

Working with others to achieve Best Value

Section 16 of the Local Government Act 1999

A consultation paper on changes to the legal
framework to facilitate partnership working



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CONTENTS

FOREWORD	5
EXECUTIVE SUMMARY	6
CONSULTATION QUESTIONS	9
Chapter 1: Introduction and purpose	9
Chapter 2 and Annex A: Using public resources efficiently and effectively	9
Chapter 3 and Annex B: Creating structures for partnerships	10
Chapter 4 and Annex C: Supplying goods and services	10
Chapter 5: Partnerships for waste management	11
Chapter 6: Future action	11
CHAPTER 1	
Introduction and purpose	12
Section 16 of the Local Government Act 1999	13
Application to Welsh Authorities	15
CHAPTER 2	
Using public resources efficiently and effectively	16
Introduction	16
The Government's proposals	16
Incurring expenditure and providing financial assistance to others	18
Entering into arrangements and co-operating with others	19
CHAPTER 3	
Creating structures for partnerships	20
Introduction	20
The Government's proposals	20
Establishing and participating in companies and corporate bodies	22
Non-Company Structures	23
Non-statutory partnership boards	24
Authority company directors – liability issues	25
Employee partnership schemes	26
CHAPTER 4	
Supplying goods and services	27
Introduction	27
The Government's proposals	28
Using the new powers	30
CHAPTER 5	
Partnerships for waste management	32
Introduction	32
The Government's proposals	32
Benefits of the Government's proposals	33

CHAPTER 6	
Future action	35
CHAPTER 7	
The consultation process	36
Who is being consulted	36
Response procedures	36
Next steps and implementation	37
ANNEX A	
Sharing public resources	38
Introduction	38
Secondments	38
Pooled budgets	39
Lead commissioning	40
Joint commissioning	42
Integrated provision	43
ANNEX B	
Local Authority interests in companies	45
Local Authority use of companies	45
Safeguards	47
ANNEX C	
The provision of goods and services	53
Introduction	53
Background to the powers	53
Purposes	54
Issues relating to capacity	55
Use of Public-Private Partnerships	56
Financial health and management of external trading units	56
Trading accounts and disclosure issues	58
Annex D	
Terms of reference for the taskforce on local government procurement and commissioning	60
ANNEX E	
Sections 16–18 of the Local Government Act 1999	62
Extract from the Local Government Act 1999	62
Extract from the explanatory memorandum to the 1999 Act	64
ANNEX F	
Notes	65

FOREWORD

The introduction of best value is part of our commitment to achieving better, more modern local government. We expect best value to be achieved by authorities carrying out their functions in a variety of ways, either by themselves or by working in partnership with other public agencies as well as with the private and voluntary sectors.

It is clear that many authorities feel frustrated by what are perceived to be gaps and uncertainties in the current legal framework within which local government operates. These can discourage innovation in the way in which services are delivered.

The legal framework must ensure proper accountability to local people. Yet too often that framework appears to place the needs of the organisation above the needs of the community it is there to serve. We therefore need to provide Best Value authorities with the legal tools to do the job that is required of them. The provision of the new power to promote the economic, environmental and social well being of an area in the *Local Government Act 2000* goes much of the way to help achieve that goal. But we need to go further to ensure that is the case for all authority functions and for all Best Value authorities, and not just principal councils. We also need to tackle issues that lie outside the scope of the 2000 Act.

I fully recognise that not all obstacles to partnership working are down to the legal framework. Some relate to cultural and management practices, political structures, and even the way in which local government is currently funded. Each of these we are addressing, for example through the new political management structures in the *Local Government Act 2000*, and through the reviews of both the revenue and capital finance regimes. Above all, we have introduced the new duty of best value, which encourages authorities to explore the many different ways that services can be delivered efficiently and effectively. The legal framework for partnership working, however, remains critical to its success and this consultation paper details our proposals.

The outcome will be a new framework which enables local government to harness in full the resources of the public sector and achieve engagement with the private and voluntary sectors.

I should welcome your views on our proposals.

A handwritten signature in black ink, reading "Hilary Armstrong". The signature is written in a cursive, flowing style.

The Rt Hon Hilary Armstrong MP
Minister for Local Government and the Regions

EXECUTIVE SUMMARY

The Government wishes to ensure that Best Value authorities are able to consider a wide range of options as to how they deliver best value, including those which involve acting in partnership with others. The current legal framework for partnership working restricts the options in a number of ways. It can create barriers to joint working, leave unclear the basis under which new structures are created and limit the way in which authorities can assist others through the provision of goods and services.

The Government plans to remove these legal barriers to ensure that innovative partnerships with the private, voluntary and public sectors are encouraged whenever it is sensible to do so. The proposals in this consultation paper are designed for this purpose.

Creating the right legal framework is a necessary step in equipping Best Value authorities with the powers to shape the future provision of services. But it is not sufficient in itself. Local government, as with much of the public sector, also needs to build the capacity to use these new powers imaginatively and with proper regard for propriety and local accountability. That is why the Government have together with the Local Government Association commissioned Sir Ian Byatt to lead a Task Force to review commissioning and procurement capacity in local government: it reports in May this year. Similarly, the Government is currently discussing details of a Research and Development Programme which will support Service Delivery Partnerships between local authorities and the private and voluntary sectors, using the new management arrangements and new structures which the proposals in this paper make possible.

In particular, the Government proposes new powers to encourage joint working, enabling authorities to:

- incur expenditure in support of the achievement of best value;
- give financial assistance to any person;
- enter into arrangements or agreements with any person; and,
- co-operate with, or facilitate or co-ordinate, the activities of any person.

Where local authorities are already acting to promote or improve community well-being under s2(1) of the *Local Government Act 2000* they already have powers to undertake these activities. Where local authorities propose to take action along these lines they will be free to decide which statutory power to use. These proposals would enable all Best Value authorities, including principal authorities, to undertake these activities in relation to all of their functions. Under these powers Best Value authorities will be able to:

- provide grants, loans, and guarantees;
- second or loan staff to and from anyone in the public, private or voluntary sectors;
- pool budgets – to bring resources together with those of others;

- contribute funds, and transfer or take on a lead commissioning role;
- jointly commission services through entering a single contract for the provision of goods, commodities, services, works or the provision of other assets to help secure economies of scale; and,
- integrate the provision of services with those of others within a single organisational structure.

Their use will be supported by best practice guidance which will provide, among other things, a simple but effective framework for accountability and governance.

To ensure that Best Value authorities are able to create new structures through which best value can be delivered the Government also intends to provide:

- a general power to form and participate in corporate bodies, whether these are companies limited by shares, companies limited by guarantee, trusts, industrial and provident societies or other corporate bodies;
- a power to enable Best Value authorities to delegate functions to local authority controlled companies; and,
- a new power (using the powers in section 101 of the *Local Government Act 2000*) which will enable authorities in England, and police authorities in Wales, to provide indemnities to their members and officers.

The Government will also:

- consider extending the scope of the *Local Government (Contracts) Act 1997* to cover the formation of companies and joint ventures;
- review the regulatory framework governing local authority interests in companies as set out in Part V of the *Local Government and Housing Act 1989* and the *Local Authorities (Companies) Order 1995*;
- investigate the role which Employee Share Ownership schemes can play in the local government sector; and,
- establish best practice in governance arrangements in Service Delivery Partnership contracts.

In addition, the Government proposes to extend the circumstances under which Best Value authorities can provide goods and services to others. It intends to:

- provide a new power alongside existing powers which will enable Best Value authorities to provide a full range of goods and services to others working in partnership with them; and,
- take steps to provide in due course a unified code for trading activities.

The new powers will seek to balance purpose and risk consistent with best value thus providing safeguards to local taxpayers and local businesses to ensure that such activity is both appropriate and soundly based.

The Government also proposes to remove obstacles to the achievement of best value in waste management by repealing the divestment provisions in the *Environmental Protection Act 1990*. These currently require waste disposal authorities either to divest to the private sector or to transfer to 'arms length' local authority companies their service delivery functions and to procure competitively tendered contracts. These prescriptive requirements are inconsistent with the principle that it is for individual authorities to determine the means by which they can achieve best value.

Finally, the Government also invites views on other possible future uses of the powers in sections 16 and 18 of the 1999 Act. It would not generally wish to make further use of the section 16 powers other than on a systematic basis, and following a review which would consider, for example, the progress underway in:

- joint working across geographical and administrative boundaries;
- involving the private, voluntary and community sectors in the delivery of local services;
- delivering local services with a citizen focus which builds service delivery around the needs of particular user groups or life events; and,
- tackling the root cause of social problems, such as drug abuse and social exclusion, rather than dealing with their symptoms.

CONSULTATION QUESTIONS

The Government would welcome views on the following questions:

Chapter 1: Introduction and Purpose

- Q1. How can we harness the obvious benefits of partnership with others outside local government without losing the essential elements of local governance, accountability and transparency?
- Q2. How can partnerships, which might embrace multiply partners striving to build for the longer term, be flexible enough to change over time as demands change and new solutions emerge?
- Q3. What risks are associated with these new forms of delivery, how best are they managed, and what steps can be taken to address the possibility of failure, and dealing with disputes which might arise?
- Q4. What new skills are needed by these forms of relationships and how do we build these?
- Q5. Where do partnerships designed to deliver key services fit into the wider agenda of community leadership and Local Strategic Partnerships and how can we harness the benefits of new forms of service partnerships to bring wider community benefits?

Chapter 2 and Annex A: Using Public Resources Efficiently and Effectively

- Q6. Do the proposals provide a comprehensive legal basis for Best Value authorities to work with each other and with bodies elsewhere in the public and private and voluntary sectors to improve the economy, efficiency and effectiveness of their functions?
- Q7. Are these circumstances in which other public bodies wishing to work with Best Value authorities may be restricted by their own legal constitution, causing problems when trying to create the partnerships envisaged in this chapter?
- Q8. Are there any express restrictions, prohibitions or limitations contained in legislation affecting Best Value authorities which should be 'excluded' to allow authorities greater flexibility in the use of these powers?
- Q9. Is the scope of the proposed non-statutory best practice guidance sufficient to support the use of these partnership powers (*see Figure 2*)?
- Q10. Is the use, form and content of the proposed Partnership Memorandum and a pool manager to provide the main focus of establishing governance and clear lines of responsibility appropriate (*see Figures 12 and 14, Annex A*)?

Chapter 3 and Annex B: Creating Structures for Partnerships

- Q11. Do the proposal for general powers to form companies and other corporate bodies provide a comprehensive basis to enter into such arrangements?
- Q12. What issues should be considered in extending the scope of the *Local Government (Contracts) Act 1997* to cover local authority participation in companies and joint ventures?
- Q13. Will the proposal for authorities to be able to delegate functions to certain local authority controlled companies provide flexibility in the use of these special purpose vehicles?
- Q14. Is the scope of the proposed statutory and non-statutory guidance for the use of companies sufficient to support the use of this power (see *Figure 3*)?
- Q15. What key issues should be considered in reviewing the regulatory framework for local authority interests in companies set out in Part V of the *Local Government and Housing Act 1989* and the *Local Authorities (Companies) Order 1995*?
- Q16. Is there a role for a further special purpose vehicle – a *Joint Public Partnership Board* – which could involve parties elsewhere in the public sector as well as in the private and voluntary sectors, but still remain within the local government political management framework?
- Q17. What key issues should be considered in drawing up a new power under the 2000 Act to allow authorities to provide indemnities to their members and officers?
- Q18. What role can Employee Share Ownership schemes play in the local authority partnerships with the private sector, and in the sector generally?
- Q19. What do you consider to be best practice in terms of non-statutory governance arrangements for strategic partnerships?

Chapter 4 and Annex C: Supplying Goods and Services

- Q20. Are the proposals to provide additional trading powers to Best Value authorities sufficient to enable them to develop the arrangements necessary to achieve best value?
- Q21. Is the list of purposes envisaged for these new powers appropriate?
- Q22. Are there sufficient safeguards in the proposals to protect local taxpayers from possible financial risks and local businesses against possible unfair and inappropriate competition?
- Q23. Is the proposal to limit the total amount of activity undertaken by an authority using the new powers through a prudential indicator appropriate?
- Q24. Do the new powers provide sufficient incentives for the development of public-private partnerships?

- Q25. Are the arrangements for disclosure for accounting purposes sufficiently transparent and achievable?
- Q26. Are the outline proposals for the accompanying statutory guidance to these powers sufficient (*Figure 6 and Annex C*)?
- Q27. What steps should be taken to help create a single statutory framework, for example, by excluding the application of s38 of the *Local Government (Miscellaneous Provisions) Act 1976*; revoking existing Orders; and not designating any further 'public bodies' under the *Local Authorities (Goods and Services) Act 1970*?
- Q28. Should the *Local Authorities (Goods and Services) 1970* and in Wales section 15 of the *Local Government (Wales) Act 1994* be repealed if a suitable legislative opportunity were to occur?

Chapter 5: Partnerships for Waste Management

- Q29. Are the proposal to remove the barriers to partnership working sufficient to enable local authorities to deliver better waste management services to their community?
- Q30. Will the proposals encourage the development of effective partnerships both between local authorities as well as between local authorities and the private and voluntary sectors to deliver integrated waste management?

Chapter 6: Future Action

- Q31. What areas should be the focus for future review, and action, using the section 16 power (and other legislative tools) once the proposals in this paper are implemented?

CHAPTER 1

Introduction and Purpose

- 1.1 Best value requires local authorities to secure continuous improvements to the quality and efficiency of the services for which they are responsible. Changing public expectations and technology both demand change and make it possible. If authorities are to meet this challenge, then they need a legal framework which allows them the flexibility to work with others in the public, private and voluntary sectors to deliver services in new ways. They also need a framework which provides proper accountability to local people wherever these new ways of delivering services are adopted.
- 1.2. Old contractual arrangements, such as those that characterised Compulsory Competitive Tendering (CCT), look increasingly inappropriate in a world where authorities are seeking to work with partners to encourage a commitment to common objectives, to the sharing of risks and to innovation and continuous improvement. Formalising these arrangements present new challenges and new opportunities. It is therefore important that the legal framework within which authorities operate permits rather than restricts new and imaginative arrangements. At the same time, the responsibilities of the partners need to be clearly defined under the new structures and accountability clearly established.
- 1.3. New approaches to contracting are evident through initiatives such as PFI, *Rethinking Construction* and the development of Service Delivery Partnership arrangements with the private sector. These redefine the traditional roles of the client and contractor to find better ways of achieving the outcomes that users of local services wish to see. The aim is to build contracts which focus on outcomes, with control being exercised through a shared approach to knowledge and relationships.
- 1.4. At the same time, authorities need to consider how services can be delivered through Local Strategic Partnerships with neighbouring authorities and other local stakeholders. Collaborative approaches to sharing assets and other resources and providing joined up solutions to local problems, and local services, are increasingly necessary.
- 1.5. These new forms of partnerships need to function within the local government statutory framework and within the wider modernisation agenda that the Government is pursuing. Each part of the modernisation programme has a contribution to make to improved services and to partnership working. But new forms of working raise important questions such as:
 - how are the benefits of partnership with others outside local government realised without losing the essential elements of local governance, accountability and transparency?
 - how can partnerships, which embrace more than one partner and extend over a number of years, be flexible enough to change over time as demands change and new solutions emerge?

