

# Appendix 1

## PLV legal structure and membership

### 1. Powers and Duties

There are a number of statutory provisions that local authorities can rely upon when setting up the PLV. The Council's main relevant functions in relation to the setup and operation of a company are:

- i) The General Power of Competence (GPOC) – section 1, Localism Act 2011 (“LA11”);
  - (1) Section 1 The GPOC authorises the Councils to do anything that an individual with full capacity may do. This can include setting up and participating (including borrowing/investment/provision of loans) in a company this would, prima facie, provide the powers for the Councils to do likewise.
  - (2) GPOC can be used even if there is another power that overlaps with it. However, GPOC is limited by any limitations on the powers of the Councils that existed prior to GPOC coming into force and by any new limitations that are stated to apply specifically to GPOC or to all Councils' powers (unless GPOC is specifically excluded).
  - (3) GPOC can be used for commercial purposes.
  - (4) See also the additional restrictions in the Local Government (Best Value Authorities) (Power to Trade) (England) Order 2009/2393 that apply by virtue of the overlap with Section 95, Local Government Act 2003.
  - (5) Section 5 - 7 The use of GPOC can be restricted by the Secretary of State but to date no restrictions relevant to the establishment and operation of the company have been put in place.
- ii) The Incidental Power – Section 111, Local Government Act 1972
  - (1) This authorises the local authorities to “to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions”. The Incidental Power combined with the Councils' functions under the Children Act 1989 potentially authorises the establishment of a joint company to facilitate the delivery of those functions. The Council's functions here would be those under Section 25 of the Children Act. Further, Part III of the Children Act 1989, Section 27, supports collaborative approaches between local authorities for the benefit of discharging their responsibilities for children
  - (2) The Councils' functions in relation to placing children in a secure Children's Home
- iii) Further, the use of a company to build, develop and operate the Secure Children's Homes does not amount to trading or acting for commercial purpose because any such company will be focused on providing services and goods to the vehicle's members, especially if a way can be established

for that company to operate principally for the London Boroughs to meet their statutory responsibilities.

## **2. Legal form of the PLV**

**2.1** The Pan-London Vehicle (“PLV”) will be a company limited by guarantee (“CLG”) and owned by the London local authorities. The PLV will not be focussed on profit generation and it is intended that any surplus generated by the PLV will be reinvested into its activities.

