

PROPOSED COMPANY STRUCTURES

Advice on Rules Applying to the Provision of Legal Services

1. Introduction

1.1 Kent County Council ("KCC") is considering how best to structure its Legal Services unit ("KCC Legal"). Currently it is an in-house unit made up of lawyers and support staff directly employed by KCC, with some locum lawyers employed through an agency. Most of the fee-earners are qualified, practising solicitors who have a valid practising certificate issued by the Solicitors Regulation Authority, although there are also some barristers, one licensed conveyancer, and a number of legal executives of varying degrees of qualification.

1.2 The objectives are that the appropriate structure would:

- (a) allow KCC Legal to offer its services to a wider client base
- (b) facilitate the building up of the legal business, and therefore the income stream to KCC
- (c) give KCC Legal substantial operational freedom from KCC
- (e) enable KCC to seek redress by claiming against PII in the event of professional negligence
- (d) provide an ability to cap the amount of income that is passed back to KCC, so that KCC Legal can retain money to invest in its business and offer staff appropriate incentivising pay and benefits packages

1.3 One model that has been suggested is that of a separate legal entity from KCC. This note considers whether the way in which solicitors are regulated would present any barriers to the proposed delivery of KCC legal services via a corporate structure and, if it were permitted, whether there would be any substantial advantage to such a structure.

1.4 This note assumes that the end result of the process would be a legal practice regulated by the Solicitors Regulation Authority (and which as a result can provide reserved legal services – for definition of these please see Rule 20.01(1) of the Solicitors Code of Conduct, which can be found at <http://www.sra.org.uk/solicitors>). Whilst it is true that legally some of the work (e.g. drafting of certain contracts) could be carried out by persons who were not qualified lawyers, in fact the expertise in these matters is generally with lawyers and law firms, and anything other than a law firm would not command the confidence of the clients.

2. Executive Summary

2.1 Because of the restrictions imposed by the Solicitors Code of Conduct, it does not appear viable or lawful at present to transfer KCC Legal to a corporate entity in which KCC would have any interest or control. The rules contained in the Solicitors' Code of Conduct present significant barriers to the proposed inclusion of legal services in the list of KCC functions to be considered suitable for transfer to a corporate entity.

2.2 This position might change once Alternative Business Structures (“ABS”) are permitted under Part 5 of the Legal Services Act 2007. But it will not be known until mid-late 2011 what the new rules are to be regarding use of ABS to provide legal services. The latest SRA consultation on a new solicitors’ code of conduct even suggests that there will be no provision for authorising in-house legal services to trade with the private sector through a company until March 2013 at the earliest. Therefore any substantial consideration of that possibility needs to be deferred until those new rules appear and can be considered in the light of KCC’s objectives at the time.

2.3 Because of its current status as a local authority in-house practice, KCC Legal can already supply legal services direct (without a company structure) to any organisation to which KCC is statutorily empowered to provide services. That effectively means the whole of the public sector except central government. There is also a possibility that this extends (using a combination of the well-being and charging powers contained in the Local Government Acts 2000 and 2003) to the provision of services to any person (individual or corporate) whether within Kent or outside.

2.4 KCC Legal has a specific expertise, presence, reputation and marketing advantage in the public sector part of the overall legal services market. It seems sensible therefore to concentrate its immediate future efforts in that sector.

2.5 Moving KCC Legal staff into a separate company vehicle (at any stage) would create significant problems. It might, instead, be appropriate at a later date to consider offering legal services to the private sector *through* a KCC-owned company. This would be best achieved by retaining staff in-house, who would then sell services through the company. Whether this would be commercially advantageous would depend on the ABS rules then in force and on the level of competition in the private sector legal services market, which itself is rapidly changing and in a state of flux.

2.6 There is no inherent advantage in a company as a structure, other than it provides the power to trade with private sector under the Local Government Act 2003. KCC Legal already has this ability, to a greater or lesser extent.

2.7 It would not be possible for KCC to claim against its own legal company’s insurance policy in the event of professional negligence. This is because there is a major shareholder exclusion clause within professional negligence policies, which prevents major shareholders (in this case KCC) from making a claim against an arms length company.

