

# Alternative Delivery Vehicles for the Provision of Tourism, Leisure, Culture and Youth Services

Report on Legal Issues and Legal and Organisational Structures for  
Monmouthshire County Council

Date: 24 March 2016



Anthony Collins  
solicitors

# DRAFT

## OVERVIEW

1.	BACKGROUND AND PURPOSE .....	2
2.	COUNCIL KEY OBJECTIVES .....	3
3.	EXECUTIVE SUMMARY .....	5
4.	THE LEGAL STRUCTURE .....	6
5.	GOVERNANCE .....	16
6.	APPLICATION OF EU PROCUREMENT LAW .....	19
7.	STATE AID .....	26
8.	COMMUNITY RIGHTS, CONSULTATION AND JUDICIAL REVIEW.....	31
9.	POWERS AND DUTIES .....	37
10.	EMPLOYMENT ISSUES .....	42
11.	SUPPORT SERVICES .....	42
12.	ASSETS .....	42
13.	PROPERTY .....	43
14.	OTHER CONSIDERATIONS .....	ERROR! BOOKMARK NOT DEFINED.
15.	THE COUNCIL'S ROLE IN THE ON-GOING RELATIONSHIP WITH THE ADV:....	47
16.	CULTURAL STRATEGY .....	ERROR! BOOKMARK NOT DEFINED.
17.	BEST PRACTICE AND PEER SUPPORT .....	48
18.	CONCLUSION.....	ERROR! BOOKMARK NOT DEFINED.

Appendices – attached separately

# DRAFT

## 1. Background and Purpose

Monmouthshire County Council (“MCC”) currently provides Tourism, Leisure, Culture and Youth Services with a combined budget of £4 million and approximately 250 staff. In 2014, MCC undertook a comprehensive assessment of the future options for its Culture services and it became clear that the Culture services are heavily linked and inter-dependent with the Leisure and Youth/Outdoor Education and Recreation services.

MCC has undertaken an extensive budget engagement exercise and is proposing that the services will be provided to the residents of Monmouthshire through Alternative Delivery Models (“ADM”) whilst a potential trading model will provide support for the ADMs and generate income through training, events and consultancy services. To date no decisions have been made around the legal form or governance of any ADM. The purpose of this report is to help inform the Council’s key decisions in this area.

# DRAFT

## 2. Council Key Objectives

MCC's overall objectives include:

- To undertake an options appraisal of the Tourism, Leisure, Culture and Youth Services.
- To develop a business case which will enable the ADM(s) to demonstrate to MCC the potential for growth and sustainability for the services.
- To undertake an analysis of the legal and governance structures available and make recommendations including:
  - growth and investment opportunities;
  - any skills gaps within the proposed governance model and the ADMs Board;
  - HR including TUPE and future pension arrangements;
  - appropriate procurement routes to determine options for awarding services to the new ADMs;
  - asset/leasehold transfer; and
  - stakeholder engagement to include maximising staff, community and service user involvement.

In addition to these overarching objectives, Tourism, Leisure, Culture and Youth Services have each identified objectives which are specific to their services and these are set out below. We have set out at Appendix 2 a summary of our understanding of the structure in which services currently operate.

# DRAFT

Key Objectives for each Service			
Tourism	Leisure	Youth	Cultural
To increase the competitiveness of Monmouthshire as a year round sustainable tourism destination.	Be the leading fitness qualification provider.	To sustain, create and grow opportunities for young people through localised services.	Inspire a passion for Monmouthshire and encourage people to engage with their communities.
To grow the economic, environmental and social contribution of Monmouthshire's visitor economy.	Improve the nation's health.	Shares resources with outdoor education, sports development and play.	Encourage tourism, employment and support skills development.
Address the imbalance of accommodation type (40% serviced/60% non-serviced).	Provide a greater choice of activities and more indoor activities to overcome bad weather.	Provide young people with learning experiences which enable them to fulfil their potential as empowered individuals and members of communities.	Collect and share history, stories and heritage of communities.
Reduce the risk of seasonality (caravan and camping accommodation currently makes up 70% of non-serviced accommodation).	Make more efficient use of physical space in order to meet demand.	Enable young people to feel and be perceived as valued members of the community.	Rationalise storage resources and collections.
Destination partnerships for Brecon Beacons National Park and Wye Valley & Forest of Dean.		Provide formal education service.	

# DRAFT

## 3. Executive Summary

Based on our assessment of the information provided to us and the views expressed at the visioning day (1 March 2016), our conclusions are that the ADMs could take a variety of forms and the choice of structure will be affected by a number of factors detailed in the later sections in this Report. We have detailed our initial recommendation at the end of this section.

It is evident that the final preferred option cannot be ascertained until the Council has made some key decisions in relation to:

- the level of control required by MCC;
- the availability of alternative funding and the level of funding that will still be required from MCC;
- whether particular assets are transferred/licenced to the ADM;
- the priority of services within each of Tourism, Leisure, Culture and Youth Services;
- the organisational support for combining the operations within Tourism, Leisure, Culture and Youth Services;
- the appetite for and the extent of any staff, service user or community ownership; and
- the ability to bring together the presently disparate services as a cohesive whole.

The responses to the above will assist us in further assessing the appropriateness of the potential options and recommendations detailed below. This work will need to be further informed by the detailed business planning work that will be undertaken as part of the next phase of the project.

### **Key recommendation:**

**Our recommendation would be to establish a group structure comprising of a local authority 'Teckal' company, a separate trading company and a separate charitable company.**

# DRAFT

## 4. Business Plan Report Summary

The detailed business summary can be found in detail at Appendix 1 (“**Business Plan Report**”) and provides an overview of each of the services.

In summary, this initial work indicates that, as a minimum, the ADMs will need to generate £0.8-1.6 million in new income and savings over the first 5 years of its life in order to sustain the services at their current level. There will be additional costs associated with establishing the ADMs that need to be taken into account and as a consequence, the ADMs should look to generate between £2.0 and £2.5 million in new income and savings over the first 5 years of its life which translates to an average income of £400,000-£500,000 each year.

Based on the current service provision, there are some services that would benefit from trading on a more commercial basis (such as Leisure and Outdoor Education) whereas other services are more limited in their trading activities and will be more reliant upon MCC funding (such as Museums and Youth Services).

The due diligence process and conversations with staff have already identified the desire to unlock more grant funding opportunities, an appetite to operate outside of the immediate Monmouthshire area and an enthusiasm for trading more commercially (such as charging for popular services currently provided for free). This political support and economic mind-set is crucial to the success of the ADMs as Monmouthshire has a small population (91,000) and will need to generate income from companies and individuals other than those in need of support services. It is interesting to note that, other than Outdoor Education, all of the services are currently operating at a loss.

One of the biggest risks, whilst wanting to create ‘synergies’ between the services is that some of the services that would operate well independently or more commercially end up being held back or subsidising those that don’t have the same capacity. It will be imperative to consider how best to organise, lead and manage the new entities.

The critical issue identified is the investment to get the services into a position to operate commercially. Many services have limited spare capacity and there may need to be an investment in enhancing existing skill sets to meet those new challenges. These are all areas that will need to be discussed in more detail with the wider leadership team as part of the detailed business planning work.

# DRAFT

We have used the initial business case to inform the proposed structure at Appendix 3.



# DRAFT

## 5. VAT Report Summary

The detailed VAT summary can be found at Appendix 4 (“**VAT Report**”). We have summarised some of its main findings below for ease of reference.

Due to the exemption available the advice has been separated out in relation to Leisure services and non-leisure services.

### **Areas other than leisure**

The VAT Report concluded that, from a VAT perspective, in order to achieve improved VAT recovery on costs, it would be beneficial to ensure that any new entities receive charges from MCC through a services contract. This is preferable to receiving grant funding from MCC as the main income stream.

The VAT Report also confirmed that the status of the legal entity should not have a significant impact providing the service contract is in place and so the options that we have presented in this report are achievable from a tax perspective.

Other significant income streams are planned where the customers can recover VAT, therefore, exemptions tend not to be beneficial. This again provides increased flexibility on type of entity used because eligibility criteria for VAT exemptions do not have to be met.

Our due diligence on the grant agreements we have seen so far have indicated that MCC’s beneficial rights under the grant agreement cannot be transferred to any third party and MCC will need to review with the grantors whether these conditions can be re-negotiated.

