



GLOUCESTERSHIRE
WASTE PARTNERSHIP



Joint Waste Programme

Draft Report: Governance and Legal Form

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1.0 Introduction

This short report summarises the methodology and findings of work carried out by Joe Papineschi (Eunomia) and Shirin Wotherspoon (One Legal) on governance issues and options. The aim of the work was to identify a preferred option for the governance structure of the Joint Waste Programme shared waste collection and disposal service, based on an objective evaluation of all of a range of available options.

2.0 Background

Since 2007, the Gloucestershire local authorities have been investigating the potential for and then working towards a shared waste management service. Several phases of work have been undertaken to examine in detail the options for developing such a shared service and to understand the financial and operational costs and benefits of these options. In September 2010, each of the seven waste authorities in Gloucestershire considered a detailed business case for moving into an implementation phase and five authorities (Cheltenham BC, Cotswold DC, Forest of Dean DC, Tewkesbury BC and Gloucestershire County Council) passed resolutions to the effect that they would continue to work together towards implementing a shared service. Gloucester City Council and Stroud DC decided at this point to cease direct involvement in the project, but have not ruled out joining the shared service at a later date.

This increased clarity regarding the make-up and scope of the partnership has allowed the partner authorities to work towards a decision on the governance and management arrangements and legal form for the future shared service. Whilst, since relatively early in the partnership's investigations of shared service options, a presumption in favour of governance under a joint committee has been made, no formal decision has so far been taken. The work reported here was commissioned by the Programme Board in order to challenge that presumption and to inform the decisions that must now be made in the relatively near future regarding the governance model to be implemented.

3.0 Methodology

Depending on the eventual outcome of the partnership's deliberations regarding governance, the decisions on the governance of the shared service have the potential to be very significant. As such, it was considered essential that a robust and objective process of options appraisal was undertaken, considering a wide range of options. In summary, this process entailed:

- The establishment of a set of 'partnership principles' against which the governance options could be identified and tested;
- The identification of a wide range of governance options, designed to be representative of the full range of options available;
- The narrowing down of the options to a shortlist of 'most likely' options;
- The establishment of a set of evaluation criteria, based on the partnership principles, which would allow the performance of the options to be quantified;
- The evaluation of the options against the criteria.

4.0 Principles

Based on decisions previously made by the partner authorities, the Joint Improvement Board and the Shadow Joint Waste Board, a consolidated set of partnership principles were drafted and discussed by the Programme Board. The following principles were agreed and formed the basis of the subsequent stages of the project:

4.1 Scope and Functions

1. The waste collection and disposal functions under Part 2 and street and litter cleansing functions under Part 4 of the Environmental Protection Act 1990 and associated legislation will be the primary functions of the shared service.
2. Other related services (such as grounds maintenance) could also be considered for inclusion on a case-by-case basis, particularly where not including them might result in detrimental impacts in terms of residual services (e.g. due to shared infrastructure or management).
3. Incidental activities such as fleet management which could extend beyond the functions outlined above could be considered for inclusion where there is a business case for doing so (such as economies of scale) but this should be a secondary consideration in selecting a recommended governance option.
4. Maximising potential for trading/income generation is of interest, but this should be a secondary consideration in selecting a recommended governance option.
5. Any decisions regarding outsourcing should be taken on value for money grounds and supported by a robust business case. No services should be considered fundamentally off-limits for market testing. Equally, no presumption should be made against provision of waste services in-house.

4.2 Decision Making

6. In the event of a member decision-making body being formed, each partner authority will appoint two elected members to the body and each of them will have a single, equally weighted vote.
7. Where significant delegation of functions takes place, accountability to local electorates will be protected by a system of vetoes focused on matters of significant extra-budgetary financial cost and significant service change. Provisions will be included to manage deadlock situations. Initially, these will lead to decisions not being implemented, but may lead to exit from or ultimately termination of the partnership arrangements.
8. Annually, the partnership will agree:
 - A business plan
 - A medium term financial plan
 - An annual budget for the partnership

These will be approved by the individual partner authorities. Where the partner authorities fail to approve a budget, the existing budget will be adopted, but adjusted to take account of unavoidable financial impacts such as inflation and landfill tax.