2.8 The impact of HM Government proposals needs to be taken into account, including how the suggested new power of general competence would affect this and the potential for Eric Pickles to abolish local government companies (and the need for them) as part of the bonfire of the quangos.

3. The Regulatory Framework

3.1 The Solicitors’ Code of Conduct (“SCC”), which is monitored and enforced by the Solicitors Regulation Authority (“SRA”), imposes extensive obligations on solicitors working in practice. The rules which comprise the SCC have the status of statutory rules.

3.2 Rules 12, 13, 14 and 20 of the SCC make up the framework which set out the ways in which individuals and bodies subject to the SRA’s rules can practise, and restrictions upon those individuals and bodies.

3.3 Rule 12 (Framework of practice) specifies the types of businesses through which solicitors may practise. This includes partnerships, companies and limited liability partnerships. The rule requires that solicitors must not provide services to the public except through a firm which is a recognised body or a recognised sole practitioner (both regulated by the SRA) or through an authorised non-SRA firm (regulated by another approved regulator).

3.4 Rule 14 (Recognised Bodies) governs the composition and structure of a “recognised body” and the services a recognised body may provide. It seems clear that KCC Legal is not, and could not become, a recognised body whilst KCC (or any other corporate body) retains an interest. Paragraph 32 of the Guidance note to Rule 12.04 points out that:

“...Non-lawyer participation in all recognised bodies is restricted to 25% as measured by three different indicators:

- (a) number of managers;*
- (b) proportion of shares or other ownership rights;*
- (c) proportion of voting rights exercised or controlled”*

In addition, the non-lawyer participation must be approved individuals, rather than a body corporate such as KCC. The intention appears to be just to permit a law firm to bring in one or more professional non-lawyer individuals to assist the lawyers in managing their firm.

3.5 Rule 12 does permit in-house legal practices, but subject to certain restrictions. In particular, in-house solicitors may act only for their employer or in the circumstances set out in Rule 13.

3.6 Rule 13.03(1) includes provision for in-house solicitors to act for:

- (a) the employer's...holding, associated or subsidiary company;*
- (b) a partnership, syndicate, LLP or company by way of joint venture in which the employer...and others have an interest;*
- (c) a trade association of which the employer...is a member; or*
- (d) a club, association, pension fund or other scheme operated for the benefit of employees of the employer*

However, 13.03(1) (a) and (b) do not apply if the solicitor is employed in local government (Rule 13.03(2)).

3.7. Rule 13.08 states that solicitors employed in local government may act:

- (a) for another organisation or person to which or to whom the employer is statutorily empowered to provide legal services, subject to the conditions in (b) to (g) below;*
- (b) for a member or former member of the local authority, provided that:*
 - (i) the matter relates to or arises out of the work of the member in that capacity;*

- (ii) *the matter does not relate to a claim arising as a result of a personal injury to the member;*
- (iii) *you are satisfied that the member does not wish to instruct some other lawyer; and*
- (iv) *no charge is made for your work unless those costs are recoverable from some other source;*
- (c) *for a company limited by shares or guarantee of which:*
 - (i) *the employer or nominee of the employer is a shareholder or guarantor; or*
 - (ii) *you are, or an officer of the employer is, appointed by the employer as an officer of the company, provided the employer is acting in pursuance of its statutory powers;*
- (d) *for lenders in connection with new mortgages arising from the redemption of mortgages to the local authority, provided:*
 - (i) *neither you nor any other employee acts on behalf of the borrowers; and*
 - (ii) *the borrowers are given the opportunity to be independently advised by a qualified conveyancer of their choice;*
- (e) *for a charity or voluntary organisation whose objects relate wholly or partly to the employer's area, provided that there is no charge to the charity or voluntary organisation in non-contentious matters, and in contentious matters the employer indemnifies the charity or voluntary organisation in relation to your costs insofar as they are not recoverable from any other source;*
- (f) *for a patient who is the subject of a Court of Protection Order where you are acting for a work colleague (under 13.02 above) who is appointed as receiver for the patient; or*
- (g) *for a child or young person subject to a Care Order in favour of the employer on an application to the Criminal Injuries Compensation Authority.*