### **Leisure services**

Due to the fact that any new entity will generate income from the general public, there is an opportunity to explore further the use of a non-profit making leisure trust. Again, if any deficit is met through a services contract this could make this a more beneficial structure subject to gaining HMRC’s agreement in relation to inclusion within a partial exemption calculation. However, that would mean the contracts would need to go out to a wider public procurement exercise and so we wonder whether the objectives would

# DRAFT

still be better served through a Teckal and separate trading company vehicle, albeit the leisure exemption on income may not then be achievable.

If a charity is included within any new structure it will provide an additional opportunity to mitigate any corporation tax cost through the use of 'gift aid'.

Not for profit entities as described will often achieve significant savings in relation to 'business rates'. When combined with a VAT opportunity this could be a significant opportunity.

Further work will be required to establish if other funding streams become available for any new entities and whether such entities are required to have a particular status.

# DRAFT

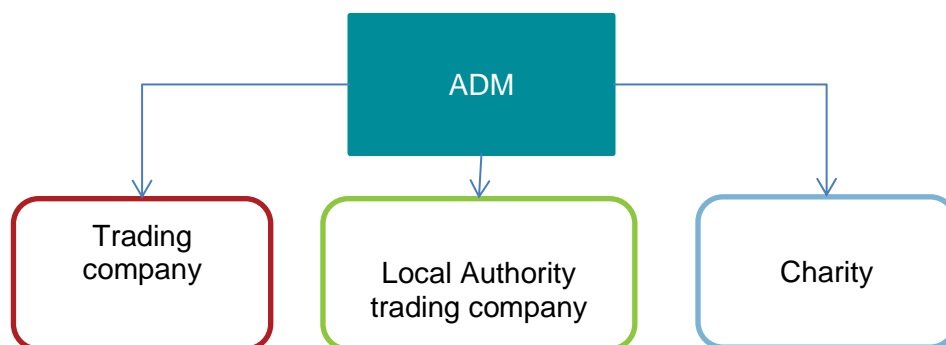
## 6. The Legal Structure

### Overview

In accordance with the Business Plan Report and VAT Report, to secure the best tax position and to enable cross-subsidies of the different services, we would recommend a group structure made up of different types of ADMs. We envisage that this group structure would work best, if it comprised of a Local Authority trading company, a separate trading company and a separate charitable company.

This would be helpful because

- (1) The 'Teckal' company could operate so as to service most of the Council's needs and so would essentially be the 'internal' facing company;
- (2) Due to restrictions on Teckal companies' ability to generate external income from other sources (limited to no more than 20% funding/income from other sources), a trading company would be a useful vehicle through which to conduct other 'external' facing trading activities; and
- (3) The charitable company would enable certain services to benefit from other charitable sources of income/donations that may not be presently accessible as part of MCC. It would also enable potential business tax relief and would allow other ADMs entities to 'gift aid' profits to be reinvested into charitable purposes, thereby mitigating the impact of potential corporation tax charges.



It may be that in the future there is a greater appetite for community engagement and involvement or the potential for some sort of community and/or service user ownership. However, for now the main priority for MCC is to ensure that the services are sustainable for the future. Once the ADMs is firmly established with a secure trading

# DRAFT

history it may be appropriate at that time to consider whether certain services can be delivered through a more co-operative organisation or joint venture.

In establishing its group structure, MCC will need to consider what type of legal structure/vehicle will best serve its aims. We have set out below a summary of some of the more likely options you may want to consider.

## **Trading Company/Local Authority trading company**

### **Option 1: Community Interest Company (CIC) (limited by shares or guarantee)**

The ADMs could include a CIC. CICs are a type of company set up with a social purpose and that want to use their profits and assets for public good. CICs are companies which can be limited by shares or guarantee but the key difference is that the purpose of the company is to provide a benefit to the community rather than its shareholders, directors or employees.

One of the main characteristics of a CIC is that it is subject to an asset lock, to ensure that its assets and profits are never sold at an undervalue and are dedicated to community purposes.

One aspect of the asset lock in a CIC limited by shares is the cap on dividends and interest, which aims to strike a balance between encouraging investment and ensuring that profits are used to benefit the community (the maximum aggregate dividend cap payable is 35% of distributable profits). MCC has indicated a desire to consider how its various services can be linked or operate so as to fund and/or cross-subsidise various activities across the ADM. MCC will need to be mindful of some of the restrictions surrounding the CIC model such as the asset lock and dividend cap when considering how any such arrangements would work.

Any CIC within the ADMs would not be limited by the constraints of charitable status and could therefore be more flexible about who is on its Board and whether Board Members were paid for their role.

A CIC limited by shares allows investors to receive a limited return (as detailed above), which would mean that in the future the ADMs could issue limited dividends to any future employee or community owners as an incentive. It would also make equity investment possible if the ADMs wanted to partner with another organisation in the future.

# DRAFT

The disadvantages of a CIC are that it cannot obtain charitable status. However, we are also recommending that MCC also establish a charitable company so as to ensure tax-efficiency through the Gift Aid mechanism.

The CIC would be appropriate for the most commercially aligned services such as Leisure which would operate as a 'social enterprise'. This is because it would operate for the benefit of the community but not to the extent that its activities would be 'charitable'. One of the key determining factors as to whether a CIC is appropriate may depend upon the approach taken on ownership/transfer of assets and whether an "asset lock" is appropriate in these circumstances.

A CIC is registered with the CIC Regulator which sits as part of Companies House. The CIC Regulator website contains lots of useful information on the establishment of CICs.

<https://www.gov.uk/government/organisations/office-of-the-regulator-of-community-interest-companies>

## **Option 2: Company limited by shares (CLS)**

The ADMs could include a CLS which is the most common type of private company and is a frequently used vehicle for Teckal companies.

CLSs have a 'share capital' which shareholders are obliged to contribute to and in return they can receive a share of the profits based upon their shareholding. The liability of shareholders' is limited to their value of their shareholding and Directors are also protected providing they act in accordance with their Directors' duties.

CLSs are regulated by Companies House and subject to the Company Act 2006 and associated regulations.

A CLS would be appropriate for the ADM's most commercial activities which are less reliant upon grant funding. This structure has the least restrictions upon the use of assets or distribution of profits and therefore provides the greatest flexibility in how the services can be provided. MCC must consider which services will need the additional protection of sitting within a more regulated or controlled arm of the ADM, particularly in view of those that require subsidised funding or are provided in order to meet MCC's statutory obligations.

## **Option 3: Company limited by guarantee (CLG)**

# DRAFT

The ADMs could also include a CLG registered with Companies House. A CLG does not have to be charitable, although it is commonly used by charitable bodies. It would be relatively easy to set up a CLG with stakeholder input and stakeholders could be 'members' of the company with powers to appoint directors to represent their interests at Board level. Equally, it would be possible for MCC to be the sole shareholder. Though, note if used for the charitable vehicle, the requirement for this vehicle to demonstrate its independence from the state. Please see more on this in the later sections of this report.

CLGs are widely recognised and familiar to grant/funding providers and can provide great flexibility between operating at a profit and protecting the assets of the organisation.

If charitable status was sought for a company limited by guarantee via an application to the Charities Commission, this will take longer to set up than some of the other forms. This is due to the amount of time that it can sometimes take the Charity Commission to process the application which usually takes on average around 8 weeks to register, though this can be variable depending upon the complexity of the application and the resource availability at the Charity Commission) and would also be subject to active regulation by the Charity Commission. The initial application would also be a heavier burden, as would the on-going filing requirements, as annual accounts which comply with the Commission's Statement of Recommended Practice ('SORP') and an annual return will need to be filed with Companies House as well as the Charity Commission.

Nevertheless the on-going filing requirements burden may be minimised as a result of the Small Business, Enterprise and Employment Act 2015 (as relevant parts come into force) which will remove the need to file annual returns on a set date each year and eliminate the need to maintain statutory registers at the company's registered office. The changes will mean that filing processes will now be more streamlined and administrative duplications significantly reduced.

The CLG would be suitable for services which do not rely on large subsidies and would benefit from greater flexibility over the transfer of assets (for example Outdoor Education and Youth Services), these would be the services that have the most 'commercial' approach to their operations and already break even.

# DRAFT

## Option 4: Community Benefit Society (CBS)

Alternatively, the ADMs could be formed to include a CBS registered with the Financial Conduct Authority (FCA). CBSs are not registered with the Charity Commission, but can be 'exempt' charities which operate for the benefit of the community. The fact that they are only 'exempt' charities can impact access to some forms of funding.

