPE transfers will depend upon the extent to which the delivery of the Adoption Services is transferred to the JV Company. Therefore:
- (a) if responsibility for the delivery of all aspects of the Adoption Services are transferred to the JV Company, then all employees currently employed by the LAs in the delivery of those services will transfer under TUPE to the JV Company when they become responsible for the delivery of the Adoption Services;
 - (b) alternatively, for example, if the LAs agree that only responsibility for the 'management' of the Adoption Services will be transferred to the JV Company with

local delivery in each LA area remaining within a locally based team in that area, then it is likely that TUPE would only apply to the employees involved in 'management' of the Adoption Services to the JV Company, with the remaining employees staying as employees of their existing LAs;

- (c) as a further alternative, each LA could decide to transfer different levels of the Adoption Services to the JV Company so some could transfer all their services, while others only transfer the management but retain their own local delivery team. If such an approach were adopted, there could be differences as to the impact of TUPE between each LA.

6.1.3 Essentially, therefore, the potential impact of TUPE will depend upon the level of service delivery responsibility which will be transferred to the JV Company. The LAs will therefore need to consider the approach which they want to take in order for a full assessment of the potential TUPE implications to be undertaken.

6.1.4 Where employees do transfer from the LAs to the JV Company, there could be local variations between the terms and conditions on which the employees of those LAs. There could therefore be a potential mixture of terms and conditions which would apply across the employees and which would therefore be inherited by the JV Company on any such TUPE transfer.

6.1.5 We would therefore recommend a due diligence review of the terms and conditions which currently apply to the LAs employees in order to identify what terms and conditions the JV Company would inherit on any TUPE transfer. The JV Company would need to consider how the variety of terms would fit in with its structure of terms of conditions. This will also identify any potential issues and/or conflicts which may arise.

6.1.6 Equally, the LAs would also need to undertake a due diligence review of the current and potential risks, claims and liabilities which exist in relation to the LAs employees as these would then be inherited by the JV Company on any TUPE transfer (subject to any indemnity provisions which may be provided to the JV Company by the LAs).

6.2 Secondment

6.2.1 Following on from the potential TUPE implications, where TUPE does not apply in relation to any of the LAs' employees because of the structure adopted, the LAs could still agree to second employees to the JV Company.

6.2.2 The parties would need to agree matters such as:

- (a) the basis on which such employees were seconded;
- (b) the duration of such secondments;
- (c) how the necessary commercial arrangements would operate between the JV Company and the LAs for the provision of those employees;
- (d) what obligations would exist between the JV Company and the LAs around recruit of additional employees and/or replacement of any seconded employees were they to leave or their secondment be terminated.

6.2.3 Appropriate documentation would then need to be entered into between the JV Company and the LAs to record the terms on which such secondments would take place, together with confirmation of how management responsibilities and liabilities would be addressed between the parties (including indemnity provisions as necessary).

6.3 Position on terms and conditions for future staff

- 6.3.1 As stated above, there could be a mixture of terms and conditions which apply to the LAs employees which the JV Company would inherit on any TUPE transfer.
- 6.3.2 In relation to future staff, the JV Company would need to determine what terms and conditions to offer those future staff. The JV Company is not necessarily going to be bound to follow the particular terms and conditions of any of the LAs and therefore it may have more freedom to design its own package of terms and conditions for those future staff.
- 6.3.3 To the extent that there would also be secondment arrangements adopted as part of the JV Company arrangements, the parties would need to agree the basis on which recruitment of future staff was to be dealt with. Depending on the approach agreed this would then dictate whether such employees are recruited on the LAs terms and conditions or whether they are recruited on the JV Company's terms and conditions.