3.8 The conditions specified in Rule 13.08 (b) to (g) do not limit the areas of work that can be done to those areas specified. Rather, they impose restrictions only on how those particular categories of work should be dealt with. Therefore KCC Legal, as currently constituted as an in-house practice, can act for any organisation or person "to which or to whom (KCC) is statutorily empowered to provide legal services" (as long as it complies with the restrictions in (b) to (g) where it is that kind of work that is being done).

3.9 By virtue of the Local Authorities (Goods and Services) Act 1970, KCC is empowered to provide goods and services to any organisation that is considered to be a local authority or a "public body" for the purposes of that Act. This effectively covers most of the public sector (including the NHS) except for central government.

3.10 The cumulative effect of this is that KCC Legal can already (without the need for any additional corporate structure) provide legal services to the wider public sector as an in-house unit, as well as being able to provide legal services to KCC itself without the need for a tender process.

3.11 KCC can also already provide legal services to private sector clients through the use of its spare capacity. It is also able to provide wider-ranging legal services to private sector clients specifically in Kent by using a combination of the well-being and charging powers contained in the Local Government Acts 2000 and 2003.

3.12 The conclusion therefore is that the in-house model as currently operated is the only model that is currently permitted that delivers the required outcomes. It has the freedom and flexibility to grow and expand as a business without the need for reconstitution or incorporation.

4. The Future Regulatory Framework

4.1 Under the provisions of Part 5 of the Legal Services Act 2007 there are proposals for Alternative Business Structures (“ABS”) to be permitted for the delivery of legal services.

4.2 It is anticipated that when ABS come in, they will allow corporate bodies such as KCC to own a stake in, and possibly control a legal business. But until the new rules are disclosed (which is expected to be in mid-late 2011) it will not be known exactly what is to be permitted, and subject to what conditions. Therefore any discussion of the use of ABS (and whether this would be advantageous to KCC) must wait until the new rules appear.

4.3 This, however, ignores the fact that KCC already wholly owns and controls its own legal business in the form of KCC Legal. The ‘Kent Model’ of legal services delivery is nationally recognised as the leading exemplar and most successful trading operation of its kind anywhere in the country.

4.4 The latest SRA consultation on a new solicitors’ code of conduct suggests that there will be no provision for authorising in-house legal services to trade with the private sector through a company until March 2013 at the earliest.

5. Business Advantages of the current in-house structure for KCC Legal

5.1 An in-house practice owned by a local authority does not have to comply with the same requirements as any other kind of solicitor’s practice. In particular, the Solicitors’ Accounts Rules do not apply and there is no requirement for separate office and client bank accounts, accountant’s certification, etc. All monies held by the practice at any time are already in KCC’s bank.

5.2 A great number of expenses and overheads are significantly reduced. Professional indemnity insurance (which is a major cost for private practice) is obtained as part of the KCC general insurance policy, at a very small premium. If it were a private entity the cost of such insurance would amount to a prohibitively high proportion of what is now profit. Practising certificates are also significantly less expensive in-house than in the private sector.

5.3 Surplus income of the unit is already in the coffers of the authority, without cross-charging or corporation tax issues. KCC Legal also comes under the KCC VAT exemption rules without any further complications.

5.4 KCC Legal competes for public sector work and the fact that KCC Legal is itself an in-house part of the public sector is a major selling point that sets it apart from the competition. Public sector clients particularly like the idea of keeping the money and

the business in the public sector. Moreover, giving work to KCC Legal is seen as a form of collaboration between public bodies (which is prima facie good and can be done relatively informally), rather than awarding a contract to a corporate entity/private body (which requires the formalities of a formal tender process, etc).

5.5 The *Law:Public* arrangement with Top-100 law firm Geldards (which has been widely publicised and well received nationally as a potentially lucrative way of generating significant additional income) is marketed on the basis of being a private/public partnership. If KCC Legal were to become something other than an in-house team then this would clearly no longer be applicable.

