Browne Jacobson’s guide to government sector commercialisation
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Introduction

With ever more ambitious financial targets being set by central government, the need to look at different ways to make savings, safeguard services and generate income is becoming more important for local authorities and other public bodies.

The commercialisation of public services is not a new thing, but recent years have seen the public sector becoming more entrepreneurial and inventive in the ways in which it delivers services. For the purposes of this guide, commercialisation means the delivery of services by a public body in a way which results in making profit or reducing costs, although this may not be the primary or only aim of the provision of the services.

This guide provides information and guidance for public bodies considering a new commercial approach to service delivery. It will primarily be relevant to local authorities, although many of the issues will also be relevant to central government and other public bodies. It is a general guide only, and you should take full legal advice in advance of engaging in any particular commercial project.
Why consider commercialisation?

Commercialisation can offer a number of opportunities including:

• safeguarding the provision of essential public services by delivering them through a new model which reduces costs or generates profits;
• generating revenue through trading profitable services;
• generating economies of scale and efficiency savings to reduce the costs of service delivery;
• providing a greater choice of services to address wider needs in the local area;
• exploring new options to ensure value for money and modernisation;
• retaining jobs and the availability of expertise within the public body; and
• encouraging innovation and collaboration.
What services can be commercialised?

There are a wide range of activities undertaken by public bodies on a daily basis which may be commercialised. Those which are heavily process driven are often developed into shared services arrangements to achieve costs savings through streamlining processes and implementing a common approach to delivery.

Some services which are commonly delivered through shared service arrangements or provided through trading companies are:

- HR;
- customer services;
- building control; and
- back-office services.

Local authorities have a wide range of other services which may be suitable for commercialisation including financial services, property, care homes, school meals and consultancy services. Specialist services, such as children’s services, legal, waste and transport functions may also be amenable to alternative approaches to service delivery under the right conditions. However, where specialist services are to be commercialised, this should be done sensitively and with regard to the particular circumstances. It is worth considering whether a public consultation will need to be undertaken with users of that specialist service, before any action is taken.
Charging and trading

All public bodies will need to identify the specific powers which they have in respect of the commercialisation of particular services. This section relates in particular to the powers of local authorities to raise income or cover their costs.

To raise income the local authority may be able to trade or charge services. Trading services means providing them with a view to making a profit. Charging for services means recovering only the costs of delivery. There are express limitations upon the powers of local authorities to do either. Local authorities may charge for the provision of discretionary services. Discretionary services are services that a local authority is not under a duty to provide, but which it has a power to provide, for example, pest control or catering services. Local authorities may not charge for the provision of services that they are under a statutory obligation to provide. A local authority can set its own charges for a discretionary service provided that these cover only the expenses incurred by the authority in providing the service. Local authorities have certain powers which authorise them to trade services for a profit. There are a number of different sources of vires for trading which each have particular limitations.
Powers to trade

Local authorities must identify a specific power for any commercialisation activity they wish to undertake. The Localism Act 2011 (‘LA 2011’) introduced the general power of competence (‘GPOC’) for local authorities which permits an authority to do anything that individuals generally may do.

LA 2011 provides a power for local authorities to charge for the provision of services, subject to certain limitations and restrictions. S.3 of the LA 2011 imposes boundaries on the exercise of the power. Accordingly, a local authority may charge for the provision of services, provided that:

- the service is not something the authority is statutorily obliged to provide;
- the person being provided with the service has agreed to it being provided; and
- except for s.3 of the LA 2011 and the power under s.93 of the Local Government Act 2003, there is no other power to charge for providing the service. The authority is not prohibited from providing the services, or charging for them.
Powers to trade

If the s.1 LA 2011 power is used as the source of power for charging, the authority is under a general duty to ensure that the income from charges made under this section does not exceed the cost to the authority in providing the services on a year on year basis. There is no other pre-existing, or post commencement restriction on charging for a particular service. S.93 of the Local Government Act 2003 (‘LGA 2003’) also provides a power to charge for the provision of discretionary services.

A local authority may charge for the provision of services under s.93 LGA 2003 provided that:

• the recipient has agreed to the provision of the service; and
• there is no other power to charge for the provision of the service in other legislation.