6.4 Pension position on transferring and future staff

- 6.4.1 As the transferring employees who would transfer under TUPE from the LAs to the JV Company are going to be members of or entitled to join the LGPS, the LAs will be obliged to ensure that when their employment transfers to the JV Company, appropriate 'pension protection' is provided for them. We anticipate that this would therefore be a case of the JV Company also participating in the LGPS to allow the transferring employees to continue with their membership of entitlement to join following the transfer.
- 6.4.2 Following on from paragraph 3.4.1 above, issues which the LAs would need to consider would be:
- (a) whether the JV Company would participate in only one of the relevant LGPS Pension Funds or whether it participated in all of the relevant LGPS Pension Funds;
 - (b) whether future staff employed by the JV Company were:
 - (i) going to be provided with membership of the LGPS; or
 - (ii) going to be provided with membership of an alternative pension arrangement which satisfies the requirements to be a 'qualifying scheme' in order to comply with auto enrolment requirements.;
 - (c) where future staff employed by the JV Company are to be provided with membership of the LGPS, depending on the JV Company's participation arrangements in the LGPS, which of the relevant LGPS Pension Funds those future staff participate in.
- 6.4.3 If the JV Company were to only participate in one LGPS Pension Fund, there could be potential transfer issues to be considered between the LGPS Pension Funds of the transferring employees accrued benefits. The actuaries of the LGPS Pension Funds would need to be consulted as to the basis of any such transfers. The LAs would no doubt want to ensure that any potential negative effects on them and their participation in the relevant LGPS Pension Fund were minimised.

6.5 Equal Pay

- 6.5.1 As stated above, there could be a mixture of terms and conditions which apply to the current LA employees which the JV Company would then inherit on any TUPE transfer under this option. There is a potential equal pay risk whenever two or more sets of terms and conditions exist within a workforce. However, we are not aware of the extent of the difference between the sets of terms and conditions and therefore the extent of the equal pay risk and this would therefore be an issue for the JV Company to deal with. This is

therefore simply flagged as a risk that the LAs should be aware of under this option at this stage.

7 TAX

7.1 For the purposes of the applicable VAT legislation, the corporate RAA will be providing "welfare services". This would bring the RAA within a VAT exemption.

7.2 The consequences of the VAT exemption are twofold:

7.2.1 The RAA will not be required to charge VAT to the participating authorities in respect of the welfare services it provides.

7.2.2 Since it will be making exempt supplies, the RAA may not be able to recover the VAT it incurs in procuring support services from third parties, such as finance, human resources advice and ICT.

8 CONSULTATION

8.1 The consultation position will be the same for reach of the three delivery model options.

9 BRAND/IDENTITY

9.1 There can be a view that moving services into a new organisation removes the perceived constraints of a public sector attitude and ethos and creates a more commercial environment and one where it is easier to adopt a new brand as it has a distinct identity from the participating authorities and the VAAs.

9.2 On formation the JVCo RAA can identify its own name which reflects their aims and aspirations and as new entity it will be less likely to be identified with its partners.

10 SET UP STEPS, COSTS AND TIME

10.1 Each local authority will need to make the decision to approve the business case to trade and form the JVCo RAA.

10.2 The Company structure will need to be agreed between all partners and the Company incorporated with the appropriate regulator following drafting of the Articles of Association of the JVCo RAA.

10.3 Procurement of VAAs JV partners.

10.4 A Members Agreement will need to be drafted, negotiated and agreed by the partners.

10.5 Registration with Ofsted of the RAA as a registered adoption society.

10.6 Services Agreements will need to be drafted and agreed between the JVcO RAA and the participating authority.

10.7 Any contractual arrangements with the VAAs will need to put in place after due diligence of existing contractual arrangements.

10.8 TUPE consultation with staff and consultation with service users and stakeholders. The pension implications will need to be agreed and nay necessary pensions agreements drafted and agreed

10.9 This is a lengthier option to set up. It will need to take account of multiple local authorities decision-making processes and legal negotiation between multiple local authorities and the VAAS. It will also involve multiple regulators.

- 10.10 This is likely to be the most costly and time consuming option particularly given that a procurement exercise is required and they will be multiple negotiations between may parties both local authorities and VAAs.