- what risks are associated with the new forms of service delivery, how best can they be managed and what steps can be taken to address the possibility of failure and the disputes that might arise?
- what new skills are needed by these forms of relationship and how can they be acquired?
- where do partnerships designed to deliver essential services fit into the wider agenda of community leadership and Local Strategic Partnerships and how can the benefits of these service partnerships be harnessed to bring about wider community benefits?

1.6. A new legal framework, as proposed in this consultation paper, cannot resolve all these questions. The Government will continue to explore other means of doing so. It will, for example, wish to work with others to research and develop new models of delivery, increase knowledge and build capacity across the board. It has already begun work in two areas:

- **DETR/LGA Taskforce led by Sir Ian Byatt to review procurement and commissioning practices in local government.** The Taskforce's aim is to identify what is considered to be best practice not just in local government, but elsewhere, and make recommendations that will build lasting capacity. It will report in May 2001. Its terms of reference are reproduced at **Annex D** of this paper; and,
- **Research and Development Programme on Service Delivery Partnerships** to promote and test alternative models in order to identify the conditions under which they might flourish (see *Figure 1*).

Figure 1: DETR Research and Development Programme on Service Delivery Partnerships

The Government is establishing an R and D Programme to assist in the development of Service Delivery Partnerships in local government. These Service Delivery Partnerships arrangements embrace innovative and far-reaching forms of commissioning and procurement. The main aims of the programme are to:

- learn the lessons from existing strategic partnering arrangements;
- identify the critical success factors for their development;
- facilitate the growth of Service Delivery Partnerships by undertaking R and D work which will build supply and demand capacity; and,
- help and assist authorities in identifying business needs and develop strategic partnering arrangements where it is appropriate to do so.

A prospectus for the programme is currently being developed and will be published shortly.

Section 16 of the Local Government Act 1999

1.7. Where proposals in this paper require changes in legislation the intention is to use the powers in Sections 16-18 of the *Local Government Act 1999* (the '1999 Act')¹. They enable the Secretary of State:

- to modify or exclude existing enactments which apply to Best Value authorities if he is satisfied that such action would remove a provision which restricts an authority's ability to achieve its statutory duties under best value;
- to confer on Best Value authorities a power to do anything which he considers necessary or expedient to permit or to facilitate the achievement of best value; and,
- to allow Best Value authorities to contract out functions where that would facilitate the achievement of best value (to bring them in line with local authorities who are currently covered under the *Deregulation and Contracting Out Act 1994*²).

An order made under these provisions may impose conditions on the exercise of any power conferred.

- 1.8. Section 17 of the 1999 Act sets down the procedures that the Secretary of State must follow in making orders for new and amended powers under section 16. He is required to '*consult such authorities or persons as appear to him to be representative of interests affected by his proposals*'. A copy of the relevant parts of the 1999 Act and related explanatory notes are reproduced in **Annex E** of this paper.
- 1.9. In February 1999 the Government prepared a discussion paper for the House of Commons Standing Committee, which was then considering the Local Government Bill 1998³, on the rationale for the Government taking these powers. It also provided illustrations of the possible uses to which these powers could be put to further best value, initially in four key areas:
 - facilitating joined-up service delivery including working across organisational boundaries to provide integrated services;
 - the development of more service delivery models with an emphasis on partnerships;
 - clarifying the circumstances under which authorities can provide goods and services to others; and,
 - making better use of existing public assets.

Since then the Department has held a number of informal discussions with local government, the private and voluntary sectors and the legal profession. This paper takes account of those discussions.

- 1.10. More recently, the *Local Government Act 2000*⁴ (the '2000 Act') has added a new factor in the form of a general power for principal local authorities to do anything intended to promote or improve the economic, social or environmental well being of their areas. Although this power is subject to express restrictions, limitations and prohibitions in other legislation, it greatly extends local authorities' vires. The well-being power can be used in substitution for any existing statutory power, and such use removes implicit restrictions from biting on the well-being power. This in effect allows local authorities to extend the scope of their activities as long as they are of the opinion that the action they are taking promotes or improves well-being. The guidance on the use of the power makes clear that

local authorities can enter into a variety of arrangements with other bodies provided that those arrangements promote or improve local well-being⁵. For principal local authorities s2(1) of the 2000 Act provides a broad power to act where those authorities wish to further community well-being⁶.

- 1.11. However, there are other issues not addressed through the well-being power such as local authority trading, delegation and charging. Local authorities cannot use the well-being power to raise money, whether by precepts, borrowing or otherwise. This stops them from using the power to charge for discretionary services, but the Government is looking at this issue and intends to bring forward regulations under s150 of the Local Government and Housing Act 1989 to allow authorities to charge for discretionary services provided under their statutory powers, including under the well-being power. The well-being power is also not available to special purpose authorities – e.g. fire, police and passenger transport. The proposals in this consultation paper thus complement the provisions in the 2000 Act, extend the approaches available to other local authority functions, and go further in some key areas of local authority activity – as well as applying in all respects to other best value authorities.

Application to Welsh Authorities

- 1.12. These proposals apply to England and Wales subject to the views of the National Assembly for Wales.
- 1.13. The National Assembly for Wales is unable to exercise the powers under section 16 since they effect changes to primary legislation. However, section 29 of the 1999 Act requires that in relation to the powers under section 16, the Secretary of State '*shall not make any provision which has effect in relation to Wales unless he has consulted the National Assembly for Wales*'. In addition the Secretary of State requires the consent of the National Assembly if he uses his section 16 powers to amend, modify or exclude the application of legislation made by the National Assembly. There are no proposals contained in this paper which affect legislation passed by the National Assembly for Wales.
- 1.14. Apart from the proposals set out in Chapter 5 on the exclusion of the divestment provisions in the *Environmental Protection Act 1990* (which was announced in the joint England and Wales Waste Strategy)⁷, a decision whether to apply the rest of the proposals contained in this paper to Wales will await the conclusion of this consultation exercise. The Government will then consult the National Assembly for Wales.

CHAPTER 2

Using Public Resources Efficiently and Effectively

Introduction

- 2.1. Public services need to be responsive to the needs of citizens not merely the convenience of service providers. All too often traditional boundaries between providers hinder the ability to build services around the needs of those who use them. The result is often a confused pattern of service delivery and a duplication of effort and resources locally. Staff working in public services can be as frustrated by these failures as are the people they are trying to help. That is why the Government wants to see central and local government using their joint abilities and capacities to work more efficiently and effectively with each other and with those in the private and voluntary sectors.
- 2.2. Organisations that have common objectives should be able to co-operate and pool their resources to achieve higher standards of delivery. This is rarely a problem for the private and voluntary sectors but local authorities have to date been restricted as to what they can undertake with others by means of joint working.
- 2.3. Joint working arrangements have tended to focus on the establishment of joint committees of local authorities⁸. There have also been significant developments in relation to crime and disorder and health. In order to ensure that Best Value authorities can use their resources more creatively to deliver services in the most efficient and effective ways, the Government proposes to provide a clear framework of new powers which would allow authorities to extend joint working in new ways, including working with the private and voluntary sectors.

The Government's Proposals

- 2.4. It intends to combine the approach taken in respect of the well-being power in the 2000 Act with that provided under the *Health Act 1999*. It will provide four new discretionary powers which will enable authorities to:
 - incur expenditure in support of the achievement of best value;
 - give financial assistance to any person;
 - enter into arrangements or agreements with any person; and,
 - co-operate with, or facilitate or co-ordinate the activities of any person.

- 2.5. These powers will include the ability to:
- provide grants, loans or guarantees;
 - second or loan staff to and from any person;
 - pool resources into a joint budget (for example: money, staff, information technology, equipment and other assets including pre-existing contracts);
 - contribute funds within an agreed framework or plan to transfer or take on the lead commissioning role;
 - enter into joint commissioning arrangements; and,
 - integrate, within a single organisational structure, the provision of services with the services provided by others.
- 2.6. This is not an exhaustive list of activities that could be undertaken under these powers. They are examples and, as such, are not intended to limit the generality of the powers.
- 2.7. The new powers not only affect the delivery of front line services to the public. They could also be used to deliver support services, to procure commodities, goods and works, or to create and hold assets on a joint basis covering all functions of a Best Value authority. They will be wide powers, subject only to any express restrictions, prohibitions or limitations in any other legislation, thereby providing an effective substitute for narrower existing powers. These restrictions will be kept under review in order to ensure that they are appropriate.
- 2.8. The Government is minded to confine statutory guidance to an explanation of the powers themselves and to encouraging their imaginative use. Non-statutory guidance will, however, cover best practice and provide a simple common framework for governance and accountability issues (see *Figure 2 and Figure 12 of Annex A*). The intention is to permit Best Value authorities to develop proportionate arrangements to fit local circumstances. Further consideration will be given to whether there is a place for non-statutory model agreements in order to reduce the transaction costs of these arrangements.
- 2.9. The proposed new powers will sit alongside the powers granted to local authorities and NHS bodies under section 31 of the *Health Act 1999*⁹. If a local authority wishes to enter into an arrangement which involves a NHS body then that arrangement will, in effect, be subject to any express restrictions, prohibitions or limitations in that legislation. Unlike the Health Act powers, the use of these new powers will not be subject to a notification process.

Figure 2: Partnerships Good Practice Guidance

The intention is to draw on the experience of others in producing non-statutory good practice guidance to support the use of these powers. The Government believes that this guidance should cover the following issues:

- identifying the need for partnerships
- partner selection
- setting aims and objectives for partnerships
- identifying critical success factors
- managing risk
- models for partnerships
- legal and technical issues
- frameworks for governance and accountability
- sustaining partnerships
- managing a corporate wide partnerships agenda

Incurring Expenditure and Providing Financial Assistance to Others

- 2.10. The first two proposed powers will confer in effect a broad spending power on Best Value authorities when they undertake an activity in support of the achievement of best value. It would, for example, allow authorities to fund activities of different groups and bodies, as well as invest in activities, provided that they can demonstrate that the expenditure contributes to the achievement of best value in discharging any of their functions.
- 2.11. Like the well-being power this spending power will contain no restriction or limitation on the amount of expenditure a Best Value authority can incur. Rather, authorities will be able to make a judgement on the level of funding within the context of considering whether the expenditure is (or contributes to) the most economic, efficient and effective method of delivery of a particular function. It may also be given by any means considered appropriate (and which represents best value) including grants, loans or the provision of guarantees.
- 2.12. The proposed power would not be sufficient to enable authorities to grant indemnities against personal loss to their members or officers in *all* the circumstances in which such indemnities might be thought desirable. Instead separate action is proposed on this issue.

Entering into Arrangements and Co-operating with Others

- 2.13. Both the duty of best value and the framework laid down in the legislation encourages authorities to work with others to deliver improved services. The power to enter into arrangements or agreements, and to co-operate with others, provides the legal underpinning for this work.
- 2.14. These powers will be particularly useful in developing Service Delivery Partnerships with the private sector and other public bodies. But it will also be helpful at neighbourhood level where local services need to be delivered jointly.
- 2.15. The Public-Private Partnerships Programme (the 4Ps) is currently developing guidance on the achievement of best value through PFI. The aim is to build best value and partnership working into these contracts and their management. Although many of the considerations in this guidance are likely to be appropriate to other forms of contracting, the Government will consider what more can be done to encourage new forms of partnering contracts in local government, possibly based on more standardisation.
- 2.16. Further examples of how the proposed new powers can be used including secondments, pooled budgets, lead and joint commissioning arrangements are set out in **Annex A**.

CHAPTER 3

Creating Structures for Partnerships

Introduction

- 3.1. Working with others presents local authorities with important choices as to how they formalise relationships with their partners to deliver quality services. No single model fits all the possibilities and the legal framework needs to allow for this in providing greater certainty as well as more flexibility.
- 3.2. A new generation of contractual arrangements is being developed as a result of best value. These mirror developments elsewhere in the economy, in terms of strategic partnership arrangements – involving new definitions of the client and the contractor – where the latter is seen as a partner fully responsible for service delivery and its monitoring. The new approach emphasises risk sharing and shared strategic goals; it includes incentives to work together to secure continuous improvement, and, it involves key stakeholders in improving service responsiveness.
- 3.3. New forms of partnering may require new structures (often referred to as “special purpose vehicles”) and new forms of governance and accountability to reflect this new working environment. This Chapter sets out the Government’s proposals for ensuring that Best Value authorities have available to them a variety of new structures or vehicles designed to be used in combination with the proposed partnership powers.

The Government’s Proposals

- 3.4. The Government proposes to provide Best Value authorities with a power to form and participate in a range of corporate (company) structures to facilitate the achievement of best value. This new power will:
 - include a range of corporate structures as described in Part 1 of *Companies Act 1985* and societies under the *Industrial and Provident Societies Act 1965*: companies limited by shares, or by guarantee; unlimited companies and Industrial and Provident Societies;
 - require local authorities to exercise the ‘control’ they have over a company it has formed or participated in to ensure that the company does not engage in activities other than those which the authority itself could legally undertake;

- enable an authority to delegate¹⁰ executive functions¹¹ to those corporate structures which operate under their 'control'; and,
 - cover all functions of a Best Value authority.
- 3.5. This new power will be subject to any express restrictions, prohibitions or limitations in any other legislation. Subject to that, authorities will be able to use these powers instead of the existing narrower specific powers. This will give authorities greater flexibility to group together services in new and innovative ways.
- 3.6. Companies formed using the new power, like any other, will be subject to the requirements of best value and to the framework of regulations created by *Part V* of the *Local Government and Housing Act 1989* and the *Local Authorities (Companies) Order 1995*. This framework will need to be reconsidered following the provision of the proposed new power and any changes to capital controls which might flow from the current review of local government finance.
- 3.7. Statutory guidance under section 16(5) of the 1999 Act will set out how companies can be used to help authorities to achieve best value. It will cover the issues set out in Figure 3. These issues are explored in more detail in **Annex B**.
- 3.8. The provision of this general power will help overcome the risk of legal challenge some authorities have claimed they face in establishing and participating in companies as a result of the 'ultra vires' doctrine. The private sector will nevertheless wish their interests to be protected in the unlikely event that an arrangement is found to be unlawful for the authority, for example, because of procedural errors. And local taxpayers will not wish to face unnecessary risk.
- 3.9. The Government is therefore willing to consider extending the 'safe harbour' provided for in the *Local Government (Contracts) Act 1997*¹² for major long-term contracts to cover the certification of agreements to the subscription of share or loan capital which will underpin an authority's participation in a company using this power. This would provide protection to partners who enter into joint ventures with authorities (and to third parties who contract with them).

Figure 3: Guidance on Companies

Statutory Guidance

- Background to the powers
- Scope of the powers
 - delegation powers
 - certification under the Local Government (Contracts) Act 1997
 - limits in other legislation
- Facilitating the achievement of Best Value
- Limits and restrictions on the use of the powers
 - controls on the activities of local authority companies
 - use of delegation powers
 - distinction between executive and non-executive functions
 - capital finance framework on companies
 - propriety controls on local authority interests in companies
 - audit, inspection, accounting

Non-Statutory Guidance

- Why companies?
- Issues to consider in setting up companies
- Running a company
- Corporate governance for companies

3.10. In parallel with these measures, the Government will:

- review the regulatory framework set out in *Part V of the Local Government and Housing Act 1989* and the *Local Authorities (Companies) Order 1995* in the light of the review of local government finance and the proposals in this paper;
- use its powers in *section 101 of the Local Government Act 2000* to confer a power on local authorities in England and police authorities in Wales to provide indemnities to their members and officers;
- investigate the role which Employee Share Ownership schemes can play in the local government sector; and,
- establish best practice in governance arrangements in service delivery partnership contracts.

