

Report to: Community Protection Panel 21 Jan 2008
Licensing Committee 28 Nov 2007
Cabinet 29 Nov 2007

Subject: AGMA Public Protection Partnership Project: Proposal to Support the Establishment of Business Regulation Solutions

Report of: Director of Environmental Services

Contact officer: Alan Blundell Telephone: 01942 705027

Purpose/summary: To outline the change management programme being undertaken by the Association of Greater Manchester Authorities (AGMA) Public Protection Partnership and the company Business Regulation Solutions already established as the delivery mechanism to improve business compliance throughout Greater Manchester.

Alternative options considered and reason for selecting the one recommended: Not to participate etc.

Recommendation/decision: That Cabinet:

- 1) Agree to participate in this initiative and enter into a Memorandum of Understanding ('MOU') to take it forward.
- 2) Nominate the Assistant Director (Regulatory Services) to serve as a Non Executive Director on the Board of Business Regulation Solutions;
- 3) Agree that any surplus produced by the Company will be invested back into service development rather than distributed to the participating local authorities;
- 4) Authorise the Assistant Director (Regulatory Services) to enter into arrangements to provide resources and expertise to Business Regulation Solutions, in return for payment by the Company of the Council's full costs;

- 5) Authorise the Deputy Director of Legal & Property Services to agree the terms of Company Memorandum / Articles, Memorandum of Understanding (MoU), governance arrangements, ethical protocol, etc;
- 6) Indemnify the Assistant Director (Regulatory Services) in relation to any action of or failure to act by the officer in question when discharging their responsibilities as a Non Executive Director on the Board of Business Regulation Solutions in accordance with the Council's approved employee indemnity scheme.

Key Decision: This report does not involve a key decision.

Risks/Implications:

Financial:	There are no direct financial implications arising from agreeing this report other than that the Council will be fully reimbursed for the cost of any staff time allocated to work with the new Company.
Staffing:	No implications
Policy:	No implications
Equal Opportunities - has a Diversity Impact Assessment been conducted?	No
Wards affected:	None

Property – Does the proposal involve a reduction, addition or change to the Council's asset base or its occupation?

No

Does this proposal have significant implications for the Council and the local population?

A diversity impact assessment is not necessary at this stage, however, equality and diversity implications have been considered when producing this report.

Does this proposal involve a new policy or procedure or significant changes to an existing policy or procedure?

A diversity impact assessment is not necessary at this stage, however, equality and diversity implications have been considered when producing this report.

Has the Director of Legal and Property Services confirmed that the recommendations within this report are lawful and comply with the Council's Constitution?	Yes
Has the Director of Finance and IT confirmed that any expenditure referred to within this report is consistent with the Council's budget?	Yes
Are any of the recommendations within this report contrary to the Policy Framework of the Council?	No

* delete which applicable

For Cabinet reports only:

Categorisation of the report:	x
Discussion leading to a decision	x
Monitoring	
Sharing for corporate understanding	

Discussion	
Decision	
Information	

Tracking/Process:

	Consultation	Ward Members	Partners
Panel	Overview & Scrutiny	Cabinet	Council
		29 Nov 2007	

List of Background Papers in accordance with Section 100D of the Local Government Act 1972:

Proper Officer Martin Kimber

Date 28 November 2007

1. **Background:**

- 1.1 The AGMA Public Protection Partnership consists of the ten Greater Manchester Authorities plus Warrington MBC and Greater Manchester Fire & Rescue Service. These authorities have joined together as part of the AGMA shared services project. The Public Protection Partnership was developed to create a major change programme to meet increasing public expectations and to meet the requirements of national regulatory reform.
- 1.2 A comprehensive programme of work, approved by the AGMA Chief Executives Group has been developed to establish not only service improvement within each authority and consistency between authorities, but also to support new ways of working across the City Region, greater strategic alignment, and to provide greater efficiency and value for money.
- 1.3 The Public Protection Partnership programme objectives are to:
 - Improve business compliance with regulatory requirements;
 - Achieve greater efficiency and effectiveness in service delivery;
 - Achieve greater consistency in policies, procedures and standards;
 - Develop a non profit distributing organisation (NPDO) in the form of a Company Limited by Guarantee to provide consistent business advice, training and contract services to businesses;
 - Develop joint service delivery where a single service can provide better value for money than the same service delivered by each authority;
 - Develop a joint and consistent approach to staff training and development.