11 ADVANTAGES OF THIS MODEL

- 11.1 The JVCo operates on an arm's-length basis from both the commissioner and providers organisations. This makes it easier for a team to be established that can be dedicated to focusing on delivering the service away from the day-to-day pressures of the respective public or private partner's business.
- 11.2 Having an equity investment in the JVCo also provides the public sector with a basis for gaining a long-term financial return on the infrastructure and expertise committed to the project.
- 11.3 Use the experience of the VAAs in running commercial enterprises.
- 11.4 A delivery model in which the public sector seeks to transfer risk to the private sector through the creation of an arm's length relationship.
- 11.5 A new entity jointly owned by the participating authorities and VAAS offers a neutral platform which affords all partners equal status within the arrangements and avoids the perception of control which the required role of a "lead authority" can create;
- 11.6 A new entity jointly owned by a number of different partners offers an attractive platform for growth. A company can trade commercially (within certain limits) and so can be used to generate additional revenue to further enhance the cost effectiveness of the RAA;
- 11.7 Moving services into a new organisation removes the perceived constraints of a public sector attitude and ethos and creates a more commercial environment;

12 DISADVANTAGES OF THIS MODEL

- 12.1 Requires willing VAAs to be JV partners in the RAA which have to be procured as no applicable exception exists under the 2015 Regulations.
- 12.1 More complex to establish involving lengthy legal documentation which needs to be agreed between the parties and the involvement of regulators in relation to the incorporation of the company and registration of the company as a registered adoption society.
- 12.2 Governance issues remain complex: members and officers will need specific skills to effectively discharge their functions;
- 12.3 Potential tax and state aid issues which will need to be explored.

13 SUMMARY AND CONCLUSION

The JVCo RAA where both local authorities and VAAs participate on equal terms may seem an attractive proposal to achieve DfE aspirations for RAAs however this is the most complex and costly model to establish and will require a procurement exercise in the first instance which may not identify any willing JVCo partners or may only encourage larger and more established VAAs to tender. Whilst public private partnership can lead to successful outcomes and each party will bring different skills and expertise to the venture there are many issues to work through including the TUPE of staff to an organisation which is neither a local authority or local authority controlled and the resultant pension implications of that. State Aid and tax issues will also need to be examined in detail although these will not be dissimilar problems to the corporate RAA with only local authority owners.

14 RECOMMENDATION IN LIGHT OF OPTIONS APPRAISAL ASSESSMENT CRITERIA

It is proposed that the three options are evaluated against the following main criteria which in turn is divided further into sub criteria:

- 14.1 Desirability (how well the model promoted the objectives and priorities of adopters and adoptees, helps meet key outcomes, allows for the required level of ownership / control).
- 14.2 Viability (The extent to which the model demonstrates financial sustainability, allows for savings to be realised, achieves any required additional income).
- 14.3 Feasibility (The extent to which each option can be implemented within required tolerances of cost, time etc. allows partners to discharge relevant statutory functions and deals with the technical challenges e.g. pensions, TUPE etc.).

Each of the three delivery model options have advantages and disadvantages which have been explored above from a legal perspective taking in account where possible this criteria but should assist decision makers in evaluating each of the three delivery model options.

Option 1 – the Hosted Single local Authority and Option 3 - the Joint Venture between local authorities and VAAs do require in the case of Option 1 one of the authorities to be willing to be the Lead Authority and in the case of Option 3 one or more VAAs to participate in the procurement of a JV partner so each of these two options could fail on the basis that that neither a local authority or the VAAs are willing to do so.

All three options have potential to involve all parties either contractually or by participation at different levels within the management structure of the RAA. Each option has a procurement implication with Option 2 more comfortably falling within an exception to the 2015 Regulations.

All three options have TUPE and pension implications which will need to be worked through in each case. The VAT position of Options 2 and 3 will need to be addressed and there are potential state aid issues for Options 2 and 3 which given the nature of the services and the status of the RAA are not likely to be a significant obstacle.

A new corporate entity as envisaged by Options 1 and 2 may be better able to adopt a new brand and identity and provides for greater flexibility and ability to innovate and grow outside of the constraints of the culture and regulation of local government.

All three options will require legal documentation drawing up and a timetable which fits within the decision making required by the seven local authorities. Option 2 and 3 will require more complex and documentation and the involvement of the Registrar of Companies and Ofsted and potentially the CIC Regulator dependent on the choice of corporate model chosen.