5.6 There is the ability for KCC Legal to provide legal services to KCC without any form of tender process, and on terms that can be dictated by KCC. The other side of this same point is that KCC keeps control of the specialist staff that it needs to assist with its own legal and governance issues.

5.7 Good staff have been recruited and retained over many years on the basis of working for and within the public sector. There may be a negative reaction and retention issues if staff were required to move out of the main-stream public sector (see paragraph 8.8 below).

5.8 It is not possible for these same advantages to be obtained using a company structure model.

6. Business disadvantages of the current in-house structure for KCC Legal

6.1 KCC cannot sue its own legal section if substantial mistakes are made. Whilst it is very rare that this would be an issue in practice, there seem to be two possible ways of dealing with this problem whilst retaining an in-house legal unit:

(a) reciprocal arrangements with another local authority with a substantial legal team (e.g. Essex) whereby each carried out specific large deals for the other. This would have no net cost to either body (assuming that each did similar amounts of work for the other)

(b) putting out to the private sector any complicated or politically difficult matters (as happens at present)

6.2 It should be noted that if KCC did specifically want the ability to sue a company operating KCC Legal, this would have its own cost. One would assume that this would obliterate any hope that KCC's insurers might offer the company preferential professional indemnity rates as part of the KCC family. It would also encourage a cautious approach to the provision of legal advice, hedged with caveats to minimise the risk of liability.

6.3 KCC Legal can already act in certain circumstances for private sector clients. However, whilst all new clients are welcome, the area in which KCC Legal has specialist expertise (and an advantage over the competition) is the public sector. There is potentially enough scope in the public sector for KCC Legal to expand its business for the foreseeable future. The restrictions on this seem to be political, rather than legal or structural. If KCC Legal were to expand into supplying services to the private sector it would be in direct competition with other legal practices in the county, and could give rise to claims of unfair or inappropriate competition from the Kent business community.

6.4 KCC Legal cannot easily reward staff as they might wish to be rewarded as an incentive to bringing in additional external income. It is not clear whether this is a real problem. Discussion with the KCC Reward Manager suggested that:

(a) the fixing of KCC salaries on certain scales was a matter of discussion and negotiation with the unions

(b) a pilot scheme had been discussed with regard to KCS which might allow incentive-based rewards to some staff

6.5 It would therefore appear possible to negotiate such a deal with staff whilst remaining employed by KCC.

6.6 Terms and conditions are tied to those of KCC, including the LGPS. This is unlikely to be a real problem. The issue, as regards highly qualified legal staff, is more likely to be paying staff enough to attract and retain them when the economy revives.

7. Business Advantages of KCC Legal being transferred into a company structure (if/when it becomes legal to do so)

7.1 KCC could sue the company if mistakes were made – see paragraph 5.2 above as to the likely effect of this on insurance premiums, paragraph 6.1 as to alternative solutions and quality of advice and Section 12 below on the ability of major shareholders making a claim against their own company's PII policy.

7.2 The company could potentially trade with, and provide services to, the private sector – but see paragraph 6.2 as to existing powers to do this, and section 9 below as to why this would prevent the company being a Teckal company which can, at the same time, provide services to KCC without a competitive process.

7.3 The company could be rebranded so as to lose/minimise the connection with KCC. It seems uncertain whether this would be a benefit or not. Given the public sector client base, it might be a disadvantage.

7.4 The company could enter into employment contracts that reward staff in different ways. See paragraph 6.3 as to whether this could be achieved in another way. So long as KCC owns a material stake in the company it will still be subject to the criticism that an incentive scheme is spending public money improperly.

7.5 Depending on the HMG view on a two-tier workforce, the company might in future be able to recruit new staff without offering them LGPS membership. But query how this reduction in benefits helps to recruit/retain good new staff. (Current staff will already have membership of LGPS - see paragraph 8.5 below).

