

Confidential - Coast to Coast RAA Proposal

Initial Options Paper on Potential Legal Model for the RAA

1) Background

Durham County Council, Cumbria County Council and Sunderland City Council/Together for Children Sunderland Limited¹ are jointly developing a proposal for a new regional adoption agency covering their three areas, namely the Coast to Coast RAA proposal (“the RAA”).

The purpose of this paper is to consider in outline terms the potential options for the legal form of the new RAA and to identify which of these options should be subject to further consideration as part of the development of the outline business case for the proposal.

2) Key Factors/Considerations

There are a number of key factors and considerations which will influence the assessment as to the most appropriate legal model for the new RAA. These are set out below.

In summary, the model for the RAA needs to:

[DN: this section should refer to the key objectives/vision for the new RAA and against which each potential model can then be fully assessed in due course. I appreciate this is work in progress. By way of illustration, the key factors may include:

- (i) The agreed vision for the RAA [to be defined and based on service outcomes];*
- (ii) The establishment of a single legal entity as the RAA in order to enable the effective discharge of the relevant adoption functions of the three Councils;*
- (iii) To provide a fully co-ordinated, pooled, consistent and innovative practice model for adoption services across a wide geographical area;*
- (iv) To provide clear, transparent and effective governance arrangements within the RAA and between the Councils;*

¹ Sunderland has outsourced the performance of its children’s social care functions (including the adoption functions) to TFC (a wholly-owned Teckal compliant company) in accordance with Section 1 CYPA 2008. This arrangement is also reflected in a DfE Direction dated March 2017.

- (v) *To provide clarity and transparency between the respective roles and responsibilities of the RAA and the Councils;*
- (vi) *To provide a structure that is lawful, namely one that is within the scope of the Councils' legal powers² and is compliant with public procurement law to permit the direct procurement of adoption agency services by the Councils from the RAA³;*
- (vii) *To enable effective collaboration between the RAA and existing voluntary adoption agencies (VAAs) [we need to be clear on the intended role of VAAs as this impacts on the model];*
- (viii) *To provide the most tax efficient structure possible in order to minimise additional VAT costs arising under the RAA proposal; and*
- (ix) *To minimise any additional costs and risks arising to the Councils (either directly or indirectly) as a result of the new RAA arrangements (e.g. equal pay risks).*

3) Summary of Potential Legal Forms

The current DfE guidance on the establishment of regional adoption agencies identifies four potential legal models for an RAA.

Based on the (draft) key factors and considerations outlined in Section 2 above, I agree that the four models identified by the DfE are the most suitable potential options for the RAA, albeit it should be noted that there are a number of variations that can exist under each model. Some of these variants are identified below.

Further, it should be noted that at this stage it is still to be determined how Sunderland will participate in the proposed RAA i.e. whether it will be the Council or TfC (as the Council's current outsourced service provider and a VAA) (or both) who should participate in the formal arrangements. Given that Sunderland's adoption functions are currently subject to the DfE Direction, dialogue will be required with the DfE in the coming months.

However, depending upon which model is identified as the preferred option, this could impact on how Sunderland participates under the model. For example, if the preference is Option 3.2 (Controlled company) then it would

² Principally Sections 101 (power to delegate to another local authority or a joint committee of two or more authorities) and 111 (power to do anything which is calculated to facilitate the discharge of any of their functions) of the Local Government Act 1972; Sections 1 and 2 (power to contract out the discharge of care functions) Children and Young Persons Act 2008; and Section 1 (general power of competence) Localism Act 2011.

³ The model will need to comply with Regulation 12 (contracts between public sector entities) of The Public Contracts Regulations 2015 i.e. the model must be either (i) a Teckal compliant company jointly controlled by the Councils which meets the control and activities tests; or (ii) meet the Hamburg Waste tests of mutual inter-contracting authority co-operation to provide public services in the public interest.

appear that the Council, rather than TfC should participate due to the provisions of the CYPA 2008 (which do not appear to permit formal sub-delegation of functions by TfC to a third party) and similarly if the preference is Option 3.1 and another authority is to act as host, then the Council rather than TfC should participate. However, if it was to be agreed that Sunderland should act as host then Option 3.4(i) could also be a potential option.

The four potential legal forms for the RAA are as follows:

3.1 RAA hosted by single lead Council

Under this model, one Council would act as lead authority and host the RAA on behalf of the other Councils under a shared service arrangement. No new legal entity is created.

The host authority would act as the accountable body for the RAA and exercise the relevant statutory functions on behalf of the Councils.

The host authority would therefore hold the pooled budget for the RAA, employ the relevant staff via TUPE and hold, or have rights to use, the relevant service assets.

It would also be assumed that the host authority would provide all or most of the relevant support services to the RAA.

Operational decision making within the RAA (i.e. the day-to-day agency decision maker functions) would be carried out by the host authority, whilst the strategic management and performance of the RAA would then be overseen by a partnership board, or potentially a formal joint committee⁴, of the three Councils.

This arrangement would be governed by a partnership agreement between the Councils under Section 101 of the Local Government Act 1972. This would appoint the host authority and formally delegate the exercise of the adoption functions of each Council to the host (subject to the supervision of the joint board or committee of the three Councils) for the duration of the RAA. The agreement would also cover, amongst other things, governance, budget/funding, performance framework, staff and assets.

⁴ The detailed governance arrangements for the preferred model will need to be developed in due course. A formal joint committee of the three Councils is an option under Sections 101(5) and 102 of the 1972 Act but is not essential. The alternative would be to establish a strategic partnership board under the shared service agreement. My initial view is that the latter may be more appropriate in this case.