Each option from 1 through to 2 and then 3 could transform into form 1 to 3 although multiple TUPE transfer would on balance best be avoided.

On balance subject to the full evaluation to be carried out by the officers of the participating authorities on the basis of the legal implications of each delivery model option our view would be to recommend Option 2 at this stage.

Bevan Brittan LLP

[] March 2016

SCHEDULE 1- OVERVIEW OF CORPORATE STRUCTURES

This Schedule provides an overview of the key legal forms available for new "not for profit" corporate entities:

- A. Company limited by guarantee**
- B. Community interest company limited by guarantee**
- C. Community interest company limited by shares**
- D. Community Benefit Society**

A. COMPANY LIMITED BY GUARANTEE

1 SUMMARY OF LEGAL FORM

- 1.1 A company limited by guarantee is a limited company that has members who, rather than purchase shares, provide a nominal guarantee in the eventuality that the company is wound up. It is established under and subject to company law in the same way as companies limited by shares with the exception of law relating to shares. Although not a legal requirement, a company limited by guarantee would typically have restricted objects and a prohibition on distribution of profits.

2 KEY CHARACTERISTICS

- 2.1 A company limited by guarantee has its own legal personality meaning that it may enter into contracts in its own name and be sued by and sue third parties in its own name. This means that the directors and members of the company benefit from limited liability and can only be pursued personally for their actions where they have acted in breach of their legal duties, for example wrongful trading.
- 2.2 Although not a legal requirement of the form, a company limited by guarantee typically has a prohibition within its memorandum of association on the distribution of profits.
- 2.3 A company may only pursue activities that are within or reasonably incidental to its stated objects. A company limited by guarantee would typically have more specific objects than the general commercial objects used in a conventional company limited by shares. The company's objects would ordinarily relate to the particular activities that it is being established to work within. This, together with the prohibition on distribution of profits, is used to ensure, and demonstrate to third parties, that surpluses will only be used for the particular purposes stated in the objects.
- 2.4 It is possible for a company limited by guarantee to be used in a flexible and commercial way as the requirements of independence associated with charities and community interest companies do not allow for this with charitable companies or CICs.
- 2.5 Corporation tax is paid on profits.

3 GOVERNANCE STRUCTURE

- 3.1 A company limited by guarantee has a governing structure of members and directors. Directors have the role of managing and running the day to day business of the company usually associated with company directors. Unlike with charitable companies directors can be paid and there are not the same requirements in relation to independence that directors of charities and CICs are subject to. This means that directors of a company limited by guarantee could, for example, be connected with associated third parties and individuals can be paid for carrying out their role as directors.
- 3.2 The members of a company limited by guarantee do not own the company in the same way that shareholders do in respect of a company limited by shares as there is no notion of equity. Rather than having a shareholding, the members guarantee to provide a sum (usually a nominal £1) in the eventuality that the company is wound up. The members of a company limited by guarantee do however otherwise have the role given to shareholders (i.e. they can appoint and remove directors and have the sole power to amend the memorandum and articles of association).

4 CONSTITUTION

- 4.1 A company limited by guarantee is governed by its memorandum and articles of association. The memorandum of association will state that the subscribers wish to form a company and agree to become members of the company.
- 4.2 The articles of association sets out the governance structure of the company; the provisions governing conduct of meetings and decision making by both the directors and members; the charitable objects of the company; the powers of the company; dissolution provisions; a prohibition on distribution of profits; and what benefits the directors and members of the company are permitted to receive.

5 REGULATOR

- 5.1 Companies limited by guarantee are subject to the regulation of Companies House. Companies House is a very light touch regulator. A company would typically only interact with Companies House through the requirement to file annual accounts/directors' reports as well as notices following various actions, such as a name change or appointing or removing a director.