Whilst this guide concentrates on separate vehicles, it is worth noting that local authorities have a number of powers to charge and trade. One of the most important of these is the power to trade commercially under the Local Authorities (Goods and Services) Act 1970 (LAA 1970). Under s.1 of the LAA 1970, local authorities are given powers to enter into agreements with each other and with a long list of other designated public bodies to provide goods, materials and technical services on a commercial basis. This allows local authorities to make use of surplus capacity and to secure the benefit of economies of scale.
Powers to trade

There are however some restrictions on the types of services that can be provided and the types of bodies that an authority can trade with. These should be looked at when considering the use of this power and any of the direct powers.

Local authority powers under the LAA 1970 have now been further extended by various acts such as the LGA 2003 and the LA 2011. S.4 LA 2011 provides that the GPOC confers a power on a local authority to do things for a commercial purpose (which for these purposes means trading for a profit) provided that it may do the thing under the GPOC other than for a commercial purpose. The power to do something for a commercial purpose is accordingly restricted by pre-existing, or post commencement limitations. It may not be used to trade in services which the authority is under a statutory obligation to provide.

If a local authority chooses to use s.4 LA 2011 as the source of its vires to trade, it is obliged to undertake such trading activities through an entity of the type specified under s.4(4) LA 2011.

Many local authorities will choose to use the powers under the LA 2011 as the basis for their charging and trading activities. However, given the historical uncertainty about the scope of some powers to charge and trade, authorities may find it helpful to identify another source of power to give members confidence that the authority does in fact have the necessary vires to carry out its proposed action. Additionally, other powers may not require a separate trading entity which may be beneficial.
Powers to trade

S.95 LGA 2003 allows ‘best value authorities’ (which includes English local authorities) to do for a commercial purpose anything which they are authorised to do for the purpose of carrying on any of their ordinary functions. However, it is subject to limitations similar to those set out in s.4 LA 2011.

Accordingly, the authority may not trade in any service under s.95 that:

- it is under a duty to provide as one of its ordinary functions; and
- it is authorised to trade in under another legislative provision.

There are many other specific powers to charge and trade for particular services, which should be considered alongside the powers in the LGA 2003 and LA 2011 because they may impose restrictions or limitations on the use of those powers. Rob Hann’s Special Report on Local Authority Charging and Trading Powers is a very good compendium of such powers.

Arguably, as a result of the provisions in the LA 2011, the provisions of s.95 are largely redundant or difficult to use, as ss.1-4 are other legislative provisions which allow a council to trade in most circumstances. However, for now, it remains a legislative provision and should be considered on a case by case basis. Authorities wishing to make use of the s.95 power must set up a company from which to run their activities.
Powers to trade

There is also an additional requirement for the local authority to put together a business plan before trading can begin under The Local Government (Best Value Authorities) (Power to Trade) (England) Order 2009 (SI 2009/2393) (‘The Trading Order’). While there is no explicit requirement for a business plan under the LA2011 it is advisable to have such a statement to ensure the viability of the venture.

The Trading Order requires that the business case is a ‘comprehensive statement’ as to:

- the objectives of the business;
- the investment and other resources required to achieve those objectives;
- any risks the business might face and how significant those risks are; and
- the expected financial results of the business, together with any other relevant outcomes the business is expected to achieve.
Models for commercialisation

Whether or not a new model for delivery of services is required will depend on a number of circumstances, including legislative requirements (for example, s.4 LA 2011 and s.95 LGA 2003 which require a company to be established for trading), procurement and commercial considerations, such as the ability to streamline the decision making process in a company.

There are many different ways of approaching service delivery. For example, public bodies may establish a wholly-owned company, a corporate joint venture with another public body, a corporate joint venture with a private sector body, a co-operative or community benefit society, a commercial joint venture (supported by contractual arrangements rather than a corporate vehicle) or a mutual.

When considering a new model for the delivery of services, a public body will need to understand:

- is there a particular delivery model required for the provision of services (for example, are you obliged to establish a company to trade)?
Models for commercialisation

- if a new entity will be established, are there specific benefits attaching to particular vehicles? (For example, certain types of vehicles will enable a local authority to meet the requirements of the Teckal exemption (now codified at Regulation 12 of the Public Contracts Regulations 2015).