7.6 At some point, it might be possible or desirable to sell off the company (or a share in the company). It is unclear whether and, if so, when the legal services market will develop so as to make this a profitable exercise. If it were to happen, it would undoubtedly have an effect on staff and KCC would also lose control of its own supply of legal services.

8. Business disadvantages of KCC Legal being transferred into a company structure (if/when it becomes legal to do so)

8.1 It is unclear whether clients would use KCC Legal in the same way if it did become a private company. At that point, it is hard to see what would be the attraction

and what would differentiate that KCC Legal company from the many other solicitors' firms in an already saturated market. It would certainly not be able to offer legal services to KCC clients at such a low cost as it currently charges.

8.2 Taxation: profits in the company would be subject to corporation tax (not currently payable).

8.3 The company would need its own VAT arrangements – and all of the other costs and regulatory arrangements that come with being a private sector law firm.

8.4 KCC could not guarantee work to (or subsidise) the new company without being potentially in breach of state aid rules.

8.5 The company would also have to become an admitted body of LGPS. Existing staff would transfer under TUPE, and this would carry an obligation to provide the same pension, or one certified by the Government Actuary's Department as broadly comparable. To provide a private pension which is broadly comparable is prohibitively expensive – therefore admitted body status of LGPS is the only option.

8.6 Collaboration/sharing services with other public sector bodies becomes more problematic.

8.7 There would be a need for formal arrangements (e.g. lease) for sharing of accommodation with KCC, etc.

8.8 Good legal staff, who accept lower benefits as part of the public sector ethos, might not be prepared to remain on this basis if they are to be part of the private sector.

8.9 There are potential problems as to how KCC itself would obtain its legal services – see section 9 below.

9. How such a company might relate to KCC if staff were transferred to it.

9.1 The EU Treaty requires all contracts (even those to which the full EU procurement process does not apply) to be awarded on a fair and open basis. This generally means advertising contracts through a competitive process. If KCC Legal staff were in a separate company, then KCC would have to tender out its legal services requirement on a fair and open basis, and the KCC Legal company would have to tender for it.

9.2 There can be no guarantee that the KCC Legal company would be awarded all or any of the work. A private sector competitor might even consider it worthwhile to take on all or part of the work at a loss.

9.3 If the KCC Legal company fails to win the tender, then at that point the work goes to the winning outside firm. In such a situation TUPE would probably apply to transfer the relevant staff to the winning tenderer. At that point KCC would have lost its in-house legal capacity and its income stream, and would henceforth be at the mercy of the open market.

9.4 KCC would only be allowed to award the work to the KCC Legal company without tender if the company came under the Teckal exemption, i.e. it was wholly owned by KCC, did materially all of its work for KCC, and was subject to the same degree of control as other departments of KCC. At that point the company would be considered to be a part of KCC itself for EU procurement purposes. That then would

leave all of KCC's legal staff in a company that cannot (by definition) work for external organisations – which defeats the object as it would kill the external client business.

9.5 It might, in theory, be possible to form a joint Teckal company with other public sector bodies to provide legal services to them all, but:

(a) the legal position is uncertain – the only attempt at this so far has been the Brent/LAML insurance case where the aggrieved private sector challenged in court. The case is expected to reach the Supreme Court soon, on appeal from Court of Appeal

(b) it is assumed that the objective of this exercise for KCC is primarily to make money from the rest of the public sector, rather than to collaborate with them on a shared-cost basis

9.6 There is therefore no easy or immediate solution based on transferring the legal staff into a company.

10. The value of a strong internal legal function

10.1 Recent concerns have been raised in the press by the Chair of the Solicitors in Local Government Group and others, regarding putting local government lawyers at arm's length:

"I have concerns about shared services if it means that people begin to see the cost of everything and the value of nothing. I will never believe that legal services is a back office function or merely transactional – the role of the lawyer in local government is very central to the delivery of services and the vibrancy of the organisation as a whole. The legal department is like a corporate glue in terms of governance, standards and ethics, decision making and I think that you separate out legal services from that at your peril.