6 ADVANTAGES AND DISADVANTAGES

- 6.1 The advantages of adopting such a model are:
- 6.1.1 A separate legal entity capable of entering into contracts
 - 6.1.2 Members liability is limited
 - 6.1.3 A transparent structure subject to filing requirements at Companies House
 - 6.1.4 Lighter touch regulation.
- 6.2 The disadvantages of adopting such a model are that
- 6.2.1 Cost of incorporation
 - 6.2.2 Cannot make a profit
 - 6.2.3 It would be subject to regulation by Companies House resulting in additional administration requirements
 - 6.2.4 As a result of the regulation by Companies House there is a risk of fines if company requirements are not followed
 - 6.2.5 Formal process to wind up

B. COMMUNITY INTEREST COMPANY LIMITED BY GUARANTEE

1 SUMMARY OVERVIEW

- 1.1 A CIC limited by guarantee has community based objectives that it must solely focus on. In the same way as a company limited by guarantee, rather than shareholders it has members who guarantee to contribute a nominal sum in the event that the company is wound up. A CIC limited by guarantee is prohibited from distributing profits.

2 KEY CHARACTERISTICS

2.1 A CIC is a company with certain unique characteristics that place restrictions on what actions the company can take. The key characteristics of a CIC are the:

2.1.1 asset lock; and

2.1.2 community interest test.

3 ASSET LOCK

3.1 The main elements of the asset lock are as follows:

3.1.1 CICs may not transfer assets at less than full market value unless they are either transferred to another asset locked body or transferred for the benefit of the community. An 'asset locked body' is defined as a CIC or a charity.

3.1.2 On dissolution of a CIC any surplus assets must be transferred to another asset locked body.

3.2 There is no statutory definition of 'assets' within the legislation governing CICs. However, the CIC Regulator has stated that 'assets' must be given a wide interpretation and would include land, cash and revenue streams. This means, for example, that payments to staff and directors must not be disproportionately high.

3.3 A CIC can raise debt finance for its activities in the same way as any other corporate body, provided that the loans are subject to commercially reasonable interest rates. However, an "interest cap" applies where the rate of return for the lender is performance related. Any loan where the rate of interest charged on the loan is linked partially or fully to the profitability of the CIC, its activities as a whole or any particular activity will be classed as a performance-related loan and the cap will apply. The cap is current 10 percent of the average amount of a CIC's debt, or sum outstanding under a debenture issued by it, during the 12 month period immediately preceding the date on which the interest on that debt or debenture becomes due.

4 COMMUNITY INTEREST TEST

4.1 In order to qualify as a CIC, a company must satisfy the community interest test. The test is that: "*a reasonable person might consider that its activities are being carried on for the benefit of the community*".

4.2 The test is one of the underlying purposes of a company's activities and it is a question of what ultimately the activities are directed at. "Community" is given a wide meaning and can include a section of the community defined by geography, interest or need. However, it is necessary that the community is not an unduly restricted group of beneficiaries. This is a much wider and simpler test to satisfy than that required for an organisation to be a charity.

4.3 A statement setting out how the community interest test will be met must be lodged with the initial application to form a CIC, along with the usual documents required for company registration. Compliance with the community interest test is an ongoing requirement. The CIC Regulator will monitor how the CIC is satisfying the community interest test via the annual form that the CIC has to submit to the CIC Regulator setting out its activities in the preceding year.

4.4 If ultimately the CIC Regulator is not satisfied that the community interest test is being met it has wide powers including the power to appoint and remove directors, appoint a manager of the CIC and in extreme situations order the transfer of CIC membership or present a petition to the Court for the winding up of a CIC.

4.5 There is a clear inter-relationship between the asset lock and the community interest test in that the test may not be met if a reasonable person might consider that the activities of the CIC are being carried on for the benefit of the company's directors, employees or service providers rather than for the benefit of the community. This is on the basis that in such an eventuality the assets are being

used to provide benefit to third parties rather than being used for the community. This will be monitored through the annual report.

