

Appendix 4

LEGAL ADVICE ON THE POTENTIAL MODELS

Introduction

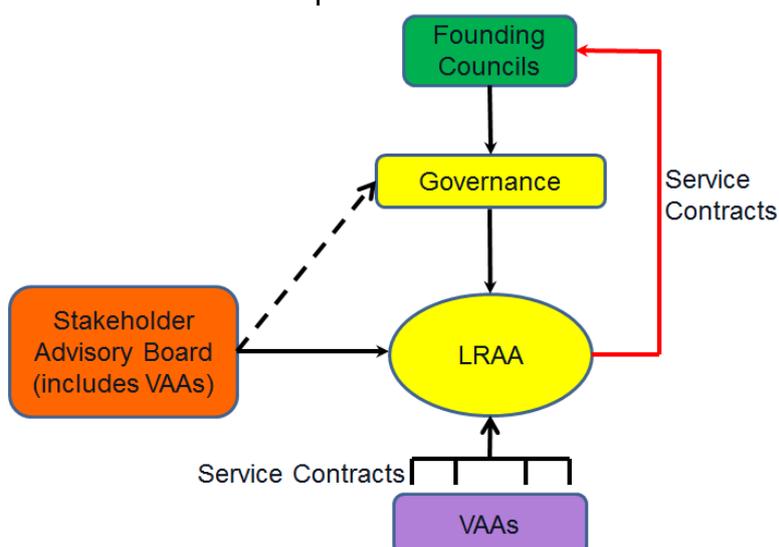
At the March meeting of ALDCS, Directors received a report of stakeholder engagement in respect of the potential legal entities which could form the model for a future regionalised offer. On the direction of ALDCS, legal advisors were appointed to produce detailed advice on the two preferences which Directors supported. Those preferences, based on guidance from stakeholders including VAAs, were a local authority trading company (Option 1) and a joint venture (Option 2).

The report has now been completed and covers the following areas for the preferred models:

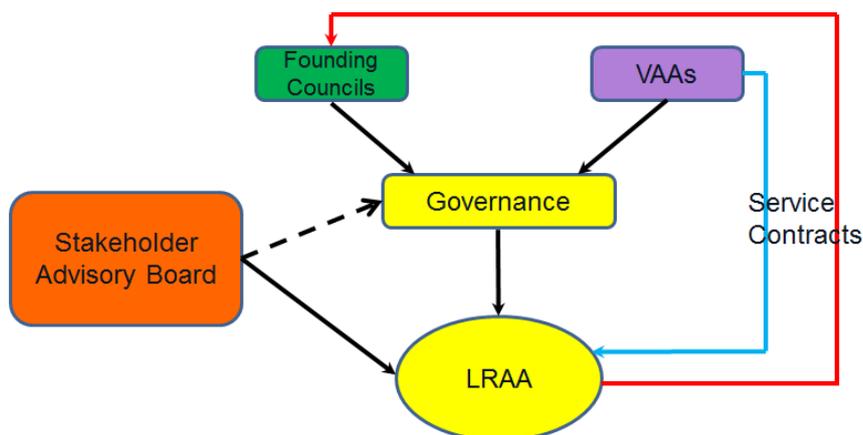
- Benefits and limitations of VAA involvement in the ownership and/or strategic partnership, with advice on the joint venture options and whether joint venture partners would need to be procured.
- Governance implications with regard to the need for accountability to the LAs responsible for the child.
- Legal entities that would be appropriate for securing the optimum balance with non-statutory organisations within these models.
- Income and tax implications of the models, including VAT treatment and the ability to trade with other regional agencies.
- Procurement implications of these models, particularly with reference to Teckal exemption.
- Implications for registered charities including charitable assets and income.
- Potential staff transfer implications.