4.3 Financial

- Contributions to the joint budget will be made on the basis of a cost-sharing agreement, based on the following principles:
 - a. For household waste collection services, contributions will be based on the following factors:
 - i. Service design, service level and frequency of collection;
 - ii. Number of households or service users; and
 - iii. Sparsity/density of population.

However, where a cost overrun bears on the partnership, this will substantially pass through to the authority to which the cost overrun relates.

- b. For waste disposal costs, the WDA will be the sole contributor. In addition, the WDA will contribute towards the cost of waste collection in lieu of payments of recycling credits and organic waste collection payments to the extent that each district is at least no worse off than under the current arrangements.
 - c. Management and back office costs, overheads and support services will be recharged on the basis of:
 - i. First, a WDA/WCA split, based on a measure of historic back office management cost differential; and
 - ii. Secondly, between the WCAs, divided equitably.
 - d. Costs associated with the payment of a third party which provides collection services in only one partner authority area will pass through to that partner authority.
 - e. Minimum savings at an acceptable level to each authority will be required in the first full year of the partnership.
 - f. Asset contributions will be recognised at market value, whether assets are transferred or made available via, for example, a lease. Asset transfers will be minimised unless a sound business case exists to do otherwise, in order to maximise simplicity, both in set-up and potential exit or termination.
- Value for money will be demonstrated regularly and objectively. The waste collection services that are delivered in-house at the start of the shared service will be market tested by 2018 subject to a decision by the relevant executive body or bodies that this is required in order to demonstrate continued best value.

4.4 Expansion and Contraction of the Partnership

- The partnership is, in principle, open to considering the addition of new partner authorities, both from within Gloucestershire and outside the county. However, the primary aim of the partnership is to meet the direct needs of the founding partners.
- Decisions regarding the expansion of the partnership will take account of any considerations relating to set-up costs carried by the founding partners when considering the overall business case for partnership expansion.

5.0 Governance Options

Different 'governance structure components' would have to be combined to make up most of the overall governance structure options available for the shared waste service. For example, a Joint Committee would have to be combined with an administering authority in order for the partnership to be able to enter into contracts or employ management staff. For this reason, we have considered options in terms of the potential governance structure components that could be used at three 'tiers' within the overall governance structure of the partnership:

- **The strategic/policy level**, which essentially includes the strategic decision-making processes involving elected members;
- **The management/back office level**, including overall service management, performance management, public communication and administration; and
- **The operational level**, including front-line service delivery (i.e. refuse collection, street cleansing, supervision etc.)

As a starting point in developing the governance options for appraisal, we identified potential governance structure components, with a view to configuring these into a number of overall governance structure options based on the three tiers described above. These components were:

- **Secondment: Section 113 of the Local Government Act 1972** allows officers employed by one local authority to work on discharging the functions of another authority;
- **Collaborative arrangements:** a contractual arrangement between authorities under which approaches to policy and decision-making are established, but where decision making itself still takes place within each partner authority;
- **Joint committees:** joint committees are joint decision-making bodies that allow multiple authorities to discharge their functions jointly. Generally, they are made up of members appointed by each of the authorities;
- **Lead authority: Section 101 of the Local Government Act 1972** allows one authority to discharge the functions of another authority that has similar functions. This arrangement can be used in combination with other structures. For example, the administering authority in a joint committee arrangement is usually established using these powers;
- **Limited company:** local authorities are allowed to set up limited companies, but cannot delegate functions to them;
- **Joint Waste Authority:** joint waste authorities can be set up under Part 11 of the Local Government and Public Involvement in Health Act as special purpose authorities responsible for one or more of waste collection, disposal and street cleansing; and
- **Outsourcing:** local authorities are able to contract with third parties to discharge their functions, usually following a formal procurement process.

Some of these potential components could be used at one tier (e.g. a joint committee could be used at the strategic/policy level) but not at another (the operational level). Other components, although theoretically usable at a particular tier, are for one reason or another not desirable or practical. The sortlisting process that resulted in the overall

governance options that were subjected to detailed appraisal is described in the next section.