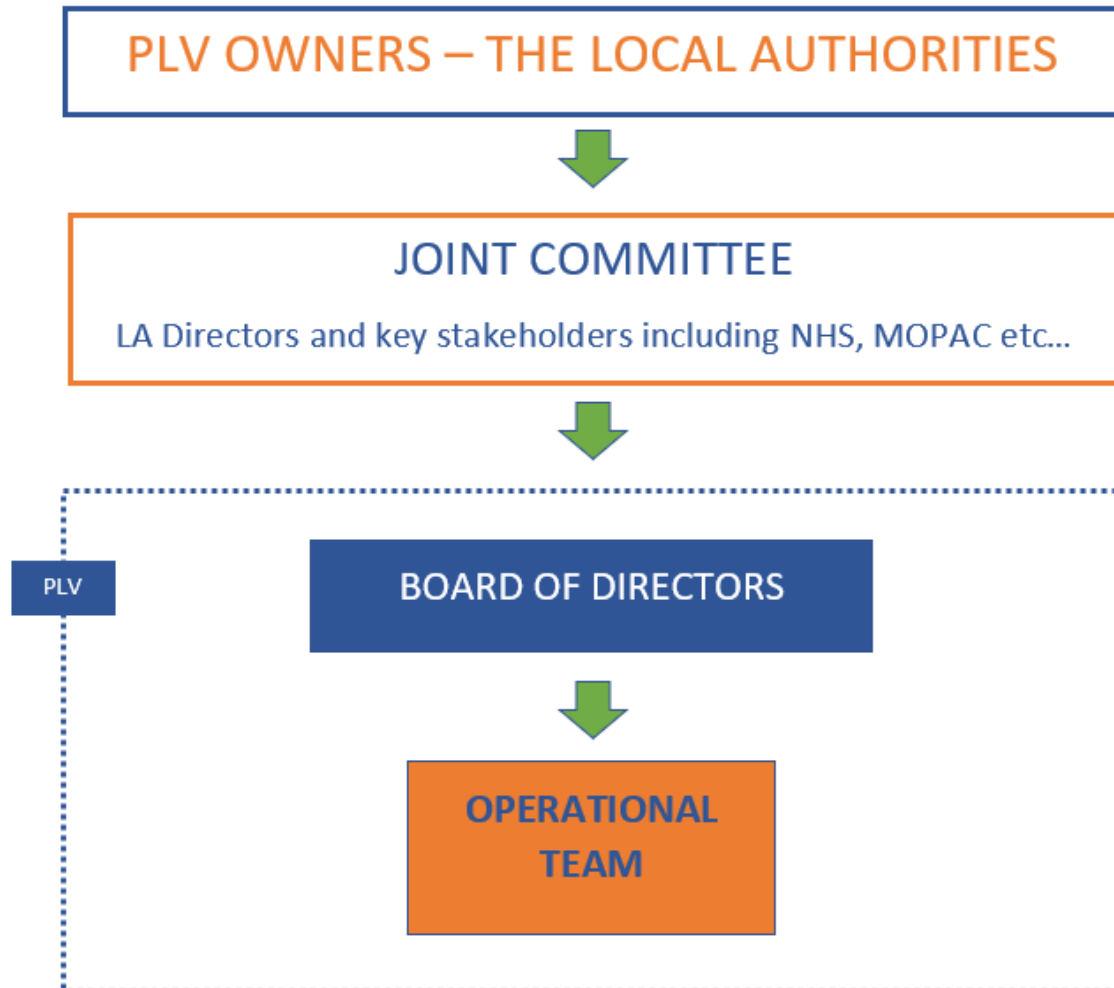
**2.2** The CLG structure will –

- a. Enable Teckal compliance and as such will enable the PLV member LAs to contract freely with the PLV for its services without a competitive public procurement process being undertaken;
- b. Provide for London LAs to join and become members of the PLV, and
- c. subsequently leave if they desire. The process for joining and leaving the PLV will be set out in the company’s Articles of Association (“Articles”) and governance agreement to cover issues such as notice periods, the treatment of on-going costs and liabilities etc;
- d. For the first five years of the PLV’s existence, “lock in” the PLV member local authorities (including any local authority who joins the PLV during this period) for a term of five years with a break clause at three years and at the end of the term, and from year six onwards, “lock in” the PLV members (including any LA who joins the PLV during this period) for a term of ten years with a break clause at the end of the fifth year of the ten-year term (see ‘onboarding and exiting arrangements”);
- e. Provide sufficient flexibility for the PLV to extend to activities provided in other areas related to children and young people, subject to agreement of the local authorities.

**2.3** As a CLG, the PLV will be registered at Companies House and will be subject to the Companies Act 2006. The PLV member LAs will be the equivalent of the shareholders of a company limited by shares and as such will in effect ‘own’ the PLV. In turn, the PLV will own its assets (i.e. the SCHs). The PLV member local authorities will only guarantee the PLV’s debts if it is wound up, up to a limit usually of £1 or a similarly nominal amount (this is separate from any specific guarantees on liabilities that may arise for specific arrangements). The PLV member local authorities will appoint the PLV’s directors who will then hold to account the officer team of the PLV, which will have delegated responsibility for the PLV’s day to day operations.

## 2.4 How the PLV will be governed

2.4.1 An organogram showing the proposed structure is set out below. The rest of this section explains the different components.



2.4.2 The PLV's governance arrangements will be set out in:

- 2.4.2.1 Bespoke Articles which will be filed at Companies House and as such will be publicly available;
- 2.4.2.2 An additional, parallel PLV member local authority governance agreement setting out collaboration arrangements between local authorities; and
- 2.4.2.3 Any other agreement which may be appropriate or necessary for the effective governance of the PLV (Such as a funding agreement, information sharing protocols etc).

2.4.3 The PLV members'/governance agreement and any additional agreements will remain confidential to the parties concerned but will be subject to the

Freedom of Information Act 2000 and the Environmental Information Reporting Regulations 2004 as any company wholly owned by a local authority is subject to the same regime as applies to the local authority which owns it.

- 2.4.4 The PLV will also be required to operate in accordance with its business plan and operational plan which will be reviewed in accordance with the PLV member LA/governance agreement.
- 2.4.5 The PLV's constitution will seek to ensure that its board directors are provided with sufficient freedom to achieve the PLV's objectives, while providing for the PLV member LAs to have sufficient control over, and involvement in, the PLV, its delivery of the SCHs and commissioning of services provided by a third-party operator.
- 2.4.6 Legal documents to establish the PLV (and not confined to its governance) will include, but are not limited to
- Memorandum of Association and Articles of Association;
  - Governance Agreement;
  - Member Committee and Stakeholders' Board Terms of Reference (see below for discussion);
  - Funding Agreement(s);
  - Support Services Agreement/Service Level Agreements;
  - Access to Information/Information Sharing Agreement (including as pertains to the Freedom of Information Act 2000 and Environmental Information Reporting Regulations 2004
  - Data Protection Act protocol
  - New member joining agreement

## **2.5 The Member Local Authorities and their roles**

- 2.5.1 There will be a single class of membership for the PLV, rather than different classes split between initial local authority members and any others subsequently joining. Between them, the PLV member LAs will appoint six "representative" directors to the PLV board of directors (out of a total of eleven PLV directors – see The Board of Directors section below). All these directors will be non-executive directors. A lead officer on the PLV operational team (e.g. the "Senior Lead") will not be appointed as a PLV board director, but may be invited to join with observer status, in order to give the PLV board of directors the space to develop a strong forum for holding the operational team to account.
- 2.5.2 The constitution of the PLV will be drafted to provide for the rotation of the PLV directors. The directors will serve a term of five years. In relation to the six PLV member local authority representative directors, should a director leave their post at their employing LA during the five-year term of their PLV directorship, their incumbent will take on the role of PLV director for the remainder of the term. At the end of the first five-year term, two directors will stand down, with a further two directors standing down each year thereafter.