2. **National Regulatory Reform**

- 2.1 In 2004 HM Treasury commissioned a review of the enforcement of Public Protection Legislation as part of the Comprehensive Spending Review. This review, chaired by Sir Philip Hampton reported its findings in March 2005. The Hampton Report, "Reducing Administrative Burdens: Effective Inspection and Enforcement", made a number of recommendations including:
 - Comprehensive risk assessment should be the foundation of all regulators' enforcement programmes.
 - There should be no inspections without a reason, and data requirements for less risky businesses should be lower than for riskier businesses.
 - Resources released from unnecessary inspections should be redirected towards advice to improve compliance.
 - There should be fewer, simpler forms.
 - Data requirements, including the design of forms, should be coordinated across regulators.
 - When new regulations are being devised, Government Departments should plan to ensure enforcement can be as efficient as possible.
- 2.2 The AGMA Public Protection Partnership undertook market research with Small and Medium-sized Enterprises ('SMEs') to determine whether their views reflected the findings of the Hampton Report. That research indicated some correlation with the findings in the Report, but also identified a clear need to ensure that solutions are tailored to meet specific needs of SMEs operating within Greater Manchester. In particular, SMEs indicated they wanted continued support as they have insufficient internal capacity to ensure legislative compliance. Some also indicated an interest to buy in professional

services to support their development needs.

- 2.3 Most SMEs have confidence in the services and advice provided by their local authorities. Therefore by implication the SMEs who want to purchase support may well want to purchase such services from an arm's length local authority supported company. Furthermore, SMEs consider that it would be hugely advantageous if this facility could provide a one-stop shop for information on local authority regulatory services.
- 2.4 AGMA authorities recognise the need to encourage and support new enterprise to generate wealth, employment and economic growth across the Greater Manchester conurbation. Whilst this project is primarily concerned with meeting the national requirements for regulatory reform, the change programme is a powerful catalyst in support of the wider government agenda for neighbourhood renewal and sustainable communities together with supporting the economy of the City-Region.

3. Proposals for the Operation of the Company

- 3.1 One of the key enablers within the AGMA Public Protection Project is the Commercial Services work stream, where a Non Profit Distributing Organisation called Business Regulation Solutions has been created by Manchester Solutions (see 3.3 below) to support compliance with public protection legislation through the provision of advice, guidance, training and ultimately consultancy.
- 3.2 Greater Manchester Fire and Rescue Service led this work stream due to their unique position of already having a large successful training unit which needed to be re-constituted to satisfy legal requirements for Fire Service Authorities to trade. The new company has met the immediate requirements of the Fire and Rescue Service but also is fit for the purpose for delivering the commercial public protection services required by the AGMA authorities and Warrington MBC (as an aligned AGMA partner). The proposal to establish and trade through the new Company was approved by the Greater Manchester Fire & Rescue Authority at their meeting of 6th September, with trading through the new Company commenced from 15th October 2007.
- 3.3 The constitution and basis of operation of Business Regulation Solutions is as follows:
- The Company is limited by a one pound sterling guarantee, whose sole member will be an existing limited by guarantee company, Economic Solutions Limited trading as Manchester Solutions (referred to as "Manchester Solutions" in the remainder of this report).
- 3.4 Manchester Solutions is already engaged in the provision of business support and training services, with an impressive track record of delivering business training, advice and consultancy in other areas of business practice. It has 13 members, of which 8 are private sector businesses and 5 are AGMA members. It is a Non Profit Distributing Company with close links to the Chamber of Commerce.