- are there benefits which might be obtained from separating the risks of a new trading venture from the main ‘business’ of the local authority by adopting a structure with limited liability?

- are there tax benefits from a particular structure?

- will benefits be obtained from working with a partner, for example in a shared services arrangement or joint venture?

Public bodies will need to identify the particular benefits they wish to achieve and then consider what form or structure of service delivery will best enable them to meet those outcomes. Consideration should be given to the costs associated with establishing a new structure, the lead-in time before the new structure will be up and running and the wider State aid, procurement, tax and TUPE issues which may arise. Table one on the following pages sets out different approaches to service delivery and some pros and cons. Legal advice should be taken before adopting any of these structures.
### Table one

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<tr>
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<th><strong>Pros</strong></th>
<th><strong>Cons</strong></th>
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<tr>
<td>Retaining in-house delivery of services</td>
<td>• Likely to be the cheapest to establish option.</td>
<td>• Unlikely to deliver cultural change.</td>
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<tr>
<td></td>
<td>• No procurement risk.</td>
<td>• The risk that a new ‘venture’ will fail remains within the public body.</td>
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<td></td>
<td></td>
<td>• Unlikely to be able to benefit from grant funding.</td>
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<td></td>
<td></td>
<td>• May not be able to trade with a view to profit.</td>
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<tr>
<td>Company Limited by shares (CLS)</td>
<td>• Well known structure.</td>
<td>• If a ‘not for profit’ model is favoured, the CLS is less appropriate</td>
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<td></td>
<td>• Well suited to commercial activities/trading.</td>
<td>and may be viewed with suspicion.</td>
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<td></td>
<td>• Capable of profit distribution and investment growth.</td>
<td>• Unlikely to be able to access funding for charitable/social purposes.</td>
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<td></td>
<td>• Model allows for employee ownership (including economic ownership) and</td>
<td>• The risk that a new ‘venture’ will fail which may have political</td>
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<td></td>
<td>control rights if this is required and wanted at some point in the</td>
<td>ramifications.</td>
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<tr>
<td></td>
<td>future.</td>
<td>• Unlikely to be able to benefit from grant funding.</td>
</tr>
<tr>
<td>Company Limited by guarantee (CLG)</td>
<td>• Most popular form of entity for ‘not for profit’ organisations.</td>
<td>• No possibility of equity investment - cannot issue shares.</td>
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<td></td>
<td>Trusted model for those purposes.</td>
<td>• Not well suited to profit distribution.</td>
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<tr>
<td></td>
<td>• Apart from membership structure, very similar to CLS - same wide</td>
<td>• Employee control rights may be included, but not ideal to secure any</td>
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<td></td>
<td>legal powers and well known regulatory environment.</td>
<td>economic interest.</td>
</tr>
<tr>
<td></td>
<td>• Easiest entity for Teckal Exemption.</td>
<td>• Can’t convert to CLS later.</td>
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Table one continued...

| Co-operative Society or Community Benefit Society | • Strongly recognised amongst sectors where the co-operative structure is valued.  
  • Similar limited liability and legal personality to companies. | • The existence of this structure and its key characteristics are poorly understood by commercial bodies such as banks.  
  • Administration - more expensive and complex than companies. |
|---------------------------------------------------|--------------------------------------------------------------------------------|--------------------------------------------------------------------------------|
| Community Interest Company (CIC)                  | • Can be a company either limited by guarantee or by shares.  
  • Clear public statement of community interest purposes.  
  • Flexibility to pay directors (unlike charities). If limited by shares it can pay dividends up to a dividend cap. Not restricted to objects/purposes, which qualify as charitable, only for community benefit. Existing CLSs and CLGs may convert later into CICs. | • Does not receive the tax advantages extended to charities.  
  • The scope of the community interest test can be ambiguous.  
  • Asset lock legally required to be included in constitution.  
  • Can’t stop being a CIC unless converts to a charity. Dual regulation of CIC Regulator and Companies House. |
| Charitable Trust                                  | • Tax advantages.  
  • Clear public statement of charitable objects. | • Additional regulation and responsibilities.  
  • Trustees can’t be paid. Can only be used if activities are ‘wholly charitable’ and significant restrictions on trading. Asset lock. Must be independent from the establishing body (difficult to have control over the activities of the charity). Unlikely to meet Teckal requirements. |
### Mutual
- Can take a number of legal forms.
- Employee involvement may increase engagement in provision of the services.
- Can be set up as a not-for-profit company.
- Unlikely to meet Teckal requirements.
- Rights of employee control must be included to some degree.