A CBS would be most appropriate for services which benefit from and /or rely heavily on community engagement and support as they're designed to give their members a sense of 'ownership' of the organisation whilst also protecting the assets and profits. This could be a way to co-ordinate the volunteers across multiple sites and in particular allow the Museums service to maximise on the community engagement it's looking to foster.

## Charity

As indicated above, a CLG is a common form for charities. In addition, another vehicle that can be used is a CIO.

One issue with the setting up of a charity to sit 'alongside' a CIC ADMs is that it may be difficult for it to maintain the level of control over the charity's Board that it would want, given that it could be transferring a significant amount of money in the future. However, the ADMs could put in place safeguards by ensuring that the charity had a wide membership that could be called upon in the event that the Board was not acting appropriately.

## Option 5: Charitable Incorporated Organisation (CIO)

CIO's are charitable in nature and are regulated by the Charity Commission. A CIO is a new form of corporate structure that became available exclusively for use by Charities from January 2013. A CIO, unlike charitable companies (such as a company limited by guarantee with charitable status) is only registered with the Charity Commission, not also with Companies House. All CIOs are registered charities and unlike other corporate forms, they cannot exist until registered by the Commission and entered into the register of charities.

The perceived benefit of obtaining CIO status is that the liability of its charity trustees and members is limited. If wound up, the members are either liable to contribute up to a specified amount to the assets of a CIO or alternatively, not liable to make any contribution at all. The filing and

# DRAFT

accounting regime is also perceived as less onerous than that required for Companies House purposes.

It would be possible for a CIO to include a degree of staff involvement, as they could become members or serve as a minority part of the board. Nevertheless, a CIO is more limited in what it can do in this area when compared to a CLG or a CIC.

There are strong financial benefits to CIO's, as they should get mandatory relief on business rates and the other tax reliefs available to charities, as all CIOs are registered charities.

In terms of disadvantages, raising finance through equity investment may be difficult if equity is required by funders and there are sometimes concerns regarding the fact that there is not a web based searchable register over the charges on a CIO's assets (as there would be with Companies House, unless a registration with the Land Registry is triggered. CIO's are restricted by charity law and by Commission regulation and this can result in a lack of flexibility unlike for CLG's or for CIC's.

The CIO would be appropriate for holding the 'community assets' which are currently owned by MCC but could benefit from charitable investment or sponsorship such as Caldicot Castle, Shire Hall, Old Station. Due to the historical nature and cultural significance of the assets, they would be protected for the benefit of the community, but distanced enough from MCC to attract alternative funding.

You will also be aware of restrictions placed on charities with regards to trading and their 'non-primary purpose' income. Further consideration would need to be given as to how some of the present 'trading' activities may need to be conducted by the separate trading ADM, instead of through the charitable vehicle.

For a table comparing the legal requirements, administrative obligations and the advantages/disadvantages of the organisation structures please see Appendix 5.



# DRAFT

## 7. Governance

In our experience, whenever a council appraises its options for ADMs, it is always imperative that the governance and accountability for those arrangements ensure that safe, sustainable services will continue to be provided to its communities and services users. Also, that any new organisations continue to be accountable to the council and its communities for the provision of those Services and ultimately in assisting the council to discharge its statutory duties (which are considered later in Section 13 of this report).

The required assurances and protections can be embedded in a number of ways, mainly:

- through an effective governance architecture for the new ADMs;
- through MCC's governance arrangements that it puts in place to enable it to continue to have a role as both facilitator and potential strategic partner to the ADMs; and
- finally, through the legal contractual arrangements that MCC may put in place in respect of the provision of the Services.

We consider each of these elements in turn below.

### **Governance Architecture for ADM**

An important aspect of new ADMs is that a legal structure alone may not be enough to deliver the changed ethos and culture that such a radical transformation may require. This may instead need to be embedded at the heart of how the ADMs conducts itself and how it remains accountable through its governance architecture. If enough time and attention is given to it, the governance architecture of the ADMs should enable it to meet its core vision.

In respect of wider governance considerations, MCC will need to evaluate the range of stakeholders it wishes to engage in the Services and the means in which it will do so, whether through formal ownership of the new ADMs or through providing them with an effective voice and rights enshrined within the ADM's constitutional documents, primarily through its Articles of Association and establishing some form of multi-constituent rights for the various stakeholders involved. The focus on staff or community involvement may dictate whether you have representatives of those groups appointed to the Board of Directors of the ADMs or whether you involve them in less formal capacities such as holding regular staff and community forum meetings. There is a fine balance to be struck between ensuring that the governance is fit for purpose

# DRAFT

and appropriately inclusive, without making it unwieldy or impeding the ability of the Board to get on and make decisions about the Business. This is also true for the degree of ownership and control that MCC may wish to continue to have in relation to these Services.

As we have indicated in earlier sections of this report, it will be vital to get a Board which has the right skills to be able to deliver the aims and objectives of the ADMs and ultimately, the business plans. This may require the injection of new entrepreneurial skills – to spot the opportunities available and to take advantage of them – and change management skills – to help staff manage the transition from in-house provision to life in a new ADM. Skills audits are often a useful way to determine the skills set that staff may already have and those that they may want or need to bring into the organisation. When considering the Board for the ADMs, thought should also be had as to the number of executive and non-executive directors to be appointed to the Board and the important role that non-executive directors play in holding the Board to account.

MCC will also need to be mindful and will need to demonstrate compliance with “The Good Governance Standard for Public Services” which focuses on the six core principles of good governance, which means:

- focussing on the organisation’s purpose and on outcomes for citizens and service users;
- performing effectively in clearly defined functions and roles;
- promoting values for the whole organisation and demonstrating the values of good governance through behaviour;
- taking informed, transparent decisions and managing risk;
- developing the capacity and capability of the governing body to be effective;
- and
- engaging stakeholders and making accountability real

MCC will need to consider how it would structure its ‘shareholder’ panel so as to effectively carry out its role as a shareholder in the Teckal vehicle, compared to its role as a commissioner, or retained “client side” function.

Thought will need to be given to the Shareholder Agreement which will need be put in place to govern the relationship between MCC and the Board of the ADM, including assessing the potential for conflicts and how they may be addressed.

# DRAFT

Therefore, as the ADMs moves from options appraisal to implementation, it will be necessary to spend more time assessing and evaluating its most effective governance structure.

It is important not to underestimate the culture-shift that is necessary to successfully move from work practices where funding for work has generally been a 'given' to a more competitive environment. However, the transition will also provide opportunities for innovation, creativity and for doing things differently.

## **Council governance function and its role as a facilitator and strategic partner:**

As we have indicated above, depending upon the form of the ADMs chosen, MCC will also need to give careful consideration of the amount of ownership and/or control it wants to have in relation to the new ADMs. This may also be dictated by overarching requirements e.g. the ability of the charitable company to be able to demonstrate its independence from the state (see below). This will include consideration of what may be appropriate for Council representation on the new ADM, whether at Board level or otherwise and as indicated above, the terms and remit of any shareholders agreement entered into if MCC will continue to have some ownership in the ADM.

On the assumption that MCC is likely to want to pursue a ADMs which includes a charitable company, then it will not be able to enjoy the same levels of control or board involvement that it may have in some of in the other "Teckal" compliant companies. Its approach will need to be different for the various companies within the ADM. MCC will of course have a vested interest in the ADMs continued success and to it would need to see its role as one of a facilitator, collaborator and strategic partner, particularly in relation to any on-going grant funding arrangements or service contracts and the general way in which MCC and the new ADMs will continue to work together. It may be helpful to reflect this in a form of Collaboration Agreement which will detail how MCC and the ADMs will work together to deliver their aspirations for these Services and the communities which they serve.

## **Governance achieved through the contractual arrangements:**

We have covered some of the contractual considerations in this Report, but essentially there are a whole range of safeguards and monitoring and reporting requirements that that MCC can put in place in its contractual arrangements with the new ADMs. The approach may vary depending upon whether MCC opts for a grant funding, with seven year (less one day) leases which are co-terminus with the grant arrangements and/or more formal service contract arrangements.

# DRAFT

## 8. Application of EU Procurement Law

With many other public services spin out projects undertaken to date, one of the more significant areas of concern has surrounded the Council's ability to demonstrate that it is complying with its procurement obligations. Historically, different approaches have been taken in relation to this area and indeed different approaches are likely to be taken in the future within the context of the Public Contracts Regulations 2015 (the "**Regulations**"). In other similar projects, councils have started with an assessment of whether:

- it will award a grant to the new ADM, which is not subject to procurement requirements. However, it is essential to ensure that it is a grant arrangement and not a de facto service contract, called by a different name;
- it will award a contract for services to the new ADM, which will need to comply with the requirements of the Regulations and the Council's own constitutional requirements.