Establishing and participating in companies and corporate bodies.

3.11. At present, there are few explicit powers for authorities to create and enter into corporate agreements except for specific activities such as waste disposal and certain transport functions (see *Figure 4*). These explicit powers appear to have arisen in a piecemeal way

and the end result, with the absence of powers in other areas, provides with hind-sight no logical coherence to the framework. Where no specific powers exist, authorities have relied upon section 111 of the *Local Government Act 1972*¹³. However, subsequent case law¹⁴ has drawn tight boundaries around the use of section 111: this has created some uncertainty as to the legality of local authority participation in companies and other corporate structures.

Figure 4: Examples of existing powers for Local Authorities to establish and participate in companies

- section 67 of the Transport Act 1985 allows a local authority to form a company to take over a bus undertaking;
- section 58 of the Housing Associations Act 1985 allows a local authority to set up an unregistered housing association;
- section 13 of the Airports Act 1986 allows a local authority to own a municipal airport company;
- section 33 of the Local Government Act 1989 allows a local authority to establish a commercial undertaking pursuant to the economic development of their areas; and,
- section 32 of the Environmental Protection Act 1990 allows a waste disposal authority to form or participate in a waste disposal company

- 3.12. The new power to promote well being in the *Local Government Act 2000* now enables principal authorities to form or participate in companies, trusts or charities, including joint venture companies. This is provided that they are satisfied that the primary purpose behind the formation of, or participation in, a particular company is likely to achieve the promotion or improvement of the economic, social or environmental well-being of the authority's area.
- 3.13. Both this new power and the existing specific powers to form companies derive from the view that authorities should only be given such powers in appropriate commercial fields such as the provision of leisure facilities, economic regeneration, theatre and conference facilities. But under best value there are considerable benefits in making such powers available in relation to authorities' other mainstream functions. This will expand the range of service delivery options available to authorities in delivering best value in any given circumstance.

Non-Company Structures

- 3.14. As part of the drive to provide efficient and effective services authorities are expected, especially in best value reviews, to consider whether services are being provided on an optimum scale and whether joint provision with other authorities would secure better economies of scale and best value.¹⁵ The previous Chapter refers to new ways in which joint provision might be undertaken. Local authority companies represent a further possibility.

SOCIAL CORPORATE ENTITY

- 3.15. A variant of this might be a new 'social corporate entity' as an alternative to Company Act structures. This proposal has been raised in discussions but it is unclear whether there is a need for such an entity given the availability of options such as Industrial and

Provident Societies¹⁶ and charitable trusts to local authorities and their partners. If authorities are able to provide indemnities to their elected members and officers when acting as company directors or trustees, as proposed in paragraph 3.20, the use of company structures will become more attractive. In any case, it would make sense to await the outcome of related developments such as the review of company law¹⁷; the review of the *Industrial and Provident Societies Act 1965*¹⁸; and the work of the Commission on the Co-operative Movement¹⁹, before coming to a firm view.

JOINT PARTNERSHIP BOARDS

3.16. Joint Committees have a continuing role to play in providing a vehicle through which local authorities can work together. It is unclear whether they will be sufficiently flexible to cope with the variety of opportunities for joint working that are emerging. In particular, there may be a demand to embrace private and voluntary sector partners within the new structures and legislation will be needed to facilitate that. One possibility would be to legislate for a 'Public Partnership Board' which could have the following features:

- a Board could be established by two or more Best Value authorities;
- it would operate within the local government management structure and ethical framework as set out in Parts II and III of the *Local Government Act 2000*;
- a Board could be empowered to hold assets, employ staff (who remain essentially in the public sector), borrow and obtain the money it needs from constituent authorities;
- for accounting purposes it could be a quasi-body with separate accounts;
- with the exception of non-executive functions, authorities could be able to co-opt outside members, and these members could have voting rights if the participating authorities so decide;
- authorities would be able to delegate functions to such Boards; and,
- Boards, for executive functions only, would not be subject to political balance considerations.

3.17. While the development of such Boards might be some way off, nevertheless it would be useful to consider its implications and possible applications. The Government would therefore welcome views as to the value of such Boards and the way in which they might operate.

NON-STATUTORY PARTNERSHIP BOARDS

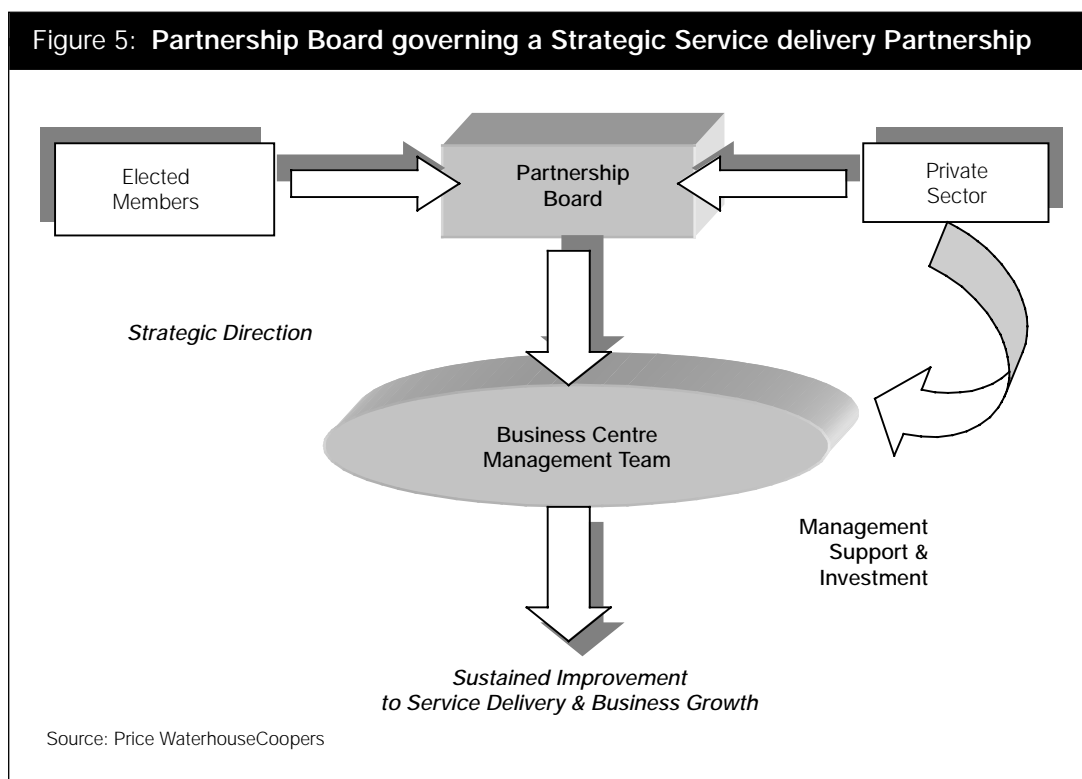
3.18. There has been a welcome trend in adopting non-statutory Partnership Boards to oversee strategic partnership arrangements between local authorities and the private sector. Their aim is to bring elected members, senior officers and company directors together to discuss strategic issues relevant to the partnership such as:

- business strategy and policies;
- future budgets and overall financial arrangements;

- dispute resolution; and,
- the wider impact and role of the partnership in the local community.

They are mirrored elsewhere in the management structure and in the supply chain with any sub-contractors.

- 3.19. As these arrangements are non-statutory, they are either built into the contract or governed through a separate memorandum. The Government considers that there are benefits in establishing best practice in such arrangements with a view to wider dissemination.



Authority Company Directors – Liability Issues

- 3.20. Elected members and officers acting as directors of local authority companies have some legal responsibilities distinct from those which arise from their role as councillors or public servants. Concern has been expressed about whether these responsibilities could come into conflict leaving elected members and officers exposed legally. In particular, concern has been voiced about:

- actions undertaken on behalf of an authority which are subsequently deemed to be ultra vires;
- the ability to provide explicit indemnities to elected members, as opposed to officers; and,
- the circumstances where statutory immunity (through section 256 of the *Public Health Act 1875*) is provided;

- 3.21. Although the proposals contained in this paper, together with the new power of well-being, provide greater certainty as to vires which will prevent situations arising where indemnities are required, the Government believes that there are sufficient gaps and uncertainties in the legal framework on these issues to justify specific powers on these matters. It proposes, therefore, to take powers under section 101 of the *Local Government Act 2000* which will allow the Secretary of State by order to confer a power on local authorities in England and police authorities in Wales to provide indemnities to their members and officers. Section 101 of the 2000 Act provides an equivalent power to the National Assembly for Wales in relation to Welsh authorities. The Government will be considering with the Local Government Association and others how to make best use of these powers and will consult separately on its proposals.

Employee Partnership Schemes

- 3.22. The Government recognises the importance of fair employment and the contribution that a well-motivated and well-trained workforce can make to the provision of public services. Sustained improvement under best value depends on employees being committed to providing high quality and cost effective services to the public.
- 3.23. In addition to the new opportunities and new skills that different forms of partnerships should bring, the Government will also consider other ways in which the right incentives might be given to staff to involve them as active members of a partnership. For example, there is a wide range of potential employee partnership schemes, from simple performance-related pay schemes through to employee share ownership schemes, which have a potential contribution to make. The all-employee tax-advantaged schemes²⁰ for example promote enterprise for the whole workforce and not just a few senior staff. They help all employees to share in the success of the company.
- 3.24. These schemes have a role to play in local government, particularly in local authority companies and joint ventures, as they have in other parts of the public sector. They can also be used by private contractors operating within the local government sector as much as in the wider private sector. The Government does not believe that there are any legal obstacles to their development but would welcome views as to their role and promotion.

CHAPTER 4

Supplying Goods and Services

Introduction

- 4.1. Where they do not have specific powers²¹, local authorities may rely on the provisions of the *Local Authorities (Goods and Services) Act 1970*²² (the '1970 Act') to enable them to supply goods and materials, and various administrative and technical services, to other local authorities or to designated 'public bodies'. For the purposes of the 1970 Act, a 'public body' is a local authority, a police authority, a Housing Action Trust or such bodies specified in orders made by the Secretary of State.
- 4.2. Over the years authorities have made extensive use of these powers to provide goods and services to other authorities often to make better use of surplus capacity amongst the direct labour force and to secure the benefits of scale economies. These powers have often been helpful to authorities in working with others in the public sector.
- 4.3. The 1970 Act, however, hinders the achievement of best value in a number of ways. It restricts the type of services provided and the bodies with whom an authority can trade. For example, the range of goods and services which authorities are permitted to supply is narrower than that permitted under section 2(1) of the *Local Government Act 2000*. The 2000 Act allows local authorities to provide staff, goods, services and accommodation to any person in connection with their power to promote the economic, environmental and social well being of the area, even though Section 2(3) prevents authorities from charging for them. In practice, this constrains the use of the new power in the supply of goods and services to others in return for a fee or a charge. However, the Government proposed in the Green Paper on Local Government Finance that local authorities should be given powers to charge for discretionary services, including those provided under the well being power. Further work is being done on this in the light of responses received to the Green Paper.
- 4.4. More significantly, the 1970 Act limits those to whom authorities can supply goods and services and is more restrictive than is consistent with the Government's intention to promote a range of partnerships between authorities and other public bodies and with the private and voluntary sectors. Such arrangements are needed to ensure that authorities are able to consider as wide a range of options as possible in delivering efficient and effective services under best value and that authorities are able to make best use of their asset base.
- 4.5. In its discussion paper presented to the House of Commons Standing Committee on the 1998 Bill, the Government suggested that one way forward in the interim was to streamline the operations of the 1970 Act. This might be done by designating categories of organisations rather than individual organisations as 'public bodies' on a case-by-case basis. It now takes the view that more far-reaching changes are needed. Designation by category would only perpetuate the current distinction between the public and private sectors in establishing trading relationships. It would be preferable, therefore, to effect a comprehensive longer-term solution based on a new legislative framework which would balance purpose and risk consistent with best value.

The Government's Proposals

- 4.6. The new framework would allow all Best Value authorities to enter into agreements with any other person to provide staff, goods, services or accommodation so long as it is directed towards the achievement of best value in the related function. These new powers proposed are intended principally to assist authorities to explore a full range of options to deliver best value in respect of the core services for which they are responsible. The Government has identified 3 broad purposes within which it believes it is justifiable for Best Value authorities to provide goods and services (this is explored in paragraph C.5).
- 4.7. Any agreement made using these powers would contain such terms and conditions as to payment as the parties considered appropriate subject to any guidance provided by the Secretary of State. The power could only be used where the goods or services concerned are provided in connection with an authority's functions. It will be subject to any express prohibition, restrictions or limitations which are contained in any other enactment. This is apart from those in the *Local Authorities (Goods and Services) Act 1970* and, in relation to Welsh Authorities, section 25 of the *Local Government Act (Wales) 1994* which will remain on the statute book for the time being.
- 4.8. The Government will also take steps to create a single unified statutory framework for local authority trading by:
- using its powers in section 16(1) of the 1999 Act to exclude English and Welsh authorities from the provisions of section 38 of the *Local Government (Miscellaneous Provisions) Act 1976*, relating to trading in spare computer capacity;
 - revoking in relation to England and Wales all existing orders made under section (1) (5) of the *Local Authorities (Goods and Services) Act 1970* which designates persons as 'public bodies' for the purposes of that legislation. This will be subject to further consultation with the parties concerned; and,
 - adopting an administrative policy of not designating in England and in Wales any further persons as 'public bodies' under 1970 Act.
- 4.9. These provisions will give all authorities the flexibility that they need to develop the new arrangements which are necessary to secure best value. The Government will also consider in due course whether the *Local Authorities (Goods and Services) Act 1970* and, in relation to Welsh Authorities, section 25 of the *Local Government Act (Wales) 1994*, are needed or whether repeal would be the better option.
- 4.10. Greater freedom to supply goods and services to others poses a potential risk to local taxpayers and could, if unrestricted, lead to inappropriate competition with the private sector. To minimise the potential risks and ensure transparency, a number of prudential controls are proposed for the new framework.
- 4.11. Firstly, the total value of goods and services provided to others using either the new powers alone, or the new powers in conjunction with the existing powers, would be restricted to a specified financial limit which would be expressed as a prudential indicator. The Government's initial view is that such an indicator should be calculated as a proportion of its non-service specific income as shown in its consolidated revenue account for the previous financial year. Specifically, the proportion would be applied to the aggregate of the following figures:

- demands or precepts from the Collection Fund
 - transfers to/from the Collection Fund (e.g. in respect of the previous year's deficit/surplus)
 - government grants (not attributed to specific services)
 - distribution from non-domestic rate pool.
- 4.12. The limit may be set at different levels for different classes of Best Value authority. It will need to reflect the likelihood that the majority of trading conducted between local authorities, and local and police authorities, housing action trusts and parish councils is likely to continue to be conducted using the 1970 Act, and in Wales the 1994 Act, provisions.
- 4.13. Guidance will be given as to the appropriate basis for the calculation of trading activity for the purposes of the prudential indicator. It will make clear that authorities should ensure that no single project or trading unit should form in itself a significant proportion of trading activity across the authority as a whole. But where projects are being conducted through a public-private partnership, or through an arms-length arrangement (not withstanding an authority's involvement in that arrangement), it is proposed to omit that element of turnover from the calculation for the purposes of meeting the prudential indicator in respect of:
- **transactions involving local authority assets or services provided that sufficient risk has been transferred to the private sector.** This might be based upon a balance sheet test similar to regulation 40 of the *Local Authorities (Capital Finance) (Amendment) (England) Regulations 1999*²³. This could exclude turnover related to agreements between a local authority and another person where for the overall project there is no increase in any amount on the authority's balance sheet in respect of the assets provided, constructed or improved under the arrangement;
 - **where an authority has vested its trading unit(s) in an arms-length company, which is 'controlled' or 'dominantly influenced' by the authority(ies) but exercises that control or influence to secure that:**
 - the majority of the directors have a status which effectively protects them from undue influence;
 - transactions between the authority and the company are at arms' length;
 - the financial relationships between the authority and the company are clearly regulated to avoid deficit financing; and
 - the company is in competition with a market.