- 3.5 Business Regulation Solutions can have up to 11 local authority Non-Executive Directors appointed by AGMA (reflecting the intention that all 10 AGMA members plus Warrington BC will participate in this project), plus 2 Non-Executive Directors appointed by the Fire and Rescue Service, plus 2 Executive Directors appointed by Manchester Solutions. Initially Manchester Solutions has appointed the Executive Director and Greater Manchester Fire and Rescue Authority have appointed two Non Executive Directors as trading needed to commence in early October 2007.
- 3.6 Business Regulation Solutions will provide services to include the training activities currently operated by GMFRS and upon joining, the training provided by the constituent local authorities. It is anticipated that the full public protection trading will commence from 1 April 2008.
- 3.7 The primary objective of Business Regulation Solutions will be to improve business compliance with public protection legislation. In delivering this objective, there is an opportunity to generate income. However, the Company will be a Non Profit Distributing Organisation, therefore the income generated through charging will be used to cover the cost of the services provided by the Company, with any surplus reinvested into linked public protection activity by the Company as determined by the Board which could include funding a media campaign; sponsoring the training of Environmental Health / Trading Standards Officers; etc. The purpose of generating income and possibly surplus is therefore to support the Company's primary objective.
- 3.8 The local authorities and GMFRS will provide Business Regulation Solutions with personnel by way of making the time of appropriate officers available to deliver specialist public protection services. Such resources will be provided on an 'as required' basis, dependent on the demand identified by Business Regulation Solutions and the availability of public protection resources within the member authorities. The full costs of such resources will be met by Business Regulation Solutions.
- 3.9 Other than refunding the full local authority cost of staff resources (see 3.8 above), no money will change hands between the partners. Manchester Solutions will provide the necessary administrative resources for Business Regulation Solutions at its own cost and will also bear all risk associated with the project i.e. the local authorities and GMFRS will not be expected to provide guarantees of Business Regulation Solutions' liabilities.
- 3.10 Local authority staff who are currently dedicated to the provision of training will not TUPE transfer to the new Company as there is no intention for any part of any Council's activities to transfer to the Company. No contractual relationship will exist between the Council and the Company, except to the extent that individual agreements for the provision of staff resources are entered into between the Council and the Company.
- 3.11 The proposed company model and method of engagement with local authorities has been designed with the benefit of detailed legal and Counsel's advice, the key elements of which are set out in Appendix 1.

4. Risk Management Issues

- 4.1 Liability of Participating Authorities - The establishment of Business Regulation Solutions represents a low risk option for the members of the AGMA Public Protection Partnership. The Company has been established in such a way to restrict the financial liabilities of the Authorities (and its Officers who will be involved as Directors).
- 4.2 To further protect the Authorities, the company was established so that the only Member of the Company is Economic Solutions Limited (trading as Manchester Solutions). The new company is a Group company within the Economic Solutions Group and whilst the decision making, including all investment decisions, rest with the Board of Directors, the liabilities remain with the Group. There is no financial risk to the Authorities should the company fail.
- 4.3 The new company will initially trade using the current GMFRS business, but the intention is as soon as each local authority has approved the concept to grow the local authority public protection training and consultancy services within the business portfolio. A detailed 3 year business plan has been developed by Manchester Solutions for the GMFRS business, and initial assumptions based on a realistic 20% per annum business growth, predicts that the company will be in surplus within year two. The business planning for the rest of the partnership is now being developed with the intention of trading on behalf of all partners from April 2008.
- 4.4 The accounts of the new company will describe the income based on the different products and services. The Board will make decisions on the use of the trading surpluses to further support the development of public protection services not already or likely to be funded directly by the AGMA and Warrington local authorities.
- 4.5 Relationship between the Participating Authorities - Manchester Solutions have produced:
- Memorandum of Association and Articles of Association for Business Regulation Solutions;
 - A note on the governance arrangements for the Company;
 - A Memorandum of Understanding (“MoU”) between the local authorities, GMFRS and themselves. The key aspects of the MoU are:
 - It is not a legally binding contract;
 - The parties will work together to co-ordinate their activities and establish the Company;
 - The public sector partners will provide human resources by way of making available appropriate officers’ time to the Company, in order to deliver the specialist public protection services;
 - The Company will recompense the public sector partner for the full cost of the use of their human resources – including overheads, but otherwise no money will change hands between the partners under the MoU arrangements;

- AGMA will endorse and promote the Unit as a business improvement
- approach, but not exclusively;
- A protocol will be agreed to avoid any conflict of interest between the Company, staff providing advisory services and each constituent public authority's enforcement responsibilities.