We will consider the distinction between each of these two options further below. We understand that for the moment, no definite decisions have yet been made in relation to whether or not assets and buildings would transfer to the ADM, there may therefore be additional considerations in relation to the sale of land, community asset transfers and potential State Aid issues depending upon the decisions made.

We can of course provide further advice on these aspects and it may be necessary to reappraise the grant award or procurement approach once those key decisions have been made.

### **Distinction between Grant Agreement and Services Contract**

Before we consider the procurement position, MCC may want to give future consideration to whether it would be more appropriate to pass funding on to the ADMs via a grant arrangement, rather than a Services Agreement. Some Councils have considered this approach in relation to their libraries, museums and youth services for instance. If truly a grant agreement, then the Regulations do not apply. In making a decision in relation to this, MCC will need to consider whether:

- MCC is happy to award the grant with specified outcomes (as is usually the case with a grant) rather than having more detailed service specifications and KPIs as would be the case with a services contract;

# DRAFT

- breach and withdrawal, clawback or repayment of the grant is an appropriate mechanism or whether MCC would prefer to adopt a more detailed price performance mechanism that it would enforce through the services contract;
- MCC has the power/vires to award the grant as anticipated. Please see more on this in Section 13 of this report.

There may also be other additional VAT and Gift Aid implications that will need to be factored into the decision. VAT is not payable on a grant and it may also be eligible for Gift Aid. However, a services contract could not attract Gift Aid and would of course be subject to VAT. The risks of getting the distinction between a Grant and services contract wrong are that this unplanned VAT liability could affect the future viability of the ADMs and so it is important to ensure all of these factors are taken into account. MCC will need to consider the advice provided by Mazars in relation to these matters as we are not tax advisers (see Appendix 4).

Similarly, the ADMs may need to consider what reciprocal obligations it may want to enforce against MCC pursuant to the services contract, which it would not be able to do as part of any grant arrangement.

The key note of caution here is that you cannot dress one up as the other, as there are likely to be adverse consequences of doing so if the approach is challenged and/or has to be remedied at a future date. Any decision will always look at the substance of the arrangements rather than at what the parties have chosen to call it.

We have included in the table at Appendix 5 the advantages and disadvantages of the two different approaches so that MCC can determine which may be the preferred option. MCC will need to consider how the two arrangements will enable it to meet its statutory obligations to provide certain services.

## **The Regulations and preferred procurement routes:**

If MCC does decide that it is more appropriate to award a services contract to the new ADMs rather than award a grant, it will need to ensure that it complies with the requirements of the new Regulations which are a consolidation of existing procurement law, including case law. One of the key changes the Regulations make is the removal of the distinction between Part A and Part B services. This means that contracting authorities can no longer grant an uncontested contract for services worth over 750,000 euros (approximately £625,050) to spin-outs, although a 'light touch' regime has been proposed for 'health, social and other service' contracts with a value greater than this threshold. Please see below for more information on this option (Option 2).

# DRAFT

The most relevant potential procurement options open to the Council are therefore to;

- 1) form a Local Authority Trading Company (“**LATCO**”) as a Company Limited by Guarantee or Shares (though note this vehicle could not have charitable status because of issues with it being independent of the state). There would not be a requirement to undergo a procurement exercise, if the Council ensured compliance with the requirements of Regulation 12 of the Regulations (otherwise known as the “Teckal” exemption which has now been codified in the new Regulations);
- 2) procure the services in accordance with the new “light touch regime”;
- 3) run a limited “public service mission organisation” competition, also referred to as a “social enterprise” competition; or
- 4) consider whether MCC would like to procure a partner to help leverage in some additional expertise or investment. If it were to pursue this route it may need to consider, what, impact this may have on its charitable status, depending upon what type and level of expertise and investment is secured. This would also need to be in accordance with any requirements set out in the company’s constitutional and governance documents.

We have considered each of the above options in further detail below.

## **Option 1: Teckal Compliant LATCO – Regulation 12**

A public authority can procure directly from a Teckal compliant company without going through the European OJEU process. A Teckal compliant company is one that:

- is managed so that “the local authority exercises over the [company] concerned a control which is similar to that which it exercises over its own departments and, at the same time, that [company] carries out the essential part of its activities with the controlling local authority or authorities” (Regulation 12 of the Regulations);
- carries out at least 80% its activities for the controlling local authority (or for other legal persons controlled by that contracting authority); and
- has no private financial involvement in its ownership.

Teckal companies are ideal where profit-making is incidental to the services provided. Of course, the appropriateness of this approach will depend upon how much MCC wishes to retain control and ownership of the new entity or the extent to which it is

# DRAFT

important for the ADMs to obtain some independence from MCC in order to enable it to achieve its objectives and perhaps be more innovative in its service delivery.

The LATCO model may or may not be appropriate then, depending upon the decisions made in relation to this. One of the crucial aspects is the need for MCC to retain its strategic direction and control, as MCC is considering having a trading company and charitable company as part of its structure, which would not meet the Teckal requirements, then alternative procurement routes also need to be considered. We have set out some of the other options below.

## **Option 2: Light Touch Regime – Regulation 74**

As indicated above, the new light touch regime applies to contracts valued at over 750k euros (£625k) over the life of the contract for services covered by Schedule 3 of the Regulations. Schedule 3 includes youth and social services, educational and cultural services and encompasses CPV Codes from 80000000 to 92700000-8. Libraries, archives, museums and other cultural services fall within 92500000 – 92510000 and 92520000 respectively and so they can come under the Light Touch Regime.

Although greater flexibility in the process is introduced, it is still necessary for MCC to comply with the EU General Treaty principles of transparency and equal treatment. This means that there can be no favouritism or bias and all bidders must know the rules of the process. To this extent the fundamental principles of the process has not changed, though note the increased possibilities for taking into account the “relevant considerations” detailed below. MCC should consider how it can best incorporate those elements into any procurement process that it may follow.

MCC must set out in the Notice the conditions for participating, the time limits that apply and a brief description of the main features of the award procedure. (Reg 75(1)).

Regulation 76 would allow MCC to determine the procedures to be applied in connection with the award of contracts, taking into account the nature of the services being procured.

Regulation 76 provides as follows:

- there must be compliance with the principles of transparency and equal treatment of bidders.
- the procedure must be conducted in accordance with the published conditions for participation, time limits for applying and the award procedure to be applied.

# DRAFT

However, Reg 76(4) would allow MCC to make changes to the procedure during the process provided it has considered carefully that the changes do not breach the principles of transparency and equal treatment, that due and adequate notice has been given to all of the change (all bidders who responded to the notice even if not shortlisted) and it has adequately recorded the reasons for change and that those records are maintained.

All time limits imposed in the process must be proportionate and reasonable.

MCC can still follow the traditional routes of, for example a restricted or open procedure, though this should not be the default position or there would be little benefit in having these additional flexibilities.

Equally, MCC may introduce different procedures consistent with the requirements of Regulation 76 to take into account relevant considerations, including:

- the need to ensure quality, continuity, accessibility, affordability and comprehensiveness of the services;
- the specific needs of different categories of users, including disadvantaged and vulnerable groups;
- the involvement and empowerment of users; and
- innovation.

These are the areas where the more innovative and community focused aspects could be factored in as part of the procurement process. Whatever the process, having clear objectives and implementing them in a transparent and non-discriminatory way will be key.

The Regulations also require the same debrief for most forms of procurement, including under the Light Touch Regime. The requirements are essentially the same as the old Regulation 32 which never formally applied to Part B services. There is now therefore a stricter requirement to provide comprehensive feedback at the end of a procurement process under the Light Touch Regime.

Whatever procurement process may be followed, there is also a further requirement under Regulation 84 for MCC to prepare a procurement report which documents progress of the procurement. MCC must also keep sufficient documentation to justify decisions taken at all stages of the process, including the decisions to depart from the procedures originally set out.

Finally, it should not be forgotten that MCC continues to have public law duties, including to act reasonably and to ensure that it runs a process that meets the actual



# DRAFT

cost of delivering services. Therefore, the new flexibilities not only need to comply with the Regulations themselves but also with wider public law duties.