The Government's initial view is that such a company can be defined by reference to section 68(6)(a)-(h) of the 1989 Act²⁴.

- 4.14. In addition, transactions between an authority and a company which is under its 'control', other than arms-length companies, would not be counted for the purposes of the prudential indicator.

- 4.15. Where an authority establishes a joint venture with a private sector partner, and where ‘effective control’²⁵ is retained by the private sector so that the company is not regulated by the *Local Authorities (Companies) Order 1995*, then that entity would be considered to be outside the proposed regulatory framework. But the activities of controlled and influenced companies whose trading activities are authorised by these powers will be considered inside the prudential controls unless they are managed at arms-length.
- 4.16. The new power, like the 1970 Act, will require authorities to prepare separate accounts in respect of agreements made under the new legislation. This legislative framework will be supported by statutory guidance, which will cover the issues set out in *figure 6*. **Annex C** expands on *figure 6*.

Figure 6: Guidance on Companies

- Background to the powers
- Purposes
- Use of Public-Private Partnerships
- Link to Best Value
- Trading accounts and form of disclosure in Best Value Performance Plans
- Prudential Indicator and the calculation of trading activities
- Financial health and management of external Trading Units
- Project Business Cases
- External Trading Unit Business Plans
- Role of elected members and Finance (monitoring) Officers

- 4.17. The Government will also consider providing further non-statutory guidance on the development of *wider market* activities which will assist authorities in making best use of their asset base.

Using the New Powers

- 4.18. The Government has identified three general purposes where it believes it justifiable for authorities to provide goods and services to others in support of best value. These are:
- in providing small value, small volume goods and services to disadvantaged parts of their community where the market has failed to do so in the past and is unlikely to be able to so in the near future;
 - in providing small value, small volume goods and services to voluntary and community groups operating within their geographical area to build and sustain their capacity; and,
 - in making best use of existing public assets through exploiting wider markets for goods and services, either on their own or in partnership with others in the public, private, voluntary and community sectors.
- 4.19. In considering how best to make appropriate provision to enable authorities to provide

these services, the Government has sought to distinguish between activities that constitute trading and those for which a charge can be made. Where an authority provides goods and services to other bodies, and where the relationship is governed by an agreement, that activity normally constitutes trading and is normally carried out using the 1970 Act powers to recover costs and make a return on its investment. When an authority provides discretionary services which derive from their functions to individuals or bodies, and charges for these, using either a specific power or powers in section 150 of the *Local Government and Housing Act 1989*, then that activity constitutes charging.

- 4.20. Against this background, the Government considers that the provision of small value, small value goods and services to disadvantaged local people in circumstances where the market has failed to provide such services, is best provided using the powers in section 2 of the 2000 Act and in section 150 of the 1989 Act. The Green Paper '*Modernising Local Government Finance*' makes clear that authorities should be given greater powers to charge for discretionary services including specific services provided under the 2000 Act.
- 4.21. In the case of the two remaining purposes – the provision of small value goods and services to build capacity in voluntary and community groups, and in meeting the best use of public assets – the Government expects those to be achieved under the new framework described in this chapter using the powers in section 16 of the 1999 Act.

CHAPTER 5

Partnerships for Waste Management

Introduction

- 5.1. The duty of best value applies equally to Waste Disposal Authorities (WDAs) and Waste Collection Authorities (WCAs). They will be expected to deliver their waste management services to clear standards – covering both cost and quality – by the most effective, economic and efficient means available taking into account local circumstances and in consultation with local stakeholders. The Government has also announced that it will set statutory performance standards for household waste recycling, requiring authorities on average to double their recycling rate by 2003/4, and triple it by 2005/6.
- 5.2. Best value will be the key to delivering these challenging targets. Developing effective partnerships between WDAs and WCAs in two-tier areas, between neighbouring WDAs and WCAs, and between authorities and the waste management industry, will be essential for delivering increased recycling and more sustainable waste management. The Government is therefore keen to remove any obstacles to closer co-operation and collaboration and the achievement of Best Value in these aims.

The Government's Proposals

- 5.3. The prescriptive framework imposed on WDAs by the *Environmental Protection Act 1990* (EPA) for the delivery of their functions does not sit well with the 'what matters is what works' approach of best value. The Government therefore proposes to repeal the divestment and contractual requirements for waste disposal contained in the 1990 Act. This will allow local authorities flexibility in making arrangements for delivering their statutory duties for waste management. Fundamental reviews of waste collection and disposal services – which the Government believes should be carried out at the same time where possible – will provide an opportunity for authorities to consider how best to use this flexibility.
- 5.4. The proposed repeal will be enacted by the issuing of an order under section 16(1) of the 1999 Act. This will exclude waste disposal authorities from:
 - the provision in section 32 of the EPA which covers the transition to Local Authority Waste Disposal Companies;
 - the requirement in various sections of Part II of the EPA that authorities carry out their waste disposal function only through arrangements with 'waste disposal contractors'; and,

- Schedule 2 of the EPA, which lays down detailed procedures for the transition to Local Authority Waste Disposal Companies, and for putting waste disposal contracts out to tender.
- 5.5. Authorities will retain their existing statutory duties for waste management. The purpose of the proposals is to allow authorities to discharge these functions more flexibly.

Benefits of the Government's Proposals

- 5.6. Bringing the waste disposal function fully within the best value framework will create the conditions under which there is likely to be greater interest from the private and voluntary sectors in working with local government to deliver quality services at a competitive price. That interest is already apparent in the waste management sector and is reflected in the increasingly constructive relationship between authorities and the private sector developed through the sharing of ideas, the tendering process, joint ventures and capital investment projects utilising the Private Finance Initiative.
- 5.7. The repeal will not have any effect on existing Local Authority Waste Disposal Companies (LAWDC) who will be able to continue to operate in their current form, though again with the proviso that authorities will need to demonstrate that undertaking their waste disposal responsibilities through a LAWDC represents best value.

Figure 7: Waste Disposal Authority divestment provisions in the Environmental Protection Act 1990

Part II of the Environmental Protection Act 1990 requires local authorities to divest themselves of their waste disposal responsibilities. The provisions in the EPA created a mechanism for the transfer of waste disposal facilities out of the local authority, and into either a wholly or partly owned arms-length company – a Local Authority Waste Disposal Company (LAWDC) or directly into the private sector. Schemes for transferring waste disposal undertakings to LAWDCs require the approval of the Secretary of State. They also obliged local authorities (unless they are still in the process of transfer) to carry out their waste disposal responsibilities exclusively by means of letting contracts and rules were laid down for how those contracts should be let.

The aim of the divestment provisions was to introduce competition for waste disposal contracts to encourage a more efficient service and identify the full costs of waste disposal. Nearly all waste disposal authorities have now completed divestment and those that have not are under direction from the Secretary of State to do so.

Another reason behind the requirement for divestment was to separate local authorities regulatory responsibilities for waste sites from their operational responsibilities for the same sites. However, this is no longer an issue as local authorities' regulatory responsibilities were transferred to the Environment Agency with effect from 1 April 1996.

- 5.8. Historically, waste collection and waste disposal have been subject to different regimes. Collection has been subject to Compulsory Competitive Tendering (CCT) whilst waste disposal has been subject to the EPA provisions. Following the abolition of CCT and the proposed 'repeal' of the EPA divestment provisions outlined above, collection and disposal will be placed on the same footing as all other local authority services.

- 5.9. The repeal will help to encourage and facilitate partnerships between two or more authorities and between authorities and the private sector through:
- increasing the range of procurement options open to local authorities widening the range of options beyond the creation of LAWDCs or externalisation to encompass the development of joint ventures and private-public partnerships;
 - making it easier for authorities to procure waste services using the PFI route. Authorities and the waste industry have indicated that the tendering procedures prescribed by the EPA complicate the PFI procurement option;
 - providing opportunities for waste disposal and collection authorities to work together to develop joint contracts for waste collection and disposal.
- 5.10. Waste disposal authorities will also be able to take advantage of the proposals for facilitating partnership working between authorities and with the private sector outlined elsewhere in this consultation paper in order to deliver their services by the most effective means. In particular they will be able to:
- use lead or joint commissioning to achieve economies of scale when letting joint contracts; and,
 - enter into a wider range of joint ventures and participate in a wider variety of companies, which will increase the potential vehicles for delivering waste management services.
- 5.11. These proposals will encourage a more collaborative approach to the procurement of waste services. This should allow authorities to package their services in new ways, the most obvious being the integration of collection and disposal services. There will also be opportunities for packaging waste services with other environment services e.g. street cleansing and grounds maintenance. This approach will be of particular relevance to unitary authorities with responsibilities for both collection and disposal and where a single contract and provider for both services could deliver significant financial and environmental benefits to authorities and their communities.
- 5.12. It is also relevant to areas of two tier local government where waste collection and waste disposal authorities working in partnership would be able to let joint contracts for waste collection and disposal possibly using the new arrangements which allow for pooled budgets. Such integrated contracts should deliver both economies of scale and better collaboration and co-operation between authorities, as required of countywide municipal waste management strategies. The repeal of the prescriptive tendering requirements in the EPA should also allow authorities to move towards the use of negotiated outcome based specifications as the basis of a procurement exercise. This leaves the details of how best to deliver the outcomes specified to those best placed to provide them – the potential contractors.

CHAPTER 6

Future Action

- 6.1. The powers provided under section 16 of the 1999 Act are designed to promote the objectives of best value. The proposals for their use in this paper, together with the power conferred upon local authorities for the promotion of well-being, should go a long way to enable authorities to engage in new forms of partnership in furtherance of these objectives.
- 6.2. The Government will however keep these issues under review. Generally, it would not wish to make further use of the section 16 powers other than on a systematic basis and following a review of a sector or cross-sector issues. Any proposals would be considered against the following criteria:
 - joint working across geographical and administrative boundaries;
 - involving the private, voluntary and community sectors in the delivery of local services;
 - delivering local services with a citizen focus which build service delivery around the needs of particular user groups or life events; and,
 - tackling the root cause of social problems, such as drug abuse and social exclusion.
- 6.3. In doing so, the Government will take account of measures other than those available under the section 16 powers, such as:
 - section 70 of the *Deregulation and Contracting Act 1994* – which provides order making powers to allow local authorities to contract-out statutory functions; and
 - section 5 of the *Local Government Act 2000* – which provides order making powers to amend, repeal, revoke or disapply any enactment which the Secretary of State considers ‘prevents or obstructs local authorities from exercising their powers’ to promoting the economic, environmental and social well-being of their areas.
- 6.4. Over time, the Government will also wish to consider the experience of local Public Service Agreements (PSAs). Local authorities that sign up to local PSAs will agree to meet challenging targets to deliver national or local priorities, in return for greater operational freedom and flexibility, some up-front financial incentives and rewards for success. At least some of the freedoms and flexibilities sought are likely to require the use of the provisions in section 5 of the *Local Government Act 2000*. Section 16 of the 1999 Act cannot be used to provide powers to individual authorities, even on a pilot basis, but will be of value to authorities in general.
- 6.5. The Government would welcome other ideas as to how such powers might be used which are consistent with the issues identified in paragraph 6.2 and will consult on those which it wishes to take forward.

CHAPTER 7

The Consultation Process

Who is Being Consulted?

- 7.1. This consultation paper is being distributed to all Best Value authorities in England and Wales. At the same time, we are consulting other organisations such as professional and representative bodies and service suppliers in the public, private, and voluntary sectors as well as trade unions. This is to ensure that we get a wide range of responses from all sectors of the community with an interest in best value services.

Response Procedures

- 7.2. We welcome views on any of the issues raised in this consultation paper. As we expect to receive a large number of responses our preferred method of response is via email. Therefore, please email one copy of your response to the following address:
bv_powers@detr.gov.uk

- 7.3. If you do not have access to the internet please send three unbound and hole-punched copies of your response to:

Gavin Crowden
Local Government Competition and Quality Division
Department of the Environment, Transport and the Regions
5/A5
Eland House
Bressenden Place
London
SW1E 5DU
Tel: 020 7944 4134
Fax: 020 7944 4099

- 7.4. Please make sure your comments arrive by Friday 25th May 2001, as we may not be able to take full account of replies which arrive after this date. It would assist our analysis of the responses if you could set out your comments under the relevant chapter headings used in this paper and clearly mark to which paragraphs and/or consultation questions your comments refer. Furthermore, respondents should explain who they are and, where relevant, whom they represent.
- 7.5. The Cabinet Office, *Code of Practice on Written Consultation* generally requires a twelve week period for consultation. The Central Local Partnership memorandum of understanding between central and local government specifies 6 weeks as an acceptable period for consultation. In providing 8 weeks for consultation, the Department has taken account of the fact that a discussion paper on possible use of the powers was prepared in February 1999 for the *House of Commons Standing Committee* when it was considering the

Local Government Bill 1998. The Department has also held a number of informal discussions with local government, the private and voluntary sectors and the legal profession whilst preparing this Paper. In the Department's view there is a need to take the quickest possible route to getting these powers into place because Best Value authorities are waiting to use them. Potential partnership arrangements are being prevented through deficiencies in the currently available powers. For all these reasons the department has selected 8 weeks as a reasonable period for consultation responses.

- 7.6. The Department may wish to publish the responses in due course or deposit them in its own library or that of the Houses of Parliament. Should you wish your comments to be treated in confidence please clearly indicate this in your response. Nevertheless, all responses will be included in statistical summaries of comments received and views expressed.
- 7.7. This consultation paper is also available on the Department's Internet web site located at: **[www.detr.gov.uk\consultation](http://www.detr.gov.uk/consultation)**
- 7.8. If you have any questions or views on this consultation exercise you can contact Gavin Crowden at the above address or by email to: bv_powers@detr.gov.uk

Next Steps and Implementation

- 7.9. The Government's intention, subject to this consultation exercise, is to enact the necessary legislative changes so that Best Value authorities will have available to them these new powers as soon as possible. The next step in the section 17 procedure is to lay draft orders and provide proposed details of this consultation to Parliament, together with any draft guidance in relation to the exercise of these powers. These documents will be made available for wider consultation.
- 7.10. Apart from the proposed exclusion of the divestment provisions in the *Environmental Protection Act 1990*, the intention is to effect the necessary legislation by means of a single Statutory Instrument and set of related guidance.