5 GOVERNANCE STRUCTURE

- 5.1 CIC limited by guarantee has a governance structure of members and directors in the same way as a normal guarantee company. Directors have the role of managing and running the day to day business of the company usually associated with company directors. In addition directors of a CIC will have the responsibility (along with members when they take collective decisions about the company) for ensuring that the CIC continues to satisfy the community interest test. Unlike with charitable companies directors can be paid.
- 5.2 The members of a CIC will have the same rights as normal company members, that is they will retain ultimate control over the CIC and have responsibility for major policy and decisions. For example, the members will have the right to dismiss the directors, delegate powers to the directors, approve major transactions and change the constitution of the company.

6 CONSTITUTION

- 6.1 In the same way as normal companies CICs are governed by memorandum and articles of association which are prepared by the promoters of the CIC and can be subsequently amended by the members of the CIC. The articles will include all substantive provisions including the community interest statement and the details of the asset lock.

7 REGULATORS

- 7.1 CICs are registered with the CIC Regulator (an independent office). The CIC Regulator is a light touch regulator and will principally rely on CIC members and other interested parties to draw matters of concern to its attention. The CIC Regulator has significant enforcement powers, but these are only intended to be used in serious circumstances.
- 7.2 The CIC Regulator's powers include the power to appoint and remove directors, appoint a manager of the CIC and, in extreme situations, order the transfer of CIC membership or present a petition to the Court for the winding up of a CIC. The consent of the CIC Regulator must also be obtained in relation to matters such as proposed changes in a CIC's objects.
- 7.3 CICs have to produce an annual CIC report, which will be delivered with their accounts to Companies House and placed on the public record. The report must record what the CIC has done to pursue the community interest and involve its stakeholders during the year. Stakeholders would be people or groups that are affected by the activities that the CIC pursues. The annual report must also contain additional financial information such as any payments to directors or declarations of dividends in the preceding year.
- 7.4 CICs are also subject to Companies House regulation. Companies House is a very light touch regulator. A company would typically only interact with Companies House through the requirement to file annual accounts / directors' reports as well as notices following various actions, such as a name change or appointing or removing a director.

8 ADVANTAGES AND DISADVANTAGES

- 8.1 The advantages of adopting such a model are:
- 8.1.1 A separate legal entity capable of entering into contracts
 - 8.1.2 A transparent structure subject to filing requirements at Companies House including an annual CIC report placed on the public record for public scrutiny
 - 8.1.3 The asset lock feature provides a protection mechanism for the community
 - 8.1.4 Members' liabilities are limited

- 8.2 The disadvantages of adopting such a model are:
 - 8.2.1 Cost of incorporation
 - 8.2.2 Must establish community benefit
 - 8.2.3 Additional incorporation requirements to ensure company meets the Community Interest Test
 - 8.2.4 Additional regulation in that the company will be continually monitored to ensure that it provides a benefit to the community it was set up to serve and if the CIC regulator construes that the company is failing to do this there a number of powers open to the regulator as detailed above
 - 8.2.5 No tax benefits so the company would be subject to tax on profits, must pay stamp duty and does not have the benefit of gift aid or mandatory rate relief
 - 8.2.6 Formal process to wind up. Any assets must be transferred to another asset locked company

C. COMMUNITY INTEREST COMPANIES LIMITED BY SHARES

1 SUMMARY OVERVIEW

- 1.1 A community interest company (“CIC”) limited by shares has community based objectives that it must solely focus on. It also has the ability to provide limited dividends and was created as a compromise between a charity and a company limited by shares (i.e. it is a company that is demonstrably acting for the community whilst also having the ability to pay directors and leverage in funding through equity investment).

2 KEY CHARACTERISTICS

- 2.1 A CIC is a company with certain unique characteristics that place restrictions on what actions the company can take. The key characteristics of a CIC are the:
 - 2.1.1 asset lock; and
 - 2.1.2 community interest test.
- 2.2 The main elements of the asset lock and the community interest test are the same as for a CIC limited by guarantee except for additional provisions in relation to profit share:
- 2.3 If its constitution allows a CIC to pay dividends (other than to another asset locked body – another CIC or a charity) these will be subject to a cap that limits the amount of dividend payable (the “Dividend Cap”). A similar cap applies to performance related interest rates on loans where the rate of interest is linked to the CIC’s performance.
- 2.4 The Dividend Cap has three elements:
 - 2.4.1 The maximum dividend per share cap: This cap limits the amount of dividend that can be paid on any given share. Currently, the limit is 20% of the paid up value of a share in the company.
 - 2.4.2 The maximum aggregate dividend cap: This cap limits the total dividend declared in terms of the annual profits available for distribution. Currently, the limit is 35% of the distributable profits.