Structure of the two options

Option 1 – the development of a multi-LA owned corporate entity working in partnership with VAAs to deliver adoption services



Option 2 – the development of a corporate entity involving both the LAs and VAAs as members/ shareholders to deliver adoption services



Comparison of the two options

The key comparison points of the two options are shown in the table below:

	Option 1 – LA owned	Option 2 – Joint venture
Governance	<ul style="list-style-type: none"> Teckal company – can be set up from day one. 	<ul style="list-style-type: none"> Joint venture would need to run procurement to identify VAA owner-partners.
Role of VAAs	<ul style="list-style-type: none"> Role on advisory board, as well as directorships reserved for VAAs. Service contracts. 	<ul style="list-style-type: none"> Full role in governance structure.
Procurement	<ul style="list-style-type: none"> Teckal exemption would apply as Agency would be wholly owned and controlled by the Founding Councils and will carry out the majority (>80%) of its work for those Founding Councils. The Agency could use a restricted procurement procedure to establish a framework for VAAs for service contracts. 	<ul style="list-style-type: none"> VAAs are private sector for procurement purposes, and so cannot rely on Teckal. Competitive dialogue would be needed to establish terms of governance and award of service contracts. A larger exercise could prevent some smaller VAAs from taking part.

Tax	<ul style="list-style-type: none"> • Should be capable of satisfying HMRC's requirement for 'mutual trade' status, meaning there would be no corporation tax on surpluses. • Service supplies by the Agency to LAs would be VAT exempt. This means that irrecoverable VAT would be incurred by the LRAA. 	<ul style="list-style-type: none"> • Application of mutual trade exemption would be problematic due to the lack of a trade with the VAAs. Therefore, unless the Agency had charitable status, it would need to include provision in its business plan for payment of corporation tax.
Pensions	<ul style="list-style-type: none"> • May be considered a Designated Body if the 'connected with' test is met. 	<ul style="list-style-type: none"> • Less certainty of the 'connected with' test being met to gain Designated Body status. • A number of VAAs operate occupational salary-related pension arrangements, subject to regulatory oversight by the Pensions Regulator.
Other		<ul style="list-style-type: none"> • VAA constitutions would need to be reviewed. A number of VAAs would need to satisfy themselves that participation in the Agency is consistent with their charitable objects.

Notes relevant to both options

- Legal form – It is recommended that the Agency would be a not-for-profit community benefit society. At this stage, it is suggested that the Agency is not established as a charity. As a community benefit society, it should be possible to achieve charitable status in the future by adopting charitable objects.
- Governance – It is recommended that member of the Agency collectively elect the board of management of the Agency. This allows members to retain the ultimate control of the board, but also permits a smaller, more focused board that has the best suited individuals on it. A board size of 8-12 is suggested, with the majority of board members elected from candidates drawn from participating LAs.
- Staff – TUPE would apply where any services currently delivered by the Founding Councils and/ or participating VAAs are transferred to the LRAA. If there are certain functions which can only be provided by an employee of a Local Authority, alternative staffing models including secondment and joint employment or dual employment could be considered.
- Future flexibility – Processes for exit from or entry to the Agency at a later date can be agreed within the Members' Agreement.

Recommended model

The report received from Trowers & Hamblins recommends that the Agency would be a not-for-profit community benefit society which is jointly owned by all of the LAs (Option 1) that wish to participate in the project from the outset (Founding Councils). The Founding Councils' involvement in the Agency would be governed by a Members' Agreement. The Agency would be managed by a board of directors including officers of the Founding Councils, with places reserved for elected VAAs, and potential for other service user or stakeholder involvement.

This model is quicker and cheaper to set up, and retains close VAA partnership working.

VAA feedback on the report

As part of their role on the steering group, VAA representatives have sought the views of the VAA stakeholder group on the legal report. A response has been received raising the following:

- A query on the consideration of Teckal as a key factor in the decision making between an LA owned entity and a joint venture.
- The viability of an option not covered in the report for the creation of an Innovation Partnership.
- Whether it allows continuation of independent VAA sales.