5. Legal Assessment

5.1 Local Authority/GMFRS Powers and Duties - Advice has been obtained by Tameside MBC from Nigel Giffin QC, a Queen's Counsel who specialises in local authority law and procurement. Counsel was provided with copies of the documentation referred to above. Copies of his advice has been made available to AGMA members, GMFRS and Warrington MBC by Tameside Legal Services, on a strictly privileged and confidential basis. Counsel was asked to advise upon 4 main issues:

- whether the local authorities and GMFRS have sufficient legal powers to participate in Business Regulation Solutions in the manner envisaged;
- whether the proposals would infringe the Public Contracts Regulations 2006;
- whether State Aid would be involved in the proposals;
- and whether the proposals would infringe the Competition Act 1998.

5.2 One of Counsel's key conclusions is that the creation and operation of the Company does not require the exercise of local authority trading powers under section 95 of the Local Government Act 2003 (which can only be done through a local authority company). What the local authorities will do directly in relation to the Company (essentially, providing staff time and nominating Non Executive Directors) will not be done for a 'commercial purpose' as envisaged by section 95, as the authorities will not be making a profit out of these activities. Even the indirect activity by the local authorities participating in the Company will not generate profit for them, as the Company will be a Non Profit Distributing Organisation company and make no distributions to the local authorities.

5.3 Clearly, Business Regulation Solutions will be acting commercially, but as a private company it needs no statutory power to do so.

5.4 The specific conclusions reached by Counsel are summarised in Appendix I.

5.5 Treatment of Surplus - As noted above, the issue of profit is important to the sustainability of the legal position. Counsel has attached importance to the fact that the Company will be a 'not for profit' company and any surplus will be ploughed back into service development rather than distributed to participants. It is essential that all partners agree this aspect of the Company's creation and operation; otherwise the legal basis and advice obtained would need to be reviewed. This feature may impact upon some existing arrangements, for example the retention of income by some authorities from existing training. Under the proposed model the expectation is that:

- The provision of that particular training will become the responsibility of Business Regulation Solutions;
- The Council that originally delivered it will second the staff concerned to the Company as and when required for the purpose of delivering the training;
- The Company compensates the Council for the full cost of those human resources, under the individual secondment agreement;
- The Company retains any surplus/profit element for further service provision/development.

5.6 If Business Regulation Solutions were to pay the surplus to the Council concerned then it would be distributing profit, which a not-for-profit company cannot do.

6. **Proposals**

6.1 That Cabinet:

- Agree to participate in this initiative and enter into a Memorandum of Understanding ('MOU') to take it forward.
- Nominate the Assistant Director (Regulatory Services)] to serve as a Non Executive Director on the Board of Business Regulation Solutions;
- Agree that any surplus produced by the Company will be invested back into service development rather than distributed to the participating local authorities;
- Authorise the Assistant Director (Regulatory Services) to enter into arrangements to provide resources and expertise to Business Regulation Solutions, in return for payment by the Company of the Council's full costs;
- Authorise the Deputy Director (Legal & Property Services) to agree the terms of Company Memorandum / Articles, Memorandum of Understanding (MoU), governance arrangements, ethical protocol, etc;
- Indemnify the Assistant Director (Regulatory Services) in relation to any action of or failure to act by the officer in question when discharging their responsibilities as a Non Executive Director on the Board of Business Regulation Solutions in accordance with the Council's approved employee indemnity scheme.

7. **Conclusions:**

7.1 The formation and development of Business Regulation Solutions and the 'Be Assured' brand are significant elements of the overall AGMA Public Protection Partnership development programme. These initiatives are alongside the review which is ongoing of the Regulatory Services within the Regeneration & Protection Division of Environmental Services.

7.2 In particular, the formation of a single 'Business Compliance' unit within Regulatory Services, encompassing Environmental Health and Trading Standards work to ensure business compliance with regulatory requirements, will complement the development of business training, advice and consultancy services and the accreditation for business and confidence for customers provided by the 'Be Assured' scheme through the new company.

Detailed considerations of the legal advice provided by MBC Legal Services on behalf of the Partnership

Note: The “Further Work” identified in the table below is being undertaken in order to strengthen the legal position underpinning the creation and operation of Business Regulation Solutions.