This is the importance of the discussion about the monitoring officer role. I have always seen the role as a facilitator because the monitoring officer is one of the people closest to the decision-making process and it is by occupying that role and being seen to be enabling in that role that I think the Chief Lawyer positions his or her service as being at the centre.

*The legal department's role is about being proactive and being involved in strategic matters at an early stage. That is the difficulty with outsourced or shared services – **the further you remove legal services from the corporate centre and the more you regard it as simply being transactional or at arm's length, the later you bring the lawyers into the process. The real value of the local government lawyer is in helping to ensure that you fix the parameters of what you can do and that you help to plot the journey that your corporate client wants to make.**¹*

11. A possible compromise solution: "optimum solutions to maximise value"

11.1 By making reference to "Legal Services transition to arm's length trading organisation", this unnecessarily and prematurely narrows the scope of other exciting

¹ The words in bold are emphasised as this is what Legal Services does and what it could easily do more of - but this often isn't credited by managers, e.g. Legal Services often advise HR who then simply pass on the advice, mostly without acknowledging Legal's input - so the value of Legal Services can be lost in the eyes of the managers running the core functions.

and potentially preferable options available to the council in developing and re-inventing its legal service (and other support) functions.

11.2 The proposition could be re-worded along the lines of:

“...It is also intended to explore how we could further develop our currently very successful legal services, through examining a variety of externally-facing options aimed at increasing income, improving efficiency and collaborating with partners, whilst at the same time maintaining the highest standards of internal lawfulness, propriety and good governance.”

11.3 Such alternative options could well include alternative business structures such as companies, but should not be expressed to be exclusively limited to that. This is partly because the law does not currently permit local authorities to establish their own legal companies. But it is also because the public sector landscape is changing so rapidly at the moment that other, more attractive, options may present themselves in the form of collaborative ventures involving the public sector, but also including the private and voluntary sectors as well.

11.4 Examples include the recent press coverage entitled “Blueprint for local government revealed”², in which it was announced that local government legal services could be delivered from just six regional centres of excellence within the next decade. A national network of six legal hubs would provide cost-effective legal services to local authorities across the country, with Kent being the hub for the south-east; Essex for the east; Bristol for the south-west; Cardiff for Wales; and Leeds for the north.

11.5 Another example is the expansion of *Law:Public* after its successful launch in 2010. This vehicle has attracted a considerable amount of interest (even north of the border in Scotland), since it enables KCC’s lawyers to provide services to other public sector bodies both on their own account and in collaboration with a Top 100 law firm partner. The intention is to spread this out not just within our own geographical/political boundaries, but across the country, and possibly to franchise the model nationwide.

11.6 A further option would be to develop the managed or hosted legal service, whereby rather than trading with other bodies, those bodies (typically smaller local authorities) would instead transfer their legal team (other than a core retained function) to KCC to resource their legal services requirements at an agreed funding level, with an appropriate blend of lawyers working on-site from the previous in-house regime and expert teams working within KCC and its legal service partners.

11.7 There are many other options, some existing, and some just emerging, including the option of KCC buying a stake in an existing law firm. More will follow and Kent needs to be prepared to select for itself its own best way forward. Whichever options are ultimately pursued, they must be underpinned by a full business case, intelligent multi-sourcing and proprietary information technologies, so that the outcome is cheaper, better and simpler for the client. Such detailed scoping has not taken place up until now, and needs to be completed before any final conclusions on the most appropriate options can be drawn.

11.8 We need to identify a solution that is client-centric, innovative and collaborative, offering great value and delivering resourcing flexibility, efficiencies, greater pricing certainty, enhanced legal risk management and systems, processes and resources which enable the lawyers to be more effective. Put succinctly – an optimum solution to maximise value.

² Law Society Gazette, Thursday 7 October 2010

11.9 That will not be achieved by restricting our options at this early stage to just one. Indeed, the current pre-selected option would effectively rule out most of the other possible options, which would be counter-productive and restrict our ability to work collaboratively with other public bodies.