### Charitable Incorporated Organisation
- Some additional regulation as a result of being a registered charity; but less restrictive than being a charitable trust or companies act company.
- Has the same ‘legal personality’ as other companies in that it can hold property, enter into contracts and sue and be sued.
- New structure; may be less familiar.
- Less flexibility in terms of approaches to governance because they are required to have a set constitution.
- Unlikely to meet Teckal requirements.

### Shared service
- A shared service may take a number of different forms which can be in-house (requiring no legal arrangements) or through a formal private, third or public sector partnership. The pros and cons may depend on the form.
- May be cost effective to set up.
- Can allow authorities to utilise existing services and provide them to the public or to other businesses/public sector partners.
- Depending on arrangement, may be difficult to impose cultural change.
- Likely to require significant efforts to maximise benefit which will require streamlining of existing processes.
Director’s duties are derived from the Companies Act 2006 (“CA 2006”), and directors appointed by a public sector company (both executive and non-executive) have the same responsibilities as any other director.

The CA 2006 places statutory duties on directors. For example, directors are required to promote the success of the company, to exercise reasonable care, skill and diligence, and to avoid conflicts of interest. If such a duty is breached or threatened to be breached, consequences could include an injunction, the setting aside of a transaction, the restoration of company property held by the director in breach, or damages. The breach may also give rise to grounds for the termination of a director’s service contract if acting in an executive capacity, or for disqualification as a director. There are also a number of common law and equitable principles that also apply to directors such as the duty of confidentiality to the company and the duty of undivided loyalty.

Where a director fails to fulfil their duties, they will be judged against the standard of skill and experience that a director would be expected to possess.
Director’s duties

It is particularly important for local authorities appointing statutory directors to ensure that the directors have detailed and appropriate training in relation to effectively carrying out their duties whilst adhering to the principles of public life. Directors of a local authority company must also continue to act in accordance with other applicable legislation and relevant civil service and public sector guidelines. The ‘Code of Conduct for Board Members of Public Bodies’ published by the Cabinet Office in 2011 sets out seven key principles of public life and, whilst not directly applicable to public sector companies, provides useful guidance. Directors will need to strike a balance in fulfilling their duties as listed above, whilst adhering to the principles set out below in their capacity as public office holders:

- **Selflessness**: Board members of public bodies should take decisions solely in the public interest and are not permitted to make decisions so as to secure material or financial benefit for self, family or friends. It is worth noting this guidance may conflict with board members duties as directors to a company and advice should be sought accordingly.

- **Integrity**: They should not place themselves under any financial or other obligation to outside organisations/individuals which could, or be perceived to, influence them in the performance of their public duties.

- **Objectivity**: Choices made by board members should always be based on merit, particularly in relation to carrying out public business or awarding contracts.
Director’s duties

- Accountability: There is a requirement for said individuals to submit themselves to public scrutiny and be held accountable for their actions.

- Openness: Decisions should be made openly with reasons given and the restriction of information should only be permitted where it is appropriate in the context of the wider public interest.

- Honesty: Public body board members will have a duty to declare any private interests in relation to their public duties and should actively take steps to resolve any interest that arises.

- Leadership: The above principles should be supported and promoted through example.

Conflicts of interest

All directors have a legal duty to avoid conflicts of interest which may be actual, potential or perceived. The appointment of council members and officers to subsidiary companies means that they may be placed in a situation where they owe conflicting duties. Conflicts of interest may occur where a director is a member of two boards, or where a director has competing loyalties to their public sector employer and the commercial venture to which they have been appointed director. Directors of public sector companies must take care that fulfilling these responsibilities does not conflict with their duties as a board member or member of a public body. Potential conflicts should be explored when the company is established and care and thought must be taken at the start to endeavour to ensure that there is effective corporate governance in place to deal with such conflicts.
Shareholder controls

Governance arrangements between companies and shareholders

Corporate governance relates to a formal system of accountability of directors and senior management to shareholders. In the context of local authority subsidiary companies, with the shareholder being the public body or local authority (either as a sole or joint shareholder), the shareholder is able to retain a degree of control and influence in respect of the company.