ANNEX A

Sharing Public Resources

Introduction

- A.1. Chapter 2 of this consultation paper sets out proposals for four broad partnership powers which would allow Best Value authorities to:
- incur expenditure in support of Best Value;
 - give financial assistance to any person;
 - enter into arrangements or agreements with any person; and,
 - co-operate with, or facilitate or co-ordinate the activities of any person.
- A.2. The proposed statutory guidance to accompany these powers will make clear that it will be for authorities themselves to consider the appropriate detailed delivery mechanisms. At the same time, it will include some examples to illustrate the points. These will not be an exhaustive list of activities that could be undertaken under these powers and it will be made clear that providing this list will not affect the generality of the powers. The Government wishes to encourage greater use of secondments, pooled budgets, lead commissioning, joint commissioning and integrated provision, particularly where partnerships are formed to deliver Best Value. This Annex provides some examples in these areas.

Secondments

- A.3. The secondment of staff from local government to the public, private and voluntary sectors (and visa-versa) has the potential to allow for a skills' crossover between local government and its partners. This will help to improve and modernise the practices of local authorities. They can also be used, for example, in providing support to local voluntary and community groups, perhaps in lieu of other options such as grant funding. For staff themselves, secondments can also provide a number of benefits which assist career development and enable them to gain experience of policy implementation. Those on the frontline can bring their experience to bear on policy formation.

Figure 8: Examples of the use of secondments to meet Best Value

- to support voluntary and community groups or partnerships as an alternative or a complementary measure to other support mechanisms;
- to bring into the authority new skills and competencies;
- to achieve joint working with partners;
- to contribute to a Human Resources training and development strategy;
- as an alternative to TUPE transfers; and,
- to deploy, temporarily, surplus staff capacity.

Pooled Budgets

- A.4. The aim of a pooled budget is to achieve flexibility in the use of funds, and other resources, brought together by partners and placed in a discrete fund in order to meet the common community or corporate objectives ie the needs of an identified group of people. The size of the pool will be set by the partners on the basis of agreed aims and outcomes and its use defined in terms of the commodities, goods, services, works and assets identified by the partnership.
- A.5. The key principle of this arrangement is that regardless of the size contribution a Best Value authority or their partner(s) commit to a pool, the resource is then unified and available to provide agreed 'services'. Expenditure is thus based on the needs of the partnership and its users, and not on the level of contribution from each partner. This gives pooled budgets a special flexibility, whilst still operating within aims and outcomes agreed between the parties.

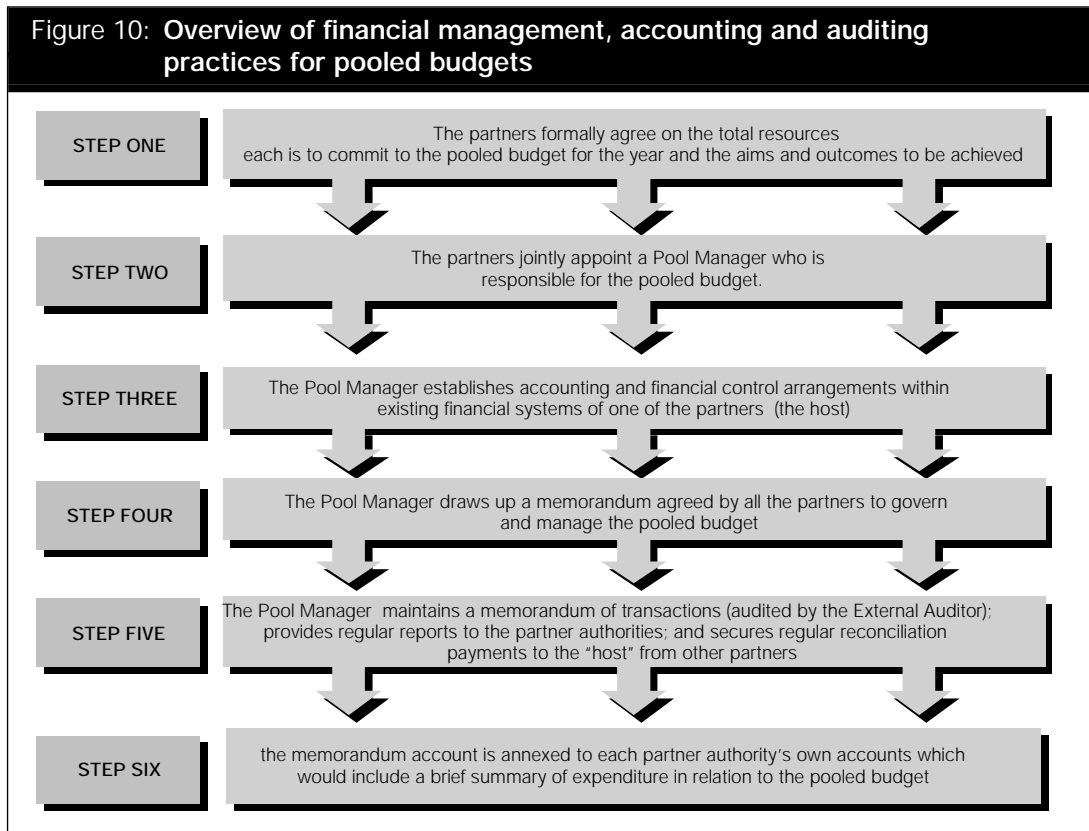
Figure 9: Example of a pooled budget

Pooled budgets provide a flexible vehicle for one-off investment projects. For example, town centre improvements. A local authority, together with the private sector owner of the town's indoor shopping centre and the local chambers of commerce could pool their resources to implement an agreed strategy for the upgrade of their town centre perhaps encompassing the shopping centre, the 'high street' and market areas and car park facilities. This might also involve the use of 'lead commissioning' of a range of works from private contractors and the council's direct service team.

Through this arrangement the council and its partners could carry on beyond the initial upgrade of facilities to 'repair and maintenance' by the council and the owners of the shopping centre having a joint budget and commissioning arrangements for cleaning, CCTV security, repairs and maintenance.

- A.6. The pooled fund could be hosted and managed by a Best Value authority or by one of its partners, or it could be hosted by any of them. It could also be managed on their behalf by another body contracted to do so, whether from the public, private or voluntary sectors. Pooled budgets would not absolve Best Value authorities and other public bodies involved in a partnership from their statutory responsibilities but should provide a way of discharging them more flexibly.

- A.7. In establishing a pooled budget, the sponsoring Best Value authority(ies) and their partners would be jointly responsible for setting the objectives of the pool, for ensuring that satisfactory financial controls are in place and for monitoring (see figure 12). The framework for the financial management, accountability and audit of the pooled budget would mean that the ultimate accountability for the pooled budget flows back directly to each partners' existing financial accountability arrangements. Figure 10 summarises the main stages in establishing and running a pooled budget.



- A.8. The 'host' would send regular monitoring reports and at the year end prepare a memorandum of accounts within their own statement of accounts which shows what has been received, spent and what remains in the pooled budget. This memorandum of accounts would be sent to each of the partners at the year's end for inclusion in their own statement of accounts. Although the 'host' would provide the financial administrative systems on behalf of the partners, it will not incur any additional liabilities except those that relate to the management of the budget.

Lead Commissioning

- A.9. There may be circumstances when it makes more sense, both in the interests of service users and of the most effective use of resources, for one Best Value authority, or one of its partners, to take a lead commissioning role on behalf of others involved in the partnership.
- A.10. Lead commissioning provides an opportunity to commission on a collaborative basis a range of commodities, goods, services, works and other assets for a client group. It can benefit the users of the service by providing a unified service. For the authority it can provide an economic, effective and efficient means of commissioning. A single commissioning budget facilitates integrated approaches and better co-ordination of those 'services' which are transferred to them, thus exploiting economies of scale.

- A.11. In effect, one partner takes on the role of the commissioner on behalf of the other(s). The partners must decide what commissioning responsibilities will be transferred to the lead commissioner and what contributions will finance the commissioning. Commodities, goods, services, works and other assets will then be commissioned on behalf of each partner drawing down their own part of the budget. The lead commissioner will be able to arrange contracts with a range of providers in the public, private and voluntary sectors.

Figure 11: Example of lead commissioning

Two or more authorities could appoint one authority as a lead commissioner to maximise their commissioning efficiency. A unified service could provide a range of services either collectively or individually, such as refuse collection, grounds maintenance, leisure services, and/or revenues and benefit services. A partnership memorandum between the authorities would govern the unified client function of such arrangements. This would also scope the service requirements that would form the basis of the tender documentation and subsequent procurement contract.

- A.12. Although under these agreements the Best Value authority would transfer responsibility for the delivery of a function(s) current accountability arrangements would still remain with the originating body. In other words, the authority would still be accountable for the functions they had transferred. The arrangement is similar to agreeing a contract where the contractor performs a service on behalf of the commissioner of the contract i.e. the contractor will be responsible if they exercise the functions negligently or illegally but the commissioner retains the duty for ensuring this does not happen. The powers do not provide for the delegation of functions, although it is open to Best Value authorities to use these powers in combination with their existing delegation powers and those proposed elsewhere in this paper.
- A.13. It is therefore important that the aims and measurable outputs and outcomes of the lead-commissioning agency are clearly agreed by the partners. It is also important that the agencies that have transferred their responsibility monitor the effectiveness of the arrangement through appropriate governance and management arrangements, which are proportionate to the size of activities being commissioned.

Figure 12: Approaches to governance and accountability

To ensure that such partnership arrangements work it is important that the aims and measurable outputs are clearly agreed by the partners. It is also important appropriate governance and management arrangements are in place. Best practice might mean that a partnership would need a combination of approaches, such as:

- ***a carefully worked out agreement – a Partnership Memorandum*** – drawn up between the partners over governance arrangements which addresses accountability, other practical arrangements including who is responsible for managing expenditure and service arrangements (see Figure 14);
- ***the appointment of a Pool or Partnership Manager*** – nominated from existing staff or appointed by the partners who would be sited in the ‘host’ agency. This would provide a single focal point, accountable for managing the budget, forecasting and reporting to the contributing partners on the outputs, outcomes and how targets are being met. Whether the pool manager, or another person, is also responsible for the day to day running of the partnership, service delivery and meeting the objectives of the budget would depend on local circumstances, including perhaps, the size of the pool; and,
- ***the integration of governance and accountability into existing systems*** – the arrangements for financial support and control should be kept as simple, robust and inexpensive as possible. This is probably best achieved by integrating them into existing proven and effective systems within one of the partner organisation. This partner would ‘host’ the operational handling of financial transactions and accounting arrangements.
- ***arrangements that are proportionate*** – this is both to the size of the partnership and to the criticality or the risks related to the activities covered by the Partnership.

These governance arrangements might be customised and used for differing forms of partnerships whether based on pooled budgets, commissioning-based and/or integrated provision.

Joint Commissioning

- A.14. Joint Commissioning is similar to lead commissioning. Here, the partners share the responsibility for commissioning. It is most likely that this flexibility would be used in the joint commissioning of integrated services provided across organisational or administrative boundaries. As with lead commissioning, governance and accountability issues would need to be worked out at the beginning of the partnership.

Figure 13: Example of joint commissioning

Joint Commissioning provides an opportunity, for example, for bundling together small PFI schemes which might otherwise be unattractive to the private sector because of their size. Authorities might thus develop joined-up PFI schemes to increase volume. An example of this is the renewal and upgrading of street lighting, perhaps across two or more authority areas. This potentially exploits operational and financial economies of scale.

Integrated Provision

- A.15. Integrated provision is an opportunity to provide a better quality of service to users who may traditionally have received a variety of different services from different agencies. Unlike a pooled budget arrangement alone, it will allow different professionals to work within one organisational structure. Thus, their ability to join up services will be enhanced and, in some cases it may be possible for one member of staff to perform several tasks, providing a seamless service for the user. It also provides a structure for the joint delivery across geographical and administrative boundaries exploiting economies of scale.
- A.16. The integrated provider can provide all the services itself, or it may contract with other providers from elsewhere in the public, private or voluntary sectors. Its advantage lies in having a single organisational structure resulting in a more co-ordinated approach and securing economies of scale.

Figure 14: Partnership Memorandum

Best practice suggests that the drawing up of a simple agreement between the parties at an early stage of the partnership can be one of the critical success factors in collaborative arrangements. These can be used for differing forms of partnerships, pooled budgets, commissioning-based arrangements and integrated provision.

Partners must decide what precise form of governance best meets local needs and circumstances; the arrangements should be proportionate to the size of the partnership.

The Government believes that such a memorandum would need to deal with the:

- aims and outcomes agreed by the partners
- agreed level of contributions from each partner and how those contributions may be varied
- duration of the arrangement, and any provisions for the review, variation, or the dissolution of the arrangements
- staff, goods, services and/or accommodation and other assets to be provided by the partners in connection with the arrangements
- day to day management of the arrangement including which body is to be the 'host' partner, and for pooled budgets the categories of staff designated to access the pool
- arrangements for dealing with under and overspends
- mechanism for dealing with complaints from users and disputes between partners
- Management reporting, accounting, audit and inspection arrangements.

There may be other issues (not covered above) which parties would need to consider in a particular arrangement to ensure clarity and understanding. Partnership Memoranda would normally be completed before, and would be in addition to, any procurement and commissioning contract needed to implement all or part of the partnership.

- A.17. Staff may transfer to the provider, or they may be seconded, or recruited, i.e. staff may be directly employed or directly managed by the provider. Whilst roles might remain separate, it should also be possible to develop generic roles so that one member of staff may be trained to do a number of activities previously carried out by a range of staff.

A.18. Although this power would provide for the transfer of responsibility for the delivery of functions (together with resources to purchase or deliver services) it does not provide for the delegation of functions. It would be open to authorities to use this particular power in combination with their existing delegation powers or with powers proposed elsewhere in this paper. The agency, which takes on the role, would take day to day responsibility for fulfilling the integrated provision although ultimate responsibility would remain with the originating body. The aims and measurable outputs and outcomes of the integrated provision would need to be clearly agreed and set down. The partners would need to monitor the effectiveness of the arrangement including their approaches to governance and accountability arrangements. Partners would also need to select the most appropriate management arrangement for the local situation. The options include:

- a joint committee with the assets vested in the lead authority; or
- a corporate body such as company or Industrial and Provident Society (this route may be more appropriate when there are non-Best Value authority partners involved).

Figure 15: Example of integrated provision: leisure services

Two or more authorities might choose to plan, and then deliver within an integrated vehicle, a mainstream function such as leisure services. They should be able jointly to secure economies of scale as well as rationalisation of their assets. Together they could provide specialist sporting facilities which on their own they might find difficult to provide. This approach would seem particularly suited to district and small unitary authorities.

ANNEX B

Local Authority Interests in Companies

- B.1. Chapter 3 sets out proposals for furthering the use of different partnership models to support best value. This Annex provides further background.

Local Authority Use of Companies

- B.2. Working in partnership with others, including those in the private sector, presents opportunities to examine and undertake new ways of tackling policy issues and service delivery. The creation of, or participation in, companies is attractive because such corporate structures can have:

- a well established and regulated structure familiar to private sector partners;
- many of the benefits of externalisation while at the same time allowing authorities to retain a degree of participation;
- a flexible framework providing an equal working relationship in place of a client-contractor divide;
- a legal and organisational framework for sharing both risk and reward which creates incentives for the private sector to deliver best value services; and,
- freedom from public sector borrowing constraints, with the ability to limit liability, where authorities do not have a controlling and influential interest.