2.4.3 The ability to carry forward unused dividend capacity from year to year to a limited extent (Nb. in any year the maximum aggregate dividend cap cannot be broken): Currently the limit is 5 years.

2.5 A CIC limited by shares can raise debt finance in the same way as a CIC limited by guarantee (see paragraph 3.3 above for further information)

3 OTHER MATTERS

3.1 Please refer to the sections above, which relate to: the community interest test; governance structure; constitution; and regulators of CICs limited by shares. The same principles apply to CICs limited by guarantee and therefore we have not repeated these sections here. The advantages and disadvantages are also the same save for the ability to distribute profits.

4 ADVANTAGES AND DISADVANTAGES

4.1 The advantages of adopting such a model are:

4.1.1 A separate legal entity capable of entering into contracts

4.1.2 It has limited liability

4.1.3 A transparent structure subject to filing requirements at Companies House including an annual CIC report placed on the public record for public scrutiny.

4.1.4 The asset lock feature provides a protection mechanism for the community.

4.2 The disadvantages of adopting such a model are:

4.2.1 Cost of incorporation

4.2.2 Must establish community benefit

4.2.3 Additional incorporation requirements to ensure company meets the Community Interest Test

4.2.4 Additional regulation in that the company will be continually monitored to ensure that it provides a benefit to the community it was set up to serve and if the CIC regulator construes that the company is failing to do this there a number of powers open to the regulator as detailed above

4.2.5 No tax benefits so the company would be subject to tax on profits, must pay stamp duty and does not have the benefit of gift aid or mandatory rate relief

4.2.6 Formal process to wind up. Any assets must be transferred to another asset locked company

D. COMMUNITY BENEFIT OR CO-OPERATIVE SOCIETY (PREVIOUSLY INDUSTRIAL AND PROVIDENT SOCIETIES).

1 Summary overview

1.1 From 1 August 2014 Industrial and Provident Societies became either co-operative societies or community benefit societies. On this date the Industrial and Provident Societies Act 1965 was repealed along with other industrial and provident society legislation and was replaced with the Co-operative and Community Benefit Societies Act 2014. (CCBS 2014). The CCBS 2014 has changed the name of industrial and provident societies to refer to societies as either co-operative societies or community benefit societies depending on what conditions of

registration the relevant societies fulfil. The purpose of the measure is to modernise the name from “industrial and provident society” to terms that are already in common usage.

2 Key characteristics

- 2.1 A community benefit or co-operative society is a corporate body. As a corporate body it has its own legal personality meaning that it may enter into contracts in its own name and be sued by and sue third parties in its own name. This means that the members of the society benefit from limited liability and can only be pursued personally for their actions where they have acted in breach of their duties.
- 2.2 A society for carrying on any industry, business or trade (including dealings of any kind with land), whether wholesale or retail, may be registered by the Financial Conduct Authority ("FCA") under CCBS 2014 if:
- 2.3 The FCA is satisfied that the conditions for either a co-operative society or a society conducted for the benefit of the community (community benefit society) are fulfilled.
 - 2.3.1 The society has at least three members or the society has two members both of which are registered societies.
 - 2.3.2 The society's rules contain provisions regarding matters listed in section 14 of the CCBS 2014; and
 - 2.3.3 The registered office of the society is in Great Britain or the Channel Islands.
 - 2.3.4 Each category of society must carry on an "industry, trade or business". An organisation that is only to hold shares in another organisation without carrying on any activity of its own cannot, therefore, be registered as a registered society.