The role of the public body as a shareholder is governed by the articles of a company and any Shareholder’s Agreement, except in the case where the local authority is the sole shareholder where no Shareholder’s Agreement is necessary. A Shareholder’s Agreement is an agreement between the Shareholders and the Company which supplements some of the issues contained within the Articles. It sets out the objectives and financing of the company and will usually contain a framework for how shareholders will act in relation to the company.
Shareholder controls

The shareholder’s objectives are to be an effective shareholder of the company and to manage the company in order to secure best value for the taxpayer.

Governance arrangements of public sector companies are currently lightly regulated but, with the increase in local authority trading companies and special purposes vehicles, this may change. The UK Corporate Governance Code may provide a useful starting guide for public bodies looking to outline formal governance arrangements.

Reserved matters

In instances where there is more than one shareholder the governance arrangements may be controlled through the use of a reserved matters list, normally contained in a Shareholder’s Agreement. As directors must always act in the best interest of the company, a reserved matters list allowing the public sector shareholders to retain control over specified matters is not uncommon.

The contents of the reserved matters list will be dependent on each specific scenario. Governance between companies and shareholders should also cover matters such as executive remuneration and board composition. It is important that governance arrangements are thought out in order to ensure maximum efficiency and value for money in relation to public funds. When there is no Shareholders Agreement public bodies may find it helpful to have a delegations matrix which sets out the decisions to be made by individuals, the Board and the Shareholder.
Other key considerations...

Contracting authority duties

Public bodies considering entering into contracts with a third party for the provision of goods, services or works, will need to consider whether the proposed arrangements comply with EU procurement rules. Most public bodies are ‘contracting authorities’ for the purposes of the Public Contracts Regulations 2015 (‘PCR 2015’) although there are exemptions and exceptions.

To be considered a contracting authority the definition under Directive 2014/24 EU which recognises ‘bodies governed by public law’ as contracting authorities needs to be satisfied. Where a public body is entering into arrangements with a wholly owned company or another contracting authority, the PCR 2015 contains exemptions which may mean that the authority does not need to go through a procurement process to award the contract.
Other key considerations...

Regulation 12(1) of the PCR 2015 attempts to codify the Teckal exemption (Teckal). This exemption allows a contracting authority to award contracts to a wholly owned company when:

- the contracting authority exerts control over the company similar to that which it exercises over its own departments;
- the company carries out more than 80% of its activity with the contracting authority or with other legal persons controlled by that contracting authority; and
- there is no direct private capital participation in the company, with the exception of non-controlling and non-blocking forms of private capital participation required by applicable national legislative provisions, in conformity with the EU Treaties, which do not exert a decisive influence on the company.

If all three requirements are met, then Regulation 12(1) allows the award of a contract to the controlled company without a procurement process. It also allows for the controlled company to award contracts back to the controlling contracting authority. Compliance with the requirements must be monitored during the lifetime of the company because if at any point the requirements are not met, the contracts awarded to the company may need to be reprocured.
Other key considerations...

Regulation 12(4) provides for a group of contracting authorities to award contracts to a jointly owned company without following a procurement exercise in certain circumstances, which may be useful where contracting authorities are considering jointly establishing a venture.

Public bodies intending to make use of the Teckal exemption may need to structure their arrangements in a particular way to meet the requirements of Regulation 12(1). For example, certain structures will not enable the controlling contracting authority to retain sufficient control over the company to meet the requirement that the controlling authority must exercise control similar to that exercised over its own departments.

When a contracting authority for the purposes of the PCR 2015 awards a public contract for goods, works or services to another entity without having gone through a procurement process in circumstances where the full rigour of the PCR 2015 applies, there is a risk that the award of the contract may be challenged. Therefore the available exemptions should be used carefully and legal advice should be taken to ensure compliance. A subsidiary company established by a local authority or public body will be subject to the public procurement regime where it also is a ‘contracting authority’.
Other key considerations...