2.5.3 Financial contributions to the working capital of the PLV will be provided for in specific funding agreements. Following the initial 5 year year period, the financial contribution required of the PLV member local authorities to the working capital (to ensure cash flow) will be dependent upon the number of member local authorities at any time.

## **2.6 On-boarding and exiting arrangements**

2.6.1 The initial PLV member local authorities will have to obtain the requisite internal authority to establish the PLV and contribute financially to its working capital. Those London local authorities which join the PLV subsequently will need to obtain the requisite internal authority to do so and also to incur the ensuing costs of membership (a financial contribution to the working capital).

2.6.2 The PLV Articles and members'/governance agreement will be drafted to provide for non-member London local authorities to subsequently join the PLV by way of written application to the board of directors of the existing members, with no such application being unreasonably refused. Membership will be contingent upon an agreed financial contribution to the working capital, which will recognise previous contributions made by existing member local authorities.

2.6.3 To ensure operational and financial stability for the PLV, during the first five years of the PLV's existence, PLV member local authorities (including any local authority who joins the PLV during this period) will be 'locked in' as financially contributing PLV member local authorities for a term of five years with a break clause at three years and at the end of this term. From year six onwards, the PLV member local authorities (including any local authority who joins the PLV during this period) will be 'locked in' for a term of 10 years, with a break clause at the end of the fifth year of the 10-year term.

2.6.4 The Articles and governance agreement will be drafted to provide for a membership 'application window' whereby those non-PLV member LAs wishing to join the PLV are able to apply to do so in the September of each year, with their membership commencing on the 1st April of the following year (if the application is approved) to coincide with the commencement of the local authority financial year. This is assuming the applying LA will have completed its internal decision-making and governance processes prior to applying to join the PLV.

2.6.5 The Articles and governance agreement will also provide for PLV member LAs wishing to terminate their membership of the PLV to serve 18 months' notice, with their membership terminating on the 31st March in a year to coincide with the end of the local authority financial year (subject to the fixed minimum membership period). This gives the PLV the opportunity to agree a transition plan and adjust its budgets with adequate notice.

2.6.6 The Articles, governance and finance agreement(s) will provide for the PLV member LAs to provide a contribution to the working capital of the PLV to coincide with the local authority financial year.

2.6.7 Exit arrangements will need to provide for settlement of outstanding and/or any on-going financial contributions and liabilities of PLV member LAs which have terminated their membership of the PLV.

## **2.7 Decision-making**

2.7.1 The Articles and the governance agreement will be drafted to reserve certain activities and key decisions to the PLV member LAs. Such an arrangement would ensure the PLV member LAs retain control and influence over the PLV. The 'reserved matters' will be limited to:

- Adopting the initial and subsequent business plans and approving any material changes to them, including which decisions are to be reserved decisions
- Appointing and removing directors;
- Borrowing capital outside of the business plan; and
- Approving material changes to the nature of the PLV's business.
- The reserved matters will be subject to a simple majority of all those members who vote (to enable decision-making on an effective basis). The responsibility to vote within the relevant time period for each decision will be with the voting LA. The PLV member LAs, by 75% majority of those that vote, can also direct the board to take, or refrain from taking, a specified action (this is common with a company that is structured to enable "Teckal" treatment). All other non-operational decisions in relation to the PLV will be made by the PLV directors, or if appropriate for certain decisions, the PLV operational team.

2.7.2 The reserved matters will not include decisions which are otherwise covered by company law e.g. amendment of the Articles by special resolution (75% of those voting at a general meeting or entitled to vote if by written resolution).

## **2.8 PLV Joint Committee**

2.8.1 The governance arrangements will provide for a joint committee of the PLV member LAs to comprise the Directors of Children's Services or similarly senior and appropriately skilled officers of the members' local authorities. The members of the joint committee will each act as a representative of their respective local authority at "shareholder/owner" level. The joint committee will be involved in approving the PLV's business plan, budget and the other reserved matters to be decided on behalf of the PLV member local authorities as listed in paragraph 2.7.1 (not including matters covered by company law e.g. amendment of the Articles which requires a special resolution), without the conflicts of interest that board directors can face.

