

The Legal form of the Somerset Waste Board**Report of Strategic Director Joy Wishlade**

(This is the responsibility of Executive Councillor Mrs D Bradley)

Executive Summary

The Somerset Waste Partnership (SWP) is working towards the creation of a Somerset Waste Board (SWB) that will manage the disposal (county) and collection (district) waste functions across the whole of Somerset. This will include the new integrated waste collection contract for the whole of Somerset that is currently being procured. It is expected this arrangement will lead to increased efficiencies and improved service delivery.

There are a number of options that could be used to establish the legal form of the SWB. These options are considered in this report. The SWP is being advised by external legal advisors, Nabarro Nathanson and Roger Henderson QC. This advice has been considered by the six partner councils' legal representatives, the Legal Sub Group (LSG), which has made a recommendation on the preferred option for the legal form of the Board. This recommendation has been further considered by the Directors Implementation Group, made up of a director from each partner council and in effect the project board.

1. Background

All the SWP partner councils have approved constitutional principles for the operation of the Somerset Waste Board, these were approved by Taunton Deane's Executive on December 7th 2005. The constitutional principles are summarised below:

- (a) The SWB will be an independent entity unless this is legally impracticable;
- (b) The duration of the SWB will be indefinite and provision will be made for withdrawal of individual partners or the winding up of the partnership;
- (c) The partnership will discharge both waste collection and waste disposal functions;
- (d) The SWB will be funded by an agreed budget pooling mechanism;
- (e) Two members are to be nominated from each constituent authority;
- (f) Each member will have one vote;
- (g) The chairperson will not have a casting vote;

- (h) Unanimity will be required to change the constitution whilst other matters will be decided by a simple majority vote;
- (i) The SWB will be empowered to make all decisions relating to the provision of waste services in Somerset, but the “ratification” of the SWB’s decisions will be required where there is “a significant impact on budgetary contributions” or on “service design”.
- (j) The SWB will be open and accountable to the public
- (k) Members of the SWB will act in the interests of the partnership as a whole and not just in the interests of their own authorities

2. Options Considered

2.1 Our legal advisors outlined six potential options that they considered should be examined as potential options for the structure of the SWB. These options were endorsed by the LSG. The potential structures examined were:

- Joint Committee with administering authority;
- Free-standing limited company;
- Free-standing limited liability partnership;
- Joint Committee plus limited company;
- Joint Committee plus limited liability partnership; and
- Joint Authority.

It should be noted that in addition to these structures the potential for the use of either a charity or trust was discussed but these structures were not considered to be appropriate/practical for the SWB’s objectives.

Below is a summary of issues relating to each potential legal structure.

2.2 Joint Committee with Administering Authority

Two or more local authorities have the legal power to appoint a joint committee to discharge any of their functions jointly. This is a relatively straightforward power and commonly used in local government since it was introduced in the Local Government Act 1972. However, there was a question around whether a joint committee could be set-up to discharge waste collection and waste disposal functions as the Environmental Protection Act specifically defines district councils as collection authorities and county councils as disposal authorities. Leading Counsels advice is that this would not be an obstacle to creating a Joint Committee, stating:

...section 101(5) of the 1972 Act is sufficiently broad to allow the county council qua waste disposal authority and the district councils qua waste collection authorities to collaborate in a joint committee along the lines envisaged in the SWP’s Specification

A joint committee does not have a separate legal personality and as such is not able to enter into contracts or employ staff. If a joint committee is required to

enter into contracts and employ staff a well established solution is that one of the authorities that form the joint committee becomes the ‘administering authority’ for the purpose of entering into contracts and employing staff.

2.3 Free-standing limited company and Free-standing limited liability partnership

Local authorities cannot delegate functions to a limited company or a limited liability partnership (“LLP”). As such both of these options were dismissed.

2.4 Joint Committee plus limited company

This option is similar to a joint committee with administering authority but a limited company is used as the vehicle to hold the contracts and employ staff. There are potential benefits of using a company structure rather than a local authority as it could increase the SWB’s ability to engage in commercial activities. There are a number of options available to create a limited company in these circumstances. The one that probably provides the most flexibility would be s95 of the Local Government Act 2003 that gives local authorities powers to trade. However, these powers are only available to councils with a CPA rating of fair and above. As two of the SWP partners have CPA ratings of “weak” this power is not available to the partnership. In addition, even if all the partner authorities did have the requisite CPA rating and we considered using the s95 powers any council who lost the CPA rating would have to withdraw from its trading activities, essentially requiring them to pull out of the SWB. It is considered that this in itself would be an unacceptable level of risk for the partnership.