## **Option 3: “Public Service Mission” Procurement – Regulation 77**

The other option is for MCC to run a limited “public service mission” competition for the Services. The use of this process would be dictated by whether MCC is prepared to consider, and wants to encourage, vehicles focussed on “public service mission” and based on “participatory principles”. This is certainly something that it should be considering with regard to its duties to promote social enterprises under Part 2, Section 16 of the Social Services and Well-being (Wales) Act, which introduces a duty on local authorities to promote the development, in their area, of not for private profit organisations such as social enterprises, co-operatives, user led organisations, and the third sector to provide care and support.

A final check would need to be completed to ensure that all services in scope fall within the permissible services that can follow this procedure. This process is the result of the Cabinet Office campaigning for the EU to include a restricted-competition procedure in the new directive, in order to acknowledge the difficulties that new public sector mutuals face and it has now been reflected in Regulation 77 of the Regulations. The procedure effectively allows contracts to be reserved to competition amongst “qualifying organisation(s)” that satisfy the following conditions:-

- “a) its objective is the pursuit of a public service mission linked to the delivery of the services referred to in Part 2 [i.e. cultural services];
- b) profits are reinvested with a view to achieving the organisation’s objective. Where profits are distributed or redistributed, this should be based on participatory considerations;
- c) the structures of management or ownership of the organisation performing the contract are (or will be if and when it performs the contract) based on employee ownership or participatory principles, or require the active participation of employees, users or stakeholders; and
- d) the organisation has not been awarded, pursuant to this regulation [i.e. utilising the limited competition procedure], a contract for the services concerned by the contracting authority concerned within the past three years.

The maximum contract awarded under this Regulation cannot be longer than 3 years, so this will also need to be factored in to any decision made. Although this may not be the length of contract that MCC would like to award initially, it would give the ADMs the opportunity to ‘bed-in’ and potentially set up a partnership (if they wanted to do so) to

# DRAFT

begin winning contracts. The expectation would be that the ADMs would then be ready to compete on the open market after 3 years. Other social enterprises bidding could be selected as collaborators with the ADMs if that is something that would increase the service provision opportunities.

The ADMs could satisfy these conditions if it set up a CIC limited by shares or a charitable CBS provided that these principles are properly enshrined in its constitutional documents. The articles of association would need to be drafted with an eye to the future to ensure that they are able to meet these requirements, if the ADMs wants to be eligible to participate in these sorts of procurements in the future.

## **Option 4: Procurement of a Partner**

If MCC did decide that it wanted to leverage in greater external investment or expertise, MCC could undertake a joint procurement exercise with the ADMs to choose a partner with which to run the Services. The difficulty with this option is that MCC would not be able to make it a condition of the contract award that the winning bidder or 'partner' awarded the contract to the ADMs (this is the rule that a contracting authority cannot nominate a sub-contractor). MCC and the ADMs would also need to decide what services they would be procuring from the partner.

One way that this might be achieved is to advertise for a partner organisation and require it to state how the public service mutual would fit within the proposals to run the Services. For example, the procurement could be a for a partner organisation to assist the ADMs to reconfigure the Services through working directly with staff. That does leave the outcome in the hands of the marketplace. However, to ensure that an appropriate partnership model was put forward, the tender documents could refer to the type of model that MCC/ADM would want to see in place. This sort of process is likely to be more complex and have longer timescales.

# DRAFT

## 9. Well-being of Future Generations (Wales) Act 2015

In addition to the general procurement requirements, if the procurement route is adopted, the nature of the Services are such that that MCC should be considering to what extent it can be utilising its procurement route to achieve the Well-being principles.

MCC will need to be aware of its obligations under the Well-being of Future Generations Wales Act 2015 to:

- develop a skilled and well-educated population in an economy which generates wealth and provides employment opportunities, allowing people to take advantage of the wealth generated through securing decent work;
- ensure people's physical and mental well-being is maximised and in which choices and behaviours that benefit future health are understood;
- enable people to fulfil their potential no matter what their background or circumstances (including their socio economic background and circumstances);
- foster attractive, viable, safe and well-connected communities; and
- encourage people to participate in the arts, and sports and recreation.

The Well-being of Future Generations (Wales) Act 2015 (the “**Well-being Act**”) comes into force on 1 April 2016 and will require MCC to improve the economic, social, environmental and cultural well-being of Wales by taking action, in accordance with the sustainable development principle, aimed at achieving the well-being goals (section 2) which are set out at section 4:

Goal	Description of the goal
<i>A prosperous Wales.</i>	An innovative, productive and low carbon society which recognises the limits of the global environment and therefore uses resources efficiently and proportionately (including acting on climate change); and which develops a skilled and well-educated population in an economy which generates wealth and provides employment opportunities, allowing people to take advantage of the wealth generated through securing decent work.
<i>A resilient Wales.</i>	A nation which maintains and enhances a biodiverse natural environment with healthy functioning ecosystems that support

# DRAFT

Goal	Description of the goal
	social, economic and ecological resilience and the capacity to adapt to change (for example climate change).
<i>A healthier Wales.</i>	A society in which people's physical and mental well-being is maximised and in which choices and behaviours that benefit future health are understood.
<i>A more equal Wales.</i>	A society that enables people to fulfil their potential no matter what their background or circumstances (including their socio economic background and circumstances).
<i>A Wales of cohesive communities.</i>	Attractive, viable, safe and well-connected communities.
<i>A Wales of vibrant culture and thriving Welsh language.</i>	A society that promotes and protects culture, heritage and the Welsh language, and which encourages people to participate in the arts, and sports and recreation.
<i>A globally responsible Wales.</i>	A nation which, when doing anything to improve the economic, social, environmental and cultural well-being of Wales, takes account of whether doing such a thing may make a positive contribution to global well-being.

MCC will be required to publish annual reports setting out the progress it has made in meeting the well-being objectives (section 13) as soon as reasonably practicable following the end of the financial year (Schedule 1). It is therefore important that where MCC is reliant upon the ADMs to meet the well-being objectives, it maintains adequate reporting systems and information sharing powers so that MCC is able to complete its annual report (see below regarding ongoing involvement in ADM).

# DRAFT

## 10. State aid

In circumstances where the resources of a Member State are used to give some form of advantage to an organisation, there is the potential for there to be State aid. Where there is State aid (which is not excepted or exempted) then the ultimate sanction is for that assistance to be repaid plus interest.

In most transactions that we have been involved in to date, State Aid issues are usually avoided by either (i) everything being transacted at a market value or (ii) given the local nature of the services, not all of the State Aid tests are met in any event or, (iii) the possibility of the services constituting Services of General Economic Interest (“**SGEIs**”) In this case, if MCC is proposing a grant arrangement, then this may constitute a form of State Aid and so the potential for State Aid to arise does need to be assessed.

There is the potential for State aid in each of the following situations relevant to MCC and the ADM:

- any sale of land at an undervalue to the ADMs;
- any grant provided by MCC to the ADMs;
- any services offered by MCC to the ADMs at no cost or at below market rates;  
or
- any assets transferred from MCC to the ADMs at no cost or at below market rates.

In terms of any proposed sale of land, the European Commission has issued a ‘Communication on State aid elements in sales of land and buildings by public authorities’ (OJ C209, 10/07/1997). In order to definitively avoid State aid, the Commission expects there to be either:

- a bidding procedure “comparable to an auction” which must be “sufficiently well-publicised, open and unconditional.” The logic here is that the winning bid must equate to market value; or
- independent expert evaluation to determine the market price “on the basis of generally accepted market indicators and valuation standards”. If there are any special obligations relating to the land (as opposed to the purchaser) then this can be taken into account in assessing the market price.

We note that the wording of the Communication refers to “sale” of land or buildings, rather than other disposals such as by way of lease or licence. However, from a purposive approach we would suggest that it would cover other sorts of disposals such as leases. Therefore, any other disposal where the price paid is less than market value

# DRAFT

may be seen as State aid. The best way, therefore, to avoid possible risk of State aid is to ensure that the ADMs is paying a market rent for its use of the premises or, if there is to be a freehold disposal, that it is paying the market price.

We are unaware what arrangement MCC is proposing to make regarding the premises, although we are aware that several of the grant agreements restrict MCC from transferring the freehold of various properties as well as the granting of any leaseholder interest. If MCC is able to and decides to grant a lease and charge market rates for the reasons stated above, it would be legitimate for the ADMs to take account of these kinds of costs in assessing the price it should be paid for the Services. The overall effect would therefore be costs neutral, or at least close to it.

In the context of private business, the market rates charged include an element to cover overheads such as rent, and the ADMs should be entitled to do the same. In this way, MCC may be charged certain amounts each year for the Services but, will receive some of this back again by way of rent.