2.8.2 The joint committee will operate under agreed terms of reference. The PLV board's regular reporting to the joint committee will be provided for in the governance agreement, which will also provide for directors or officers of the PLV (e.g. the operational team), in exceptional circumstances, to attend and

answer questions at appropriate meetings of the PLV member local authorities, their executive and committees.

- 2.9** Additional public bodies involved in the project, such as NHS bodies and the Mayor's Office for Policing And Crime, will be able to sit on the joint committee as observers. The observers' role will be subject to the Terms of Reference and governance agreement and the observers will be able to attend and participate in meetings of the joint committee but will not be able to vote. It is intended that the facilitation of the observers in this way will provide for the engagement and involvement in the project of relevant public bodies, while ensuring the PLV has the freedom it needs to achieve its objectives and marking a distinction between the LAs, as owners of the PLV and the legitimate interests of the other stakeholders.

## **2.10 The Board of Directors**

- 2.10.1 The board will be comprised of 11 directors:

2.10.1.1 A chairperson - to provide for political ownership, the board's chairperson will be the London Councils' Lead Executive Member for Schools and Children's Services at any given time. The chairperson will have a casting vote to guard against deadlock in board decisions.

2.10.1.2 Six representative directors, these will comprise senior officers of the PLV member local authorities appointed to bring oversight, experience and particular skills which would be advantageous to the PLV. They would not be full time, not remunerated or employed by the PLV and, as detailed above, will serve a fixed term of up to five years. The directorship shall be automatically terminated upon the cessation of their employment with the PLV member local authority and their incumbent will take on the role of PLV director for the remainder of the five-year term. An officer placed on the board can be provided with an indemnity pursuant to the Local Authorities (Indemnities for Members and Officers) Order 2004 for their actions in the role as long as their actions are taken legally, honestly and in good faith.

2.10.1.3 Three independent directors shall be appointed following a recruitment process. They will not be full-time, not remunerated (beyond reasonable expenses) or employed by the PLV and they will serve for a fixed term for up to five years. The PLV will have to take out indemnity insurance for them; and

2.10.1.4 A director appointed from the members of the London Society of Treasurers. This is to provide for the financial oversight of the board.

## **2.11 Public Procurement**

- 2.11.1 Ordinarily the services that are commissioned in relation to a child might be reasonably categorised as "Social work services with accommodation" (CPV Code 85311000-2) – these are subject to what is known as "the light touch regime" ("LTR"). LTR services benefit from a significantly higher competitive tendering threshold (£663,540) than for other services and greater flexibility in the design and operation of public procurement processes.

- 2.11.2 However, it is worth exploring the establishment of a joint vehicle that will not be subject to the competitive tendering requirements that councils would otherwise be subject to.
- 2.11.3 There are two exceptions in PCR 2015 to the requirement for competitive tendering that enable the commissioning of services directly from either one or more lead authority or a jointly owned vehicle. These are set out in Regulation 12 PCR 2015
- public services co-operation arrangement;
  - a “Teckal” vehicle
- 2.12 It is perfectly possible for the participating councils to establish an administrative arrangement under which one of the authorities undertakes the lead role in delivering the Secure Children’s Homes, using mechanisms under the Local Government Act 1972, section 101 in particular. These would be outside the EU procurement rules as these arrangements are not public contracts that are subject to their competitive tendering requirements.
- 2.13 One arrangement that does allow for councils and other contracting authorities to have delivered to each other services that are subject to the tendering requirements of the EU procurement regime is the public service co-operation arrangement (in large measure now defined in regulation 12(7) PCR 2015). The key test (of the 3) for our purposes is that the contract creates a co-operation between them with the aim of ensuring that the public services they have to perform are provided with a view to achieving objectives that they have in common. In order for such an arrangement to be effective there has to be genuine reciprocity between participating public bodies – however, with 32 London Boroughs potentially participating, a public service co-operation arrangement between them is likely to be unwieldy, with risk and management falling predominantly on the London Borough(s) hosting the new Secure Children’s Home provision, resulting in unnecessarily complex arrangements.
- 2.14 This leaves us with the other option for delivering and sharing services between the Councils without triggering competitive tendering requirements of the EU procurement rules – the “Teckal” vehicle now governed by Regulation 12 PCR 2015 (except Regulation 12(7)). It would accommodate direct placements by all its member councils but will need to leave open potential adjustment to its structure if the Centralised Commissioning Framework is established and a single national commissioner is in place.
- 2.15 Participating councils and other public bodies should be able to establish a single vehicle that meets the relevant tests i.e. in particular it is established so that:
- they jointly exercise a decisive influence over the strategic objectives and significant decisions of the vehicle;
  - the board of directors comprises representatives of the entity’s member authorities; and



- the vehicle does not pursue any interest's contrary to those of the Member authorities.