This legal form meets the majority, if not all, of the key factors and considerations set out in Section 2 above.

However, some of the initial questions arising under this model are:

(a) Are the Councils content for one authority to host the functions as part of their own in-house operations (subject to the joint governance arrangements to be agreed for the partnership)? Or should the RAA have its own separate corporate identity distinct from each Council and a greater degree of day-to-day operational independence from each Council?;

(b) Potential workforce harmonisation issues for the host authority.

3.2 RAA established as a jointly owned local authority company

Under this model, the RAA would be established as a jointly owned local authority company by the three Councils.

The relevant RAA adoption functions would then be performed on behalf of the three Councils on an arms' length basis by the new jointly owned company via a service contract(s).

The company would need to be controlled jointly by the three councils and carry out at least 80% of its activities for the three councils. This is sometimes described as the Teckal test and would need to be passed to enable the three Councils to contract directly with it for the performance of the relevant adoption functions for the duration of the RAA.

Each Council would directly contribute to the company's budget through an annual contract payment. The relevant staff and assets would transfer to the new company.

Support service arrangements between the company and the Councils would also need to be established. As under this model there is no single lead authority, the support service functions could be apportioned across a number of the Councils.

The Councils could rely on their powers under Sections 1 and 2 of the CYPA 2008 to formally contract out the performance of their adoption functions to the company, provided the company is registered with Ofsted as an adoption agency.

As a requirement of the CYPA 2008, the company must be a “not for profit” body corporate. Therefore, the company would need to be limited by guarantee (rather than limited by shares) and the three Councils would be the sole members of the company.

A company limited by guarantee has a well-established, clear and flexible governance model.

The management of the company would be vested in the board of directors who would act in accordance with the defined objects and in the best interests of the company. The board would comprise of appointments made by the three Councils (although the board does not have to be limited to local authority officers and/o members and could include executive directors and/or co-optees).

The company’s members (i.e. the three Councils) would be effectively the joint owners of the company and to whom certain key decisions may be reserved under the articles of association.

The exact governance arrangements (e.g. the defined objects, the composition of the board and the scope and extent of the members’ reserved matters) could be designed to meet the requirements of the Councils.

This legal form will meet the majority of the key considerations and factors set out in Section 2.

However some of the questions arising under this model include:

- (i) Do the Councils want to establish an arms’ length (but jointly owned) delivery model for the RAA with its own distinct corporate identity?;
- (ii) Careful consideration will be required for the VAT position if a corporate structure is adopted;
- (iii) A corporate model is likely to give rise to additional operating costs than an in-house model (albeit there will be some additional operating costs for the RAA under whatever model is adopted); and
- (iv) There may be benefits to each Council from a potential equal pay risk perspective if the staff are employed within a company which is not controlled by any one Council.

3.3 RAA established as a joint venture company between the Councils and VAAs

Under this model, the RAA would be formed as a joint venture company between the Councils and third parties (e.g. other VAAs).

The key difference between this model and Option 3.2 is that in this case the company would not be solely owned by the three Councils and would have third party (private) participation in terms of membership and voting rights.

Putting to one side key commercial questions such as the extent of these third party rights and the level of control that the Councils would want to exert within the company, this arrangement would not be compliant with the Regulation 12 PCR 2015 public procurement exemptions. Therefore, a public procurement exercise would be required in order to appoint the relevant joint venture partners.

Accordingly, subject to clarifying the intended role (if any) of existing VAAs within the proposed RAA, it is not considered that this option is an appropriate form of structure for the RAA.

3.4 Appoint a third party to act as the RAA

There are two potential options under this model:

(i) Appointment by the Councils of TfC to act as the RAA

This is a potential variation on Option 3.1 if TfC (rather than Sunderland Council) was to participate in the arrangement on the basis that it was agreed TfC should act as the “host authority” for the other two Councils.

TfC is a contracting authority in its own right (as a wholly owned subsidiary company of Sunderland Council which has been established to meet needs in the public interest) and a registered VAA. Therefore, it would be appear that a shared services arrangement between Durham, Cumbria and TfC under which TfC was to act as the “host” authority could be lawfully implemented pursuant to Regulation 12 of the PCR 2015 (mutual co-operation between contracting authorities to provide public services in the public interest (see Section 2 above)) and Section 1 of the CYP A 2008.

This option would require a shared services agreement for the duration of the RAA similar to Option 3.1. The services contract between TfC and Sunderland Council for the provision of Sunderland's adoption services would need to be at least co-terminus with this shared services agreement.

(ii) Appointment by the Councils of a third party (other than TfC) to act as the RAA

Under this option, the Councils would effectively appoint a third party VAA (or consortium of VAAs) to act as the RAA on their behalf.

As with Option 3.3, this would require a procurement process to identify and appoint the third party provider. The Councils would then contract with the third party for the performance of the RAA functions and the relevant staff would TUPE transfer to the provider.

Under this option, the Councils would still need to co-ordinate their contract governance and management arrangements via a lead authority.

In the circumstances, it is not considered that this option is an appropriate form of structure for the RAA.

4) Conclusion and Next Steps

Following an initial review of the potential models for the RAA, it has been identified that in principle the following could potentially be appropriate models for the RAA, subject to further analysis and discussion in due course (in particular once the key factors and considerations in Section 2 have been confirmed):

- (I) RAA hosted by single lead authority;
- (II) RAA established as a jointly owned local authority company; or
- (III) RAA hosted by TfC.

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August 2018