To the extent that MCC is to provide (even on a temporary basis) support to the ADMs by way of back-office functions such as HR, payroll and IT, then the ADMs should pay an appropriate rate for these services. This is for the same reasons as set out above in relation to market rents. Again, it would be appropriate for the ADMs to take account of these overheads when agreeing the fee for the Services, as set out above.

MCC could, of course, choose to take a more cautious and prudent approach – charging full market rates for the land, or putting a valuation on any assets (desks, computers, vehicles, etc.) that are to be transferred to the ADM, and then asking the ADMs to pay that amount for the assets. If they are to be provided at an undervalue, the amount of the undervalue could be considered to be State aid and an exemption sought to permit the transfer without breaching the rules.

The alternative is to dispose at an undervalue and consider how the potential State aid risk can be managed, by looking at using the General Block Exemption Regulation (GBER), for example. The General Block Exemption Regulations also contain provisions in relation to aid for Culture and Heritage Conservation. Also, in case it is of any relevance for the future of BRIO, aid for sport and multifunctional recreational infrastructures may also be of interest to MCC.

However, MCC, when considering State aid, is entitled to take a risk-based approach, and indeed is encouraged to do so by the Department for Economy, Science & Transport. This means considering the risk of challenge and whether or not MCC considers it has good legal basis for proceeding as proposed. It will be necessary to

# DRAFT

consider the application of these considerations to each of the Services in more detail as the project proposal is developed and refined.

Any proposed future assistance by MCC to the ADMs should be considered in the context of State aid on a case-by-case basis. However, in most (if not all cases) the assistance proposed is likely either not to fulfil all four tests (and so not be State aid) or would be able to fall within one or more of the exemptions, or possibly come within *de minimis* aid.

We can provide a more detailed assessment of State Aid once the proposals and approach have been further defined.

# DRAFT

## 11. Community Rights, Consultation and Judicial Review

On a number of similar projects that we have worked on, as part of the Business Planning process, the teams have had to consider and factor in where some of the facilities have been subject to community right requests and a desire by local communities to run their own local services. This may therefore be something MCC will need to factor in as part of its consultation and business planning process. On other transactions, there have been some issues with “community right” processes running alongside the spin out project which did lead to some uncertainty as to which services (such as libraries) were or were not going to be in scope for the new ADMs.

A series of ‘community rights’ were introduced by the Localism Act 2011 which apply to Wales (as of 6 June 2012). The legislation aims to empower community groups and oblige local authorities to give community groups serious consideration as a provider of public services. The ‘rights’ are set out in Part 5, Chapter 2 of the Localism Act 2011 and are supplemented by regulations and statutory guidance issued by the Welsh Ministers.

### **Expression of interest**

In short, where a “relevant body” submits an expression of interest to provide or assist in providing a relevant services on MCC’s behalf, MCC must consider that expression of interest. A “relevant body” can include: a voluntary or community body, a charitable company or charitable trust, a parish council or two or more employees of a local authority.

Please note that relevant bodies do not have to operate not-for-profit: if a relevant body generates a surplus, that does not prevent it from expressing an interest to provide a service under the Localism Act 2011 (provided that any surplus is used for activities which do not generate any profits or are invested in the community). We understand that a local CIC has already indicated to MCC that it would be interested in providing or assisting to provide certain services and this could be caught by the provisions in the Localism Act 2011.

Once an expression of interest has been made, MCC must consider it and then either accept it (triggering a ‘suitable’ procurement process) or reject it. If rejecting an expression of interest, MCC may only use one or more of the permitted grounds. Possible grounds for rejection are that the authority has already published its intention to consider ‘mutualising’ the service and the lack of suitability of the applicant body for taking on the service in question.



# DRAFT

Where there are (or are likely to be) other bodies exercising their community right to challenge in respect of all or part of the service, the potential implications on the ADMs are:

- (if the application is accepted) that this will lead to a suitable procurement process being adopted by MCC, which may in turn allow the ADMs to bid against the other body;
- (if the application is rejected) that it may wish to consider whether it would be beneficial to its own running of that service to involve or work with that group in some way; and
- (particularly if a large proportion of the potential services are divided up in this way) whether it affects the procurement basis for the Services, or indeed affects the overall viability of the ADM.

The MCC project team will need to identify all expressions of interest that have already been received in relation to the Services. It is possible that for MCC to limit future expressions of interest and we would recommend that MCC specify a period of time during which such expressions of interest may be submitted (please see below).

## **Community Asset Transfer**

One of the options that MCC has not yet considered in detail and which may warrant further exploration is the potential to structure these arrangements as a Community Assets Transfer (“**CAT**”) with the provision of associated grant funding. The CAT route has been adopted in the case of library services at Norden Old Library, Rochdale. This was a transfer to a Community Trust set up by a group of local people. This is also a structure that was adopted for many of the transactions relating to the transfer of leisure services to leisure trusts.

This would require MCC to transfer the assets to the new organisation and provide grant funding for the continued operation of the services. Of course, as part of this model, MCC would need to assess, how it would satisfy itself that its statutory services were being discharged, if no services contract has been put in place. The way that this has been achieved elsewhere is through entering into long term leases with the new organisation and having an outcomes-based grant funding agreement.

The National Assets Working Group (NAWG) has produced a ‘Best Practice Guide’ on behalf of the Welsh Government for Community Asset Transfers in Wales.-

# DRAFT

<http://gov.wales/docs/dsijg/publications/comm/160310-community-asset-transfer-en.pdf>

## **Value of assets transferring**

As indicated above, the Council will also have to take a view on the value of the assets being transferred. In general, local authorities in England and Wales are required to achieve the “best consideration reasonably obtainable” when they are disposing of land based assets under the Local Government Act 1972. If they are seeking to dispose of land or buildings at less than the market value then they have to obtain the consent of the National Assembly (please also see below in relation to Equality Act general duty). Please note that separate protections apply to disposals of land which include playing fields Playing Fields (Community Involvement in Disposal Decisions) (Wales) Measure 2010.

The Welsh Ministers have issued a number of “general” consents, which allow a local authority to transfer to dispose of land for an ‘undervalue’ provided that certain criteria are met: as set out in the General Disposal Consent Wales 2003. This permits authorities to transfer land at less than its market value, without the need to seek specific permission from the Secretary of State, provided that:

- the authority considers that the disposal is in the interests of the economic, social, or environmental well-being of the whole or any part of its area; or
- the authority considers that the disposal is in the interests of the economic, social, or environmental well-being of any or all persons resident or present in its area; and
- the difference between the market value of the land and the actual price paid for the disposal (if any) is not more than £2,000,000.

If MCC later intends to dispose of land in reliance upon the General Disposal Consent, it should notify its external auditor within 28 days of taking the decision to do so. If the undervalue is likely to be substantial (and could exceed the £2million threshold), MCC should obtain a professional valuation, in terms of “unrestricted value” to assess whether the National Assembly’s specific consent to the disposal is required. Please note that MCC may still need to advertise the proposed disposal of land, even where the General Disposal Consent applies.

MCC will also need to consider the various grant agreement restrictions placed on particular assets that may affect the possibility and value of the transfer. It may be that

# DRAFT

the grantor may be willing to lift such restrictions if the asset is transferred to a community group and this is a commercial decision to be made by MCC.

As a consequence, and as a way of reducing challenge under this legislation, MCC should consider publishing a notice of its intention to consider the provision of the service by an ADM. The timing of such a notice would be for MCC to consider, but to maximise the protection in this regard, a notice could be published as soon as MCC has made a decision to proceed with the proposal to set up the ADM. This is especially cogent here, in light of the ADMs potentially taking control of public services, which can prove to be an emotive and sensitive topic for local communities.

# DRAFT

## 12. Equalities Legislation and Duty to Consult

The Equality Act 2010 brings together various existing legislation in relation to equalities and also draws up some new duties. The Act deals with seven 'protected characteristics', namely:

- disability;
- gender reassignment;
- pregnancy and maternity;
- race;
- religion or belief;
- sex; and
- sexual orientation

The principal obligation under section 149 of the Equality Act is for a public authority to “*have due regard*” to the three duties to eliminate discrimination, harassment, and victimisation (amongst others), to advance equality of opportunity between those with and those without a relevant protected characteristic, and to foster good relations between those with and without a protected characteristic.

There is also a duty for a local authority to “have due regard to the desirability of exercising [its functions] in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.” However, this duty is not currently in force and there is no indication of when it will become binding law (or even that the current Government has any intention of making it so).