5.1 Shortlisted Options

Table 1 summarises the governance structure components that were appraised in detail at each tier. A tick signifies that a component was considered for the relevant tier, a cross that it was not and a greyed-out box that it was considered to be legally or practically unviable. Some discussion of the rationale behind these assumptions is provided below.

Table 1: Options Shortlisted for Detailed Appraisal

	Strategy/Policy	Management	Operational
Secondment		X	X
Collaborative arrangements	✓	X	X
Lead authority	X	✓	✓
Joint committees	✓		
Limited company		X	✓
Joint Waste Authority	✓	✓	✓
Outsourcing		X	X

- The secondment option was not considered viable for the strategy/policy tier, as this would entail an excessive degree of delegation to officers. Although theoretically viable at the management and operational tiers, secondment alone was not considered in the detailed appraisal because it would not meet the test of facilitating the creation of a genuinely shared service. However, in practice it may well be that secondment has a role to play in ensuring that officers whose role is split between in-scope waste functions and other out of scope functions can continue to work for the partnership and for their original authority employer.
- Collaborative arrangements are essentially designed for strategic governance and as such were not considered at the management or operational levels, as in practice a shared service governed under a collaborative agreement would rely on a combination of secondment and lead authorities for the delivery of the management and operational functions.
- Delegation to a lead authority was not considered viable for the strategy/policy level, as this would entail a single authority taking key decisions on behalf of other partner authorities. However, delegation to a lead authority at the management level (e.g. an administering authority to a joint committee) or at the operational level (e.g. a 'joint DSO') were considered to be viable options.
- Joint committees are joint decision-making bodies and are therefore appropriate for the strategy/policy level, but not the management or operational levels.
- Limited companies cannot be used at the strategic/policy level, as functions cannot practicably be delegated to them. They could theoretically be used at the management level, but would not add value relative to, for example, appointing an administering authority, whilst being more complex. However, a local-authority owned company would be viable at the operational level.

- A joint waste authority could operate at all three tiers, as strategic/policy decisions would be taken by members of the authority and staff employed directly by the authority could manage the services and deliver them in-house.
- Outsourcing would not be possible at the strategy/policy level, as functions could not be delegated to a contractor. Whilst management and back office functions could theoretically be outsourced, in practice this was not considered viable, as this would not provide a suitable level of control and accountability for the management of key services. At the operational level, outsourcing will almost certainly play a key role and could easily be combined with any of the other components considered in the detailed appraisal. However, in the context of this options appraisal, the focus at the operational level is on service delivery in Cheltenham, Tewkesbury and Cotswold, as these authorities have an immediate need to resolve the question of service delivery model.

As table 1 shows, the number of combinations of viable governance structure components is actually quite limited, with the following five overall options considered in the detailed appraisal:

- A collaborative arrangement at the strategic/policy level, combined with a lead authority for management (i.e. an administering authority), combined with either:
 - A lead authority at the operational level (i.e. a joint in-house service); or
 - A local authority owned company at the operational level
- A joint committee at the strategic/policy level, combined with a lead authority for management (i.e. an administering authority), combined with either:
 - A lead authority at the operational level (i.e. a joint in-house service); or
 - A local authority owned company at the operational level
- A joint waste authority with an in-house service for Cheltenham, Tewkesbury and Cotswold and predominantly outsourced services for Forest of Dean and the County Council.

Before describing the evaluation criteria and results of the appraisal, the following section provides some further detail on each of the governance structure components considered, as well as setting out the assumptions made as to the ways in which they would be used. This should be considered in the context of the principles described in Section 4.0. Under each component, the legal documents that we anticipate would be required are also listed.

5.2 Collaborative Arrangement (Strategic Level)

A Collaborative Arrangement would be a contractual arrangement between the participating authorities which would facilitate consistency of approach and implementation of waste policy across participating councils. It would not have decision making powers other than those covered by schemes of delegations to members/officers of the individual constituent authorities. As such, it would provide a means of coordinating decision-making (probably via one or more member/senior officer boards) but would not have a formal joint decision making role. This would mean that individual authorities would retain a considerable degree of control over decision-making, but would also make it relatively easy for authorities to make divergent decisions that could undermine the coherence of the shared service.