- B.3. However, authorities need to recognise that companies may not always be the most appropriate or indeed the best solution. For example, new approaches can be adopted within authorities or across authorities using joint committees or by the use of contractual agreements. Non-statutory structures can also provide effective mechanisms, for example, for sharing efficiency savings (through the contract), or providing strategic oversight (through a partnership board). These alternative approaches would avoid some of the drawbacks of corporate structures such as:

- the Companies Act framework is unfamiliar to many elected members and officers;
- elected members (or officers) acting as Company directors owe their duties to the shareholders not to the council, which can cause conflict;
- unless it is part of a wider strategy they can simply re-create, albeit in another form, the same problems which might have existed within the authority;

- company structures can carry additional overheads; and,
- taking equity stakes in projects in this way does carry risk, which other methods such as property clawback or profit/efficiency sharing contract provisions may not carry.

Figure 16: Examples where corporate structures might be used under Best Value

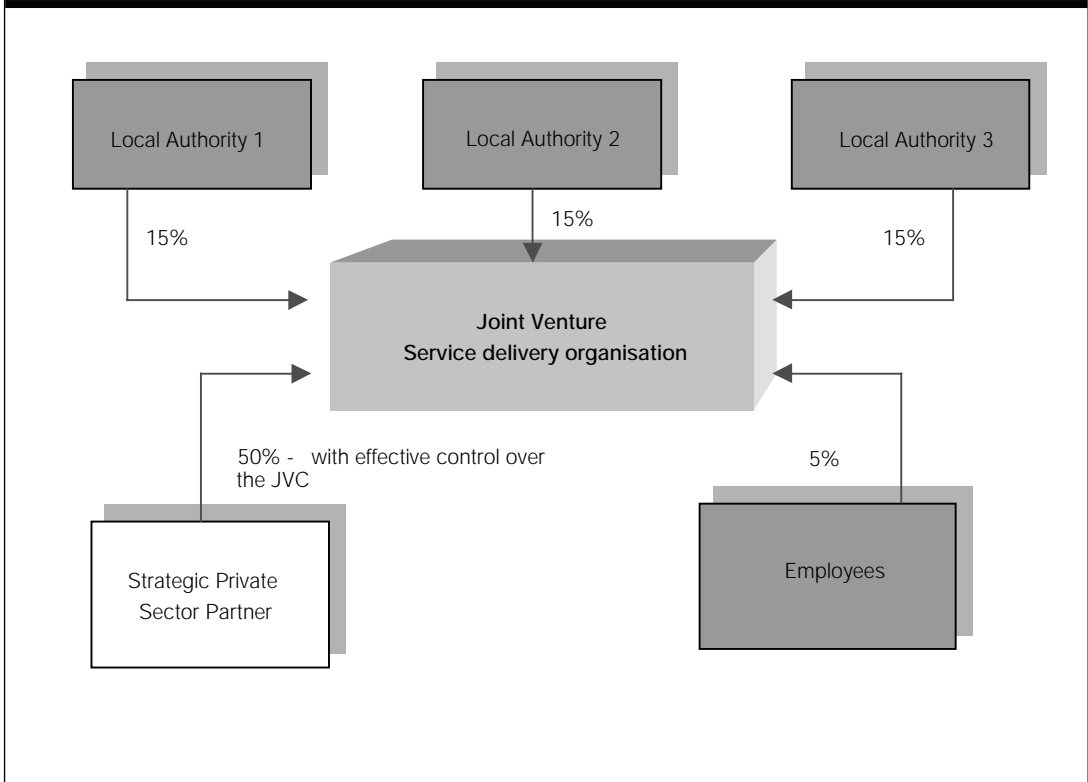
- As a vehicle to deliver integrated provision of services across the public sector, for example, intermediate care services involving NHS and Social Services;
- Economic Regeneration Companies;
- Service Delivery Partnership Arrangements, including Public Private Partnerships;
- As a vehicle to deliver 'commercial services' such as leisure services.

B.4. Nevertheless, authorities in determining the strengths and weaknesses of the various options available to them will wish to consider the role that corporate entities might play.

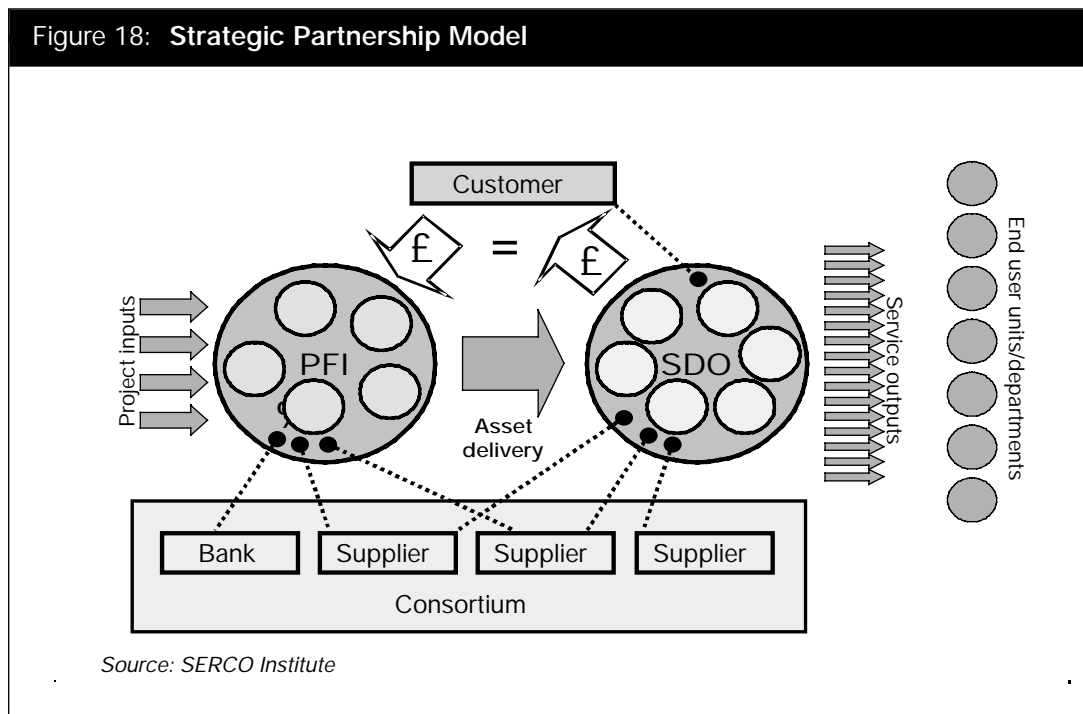
B.5. Indeed corporate structures might be used in combination with other partnership arrangements described in this paper. Two examples might illustrate this:

Example 1: a commercial service, such as leisure services, might be a commissioned arrangement with a strategic partner through a joint venture company by three neighbouring authorities via a pooled budget/joint commissioning, but where the commissioners retain an equity stake and board representation. In this particular model, the employees have also been given an equity in the company through an employee share ownership scheme. (see Figure 17)

Figure 17: Example of the use of employee share ownership scheme within a PPP structure



Example 2: another possible model is based upon a single authority and seeks to combine the benefits of PFI with a joint venture structure. This involves two consortium, with some common membership. One is a PFI SPV designing, building and financing the new and refurbished assets against which private finance is sought. The other, a Service Delivery Organisation, then operates the asset and delivers the services. This organisation produces a revenue stream which finances the payments to the PFI SPV via the commissioning authority (see Figure 18).



Safeguards

- B.6. The Government believes that while the use by authorities of companies (and other corporate structures) should give a valuable element of flexibility to best value operations appropriate safeguards must be put in place. Whilst the aim should be not to restrict unnecessarily the use of companies in the pursuit of best value services, it is necessary to ensure that appropriate restrictions are applied to such uses. It believes that the current controls on accounts and auditing arrangements, personnel controls and the other propriety controls set out in Part V of the *Local Government and Housing Act 1989* and the *Local Authority (Companies) Order 1995* provide a basis for this.
- B.7. However, given the proposed breadth of the proposed power to form companies, the Government believes that this needs to be balanced to some extent by restricting the range of activities which can be carried out through companies and other corporate bodies using this power. This will only apply to companies under 'control' of local authorities, including those companies under 'control' but run at 'arms' length'. Such companies, whether or not the local authority makes use of its powers of control, can be regarded as an extension of the local authority's interest and responsibility. The restriction would be to ensure that as far as practical²⁶ the company does not undertake any activities outside the powers of the authority itself. If 'control' rests with a group of authorities, and other public sector bodies, then the powers of control must be used to ensure that no activity is undertaken which none of the individual controlling authorities has the power to undertake.

- B.8. While this safeguard will not apply to companies influenced by an authority(ies) guidance on the use of this power it will make clear the appropriate nature of local authority involvement in companies which may have activities beyond its own. This will recognise that there are legitimate reasons why a company, in which an authority holds a substantial interest, might seek to do things not permitted to the authority.

Existing Legislative Framework on Local Authority Companies

- B.9. Companies formed under the new power will be subject to the control mechanisms set out in Part V of the *Local Government and Housing Act 1989* and the accompanying *Local Authorities (Companies) Order 1995*.
- B.10. These provisions provide a framework for governing local authorities' interests in companies and other corporate bodies. The effect of this legislation is to bring all such cases within a general framework of regulation. This is to ensure that proper control and accountability, which already applies to local authorities, is also applied when a local authority chooses to operate through a company or a society.
- B.11. The legislation adopts the approach that, where a company is under the effective control of one or more local authorities, it is in general proper to treat that company as part of the local authority sector. This mirrors the rules which are applied to all the various organisations (Government departments, non-departmental bodies, nationalised industries etc.) in the central government sector. This classification of local authority interests in companies etc, as for central government, is closely connected with the classification of public expenditure.

Figure 19: Regulated Companies under the Local Authorities (Companies) Order 1995

A company will be regulated if it is:

- controlled by a local authority as defined by section 68 of the Local Government and Housing Act 1989;

or

- influenced by a local authority as defined by section 69 of the 1989 Act²⁷ as it has both a personal and a business relationship with an authority and is an unlimited company or a society registered or deemed to be registered under the Industrial and Provident Societies Act 1965

or

- it is a company limited either by guarantee or shares and the authority has or had a right to exercise a dominant influence over the company or would need to prepare group accounts for the company in question for the company in question if the authority was considered to be a company under the Companies Act 1985.²⁸

The interests of two or more authorities are aggregated together in applying these tests of influence or control.

- B.12. The controls can be broken down into three categories:
- controls on Capital Finance;
 - controls on accounts and audit arrangements; and,
 - personnel controls and other propriety controls.
- B.13. The 1995 Order provides that the capital finance transactions of companies under the effective control (whether direct or indirect) of the local authority are treated as the transactions of the authority itself. This in turn affects the company's borrowing and capital receipts and means that where a regulated company borrows or enters into a credit arrangement, the credit ceiling of the local authority will be reduced by the amount borrowed or the value of the credit arrangement.
- B.14. The Government will wish to reconsider how these capital finance controls apply to the different categories of local authority companies in developing the prudential system of regulating capital finance in local government as set out in *Modernising Local Government Finance: A Green Paper* (see *Figure 20*). These proposals, and those for revenue funding for local government, will have a role to play in facilitating modern approaches to procurement and partnership working.

New System of Capital Controls

- B.15. Transactions by local authority companies would continue to be regulated under any new system of capital controls since their expenditure has the same impact in the national accounts as that of authorities themselves. The current method of control is closely integrated with the overall capital finance structure and changes to that structure would mean that new arrangements for companies would be needed. Nevertheless, these proposals would allow more scope for local authorities to use their own resources to finance additional borrowing, subject to controls which would ensure that borrowing was affordable, consistent with the Government's fiscal rules and delivered investment priorities. This will be of benefit to authorities in taking sound investment decisions on their own and also where they work in partnership with others.
- B.16. At the same time, the Government is reviewing the boundary between local authority companies whose investment is subject to the capital finance rules and those which fall outside the regulatory framework. This is to ensure that the categories given to local authority interests in companies does indeed reflect the classification of public expenditure, does not impose unnecessary controls and can be applied practically.

Figure 20: Proposed prudential system for capital investment and borrowing

The prudential system proposed in *Modernising Local Government Finance: A Green Paper* will mean that local authorities will no longer have to get Government approval before borrowing, except where it wants support in meeting financing costs. It should enable local authorities to consider revenue and capital solutions on an equal footing, so that Best Value will be what counts. It should secure much greater local ownership of all spending proposals.

A new approach would have three central elements:

- the Government would set a limit on the rate of increase of individual authority's debt;
- there would be a core set of prudential indicators for which local authorities would set their own ratios working within a centrally agreed framework which would help make clear the impact of capital expenditure proposals on the revenue account over time and allow performance in managing investment to be monitored and assessed; and,
- the regime would be backed up by the fundamental principle of the balanced budget requirement and accounting codes.

- B.17. However, these developments need to be looked at alongside the accounting requirements. Current practices are that authorities with material interests in subsidiary and associated companies should prepare, as supplementary information, summarised group accounts. There is no current requirement to consolidate group accounts into the consolidated revenue or consolidated balance sheet of an authority, despite the fact that both of these are UK Generally Accepted Accounting Practices (UK GAAP). It is clearly necessary that the accounts of authorities should properly reflect their interests in companies and other forms of partnership. As partnership working of all kinds becomes more common the importance of group accounting will increase. Enhancing the status of such accounts, and taking a wider view of materiality so that more authorities with partnerships and companies produce them, will bring more work well within the Government's local government finance proposals and those in this paper. As well as enhancing the stewardship by elected members and senior officers, they will help improve the information base for wider consultation. It should also assist in providing recognition to those authorities that positively use partnerships in the pursuit of best value. The Government will consider with CIPFA and other interested parties how current practices can be developed which would bring some consistency with the developing regulatory regime for local authority companies and UK GAAP.

Accounting Requirements

- B.18. The regime also places a number of propriety requirements on influenced and controlled companies in terms of disclosure; access to information; and appointment and payment to directors. It also provides that controlled companies are required to obtain the consent of the Audit Commission to their appointment of an auditor. Companies which are regulated are also required to provide the auditor for the parent authority with such information and explanation as is required for the purposes of auditing the parent authority's accounts. The provision of this new power to form companies, the onset of best value, the introduction of new political management structures, the new ethical framework for local government and the Freedom of Information Act all provide opportunities to review this framework.

- B.19. The Government would be interested, in advance of bringing forward proposals for consultation, to receive views on possible changes to the both Part V of 1989 Act and the 1995 Order.

Figure 21: 1989 Act and 1995 order: audit, propriety and disclosure requirements

For regulated companies

- **Identification:** The company must make clear in all business letters and other relevant company documents that it is controlled or influenced by a named authority or authorities;
- **Payment to Directors:** Any payment (including expenses) made to a member of the authority for his or her services as a director of the company must not, when taken together with payments made for services as a member of the authority, exceed the maximum amount payable by that authority for services as a member;
- **Disqualification:** A company must not appoint as a director any person who has been disqualified from membership of a local authority (otherwise than by reason of being an employee of the authority in question) and must remove any director who becomes so disqualified;
- **Publication of Political Material:** A company must not publish material designed to affect public support for a political party.
- **Provision of Information:** A company must provide a member of the parent authority with such information about the affairs of the company as they may reasonably request for the discharge their duties. They must also provide the authority with such financial information as they may need for the preparation of their own accounts within such reasonable time as is specified by the authority and in the form required.