If MCC proposes to enter into an agreement on the basis of an offer which is the most economically advantageous, it must have due regard to whether the award criteria should include obligations upon the Service provider which are relevant to MCC's performance of the general duty (Reg 18).

The Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 requires MCC to publish objectives that are designed to enable it to better perform the general duty and a statement setting out the steps it has taken in order to fulfil each object and how long MCC expects it will take in order to fulfil each objective (the Strategic Equality Plan

# DRAFT

'SEP'). When designing these 'equality objectives', MCC must have regard to the need to involve or consult (so far as is reasonably practicable) persons who share one or more of the protected characteristics and have an interest in the way that the authority carries out its functions. MCC will need to consider whether the ADMs will affect its current SEP and how the appropriate level of consultation can be met if it needs to amend its SEP.

Generally speaking, a public body is under no duty to consult before taking policy decisions however, MCC must assess the likely impact of its proposed policies and practices on its ability to comply with the general duty. Given the nature of the services, we understand that MSS intends to carry out some form of consultation on the proposals (beyond what has already been done through stakeholder engagement). If consultation is carried out then this may be a good opportunity to engage with the local communities so as to involve them in shaping the services. In particular, consultation may assist if there is a possibility of one or more groups expressing an interest to provide the services.

Where consultation is carried out, the case law is clear that it must be carried out at a time when the proposals are still formative, allow for intelligent consideration and response, give an adequate time to respond, and the results must be considered before the final decision is taken.

Whether or not there is any consultation, an equalities impact assessment (or equivalent) should be completed to help decision-makers comply with their equalities duties and so minimise the risk of a successful judicial review on these grounds.

# DRAFT

## 13. Powers and Duties

All local authority powers are set out in legislation and a council can only do something if it is permitted to do so (see section 111 of the Local Government Act 1972). Any actions or decisions that exceed the remit of these functions could be deemed *ultra vires* and therefore void and unenforceable in law. MCC does not have a general power of competence as this has not been adopted in Wales yet and therefore its powers to act must be grounded in legislation.

### **Well-being power**

The Local Government Act 2000 (“LGA 2000”) came into force on 18 October 2000 and the “well-being power” contained in section 2 created an entirely new power that appeared to relax the doctrine of *ultra vires* and give some reassurance to local authorities, their contractual partners and other interested parties, that the agreement they had entered into were lawful and enforceable, where no other express power was available or where the extent of an existing power was in doubt.

See more detail above at Section 9. Under section 3(5) of the LGA 2000, before exercising the well-being power, MCC must have regard to any guidance issued by the Welsh Ministers.

The Statutory Guidance relating to the power states:

*“the introduction of the well-being power enables local authorities to have a wide discretionary power to further develop their community leadership role and the delivery of better and more responsive services”* (paragraph 1.1(iii))

Section 2(4) of the LGA 2000 gives examples for use of the well-being powers including the power to incur expenditure and give financial assistance to any person (see below for limits).

The requirements of the Guidance would need to be complied with when exercising this power. MCC will need to consider how the services in question can be validly tied to exercising its well-being powers: this may be more difficult in some service areas than others.

### **Trading power and charges for discretionary services**

The Local Government (Best Value Authorities) (Power to Trade) (Wales) Order 2006 empowers a best value authority (which MCC is as a Welsh County Council) to do for a commercial purpose “anything which it is authorised to do for the purpose of carrying

# DRAFT

on any of its ordinary functions” (section 95). This includes the power to recover the costs of any accommodation, goods, services, staff or anything else it supplies to a company which has a local authority interest (within the meaning of Part 5 of the Local Government and Housing Act 1989). MCC would be prevented from subsidising trading activities on a continuing basis and therefore MCC must recover the costs outlined above through an agreement or arrangement in exercise of the section 95 power.

The Local Government Act 2003 also permits MCC to charge for discretionary services (at sections 93-94 & 97-98) provided that:

- the income from charges does not exceed the costs of provision;
- the authority must already have the power to provide the service (this includes discretionary services provided under well being powers in the LGA 2000);
- the recipient of the discretionary service must have agreed to its provision, and to pay for it;
- the power does not apply to services that an authority is mandated or has a duty to provide;
- the power does not override any existing or future provisions in primary or secondary legislation which:
  - Expressly prohibits an authority from charging for a discretionary services or;
  - Confers a power to charge for a discretionary service
- charges may be set differentially so that different people are charged different amounts; and
- authorities are not required to charge for discretionary services (they may provide them for free if they so decide).

Discretionary services are those services that an authority has the power, but is not obliged to provide. The Local Government Act 2000 gave authorities a general power to promote the economic, social and environmental wellbeing of local communities in addition to the duties under the Well-being Act 2015 (see above). This power gives authorities very broad discretion to provide additional services, but does not provide a clear power to charge.

The Stat Guidance does say:

*“through the new power to recover via a charge the costs to an authority of providing a service, the Welsh Assembly Government aims*

# DRAFT

*to encourage authorities to provide more wide-ranging and new and innovative services for their communities.”*

By providing a power to charge for discretionary services the Welsh Assembly Government's aim is to encourage authorities to provide those sorts of services they would otherwise decide not to provide (or improve) at all because they cannot justify or afford to provide them for free or to improve them. The aim is not to provide a new source of income for authorities, but to allow them to cover their costs.

MCC is therefore able to decide the charge for each discretionary service as it sees fit but the charge must not exceed the cost of its provision.

## **Limit on incurring expenditure for purposes not otherwise authorised**

There is a limit to the amount of funding MCC can provide to the ADM.

Where a local authority incurs expenditure for purposes not otherwise authorised, s.137 of the Local Government Act 1972 permits it to do so provided the local authority is of the opinion that such expenditure is in the interests of, and will bring direct benefit to, their area or any part of it or all or some of its inhabitants.

The local authority may incur expenditure on contributions to a charitable body or any body which provides a public service. The financial limit for such expenditure is calculated in each financial year by an index-linked sum (calculated by the National Assembly for Wales (the Social Justice and Local Government Department)).

## **Cultural Services**

In respect of cultural services there are several other powers established in legislation. The Local Government Act 1972 (section 145) establishes that in respect of theatres, concert halls, arts and crafts *“A local authority may do, or arrange the doing of, or contribute towards the expenses of the doing of, anything (whether inside or outside their area) necessary or expedient for [those] purposes”*.

For conference centres and tourism, the Local Government Act 1972 (section 144) provides: *“A local authority may (either alone or jointly with any other person or body) ... provide, or encourage any other person or body to provide, facilities for conferences, trade fairs and exhibitions or improve, or encourage any other person or body to improve, any existing facilities for those purposes.”*

## **Museums**

The Public Libraries and Museums Act 1964 enables a local authority in respect of museums, (section 14) *“A local authority may make contributions towards expense*



# DRAFT

*incurred by any person in providing or maintaining a museum or art gallery in any place within England or Wales, or in providing advisory or other services or financial assistance for the benefit of a museum or art gallery in any such place".* Section 13 allows MCC to charge admission to a museum which is maintained by it and *"shall take into account the need to secure that the museum or gallery plays its full part in the promotion of education in the area, and shall have particular regard to the interests of children and students."*

MCC is able to make contributions to expenses to any person incurred in *"providing or maintaining a museum or art gallery"* or *"in providing advisory or other services or financial assistance for the benefit of a museum or art gallery"* (section 14) so MCC can continue to provide financial assistance if the museum services are provided by the ADMs in future.

As indicated, in an earlier section of this report, there is a residual risk that depending upon how structured, it may mean that the authority is, in substance if not in name, procuring a service rather than simply transferring assets, which again raises the issue of an appropriate procurement process. MCC will therefore need to be very clear on the nature of the proposed arrangements and the consequent structure.

## **Leisure**

The 'Delivering with less – Leisure Services' paper issued by the Wales Audit Office recognises that leisure services are frequently under-funded and not prioritised due to the nature of Leisure being a non-statutory service. However, the paper does place significant emphasis on the link to improving health and well-being as well as promoting growth and jobs and breaking the link between poverty and educational attainment, particularly in deprived communities.

Leisure services should form part of the local authority's long term goals to improve the health and well-being of its local population and the Local Government Measure (Wales) 2009 places a general duty on councils to make arrangements to secure continuous improvement in the services they provide.