The SWB could potentially combine powers in the three pieces of legislation; the LGA 1972 that gives councils powers to act in a manner that is conducive to the discharge of their functions, the LGA 2000 that sets out general well being powers, and specific powers in the Environmental Protection Act 1990 that give local authorities the power to trade in recyclables and commercial waste activities. At present the general view of the Legal Sub Group is that although this appears to be a viable option further work is required before it could be recommended as a preferred option.

2.5 Joint Committee plus limited liability partnership

This option is very similar to joint committee with limited company but using a limited liability partnership. There are potentially benefits in using a LLP instead of a company around tax. LLP’s are tax transparent which means the SWB members would not pay corporation tax on any profits made. In addition they do not have the duty of directors of the company to act in the company’s interest mitigating the potential for conflict of interest.

One of the purposes of establishing an LLP must be the intention to make a profit. The law relating to LLPs does not define what is meant by profit, however, the general nature of the phrase “with a view to a profit” is likely to denote an intention to increase the amount of gain made by the business during a fixed period of time in the context of monetary gain. One of the intentions of creating

the SWB is to make efficiency savings and our legal advisors were asked to consider if this could be regarded as profit for the purposes of creating an LLP. It maybe that the SWB could combine the s95 LGA 2003 trading powers referred to above to make a profit and create an LLP, however, this option is ruled out for the reasons given above. The legal advice received concluded:

In the circumstances, the use of the LLP model coupled with a joint committee is problematical. I do not consider that the LLP option is satisfactory.

2.6 Joint Authority

Under the provisions of the LGA 1999 the partnership could apply to the Secretary of State to create a Joint Authority, essentially a new public body. This would need to be justified on the basis of securing continuous improvement in the exercise of local authority functions having regard to a combination of economy, efficiency and effectiveness. In addition to this members should note that the recently published White Paper has given a clear indication that the pending Local Government Bill will include provisions for councils in two tier areas to create joint waste authorities. It is probable that these will still require Secretary of State approval but having a specific power to refer to will reduce the risk that the Secretary of State would refuse a future application for a Joint Authority.

Our legal advisors and council solicitors regard the Joint Authority option as the most appropriate legal structure for the SWB as it creates the same level of political control and accountability as a joint committee but does not need a supporting legal entity. The main drawback with creation of a joint board is the time required to establish it. If we assume the new powers referred to in the White Paper will come into force in late 2007 it will probably take in the region of two years from this point to get approval to create the Joint Authority.

3. Recommendation of the Legal Sub Group

On considering the advice on the legal options the Legal Sub Group recommended that the SWB should adopt the Joint Committee with Administering Authority model in the short-term with a view to the creation of a Joint Authority as the long-term solution.

The LSG considered all the options in detail including the Joint Committee with company option. Although there was a consensus that we could not use the trading powers of the LGA 2003, due to the CPA issues, there was considerable debate around setting up a company using a different legislative approach, as outlined above in 2.4. The Group's view was that although this approach to creating a company structure could be of merit it should be ruled out on the balance of risk, cost and time.

4. Scrutiny

With regard to scrutiny the view of all legal advisors is that it is not possible to undertake joint scrutiny in a pure sense. All partner authorities will have the ability to call-in SWB decisions in accordance with their constitution. To mitigate the potential adverse impact that reporting to six scrutiny committees could create it is consider that whatever option is pursued it should be supported by a

joint scrutiny committee. Although this committee would not have any statutory function it is expected it will be an effective conduit to report SWB issues to the partner authorities' formal scrutiny committees.

5. Financial implications

There is no change to our current tax liability using the Joint Committee option. However, all authorities concerned have agreed to pool their waste budgets to fund the SWB. The work to produce a methodology to do this is progressing well and Lead Waste Officers, senior Finance Officers and S151 officers from all authorities have been involved and support the methodology principles. A presentation of progress to date was given at the HLRP meeting on December 4th and will come for decision by the Executive early in 2007.

6. Recommendation

In order to ensure the Somerset Waste Board has an appropriate legal form in the short and long-term and having regard to the need to mitigate risk and resolve these issues in a timely cost effective manner it is recommended that:

1. In the short-term the legal form of the Somerset Waste Board should be a Joint Committee with Administering Authority;
2. The Somerset Waste Partnership applies to create a Joint Waste Authority using:
 - i. The powers that are expected to arise from the Local Government Bill following the recently published White Paper; or
 - ii. The Local Government Act 1999 powers.
3. Having regard to the balance of risk, cost and time the option of using a joint committee with company structure should be ruled out.

Background Papers

Executive Report: Somerset Waste Partnership – Contract Integration 7th December 05