Issue	Counsel’s conclusion	Further work
1. Can LAs participate in and second staff to Business Regulation Solutions?	Yes, under LGA 2000 well-being powers.	Ensure the objects of Business Regulation Solutions identify the well-being objectives that Business Regulation Solutions will be achieving for LAs/GMFRS. Ensure the well-being issues are dealt with in detail in the executive decision-making processes of each participant.
2. Can LAs charge for the secondment of staff to Business Regulation Solutions?	Yes, under LGA 2003 charging powers.	
3. Can GMFRS participate in and second staff to Business Regulation Solutions?	Yes, under FRSA 2004.	GMFRS to address any fiduciary issues re: divesting themselves of the training unit.
4. Can GMFRS charge for the secondment of staff to Business Regulation Solutions?	Yes, except to the extent that it is charging for the provision of fire safety advice.	Clarify that the scope of FRSA 2004 section 6(2)(b) is not a significant constraint on GMFRS’s participation.
5. Will Business Regulation Solutions be a contracting authority under Public Contracts Regulations 2006?	Not an issue if conclusions 6 and 7 are correct, but possibly yes.	Clarify whether Business Regulation Solutions has an “industrial or commercial character” – e.g. will it operate in a competitive market, will LAs/GMFRS assume any of its financial risks?

Issue	Counsel's conclusion	Further work
6. Is the provision of the services by the LAs/GMFRS to Business Regulation Solutions pursuant to a contract within the meaning of the Regulations?	Probably yes, but only in respect of each secondment being an individual contract.	If possible, consider the issue of aggregation of the value of these service contracts under the Regulations.
7. Will the services in question be Part A or Part B services?	Probably Part B; and if so, neither the Regulations nor EU law would require the advertising of those contracts.	Firm up Part B argument by identifying the nature of the services (advisory) that the seconded staff will be providing.
8. If there is a contract, will its value exceed the relevant threshold?	Impossible to quantify at this stage (see 6 above).	
9. Will the creation and operation of Business Regulation Solutions involve State Aid?	No	Consider whether the reference in Business Regulation Solutions's Memorandum to activities "across the UK and beyond" is necessary, as this suggests its activities may affect trade between member states.
10. Will the creation and operation of Business Regulation Solutions prevent, restrict or distort competition, or amount to the abuse of a dominant position in a market, as prohibited by Competition Act 1998?	Unlikely, certainly at the start of its life.	Consider nature of marketplace and the effect that Business Regulation Solutions will have on it. Will it affect trade; will it have a dominant position?
11. Protocol re: separation of advisory and regulatory functions.	This will be an important document.	Ensure that this (or at least its key principles) forms part of the executive decision-making processes of each participant.

Appointment of Officers as Directors of Business Regulation Solutions

Directors' duties

Directors are required to attend and vote at board meetings and are legally responsible for the management of the company. The partners will need to consider early on who they will ask to serve as their directors.

The Companies Act 2006 introduced a statutory statement of the general duties that are owed by each director to the company. These are:

- To act within the powers conferred on him/her by the company's constitution (i.e. the Articles of Association and decisions taken in accordance with the Articles)
- To promote the success of the company (which requires a clear understanding of the purpose of the company);
- To exercise independent judgement on behalf of the company (i.e. simply following instructions from the relevant council as to how to vote would be a breach of duty)
- To exercise reasonable care, skill and diligence
- To avoid conflicts of interest (actual and potential) between the company and a director's interests or a duty owed to a third party (e.g. their appointing local authority)
- Not to accept benefits from third parties
- To declare an interest in a proposed transaction or arrangement.

However, this is not a complete statement of all directors' duties. Others include specific statutory duties (e.g. the duty to file accounts and reports with the registrar of companies (section 441 Companies Act 2006)) and duties imposed by common law (e.g. a duty to consider the interests of creditors in times of threatened insolvency).

Hence, the primary obligation of a director is to the company, and he/she should act in the best interest of the company. For companies limited by shares, and therefore owned by their shareholders, what is in the company's best interests has to be assessed by reference to the shareholders and their short-term and long-term interests. For companies without shareholders such as Business Regulation Solutions, this dimension is not present, which should mean that the interests of the company and individual partners are hopefully less likely to conflict.

Officers' duties

Directors who are nominated by local authorities (whether members or officers) clearly also owe duties to their appointing authorities and the public.

Each authority will have a Code of Conduct which states the principles that govern the standard of officers' conduct. As part of these obligations, officers are obliged to identify and declare the existence and nature of conflicts of interest relating to their public duties. Matters relating to a company to which the officer has been appointed by the authority must not be allowed to compromise the officer's objectivity, accountability or professional judgment.