The key limitation of the collaborative arrangement model is that it would not allow a shared service covering both waste collection and disposal to be established. This is because, without going through a joint committee, it is not legally possible for functions to be delegated to an administering authority that do not relate to that authority's original functions.

5.2.1 Legal Documents

1. A collaborative/inter-authority agreement which would set out how many elected members would be appointed from each of the authorities and what decisions and functions would be within the scope of the Joint Arrangement.
2. An inter-authority agreement appointing an administering authority under the provisions of Section 101 of the Local Government Act 1972, who would act as contracting and employing authority on behalf of the partner authorities. The agreement would also need to include a scheme of delegation to officers of the lead authority to act on behalf of the participating councils.

5.3 Joint Committee (Strategic Level)

A joint committee would be established under Section 101 and 102 of the Local Government Act 1972, section 20 of the Local Government Act 2000 and the Local Authorities (Arrangements for the Discharge of Functions) (England) Regulations 2000.

Such a joint committee would be made up of elected members appointed to it by the constituent authorities. It would have certain decision-making powers delegated to it by each of the constituent authorities, with a scheme of delegations set out as part of the constitution of the joint committee. The committee would be able to take decisions on behalf of all constituent authorities within those delegations. Therefore, a decision taken by the joint committee would, in law, be a decision of each constituent authority.

However, a joint committee is not a separate legal entity and, as such, cannot enter into contracts in its own right or employ staff directly. In order to do these things, one or more constituent authorities must be appointed to act as administering authority, via a delegation under the provisions of Section 101 of the Local Government Act 1972. In discussions regarding the potential identity of an administering authority for a shared waste service, the Programme Board concluded that Gloucestershire County Council would be best placed, primarily due to the impracticality of one of the waste collection authorities becoming the contracting authority for the major residual waste treatment contract currently being procured.

Some decisions could not practically be *fully* delegated to a joint committee, as they could have very significant implications for individual authorities and their residents. For example, it would not be practical for all decisions regarding spending to be left entirely to a joint committee, as, particularly in the case of waste collection authorities, those spending decisions relate to a significant proportion of the net revenue budget of the whole authority. Because the implications of spending decisions within waste and street cleansing could be so significant for individual authorities, it would be essential for safeguards to be included in the joint committee arrangement to ensure that the committee could not unilaterally take a decision that could impact significantly on the funding available for other services. Equally, as an appointed (as opposed to an elected) body, it would not be appropriate for a joint committee to be able to make decisions regarding the fundamental design of key services without input from the relevant partner authority. In circumstances such as these, the scheme of delegations could include

decisions for which a power of veto would apply, or could leave such decisions to be made by the constituent authorities individually.

5.3.1 Legal Documents

1. A Joint Committee constitution, which would set out how many elected members would be appointed to the Joint Committee from each of the authorities and what decisions and functions would be delegated to it.
2. An inter-authority agreement appointing an administering authority under the provisions of Section 101 of the Local Government Act 1972, who would act as contracting and employing authority on behalf of the Joint Committee. The agreement would also set out the rights and obligations of the constituent authorities in relation to one another and to the committee, including issues such as details of the cost sharing agreement.

5.4 Joint Waste Authority (Strategic Level)

A Joint Waste Authority (JWA) would be set up following by order by the Secretary of State and would become a completely new, 'special purpose' authority. The waste functions of each of the participating authorities would be transferred to the new JWA, which means that the participating authorities would effectively cease to have responsibility for those waste functions which go across to the JWA. All staff, assets, contracts and liabilities of the authorities relating to the functions would also go across to the new JWA, which would become the new employer and the party to contracts. Authorities could only leave a JWA, or a JWA could only be wound up by the Secretary of State and the process for doing so is unclear. No Joint Waste Authorities have yet been formed, which means that there is considerable uncertainty regarding some of the details of the set-up and operation of JWAs. In addition, the scope of functions that could be vested in a JWA would be strictly limited to waste collection, waste disposal and street cleansing and as such, related services such as grounds maintenance could not be transferred to a JWA.