## **Outdoor Education**

The Welsh Government's Consultation Document 'Improving opportunities to access the outdoors for responsible recreation' identified the many benefits that can arise from ensuring that individuals have access to the outdoors.  
<http://gov.wales/docs/desh/consultation/150710-access-outdoor-recreation-consultation-en.pdf>

# DRAFT

The paper lists the various pieces of legislation that obliges local authorities to create, divert and extinguish public rights of way (Highways Act 1980), provisions relating to outdoor infrastructure (Countryside Act 1968) and an obligation upon local authorities to provide access to countryside (Countryside and Rights of Way Act 2000). In addition, the Welsh Government recognises the links between providing access to the outdoors and the positive impact upon the health and well-being of individuals and this is likely to be an area that receives further financial and political support from the Government in future.

## **Tourism**

Please see above information regarding the Well-being Act and in particular, the goals to create a prosperous and attractive community.

## **Youth Services**

It has been recognised that local authorities are often influenced by the Education and Inspections Act 1996 and in particular, the duty under section 507B to secure sufficient services and activities for 13 to 19 year olds, and young people under 24 with learning difficulties. In addition, local authorities are obliged to provide and enable young people to participate in youth support services under s.123(1) of the Learning and Skills Act 2000.

In addition to the statutory obligations to provide social services, MCC has already recognised that the provision of youth services contributes (in the long and short term) to the seven goals in the Well-being Act.

We are aware that the Welsh Government is undertaking a review of how youth services are delivered in Wales and there is a proposal that the service is provided via a national approach. MCC will need to review the ADM proposals, taking into account both the risks and opportunities that such a national framework would bring.

# DRAFT

## 14. Employment Issues

MCC will need to confirm at a later date which staff might have a future role in which ADM depending upon the scope of the services and the ADMs which they may transfer to. At this point we would assume that the Transfer of Undertakings (Protection of Employment) Regulations 1981 will apply and MCC will also need to consider staff benefits that have accrued through the Welsh Local Government Pension Scheme and how these will be protected going forward.

## 15. Support Services

We understand that further internal work is ongoing in relation to the support services and overhead costs related to the services. In the implementation phase it will be essential to consider how these arrangements will continue to operate in the future and the potential impact on both the Council and ADMs. There may be a balance to be struck between MCC not wanting to lose services and/or the ADMs being forced to accept services which could prove more costly and/or may not be entirely fit for its new purposes.

# DRAFT

## 16. Property

The properties used by MCC to deliver the services are typically complex in that they tend to involve multiple parties and have conditions attached related to grant funding.

### **Lady Langattock's Nelson Collection**

We should probably see the legal advice obtained on this regarding whether MCC is auto replacement for Monmouthshire Corporation and consider how this might restrict the ownership and use of the collection.

### **Caldicot Castle**

Is a medieval castle which is an accredited Visit Wales visitor attraction: a single unit featuring both a registered museum and a country park. A fee is charged for entry although education groups (for Monmouthshire schools) are let in for free (with additional extras incurring a charge). There is a café on site with catering provided by a third party (The Crown at Whitebrook).

[how is the castle actually owned?]

The castle is trading at a nearly £60,000 deficit and relies heavily on subsidy funding from MCC as only 22% of the income is generated from admission does this take account of events on site as well? The castle suffers from poor transport links but has strong interest from Calidcot's History Society, U3A and Friends of Caldicot Castle group.

### **Old Station**

Is the railway station at Tintern that features a tea room and venue for wedding ceremonies. There is a model railway service on site managed by Wye Valley Railway Society.

The station is trading at a loss (circa £25,000 loss for 2014/2015) and receives 97,000 visitors annually.

### **Shire Hall**

Is a tourism information centre, a conference and events venue and museum. It was refurbished with £3.2 million National Heritage Memorial Fund grant funding which must be repaid if certain conditions are not met: MCC must continue to own Shire Hall until at least 21 August 2033.

**Outdoor Educations venues** - (please see Appendix 6 requesting further information)

# DRAFT

**County Hall** - (please see Appendix 6 requesting further information)

**Youth centres** - (please see Appendix 6 requesting further information)

**Leisure centres** - (please see Appendix 6 requesting further information)

**Rolls hall** - (please see Appendix 6 requesting further information).

More detailed work will need to be undertaken in relation to the proposed solution for the use of properties.

## 17. Grant Funding for Services

As part of the due diligence information, we understand that there are a number of grant agreements in place regarding the services. We have detailed the agreements that we are aware of below. For all grant funding, an assessment will need to be made as to the impact of moving assets to the new ADMs given some of the existing restrictions.

### **Vale of Usk Action Group**

The Welsh Government Rural Communities has attributed EU funding to a 7 year investment programme aiming to:

- Foster the competitiveness of agriculture
- Ensuring the sustainable management of natural resources and climate action
- Achieving a balanced territorial development of rural economies and communities including the creation and maintenance of employment.

MCC is part of the Vale of Usk Action Group with Newport City Council which has been granted a total of £3,313,125.00 for projects ending 31 December 2021.

### **URBACT Action Planning Network**

MCC is also a Project Partner with Ayuntamiento de Baena (Spain) to “develop economic prosperity using food and drink to encourage more tourism, thereby increasing local employment opportunities, improving the way of life for residents, and furthering the reputation of Abergavenny as a ‘food town’”.

Grant amount unknown, project date unknown.

### **Coleg Gwent Community Education Franchise Agreement**

MCC has received £150,367.89 for the period ending 31 July 2016 to provide

# DRAFT

*Community Education (as defined in the Further and Higher Education Act 1992).*

## **MindSCAPE**

MCC has received £165,000 Big Lottery funding to help people with dementia access and reconnect with the landscape through arts and environmental activities.

## **Living Levels Landscape Partnership**

MCC is a partner with the RSPB, Gwent Wildlife Trust (GWT), Natural Resources Wales (NRW), Newport City Council (NCC), City of Cardiff Council (CCC), Gwent Archives (GA), Cardiff Story Museum, Sustrans, National Trust, Bumblebee Conservation Trust and Bug Life to “reconnect people and communities to their landscape and provide a sustainable future” for the Gwent Levels. The partnership has secured funding of £321,100 with another £2,500,000 available from a second round application.

## **Wye Valley AONB Partnership**

MCC is working with Forest of Dean District Council, Gloucestershire County Council and Herefordshire Council to deliver the duties and obligations arising from Part IV of the Countryside and Rights of Way Act 2000. MCC will contribute circa £50,000 over three years ending in 2018.

Staff who have been allocated to the partnership (Matthew Lewis GI & Countryside Manager and Mr R Williams – technical advice officer) must work for the AONB Partnership as an independent organisation.

## **Monmouth – ‘A Town at War’**

MCC has been awarded up to £9,700 to carry out a WW1 centenary project with expiry date of 31 December 2016 (terms of grant agreement last until 31 December 2021).

## **The Rockfield and Monmouth Story**

Chepstow Museum (which is owned by Chepstow Town Council) obtained £16,100 of Heritage Lottery funding to preserve the cultural history of Rockfield music studios expiry date of 31 December 2016 (terms last until 31 December 2021).

## **New Opportunities Fund**

Not enough information provided.

## **Shire Hall Heritage Lottery funding**

Attaches conditions to £3.2 million grant which last until 21 August 2033.

## **Youth Engagement and Progression**

MCC has received £39,692 to provide support for vulnerable young people, particularly through utilising the voluntary sector. We have not seen T&Cs for this.

# DRAFT

## **Youth work**

MCC has received £89,930 to support the youth engagement and progression framework mainly through training staff. We have not seen T&Cs for this.

# DRAFT

## 18. Service Specifications

During the next phases of work, it will be essential for MCC and the ADM to agree what the Services should look like in the future, cognisant of potential financial constraints, how this will flow through to any service contracts and details of any aspirations regarding the level of savings or income to be generated. We will be happy to assist you with this work.



# DRAFT

## 19. Conclusion

We hope that this Report has provided you with a route and potential options for the future delivery of Tourism, Leisure, Culture and Youth Services in Monmouthshire. We see this solution as having the potential to realise the synergies and improvements across services that are often missed when reviewed and developed in isolation. This will need to be underpinned by more detailed work in the implementation phase to better inform a more robust business planning process and the overarching architecture for the arrangements that will need to be put in place.

In Appendix 7 we have included a summary of some of key decisions and activities that may need to be undertaken in the next phase of the work, though this is by no means exhaustive.

We are happy to discuss and further develop the contents of this Report with you once you have had the opportunity to consider its contents further. We look forward to working with you on the next exciting phase of this project.

**Anthony Collins Solicitors LLP**

**24 March 2016**