The Advocate General ("AG") of the Court of Justice of the European Union handed down an opinion in the case of LipSpecMet UAB v Vilniaus lokomotyvu remonto depas UAB and another Case C-567/15. This case considered whether a subsidiary company established by a public body was a ‘contracting authority’ and therefore subject to the public procurement regime. The AG considered that a company will be seen to have an industrial or commercial character if it is operating on the same commercial basis as its competitors. Where this is the case the company will not be considered a contracting authority as it falls outside the definition of a ‘body governed by public law.’

The AGs opinion concluded that a company will be a contracting authority where:

- the in-house (Teckal) exemption applies; or
- it provides the contracting authority with goods, works or services without commercial pressures from competitors and not in free market conditions in order to enable the authority to provide its designated service.
State aid

Where a separate entity is established to provide services to a public body (whatever the legal form) it will be essential to ensure that the arrangements put in place minimise the risk that illegal State aid is granted.

State aid regulation is part of the EU competition law regime. All public bodies are subject to the State aid regime and are not permitted to make subsidies or provide other benefits which distort or have the potential to distort competition within the EU. The EU Commission has very wide powers to investigate State aid breaches and may order recovery of any State aid received from the aid recipient, together with interest.

There is also the possibility of fines being imposed if breaches of State aid law are not remedied and legal action through the UK courts by competitors of the aid recipient to claim damages where they have incurred a loss as a result of the State aid breach. The commission may take action up to ten years after the grant of State aid is made.
State aid

In order to be considered State aid, a particular measure must meet all of the below criteria:

- it is granted by the State or through State Resources;
- it favours certain undertakings or the production of certain goods;
- it distorts or threatens to distort competition; and
- it affects or is able to affect trade between Member States.

It is worth noting that a procurement process will often help to avoid suggestion of State aid by demonstrating that the public body is not providing a benefit to the separate entity over and above the normal remuneration for providing a particular service. However, this is not always the case and is unlikely to assist where a procurement process limits the providers which may be invited to participate or otherwise fails to achieve best value.

Public bodies establishing separate entities should note that these bodies are likely to be capable of receiving and granting aid themselves, on the basis that they are likely to be engaged in economic activity but also receive a degree of public funding or are under the control of public bodies. This means that a body establishing such an entity will need to consider whether the provision of funding or assets to the entity may be State aid, but also whether the entity itself may be at risk of granting illegal aid.
State aid

From the perspective of State aid regulation, there are no particular legal forms which provide an intrinsic advantage in terms of achieving State aid compliance; the same rules will apply whichever form is taken.

It is therefore essential that if a separate entity is to be set up, that a full State aid analysis is conducted to establish whether there is any risk intrinsic in:

- any funding or other forms of public money being used to support the entity;
- any other support being provided to the entity, for example where the public body is providing back office services;
- any investment which the public body makes in the entity; and
- the transfer of assets to the entity.

The choice of structure itself will not directly give rise to State aid risks, however, consideration should be given to whether risks arise from support required by one structure but not another. The State aid position will also be judged by the level of financial ‘support’ needed by the entity.
Consultation

Depending on the nature and scale of the potential changes to the way that the services will be delivered, a public body may consider it necessary to carry out a public consultation exercise. For example, under s.3 of the Local Government Act 1999 which provides a general duty upon local authorities to consult widely including with; representatives of persons liable to pay any tax, precept or levy or non-domestic rates; representatives of persons who use or are likely to use services provided by the authority; and representatives of persons appearing to the authority to have an interest in any area within which the authority carries out functions.

In deciding who to consult and the form, content and timing of any consultation, public bodies must have regard to any guidance issued by the Secretary of State. The most recent guidance was issued by the Cabinet Office in March 2018 and this will be important to bear in mind when making decisions about any consultation.

Consideration should be given to carrying out a full vires audit to establish whether there are any particular consultation requirements. This ought to be considered and factored into the timetable for any new delivery model.

Social value

If the proposed delivery model requires the public body to procure a services contract as part of its preferred delivery model, it should note that public bodies are required to consider social value issues under the Public Services (Social Value) Act 2012.
Consultation

In particular, public bodies must consider how the services might improve the economic, social and environmental well-being of the surrounding area and how the procurement process might be used to secure that improvement.