As discussed above, a JWA could also be used at the management/back office and operational levels, essentially in the same way as any individual authority operates via management and administrative officers and in-house services.

5.4.1 Legal Documents

- An establishment order from the Secretary of State.
- A set of internal operating rules, probably in the form of a constitution similar to those of a typical local authority.¹
- An inter-authority cost sharing arrangement between each of the constituent authorities and the JWA.

5.5 Administering Authority (Management/Back Office Level)

An administering authority would be used in combination with either the collaborative arrangement or the joint committee models for strategic governance. The administering authority role would be established by using powers under Section 101 of the Local

¹ The Local Government Act 2000 (s.37) requires every local authority which adopted executive arrangements to adopt a formal constitution, and the Local Government Act 2000 (Constitutions) (England) Direction specifies the minimum content for such a constitution. Whilst s.37 has not been applied to JWAs, Defra appears to be of the opinion that JWAs should adopt and publish such a constitution.

Government Act 1972 for one authority to discharge the functions of another authority. This would allow management staff to be employed or contracts to be entered into without having to set up a separate legal entity.

5.5.1 Legal Documents

1. An inter-authority agreement which would set out the role of the lead authority and the means of its being compensated by the other authorities in respect of the costs it incurs.

5.6 Local Authority Owned Company (Operational Level)

A company is a separate legal entity and if set up by one or more participating authorities, would be legally separate from them. Companies are incorporated under a Memorandum and Articles of Association, which set out the structure and operating rules of the company. The company is owned by its shareholders, but normally run on a day-to-day basis by directors, who are appointed by the shareholders.

As a separate legal entity, a company may enter into contracts, employ staff, own land and borrow in its own right. If it makes a profit, it is subject to Corporation Tax. The company may then distribute any profit after any tax in the form of dividends to shareholders.

A local authority can contract with a company for the purchase or sale of goods, works and services, which may assist in the discharge of the authority's functions. If the company is wholly owned by the participating authorities, they can contract with the company without having to expose the contracts to competition under EU procurement law. However, a local authority cannot delegate its statutory functions to a company, in the sense of the company taking decisions on behalf of the authority or exercising statutory powers of the authority, as it could with a Joint Committee.

The key advantage of using a limited company at the operational level, as opposed to simply operating a shared service in-house, is that currently outsourced workforces (e.g. the operational workforces currently providing services for Cotswold and Forest of Dean) could potentially be in-sourced much more cost-effectively. This is because the authorities would be likely to incur a much larger employer pension contribution cost if these workforces were employed directly. In-sourcing via a local authority company may, therefore, present an affordable means of creating a larger shared 'in-house' service, incorporating currently outsourced workforces.

5.6.1 Legal Documents

- A Memorandum and Articles of Association
- A shareholders agreement between the Councils governing their conduct towards one another and dealing with issues not addressed in the Memorandum and Articles of Association.
- As required, agreements between the councils and company for service provision.
- Agreements between councils and company for the provision of support services, equipment, office space, depot and other resources.
- Contracts with third party clients (any external purchasers of services e.g. other authorities or commercial waste producers).

6.0 Evaluation of the Options

Based on the overarching objectives of the Joint Waste Programme and the principles developed with the Programme Board, a number of evaluation criteria were developed to allow a systematic appraisal of the five overall governance structure options carried out.

6.1 Evaluation Criteria

The following criteria were developed in collaboration with and agreed by the Programme Board, and are described alongside some examples of how the options were found to 'perform' against them:

- **Financial impact:** some options have different set-up costs, but may also result in different on-going costs. For example, setting up a limited company at the operational level would be relatively expensive compared to using a lead authority to employ operational workforces. However, the on-going costs of the company model would be significantly lower, due to the reduced pension costs associated with in-sourcing currently outsourced workforces. In order to allow a like-for-like comparison, a financial model was developed that considered the cash flow differences associated with the options and calculated a 10-year net present value. Based on the results of the financial modeling, each option was awarded marks out of 15 for financial impact, as this was considered to be the single most important criterion in determining the best overall option (although less important than the other criteria combined).
- **Financial decision making:** some options allow a greater level of local control over financial decision-making than others. In particular, the collaborative arrangements model allows the greatest level of local control to be maintained. The JWA option allows the least, with responsibility for the relevant functions actually being transferred to the JWA. The joint committee option sits somewhere in between, as local control can be safeguarded by veto and retained decision-making arrangements, but a joint decision-making function is put in place.
- **Service design decision-making:** as with financial decision-making, the different options would allow different levels of local control to be exercised regarding decisions on service design. The pattern would be the same as discussed above in relation to financial decision-making.
- **Joint decision-making:** some options allow a greater level of joint decision-making than others. The JWA option effectively passes all decision-making power to the joint body and as such results in the clearest joint decision-making processes. The joint committee model provides a vehicle for joint decision-making, but this is tempered somewhat by the arrangements envisaged for vetoes and retained decisions. The collaborative arrangements option has the most limited scope for joint decision-making, as no joint body is empowered to make decisions jointly, although decision-making could be better coordinated than under the current informal arrangements.
- **Two-tier integration:** the JWA option allows for the greatest level of two-tier integration, as both the waste collection and disposal functions would be vested in the same authority. The joint committee option allows for a considerable degree of integration, as both tiers can delegate their functions to a single decision-making body and, via that, to a single management team. The collaborative arrangements option has the least potential for two-tier integration, as, without going through a

joint committee, it is not possible to delegate both collection and disposal functions to be discharged by the same authority.

- **Scope of powers:** the only option that places a significant restriction on the potential scope of the shared service is the JWA model, as it is restricted by primary legislation to use for the discharge of waste collection, disposal and street cleansing functions.
- **Exit:** none of the options would be straightforward to exit in the event of the shared service failing to meet the expectations of the partner authorities, as it is likely that considerable operational and management integration would have taken place by the time a decision to terminate the shared service could be made. However, the challenges of exit would be greatest in the case of the JWA option, as approval of the Secretary of State would be required either for one authority to leave the JWA or for the JWA to be dismantled.
- **Risk:** the different options clearly present different risks to the partner authorities. A high-level assessment of financial, legal and reputational risks was carried out as part of the options appraisal, which showed that all options carry risks, but all of the identified risks appear to be manageable. Key risk issues include:
 - The fact that the company structure is relatively innovative. However, there are a small number of precedents and it is understood that other authorities and partnerships are currently considering this option;
 - Greater local autonomy is most likely to lead to relatively reduced savings. This is because the savings forecast in the business case are predicated on an optimised shared service being implemented, which is more likely to be compromised where no joint decision-making body exists; and
 - No JWAs have yet been formed and as such there is considerable uncertainty regarding the detailed operation of this option.

6.2 Results

Table 2 shows the scores attributed to each of the options against the criteria discussed above. As can be seen, the relative financial benefit associated with the company option is a key driver of the overall results, with the collaborative option scoring best against the criteria associated with local control and the JWA scoring best against the criteria associated with joint decision-making and two-tier integration. However, the JWA option performs poorly overall, as it is a low scorer against the local control and exit criteria. The joint committee options perform well or fairly well against all criteria and the ‘joint committee combined with company’ option performs best overall.