3 Governance structure

- 3.1 A registered society must have at least three members (or two if made up of other registered societies).
- 3.2 Directors are elected directly or indirectly by members under the society rules.
- 3.3 Directors have a range of duties based on the same underlying principles as those of company directors although the codified duties under the Companies Act 2006 do not apply to directors of societies. They are entrusted with control over assets that do not belong to them but to a third party (the society) and have duties not to use the assets for their own benefit and to act prudently and lawfully.
- 3.4 The ultimate duty is to act in the best interests of the society, and that applies even where a director has been appointed by a particular member or elected by a particular constituency. A director may set out the views of those who have appointed or elected him or her but may not vote in accordance with those views if to do so would be contrary to the society's interests.
- 3.5 The duty of skill and care is a duty to bring to the role of director the skills the person has and the skills reasonably required to perform the role. This latter requirement will be determined in practice by the definition of the role of director in the rules and governance arrangements of the society. Where a director is required to perform a representative and non-executive role he will not be expected to have the skills that would be required of an executive director.
- 3.6 It is important that the powers and duties of directors and of any paid executives are made clear in the society's constitution and governance arrangements. In general terms, where there are paid executives they will be given conduct of the business subject to the

reservation to directors of certain powers and duties including decisions about major issues or transactions. Some decisions may be reserved to members.

4 **Constitution**

4.1 The characteristics, powers and working methods of a society are set out in its rules, which are set out in the public record on registration with the FCA. Changes to the rules usually require the approval of the society's members and do not come into effect until registered by the FCA.

4.2 Section 14 of the CCBS 2014 states that the rules of a society must contain provision on:

- The name of the society.
- The objects of the society.
- The registered office of the society.
- The terms of admission of the members including any society or company investing funds in the society under the CCBS 2014.
- How meetings are held and conducted, voting rights and procedure and how to amend the rules.
- The appointment and removal of a committee, managers, officers and their respective powers and remuneration.
- The maximum interest in withdrawable shares in the society that can be held by any member. Section 24 of the CCBS 2014 states the maximum interest of a member to be £100,000 (save for members who are registered societies or otherwise fall within the limits of section 24(2)).
- Whether the society may contract loans or receive money on deposit from members or others and the conditions imposed on and limits on the amount loaned and the security taken.
- Whether the shares shall be transferable and how they are transferred.
- Whether the shares shall be withdrawable and how they are withdrawn.
- Provision for the audit of accounts by one or more approved auditors in accordance with CCBS 2014.
- Whether and how members may leave the society and provision for the claims of the representatives of deceased members and of trustees of the property of bankrupt members.
- How any profits of the society will be applied;
- Provisions for the custody and use of the society's seal.
- Whether and how any of the society's funds may be invested.

4.3 The society may make rules on any other matter in addition to those set out in section 14. Any amendments to the rules (other than a change in registered office or the name of the society) must be registered (and will not be valid until done so).

5 **Regulator**

5.1 A community benefit or co-operative society is registered with and regulated by the Financial Services Authority to whom it must submit annual accounts and an annual report. The FSA is a relatively light-touch regulator in respect of cooperatives not providing financial services with its resources focused on other forms that it regulates, in particular those operating within the financial sector.

6 **Registration**

6.1 The FCA will only register a society as a co-operative society if it is satisfied that the co-operative society is bona fide and does not intend to make a profit. The society's rules themselves should demonstrate to the FCA that the society is a bona fide co-operative society.

- 6.2 The FCA will only register a society as a community benefit society if it is satisfied that the business of the society is being or is intended to be conducted for the benefit of the community.

7 **Advantages and Disadvantages**

- 7.1 The advantages of adopting such a model are:

- 7.1.1 A separate legal entity capable of entering into contracts
- 7.1.2 It has limited liability
- 7.1.3 A transparent structure subject to annual company information and accounting filing requirements with the FSA
- 7.1.4 Lighter touch regulation

- 7.2 The disadvantages of adopting such a model are:

- 7.2.1 FSA registration requirements that the society is either a bona fide co-operative society or it has to be conducted for the benefit of the community
- 7.2.2 Cannot make a profit.
- 7.2.3 A new type of structure which is not commonly used with complex requirements