For controlled companies:

- **Public Inspection of Minutes:** A controlled company, which is not an arms-length company, must make the minutes of general meetings available for inspection by members of the public for a period of four years. Items are only exempt from disclosure if publication would breach a legal requirement owned by any person.²⁹

Unregulated influence and minority interest companies:

- **Disqualification of councillors:** A person who has been disqualified from being a member of an authority (otherwise than by reason of employment in a local authority) cannot represent the authority on such a company;
- **Access to information:** Where a member or officer of an authority has been appointed to represent an authority on such a company the authority must make arrangements for the person concerned to respond to questions about the affairs of the company from other members of the authority during the course of the authority's proceedings;
- **Confidential Information:** Information requested by the authority should not be disclosed if it was communicated to the local authority's representative in confidence.

Delegation Powers

- B.20. The proposed general power to form companies is intended to provide authorities with the discretionary power to discharge (i.e. delegate) their functions through companies which fall under their 'control'. This means where a function is delegated, the decision taken by the company becomes that of the authority itself. Nevertheless, where an authority responsible for it has delegated a function, that authority will still continue to be able to exercise that power.
- B.21. We believe that, alongside existing delegation and contracting-out powers, this will provide authorities with the means to empower partnerships. It will provide the flexibility to determine sensible arrangements governing the operation of partnerships which come under their control or influence.
- B.22. These powers will be subject to certain restrictions:
- authorities will not be able to delegate non-executive functions to local authority companies, this includes the determination of an authority's policy and other constitutional and quasi-legislative functions which are the responsibility of the full council, and not the executive. It is recognised that this approach will need to be customised for those best value authorities that are not subject to the management structures in Part II of the *Local Government Act 2000*; and
 - they will be only able to delegate to companies which are under their 'control'.
- B.23. This will also be subject to any express restriction, prohibition and limitation on their powers. It will mean that authorities will be able to use these powers instead of the current delegation powers, providing greater flexibility to group together services in new and innovative ways. It will also mean that the power is subject to express restrictions in existing delegation and contracting-out powers, for example, those in section 101 of the *Local Government Act 1972* which prevent delegation of an authority's functions on levying, or issuing precepts.
- B.24. However, this operational flexibility needs to be considered alongside public accountability and transparency issues. This arises in relation to delegation to local authority-owned companies which are outwith the local government accountability structures. This issue will be considered further as part of the review of the Part V regulatory framework for local authority interests in companies.

ANNEX C

The Provision of Goods and Services

Introduction

- C.1. Chapter 4 sets out proposals for Best Value authorities to be able to enter into agreements with any person to provide staff, goods, services or accommodation to others in support of best value. This Annex sets out the basis on which the Government proposes to develop the statutory guidance for the new framework
- C.2. It is proposed that the statutory guidance will cover the following issues:
- Background to the powers
 - Purposes
 - Use of Public-Private Partnerships
 - Links to Best Value
 - Trading accounts and form of disclosure in Best Value Performance Plans
 - Prudential Indicator and the calculation of trading activities
 - Financial health and management of external trading units
 - Project Business Cases
 - External Trading Unit Business Plans
 - Role of elected members and Finance (monitoring) Officers
- C.3. This Annex concentrates on the approach to a number of key issues. It does not attempt to be exhaustive and should not to be taken as being the draft guidance itself.

Background to the Powers

- C.4. The proposed new powers are intended principally to assist authorities to explore a full range of options to deliver best value in respect of the core services for which they are responsible. This might involve, for example, building capacity within its local community to enable that community to become self-sufficient. It will also enable authorities to make best use of their existing public assets by exploiting 'wider markets' for goods and services

either on their own or in partnership with others in the public, private and voluntary sectors. A capital asset that is underused, a source of intellectual property or groups of staff with marketable skills all form the basis of a 'wider markets' project. However, direct provision of goods and services by authorities is but one option and should only be deployed following an appraisal of the alternatives for which best value provides.

Purposes

C.5. The Government has identified three broad purposes within which it believes it is justifiable for Best Value authorities to provide goods and services. These are described below:

- ***in providing small value, small volume goods and services to disadvantaged parts of their community where the market has failed to do so in the past and is unlikely to be able to do so in the near future;***

In these circumstances Best Value authorities may be in a position to utilise their own resources, and marshal resources within the community, to facilitate the conditions for action. These community-based resources could be the most powerful resource available to turn round local neighbourhoods.

Direct action through the provision of goods and services to a disadvantaged community should be seen by authorities as only a stage in building, then sustaining, the capacity of the community and in making local markets so that the community as a whole becomes self-sustainable. This option should not be seen as a way for authorities to build a role for themselves in local markets but to make them better able to serve the needs of all of the local community.

- ***in providing small value, small volume goods and services to voluntary and community groups operating within their geographical area to build and sustain their capacity;***

The voluntary and community sectors have an important role to play in improving the quality of life for local communities, and in providing best value services.

However, many voluntary and community groups do not have the same capacities as those in the public and private sectors. For example, three-quarters of charities rely totally on unpaid volunteers. As well as providing grant funding, Best Value authorities may be able to offer small value, small volume goods and services to these groups to build and sustain their capacities for serving the community. This might provide better value than grant funding alone. Examples might be the provision of accommodation and professional services such as legal advice.

- ***in making best use of existing public assets through appropriately exploiting 'wider markets' for goods and services, either on their own or in partnership with others in the public, private, voluntary and community sectors.***

Good asset management is an important part of the best value regime. The way assets, whether physical or non-physical, are used and managed must be subject to Best Value reviews. This means questioning the ownership of those assets in connection with delivery of core objectives.

However, if these assets need to be retained to deliver those objectives, their most efficient use may involve exploiting their commercial potential. This includes the possibility of increasing its utilisation by sharing it with other parts of the public sector. This would make those assets, that need to be retained to deliver services, work harder without deflecting from core objectives. This includes what in local government has been hitherto referred to as ‘cross-boundary tendering’ where one authority provides goods and services to another authority.

If the assets are not needed to deliver core services, the best option would usually be disposal and/or cessation of the service, in whole or in part. If the authority continues to need services derived from the asset it would need to consider whether better value might be gained by delivering the service in a different way and/or through a different vehicle. For example, would it be better value to transfer that asset to the private sector or the voluntary sector and purchase the services from a private or voluntary sector provider?

Figure 22: Examples of wider market project making better use of existing assets

- Local statistical information
- Surplus physical capacity – such as leasing underused accommodation
- Asset sales
- Systems developed for internal use with wider application
- Specialist skills and knowledge
- Utilising service excellence by providing services to others

Issues Relating to Capacity

- C.6. In providing these new powers, the Government recognises the need for clarity on the extent to which authorities can rely upon them to invest in new assets and make profits.
- C.7. The current legal framework is interpreted in different ways. At one end of the spectrum, some have argued that the legal framework limits (and indeed should limit) trading simply to the deployment by a local authority of such surplus capacity as it has within the workforce which it retains for other purposes. The opposite view is that authorities are, and should be, free to invest in extra staff, machinery and other forms of assets, and where there are express limits related to the deployment of surplus capacity or the making of profits these relate to administrative law³⁰ and authorities’ fiduciary duty to the local taxpayer. There is some confusion and inconsistency of approach. The Government believes that this should not be allowed to arise in the future.
- C.8. In considering new wider powers for trading the Government has sought to address the key question: what is the proper role for local authority trading under best value and under what circumstances should it take place? The Government believes that investment in new assets, in the broadest sense, should generally be based on delivering core objectives. New investment by an authority in human or physical resources related to commercial or non-core activity should normally be marginal and related to the development of existing assets.

- C.9. Where investment is required beyond that which is considered marginal some form of public-private partnership structure would normally be more appropriate, where it would be for the private sector partner(s) to take on and manage risk, provide the investment needed and share rewards with the authority. This does not preclude PPPs in other circumstances. However, the Government is willing to consider a wider approach where an authority has vested its trading unit(s) in an arms-length company (see *paragraph 4.13*).

Use of Public-Private Partnerships

- C.10. In providing goods and services to the community where the local market is currently failing (see *paragraph C.5*) authorities need to first engage with local stakeholders. To overcome the short-term problem the authority may have to become involved directly in taking steps to assist the market where it is failing by, for example, providing services to vulnerable groups. However, for a longer-term solution the authority must work in partnership with local businesses and their representatives to bring about fundamental changes.
- C.11. In many cases commercial activity as envisaged in making best use of existing assets can best be taken forward as a form of public-private partnership and this form of 'trading' activity should be seen as one strand of PPP policy. PPPs can link asset ownership in the public sector to business skills and possibly private capital to develop products and services that can be marketed to the benefit of both partners.
- C.12. In relatively straightforward, and probably small, operations it might be appropriate for the authority to undertake the activity on its own. For example, exploiting spare capacity in a building, or a depot, or professional services using existing staff resources. In some cases, it would be more appropriate to enter into an arrangement with a private sector company to sell an existing good or service to third parties, in return for some form of fee or share of the increased income/revenue. In such cases, or in any event where selling the good or service concerned requires a free-standing new business, or if the proposed commercial activity is on a substantial scale to the size of the authority, some form of PPP structure or an arms-length management arrangement would normally be appropriate.

Financial Health and Management of External Trading Units

- C.13. The principles on which the guidance will be based are those laid down in the Audit Commission's Management Paper *Getting the groundwork right: financial help for local authority trading units* and are set out in *Figure 23*.
- C.14. Best Value authorities should develop a corporate capacity to set priorities between their trading activities and monitor these across the board. The Section 151 (financial) monitoring officer³¹, along with the chief officer will play key roles. The guidance will also stress that each external trading unit should have sound arrangements for financial administration and management, including annual business plans or summaries approved by elected members. These must be linked to corporate Best Value Review and reporting processes.

- C.15. It will generally be left to the discretion of authorities to judge whether this is best carried out through crosscutting reviews of all trading activities or through the related function reviews or a combination of the two. However, the Government will consider whether significant external trading units should be reviewed individually and whether all trading activities, like service functions, should be reviewed within the 5-yearly best value review cycle. As well as looking back at past performance these reviews, for example, could also be used to identify the case for new and further wider market activities, the likely development costs and revenue potential. In which case, the Section 151 officer will have a key role to play.
- C.16. The decision to supply goods and services in each case must be subject to a project business case along the lines described in *Figure 24*, and be approved by elected members, on the advice of the Section 151 officer. Among the key factors which elected members will need to take into account in approving such projects would be:
- the scale of the activity, bearing in mind the principle of materiality, to include the impact of the project on the prudential indicator, and the cash flow implications;
 - the Section 151 officer's conclusions as to the reliability of any assessment of risks and projected profits, based on authority's (and the relevant trading unit's) track record in such projects;
 - an assessment of the impact on core services delivered by the authority;
 - the purpose of the trading activity, what it is trying to achieve and the extent to which the other options had been considered;
 - the contribution of the project to the delivery of best value in its functions; and
 - the assessment of the likely impact upon the local market.

Figure 23: Financial health of trading units

- all material local authority trading units should have annual business plans which conform to a corporate blueprint and indicate the basis on which performance against budgets will be monitored;
- summaries or composites of which should be approved at member level; the reliability and timeliness of in-year accounting and performance data are at the core of sound financial arrangements for all services;
- the Finance Director has a key role in ensuring the stewardship of a local authority's financial affairs, and where trading units operate on a devolved basis, he or she needs to ensure that stand-alone financial management and reporting is operating properly and is reliable, and is reviewed on a regular basis; and
- financial reporting requires clarity about who receives what and when.

Source: Getting the Groundwork Right: Financial Health for local authority trading units, Audit Commission, February 2000

- C.17. Projects should only proceed where there is a strong business case. The return on the project whether 'social' or 'commercial' will depend on the purpose of the activity. However, it should be significant enough to outweigh the various risks. For large schemes a two-stage process could be adopted with a Strategic Business Case produced to identify the

'essentials' of the proposal. A decision can then be made as to whether it is worth developing a full business case. Where small fee earning potential or a small social project arises, authorities will be able to adopt central policies about appropriate ways of taking them forward without inhibiting development costs. Here truncated full business cases may be employed for small-scale activity.

- C.18. Business cases will need to consider whether an existing product or service is already available and if there is an existing market then the pricing policy should not prevent or restrict competition. This means pricing to reflect the full costs involved (both capital and running costs).
- C.19. Where a trading activity or a trading unit departs from its business case or plan the Section 151 monitoring officer would be required to review that activity/trading unit, and recommend action to the council, taking into account the views of the external auditor.

Trading Accounts and Disclosure Issues

- C.20. The new power, like the 1970 Act, will require authorities to prepare a separate account in respect of agreements made using the new powers. These will show the total costs of providing the goods or service (i.e. reflect all the costs associated with the activity wherever in the management structure they arise). Authorities should not cross-subsidise their trading activities with core services. This account will be separately disclosed in both the statement of accounts and the annual Best Value Performance Plan. The nature of this disclosure could in both cases include the nature of the account, total expenditure, and profits/loss in the current year and the two previous years. There will be a separate disclosure for material trading activities. These proposals will be discussed with CIPFA as part of the update of the *Best Value Accounting Code of Practice*. However, the Government has not ruled out the possibility of using its own powers.
- C.21. In addition, other information about trading activities should be disclosed in Best Value Performance Plans identifying:
- the aims and objectives of the corporate trading policy including details of any material trading activities as measured against a corporate prudential indicator;
 - those trading activities reviewed in the past year as part of the Best Value Review process, and the outcome;
 - those trading activities reviewed by the Section 151 officer and actions taken subsequently.
- C.22. The external auditor will then report on these matters as part of their audit of the Best Value Performance Plan.

Figure 24: Project business case

What is the purpose of the trading activity? What is it trying to achieve? Assessment against other options

Should the asset concerned be retained, to meet core objectives? If the authority still need services derived from the asset, would it nonetheless be more efficient to transfer that asset and purchase the services from elsewhere?

What is the nature of the commercial potential of the asset?

are the assets, and goods and services already or potentially derived from them, unique or of sufficiently high quality that they have the potential to generate successful commercial spin-offs?

Or

Is there spare capacity, after delivering the core objectives, which could be used for commercial purposes?

Is the proposed commercial activity one, which the Chief Financial Officer of the authority is able to defend as an appropriate use of council resources?

What are the implications under domestic and European procurement/ competition rules?

What effect will be the proposed activity have on the delivery of core objectives?

Are there any conflicts of interest between the council's objectives and the proposed activity?

What effect will the proposed activity have on local businesses?

Affordability – including whole life costs of the project, taking account of the timing of income flows, and the impact on budgets

Bankability and Output specification – including the projected rate of return

The proposed structure for the venture, and the justification for not using a Public-Private Partnerships

Identification and allocation of risk

Key Terms and Conditions

Indicative Timetable

ANNEX D

Terms of Reference for the Taskforce on Local Government Procurement and Commissioning

To review the state of procurement and commissioning skills and practice in local government in the light of the requirements of Part 1 (Best Value) of the Local Government Act 1999, and its objective of continuous improvement in the economy, efficiency and effectiveness of local services; and to make recommendations.