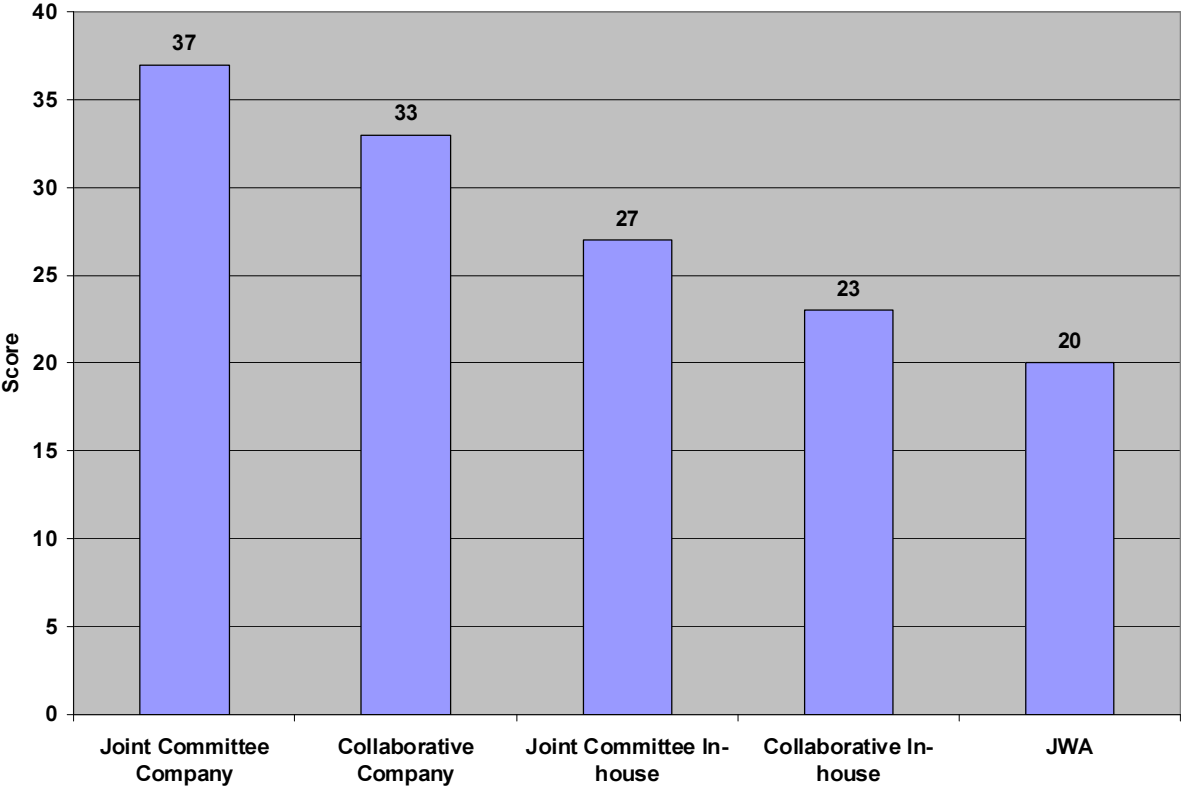
Table 2: Results of the Detailed Options Appraisal

	Joint Waste Authority	Collaborative In-house	Collaborative Company	Joint Committee In-house	Joint Committee Company
Financial impact	5	3	13	5	15

Financial decision making	1	5	5	3	3
Service design decision making	1	5	5	3	3
Joint decision making	5	1	1	4	4
Two-tier integration	5	1	1	4	4
Scope of powers	2	5	5	5	5
Exit	1	3	3	3	3
Total	20	23	33	27	37

Figure 1 presents the overall scores for each option in ranked order. The criteria and scoring system used are clearly not capable of accurately calculating which is ‘definitely the best option’ and it is important that the scores against individual criteria are also kept in mind. However, as noted above, it is clear that the limited company at the operational level is a key factor and that the JWA option does not offer enough benefits to offset the downsides associated with it. The joint committee option generally out-performs the collaborative arrangements option, ultimately because it offers a good overall compromise against the needs for joint decision making, two-tier integration and safeguarding of local decision-making and ultimate control.

Figure 1: Ranked Overall Results of the Appraisal



7.0 Conclusions

The JWA option restricts the scope of the partnership, meaning that related functions (e.g. grounds maintenance, cemeteries and fleet management) could not be included. They are also difficult to join once set up and difficult to leave in the event of the shared service failing. They also carry risks associated with their unprecedented nature.

Relying on collaborative arrangements would prevent the County Council from fully participating in the partnership, as functions cannot be delegated between tiers without going through a joint committee. As such, this option does not meet the overall aim of a

to-tier shared service and generally limits the scope of the Programme in terms of joint decision-making.

The joint committee option, ideally combined with a limited company for operational service delivery, is the best overall option in our appraisal and as such is the recommended option for meeting the overall objectives of the Joint Waste Programme. The County Council appears to be best placed to take on the administering authority role and provided the right safeguards are included in the constitution and inter-authority agreement, this should be a viable option for all parties.