Officers can be made subject to legal or disciplinary proceedings in respect of failure to comply with their duties towards their appointing authority and the public. Each authority will need to consider its own requirements and safeguards in this respect when considering nominating a director to Business Regulation Solutions.

Liability

Directors' liability

It will therefore be vital for local authority directors of Business Regulation Solutions to understand to whom they owe a duty in given circumstances and the exact nature of that duty. Directors can be personally liable for breach of duty to the company, and required to pay damages or compensation. Additional potential liability may be assumed by a director, for instance where a lender requires personal guarantees from directors of the company. As noted above, directors appointed by local authorities can be subject to legal or disciplinary proceedings by that authority for breach of duty.

The company's Articles set out the directors' powers and can help alleviate director's concerns by, for example, imposing a restriction on a director from voting on any issue in which he/she has a conflicting interest, or by expressly allowing a director to vote on a matter in which they have a conflicting interest, provided that the nature and extent of the director's interest has been fully declared to the board. In addition, specific governance arrangements can be put in place to provide further protection for partners and directors – for example, by minimising the risk of conflicts of interest and giving reassurance to the partners over the propriety of the corporate arrangements. Examples of such arrangements include non-executive steering groups, audit committees, remuneration committees, etc.

Further consideration will be needed as to whether these issues are addressed adequately by the current draft documentation.

Insurance/Indemnity

A company can take out insurance for its directors but there may be personal tax implications that arise as a consequence.

Officers may be indemnified by their local authorities against liabilities arising as a consequence of appointment to the board of a company (under the Local Authorities (Indemnities for Members and Officers) Order 2004 SI 2004 3082). Under this Order a local authority may indemnify an officer in relation to any act or failure to act by the officer in question, provided that act/omission arises from the duties or powers of that officer, in consequence of them carrying out a function which has been requested by the authority, or which is done in pursuance of the authority's purposes. As an alternative to providing an indemnity, the authority can provide insurance. Even if the act/omission in question was outside the authority/officer's powers, so long as the officer in question believed that the act/omission was within the relevant powers and it was reasonable for that officer to hold that belief at the time, the indemnity will be valid (provided the authority has powers to grant it).

An authority cannot indemnify an officer to the extent that their act/omission constitutes a criminal offence or is the result of that officer's fraud, deliberate wrongdoing or recklessness. However, subject to one condition, an indemnity may be provided in relation to the defence of any criminal proceedings against that officer or any civil liability which arises in consequence of an act or omission which constitutes a criminal offence. The condition is that the indemnity/insurance cannot be provided unless it is subject to a term stipulating that, should an officer be found guilty of a criminal offence, or (in the case of Part 3 Local Government Act 2000 proceedings) it is found that the officer has failed to comply with the Code of Conduct, then the officer will reimburse the authority/insurer as the case may be (as a civil debt).

Each local authority will have its own policies and protocols in respect of conduct, indemnity/insurance, etc which will need to be taken into account when considering the above issues.

Business Regulation Solutions will be a regulated company under the Local Government and Housing Act 1989 on the basis that it falls within the definition of a local authority controlled company. This means that it will be subject to a range of proprietary controls contained in the Local Authorities' (Companies) Order 1995, which the directors (particularly if they are members of the authority) need to appreciate. In summary, these are:

- The company's documentation must identify the controlling local authorities
- Directors' remuneration must not exceed that which the local authority would pay for comparable duties/expenses
- Disqualified councillors cannot be directors of the company
- Ban on party political publicity
- The company must provide information to auditors
- The company must provide information to councillors
- Audit Commission must approve auditors
- Minutes of meetings must be available for public inspection

Group accounts will need to be prepared by the local authorities in accordance with the CIPFA Prudential Code. Treasurers' advice will be required on the current financial implications of creating a controlled company of this kind.

However, the local authority company regime is regarded as outdated and is under review as part of the modernisation agenda. The Local Government and Public Involvement in Health Bill is aiming to repeal the existing framework and introduce a new set of proprietary constraints which are proportionate to the degree of control of a company by the public sector, and which apply to a wider range of entities than the current focus on companies. The progress of this Bill will need to be kept under review.