The review should cover the commissioning and procurement of goods, works and services that are needed to enable best value authorities to achieve best value in delivering quality services to local people at an acceptable cost. It should work within the parameters of the statutory guidance for best value and the forthcoming guidance on workforce matters. It should consider ways of giving effect to the Government's objectives on electronic and green procurement. It should also take into account the findings of the Gershon review of civil procurement in central government; the second Bates review of PPP/PFI, the Construction Industry Taskforce report Rethinking Construction and the work of the Public Sector Productivity Panel.

The review should:

- Assess the size and nature of procurement and commissioning in local government;
- Consider the extent to which there is an effective market for the supply of goods, works and services to best value authorities; recommend what action is needed by central and local government and by others including the private sector, to widen the range of potential suppliers of goods and services to assist local government in securing best value;
- Identify a model corporate procurement and commissioning strategy; what skills throughout an organisation are needed to support this good practice; a model and programme of development, training and support for improving skills in each authority; and incentives for local government to adopt good procurement and commissioning practice;
- Identify ways in which local government can maximise the benefits of e-procurement for the efficiency and effectiveness of its procurement function; and,
- Identify the local, regional and national structures needed to support efficiency and excellence in procurement and commissioning practices.

In carrying out its work the review should examine the variations in market effectiveness between the different services and the reasons for those variations; the extent to which local government understands and utilises its buying and commissioning strengths at present; and the potential role of elected members and officers within local authorities.

To make a report, recommendations and an action plan.

ANNEX E

Sections 16–18 of the Local Government Act 1999

Below is an extract taken from the Local Government Act 1999 showing the provisions at sections 16 to 18. This is followed by the corresponding extract from the explanatory memorandum to the 1999 Act.

Extract from the Local Government Act 1999

Power to modify enactments and confer new powers.

16. – (1) If the Secretary of State thinks that an enactment prevents or obstructs compliance by best value authorities with the requirements of this Part he may by order make provision modifying or excluding the application of the enactment in relation to those authorities.

(2) The Secretary of State may by order make provision conferring on best value authorities any power which he considers necessary or expedient to permit or facilitate compliance with the requirements of this Part.

(3) An order under this section may-

(a) impose conditions on the exercise of any power conferred by the order (including conditions about consultation or approval);

(b) amend an enactment;

(c) include consequential, incidental and transitional provision;

(d) make different provision for different cases.

(4) No order shall be made under this section unless a draft has been laid before, and approved by resolution of, each House of Parliament.

(5) In exercising a power conferred under subsection (2) a best value authority shall have regard to any guidance issued by the Secretary of State.

Orders under section 16: procedure.

17. – (1) Before the Secretary of State makes an order under section 16 he shall consult such authorities or persons as appear to him to be representative of interests affected by his proposals.

(2) If, following consultation under subsection (1), the Secretary of State proposes to make an order under section 16 he shall lay before each House of Parliament a document explaining his proposals and, in particular-

- (a) setting them out in the form of a draft order, and
- (b) giving details of consultation under subsection (1) above.

(3) Where a document relating to proposals is laid before Parliament under subsection (2), no draft of an order under section 16 to give effect to the proposals (with or without modification) shall be laid before Parliament until after the expiry of the period of sixty days beginning with the day on which the document was laid.

(4) In calculating the period mentioned in subsection (3) no account shall be taken of any time during which-

- (a) Parliament is dissolved or prorogued, or
- (b) either House is adjourned for more than four days.

(5) In preparing a draft order under section 16 the Secretary of State shall consider any representations made during the period mentioned in subsection (3) above.

(6) A draft order laid before Parliament in accordance with section 16(4) must be accompanied by a statement of the Secretary of State giving details of-

- (a) any representations considered in accordance with subsection (5) above, and
- (b) any changes made to the proposals contained in the document laid before Parliament under subsection (2) above.

Contracting out.

18. – (1) Section 70 of the Deregulation and Contracting Out Act 1994 (contracting out functions of local authorities) shall apply in relation to functions of any best value authority (other than excluded functions within the meaning of section 71) as it applies in relation to certain functions of local authorities.

(2) An order under section 70 as applied by subsection (1) above may be made only-

- (a) by the Secretary of State, and
- (b) if he considers the order necessary or expedient for the purpose of permitting or facilitating compliance with the requirements of this Part.

Extract from the Explanatory Memorandum to the 1999 Act

'48. Section 16 creates ancillary powers for best value authorities to act in pursuance of best value. It does so:

by creating, at subsection 16(1), a power in similar terms to the current provisions of section 1 of the Deregulation and Contracting Out Act 1994, which allows the Secretary of State to modify or exclude the application of enactments which apply to best value authorities. He may do so only if he is satisfied that such an action would either modify or exclude the application of a provision which restricts a best value authority's ability to achieve its statutory duties under best value, or would serve to facilitate the achievement of them. Such a power could be used, for example, to exclude the application of existing statutory provisions which require best value authorities to divest themselves of certain functions;

by creating, at subsection 16(2), a power which allows the Secretary of State to confer upon best value authorities a power to do anything which is designed to facilitate the achievement of best value. Such a power would be subject to any conditions or limitations which the Secretary of State judges necessary. A practical example of how this might be used is to confer on best value authorities a general power to form companies through which to exercise their functions, which goes beyond their current powers to form companies only for specific purposes. Such a power might be subject to limits and safeguards imposed by the Secretary of State, and in exercising it, best value authorities would be required to have regard to any guidance issued by the Secretary of State.

49. This power will not be exercised by the National Assembly for Wales. However, the relevant Secretary of State will need to consult the Assembly before exercising this power in respect of Wales.

50. Section 17 describes the procedure the Secretary of State shall follow in making an order under subsections 16(1) and (2). He is required to consult such authorities or persons as appear to him to be representative of interests affected by his proposals, and to lay before each House of Parliament a document explaining his proposals. Section 16 already sets out that orders made under subsections 16(1) and (2) are subject to the affirmative resolution procedure in both Houses.

51. Section 18 provides a power in similar terms to that under section 70 of the Deregulation and Contracting Out Act 1994, which enables the Secretary of State to provide by order for best value authorities to contract out functions (subject to certain restrictions similar in terms to those under section 71 of the 1994 Act). An example of an order which might be made under this provision would be one which, for example, allowed relevant best value authorities to contract out housing benefits determination work. The procedure under and circumstances in which this power can be used are set out at subsection 18(2). This power cannot be exercised by the National Assembly for Wales.'

ANNEX F

Notes

- 1 Available at www.hmso.gov.uk/acts/acts1999/19990027.htm. The Act is also available from The Stationary Office at £7.25 (ISBN 0-10-542799-3); contact 0870 600 5222. Explanatory Notes to the Act (ISBN 0-19-562799-2; £5.00) are also available from the same sources.
- 2 A copy of the 1994 Act can be found at www.hmso.gov.uk/acts/summary/01994040.htm. The Act is also available from The Stationary Office at £13.00 (ISBN 0-10-544094-9); contact 0870 600 5222.
- 3 A copy of this paper Local Government Bill Clauses 14-16: Paper to the House of Commons Standing Committee, 10 February 1999, can be requested on 020 7944 4134.
- 4 see section 2(1) of the Local Government Act 2000. Available at www.legislation.hmso.gov.uk/acts/acts2000/20000022.htm. The Act is also available from The Stationary office at £11.30 (ISBN 0-10-542200-2); contact 0870 600 5222. Explanatory Notes to the Act (ISBN 0-10-562000-9; £7.25) are also available from the same sources.
- 5 This was published on 7 December for consultation. A copy is available at www.local-regions.detr.gov.uk/consult/wellbein/index.htm. The consultation period ended on 9 February 2001.
- 6 The use of the power to promote or improve the economic, environmental and social well-being is subject to the duty to secure best value. This power is also subject to any prohibition, restriction and limitation in any other power. The well-being also does not enable a local authority to raise money (whether by precepts, borrowing or otherwise).
- 7 Waste Strategy 2000 for England and Wales. A Way with Waste. This can be found at www.environmental.detr.gov.uk/waste/index.htm. The strategy is also available from the Stationery Office at £10 for Part 1 (ISBN 0-10-146932-0), £20 for Part 2 (ISBN 0-10-146933-0). Contact 0870 600 5522.
- 8 As permitted under section 101 of the Local Government Act 1972
- 9 Section 31 (of the Health Act 1999) partnership arrangements have been developed to give NHS bodies and local authorities the flexibility to be able to respond effectively to improve services by joining up existing services, or developing new, co-ordinated services, and to work with other organisations to fulfil this. These new “operational flexibilities” which relate to certain health-related functions have been available since April 2000 and allow NHS bodies and local authorities to improve services for users, through pooled funds and the transfer of functions (lead commissioning and integrated provision).

These are permissive powers and there is no limit to the size of the partnerships, or the number of partners, which can include all health-related functions, such as social service, housing and education functions, and community and acute health services (with specified exceptions). Further information on these powers can be found at: www.doh.gov.uk/jointunit/

- 10 This has the same meaning as section 101 of Local Government Act 1972 – where a function is delegated, the decision taken by the company or the board becomes that of the authority, itself.
- 11 Executive functions are those which are the responsibility of the executive of a principal council (e.g. county, district, unitary or London Borough) and not the responsibility of the full council. In general terms executive functions are the majority of local authority functions, “non-executive” functions which are the responsibility of the full council are regulatory-type functions.

The broad approach adopted by the Secretary of State to the division of functions between the executive and the full council is that the:

- determination of the local authority’s policy framework and budget and other constitutional and quasi-legislative functions are to be the responsibility of the full council;
- the function which involve either the determining an application form from a person for a licence, approval, consent, permission, or registration or direction regulation of a person (except in cases where there is only limited discretion in the discharge of the function) together with any related enforcement actions (including prosecution) are not to be the responsibility of the executive; and
- all other functions are to be the responsibility of the executive

The Local Authorities (Functions and Responsibilities) (England) Regulations 2000 give this effect or alternatively an explanation is provided by Chapter 5 of Guidance on New Council Constitutions both are available via www.local-regions.detr.gov.uk/ncc/index.htm

- 12 The Local Government (Contracts) Act 1997 clarifies the powers of authorities to contract with third parties. By doing so it enables them to certify certain types of contracts (i.e. major long-term contracts) protecting them from challenge except by judicial review or audit review. In the event that a contract were set aside, the Act allows the contractor to be compensated, whilst minimising the likelihood that this could occur, because of the clarification of powers, the rigorous certification procedure and the inherent discretion of the courts to allow a contract to continue if appropriate.

A copy of the Act is available at www.hmso.gov.uk/acts/acts1997/1997065.htm. The Act is also available from The Stationary Office (ISBN 0-10-546598-4): contact 0870 600 5222. Alternatively the Public Private Partnerships Programme have produced a “Guide to the Local Government (Contracts) Act” (ISBN 1-84049-019-5). This is available at £50 (£25 to Local Government) from IDeA Publications 020 7296 6600.

- 13 Section 111 of the Local Government Act 1972 empowers an authority to:

“do anything (whether or not involving expenditure, borrowing or lending of money or the acquisition or the disposal of any property or rights) which is calculated to facilitate or is conducive or incidental to, the discharge of any of their functions”.
- 14 see for example, the *Credit Suisse v. Allerdale Borough Council* and *Credit Suisse v London Borough of Waltham Forest* cases being the most significant
- 15 see paragraph 39 of DETR Circular 10/99 Local Government Act 1999 Part 1 Best Value
- 16 An Industrial and Provident Society is a non-profit making corporate body registered under the Industrial and Provident Societies Act 1965 as either organisations run for the benefit of the community or workers co-operative.
- 17 see www.hm-treasury.gov.uk/pub/html/reg/0395.html.
- 18 In March 1998 the DTI launched a long term fundamental review of Company Law. More information on the scope and arrangements for the review are contained in ‘Modern Company Law for a Competitive Economy’. See www.dti.gov.uk.
- 19 A copy of the Commission’s report is available at www.co-opcommission.org.uk
- 20 See HMT’s Consultation on Employer Share Ownership at www.hm-treasury.gov.uk/pub/html/reg/sharecom.html
- 21 Such as the Civic Restaurants Act 1947 (enables district councils and London Boroughs to establish restaurants and other similar facilities for the public) and section 38 of the Local Government (Miscellaneous Provisions) Act 1976 (spare computer and IT capacity)
- 22 A copy of the Local Authorities (Goods and Services) Act 1970 can be found at www.local-regions.detr.gov.uk/bestvalue/partnerships/si.html.
- 23 A copy of the Local Authorities (Capital Finance) (Amendment) (England) Regulations 1999 can be found at www.local.detr.gov.uk/finance/capital/data.
- 24 an arms-length company for these purposes must satisfy all of the following conditions:
 - all of the directors are appointed for fixed terms of at least two years;
 - 20% or less of the directors are local authority members or officers;
 - the company has agreed to use its best endeavours to achieve a specified positive return on assets;
 - no grants have been made by the local authority which are related to the company’s financial results for any period;
 - any grants which have been made by the local authority are in accordance with agreements reached before the year in which they were made;

- any loans by the authority and any borrowings guaranteed by them have only been for working capital or the acquisition of fixed assets;
 - the authority has made charges at market rate for land used by the company.
- 25 The conditions under which a company would be deemed to be regulated is set out in Figure 19. Broadly speaking, companies which are, “effectively controlled” by the private sector, are not subject to the 1995 Order. These are where the authority(ies) only hold minority rights (less than 20%) with the private sector carrying the majority of the equity risk and controlling the majority of voting rights and where the local authority does not exercise effective control or have the right to do so.
- 26 The phrase “as far as practical” means that, if there is any conflict between that requirement and some other legal requirement (such as the fiduciary duty of the directors), that other requirement is to prevail.
- 27 A company is influenced by a local authority as defined by section 69 of the Local Government & Housing Act 1989 where one or more of the following conditions are met:
- at least 20% of the voting rights of all members having the right to vote at a general meeting are held by persons associated with the authority;
 - at least 20% of the directors are so associated;
 - at least 20% of voting rights at a meeting of the directors are held by persons so associated;
- and** where one or both of the following conditions are met
- there is a business relationship with the company which accounts for over 50% of the company’s turnover;
 - the company is located on local authority land leased or sold for less than the best consideration.
- 28 A local authority is deemed to have “**effective control**” if it satisfies either of the following conditions as set out in articles 1(5) and 1(7) of the 1995 Order:
- if the authority had been a company registered under the Companies Act 1985, it would have the right (under s258 of that Act) to exercise a **dominant influence** over the company or has in fact exercised such an influence during the previous financial year; and/or;
 - if the authority had been a company registered under the Companies Act 1985, it would have been required (under s227 of that Act) to prepare **consolidated financial statements** covering the affairs of the company as part of its group.
- 29 Arms-length companies as defined by s68(6) of the Local Government and Housing Act 1989 do not have to make minutes available to the public.

- 30 In particular the “Wednesbury” principles of reasonableness. Here a local authority entering into an agreement under the 1970 Act must have regard to all relevant factors; must not base its decision on irrelevant considerations and must not act in a manner in which no reasonable local authority could act.
- 31 Section 151 of the Local Government Act 1972 requires local authorities to make arrangements for the proper administration of their financial affairs and to nominate an officer to have responsibility for financial affairs.