11.10 Instead, any proposal to reconfigure Legal Services should prejudge nothing but instead institute a review of how the service could be best structured in the future, i.e.:

- set out KCC's key aspirations for the service in a public and formal way
- appoint an independent officer or external consultant to advise on an "expert" independent basis
- allow Members and officers input into the brief, i.e. to ensure that it is fair and balanced
- provide for an open and reasoned conclusion so that everyone can see that what is finally proposed is the best way to proceed and makes KCC Legal flourish in accordance with the pre-stated objectives

12. Professional negligence

12.1 One of the stated wishes is to be able to set Legal Services up as a company in order to be able to claim against its professional indemnity insurance policy in the event of an incident of negligence.

12.2 If the ability for KCC to be able to sue in respect of potential professional negligence by the Council's own staff is to be the deciding factor in the structure, then the question arises as to why all of the professional staff in Finance, IT, Property, Personnel, etc are not proposed to be similarly outsourced for the very same reason. It is unclear why this should be cited as a reason for restructuring Legal Services alone.

12.3 Unfortunately, there is no insurance product available to purchase which would provide protection against losses sustained by one department of the Council as a result of advice given by another. The analogy of accidental damage under a household insurance policy cannot be applied since there is no 'asset' to insure which forms the basis of the cover. The insurance market simply views this scenario as a business risk.

12.4 Even if Legal Services were set up as an arm's length company this would not provide a route for redress, because there is a major shareholder exclusion clause within professional negligence policies that prevents major shareholders (in this case KCC) from making a claim against their own company. If Legal Services were totally separate to KCC then it could obtain insurance in its own right and would enjoy the same status as any other legal firm, but then KCC would lose all the benefits that would flow from its ownership of the company.

12.5 If this is still considered to be a real issue of concern, then the best solution would be to either reach a reciprocal agreement with another authority or to outsource high-risk projects to the private sector on a piecemeal basis (see paragraph 6.1 above).

13. A viable company model

13.1 A compromise solution based on retaining staff in-house but trading their services through a limited company is conceivable.

13.2 The basis of this would be the provisions of section 95 of the Local Government Act 2003, which provides a power for a local authority to trade. This requires that trading must be done through a limited company but does not specifically require the relevant staff whose services are being supplied to be employed by that limited company.

13.3 There would therefore seem to be a possible model whereby:

(a) legal staff remain employed by KCC and therefore all of the advantages of this in terms of staff retention, relationship to clients, cost savings, marketing and reputation, etc, remain

(b) the in-house staff supply services under contract to the KCC Legal company, which in turn supplies those services to external private clients

(c) KCC would be obliged to charge the company the full cost of providing those services, which would ensure the repatriation of profits back into KCC

(d) There would still be issues of additional costs of running the company, but because most of the KCC Legal business would still be done in-house, these would remain relatively low, especially in comparison with the setting up of a separate corporate delivery vehicle

13.4 Whether and when this scheme is deliverable will depend very much on the new rules for ABS and the view taken by the Solicitors Regulation Authority at the time.

13.5 Whether this scheme is desirable will depend also on where potential clients are coming from at that point, and on the level of competition in the private sector legal market.

13.6 It is important to note that:

(a) such a compromise solution would already be available *now* for use by other KCC functions (such as Personnel, ISG, etc) where there is not the same high level of professional and statutory regulation

(b) it is currently very unlikely that any KCC company set up to provide other services would also be allowed to provide legal services

14. Market caveat

14.1 This advice is based on the assumption that the overall legal services market will continue as at present. This cannot be taken for granted. Things are changing very fast, and once the ABS are actually in place the whole market will change yet further.

14.2 Before KCC put in place a change in its structure, it would need to be satisfied that:

(a) there will be a market in which a new company of this sort can be expected to survive and flourish

(b) the process of passing the business over to a company will not materially reduce the existing market for the business's services and

(c) that financial projections give reason to believe that the company can make more of a profit for KCC than in any other structure, whilst covering all of its proper costs.

14.3 If any of these were not the case at the time, then the status quo should be maintained until such time as a more advantageous way forward for KCC is identified.

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