**TUPE and employment issues**

In any scenario which involves creating a new entity (in whatever form) there will be implications for staff and it will be important that such implications are addressed and carefully thought through. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) were amended with effect from 31 January 2014.

TUPE introduces three main concepts into UK employment law:

- The automatic transfer principle; employees transfer to the transferee who inherits all rights, liabilities and obligations in relation to them.

- Affected employees are protected against dismissal in connection with a TUPE transfer.

- The transferor is required to inform and, in certain circumstances, consult with representatives of the affected employees.

TUPE applies to a ‘relevant transfer’, which means either or both of the following:
Consultation

• a transfer of a business, undertaking or part of a business or undertaking where there is a transfer of an economic entity that retains its identity (a business transfer). This involves three elements:

(a) an economic entity;

(b) a transfer of that economic entity; and

(c) the economic entity retaining its identity following the transfer

• a client engaging a contractor to do work on its behalf, reassigning such a contract or bringing the work ‘in-house’ (a service provision change). Therefore, this can cover an initial (or first generation) outsourcing, a subsequent (or second generation) outsourcing or an in-sourcing. The supply of goods and ‘one-off buying-in of services’ are excluded. The activities carried on after a change in service provider must be ‘fundamentally or essentially the same’ as those carried on before it.

• Where TUPE is likely to be an issue, specific advice should be taken with respect to TUPE and employment issues. As part of the employment issues, you will also need to think about pension provision and the need, or not, to continue to provide access to the Local Government Pension Scheme. Again, specific advice will be needed on this and this advice should be taken early due to the potential costs involved.
Contract management

Public bodies are finding more innovative ways to generate savings. Often these can be affected through third party arrangements, but efficient contract management is key in such circumstances in order to enable local authorities to actually deliver these savings.

Active contract management is essential if the terms of a contract are going to correspond to the service that is being delivered, even if this is delivered by a body owned by the public body. Those involved in the procurement and negotiation of the contracts should work closely, and have regular communication with, those involved in delivering the service to ensure that everyone has a clear understanding of the contract from the start. This will also help to ensure that good relationships are maintained. Effective contract management will also help public bodies obtain relevant data on how the contract is working and its effectiveness in delivering savings in order to decide whether contracts should be renewed. Some public bodies have supported those employees undertaking contract management by bringing in experienced contract management specialists or by providing specialist training.
In conclusion

There are many issues that public bodies considering commercialisation will need to take into account when developing a strategy for an alternative services delivery model. These new models can prove very successful and meet a number of important aims, but they require clear planning, a strategic approach and buy in from all stakeholders.

Browne Jacobson as a full service law firm is uniquely placed to help public bodies wishing to explore new approaches to service delivery and we have significant experience in assisting others to successfully achieve commercialisation of their services.

If you would like further information about how we could help you, please contact Peter Ware: +44 (0)115 976 6242 peter.ware@brownejacobson.com.
Our team

Peter Ware
Partner
t: +44 (0)115 976 6242
e: peter.ware@brownejacobson.com

Richard Medd
Partner
t: +44 (0)115 976 6256
e: richard.medd@brownejacobson.com

Stephen Matthew
Partner
t: +44 (0)20 7871 8505
e: stephen.matthew@brownejacobson.com

Anja Beriro
Partner
t: +44 (0)115 976 6589
e: anja.beriro@brownejacobson.com
Browne Jacobson’s guide to government sector commercialisation

Contact us

Birmingham office
Victoria House
Victoria Square
Birmingham
B2 4BU
+44 (0)121 237 3900
+44 (0)121 236 1291

Exeter office
1st Floor
The Mount
72 Paris Street
Exeter
EX1 2JY
+44 (0)1392 458800
+44 (0)1392 458801

London office
15th Floor
6 Bevis Marks
London
EC3A 7BA
+44 (0)20 7337 1000
+44 (0)20 7929 1724

Manchester office
14th Floor
No.1 Spinningfields
1 Hardman Square
Spinningfields
Manchester
M3 3EB
+44 (0)370 270 6000
+44 (0)161 375 0068

Nottingham office
Mowbray House
Castle Meadow Road
Nottingham
NG2 1BJ
+44 (0)115 976 6000
+44 (0)115 947 5246