SUMMARY

Local authorities need lawyers. Councils must have access to legal expertise and advice on the extent and the exercise of their powers and responsibilities. So the 2300 lawyers who work in local government are important people.

Their numbers have gone up by 30% in the last two decades. Their workload has expanded, too, particularly on Social Services, council house sales and planning appeals. But there has been relatively little change in the way they are organised and managed.

Now the environment in which they operate is being affected by:
— changing demands;
— a different organisational framework within which authorities are required to operate;
— economic, demographic and social trends; and,
— the need to give greater emphasis to managerial leadership at the top of the authority, perhaps locating legal functions with someone other than the Chief Executive.

There is also the possibility that legal services will soon be made subject to competitive tendering procedures.

In the face of these changes, authorities need to review their legal services to ensure that their responsibilities are competently carried out.

Three key roles must be distinguished:
— ensuring propriety in council affairs;
— providing corporate legal advice to the council; and,
— supplying, or buying-in, legal services.

The way in which an authority organises itself to carry out these roles will depend on the extent to which it buys-in services or provides them in-house, and how it wishes to differentiate in its structure between the propriety and client corporate roles, and those as provider of legal services. The organisational patterns will therefore vary from authority to authority.

But regardless of the organisation for the discharge of the various legal responsibilities, every authority needs to ensure that these functions are discharged effectively and efficiently. To do this it needs to see that processes are in place both to achieve this discharge and to demonstrate value for money, and that responsibility for ensuring performance of the various legal roles is appropriately allocated.
INTRODUCTION

1 The lawyer is the original local government officer, and in many ways the model for all the other professionals to whom local authorities have looked for advice as their duties have grown and become more complex. The prominence of the lawyer is not just an historical accident. It is due to three important and continuing features of the English and Welsh system of local government.

2 First, local authorities are creatures of statute. Their only powers are those conferred on them by Parliament. Elected members therefore need to have appropriate and readily available legal advice, either on means of achieving, or of limits on their ability to pursue, what they see as the interests of their constituents.

3 Secondly, within such a statutory framework lawyers have professional skills which they can contribute to sound management and administrative practice. In particular they can take a pro-active role both by suggesting ways in which authorities can achieve their objectives within the law and by suggesting ways in which the law might be changed. At the same time it is their clear duty to ensure that authorities discharge existing statutory obligations.

4 Finally, local authorities themselves make and enforce a wide variety of laws and regulations. They can only do so effectively if they have access to legal expertise, often of a specialised nature, not only to advise them in their deliberations but also to pursue their interests, through the courts if necessary.

5 There are now more than twice as many solicitors employed in the UK as there were 20 years ago. In local government, the numbers have increased by approximately 30% over a similar period, with some 2300 now employed, with wide variations in particular types of authority (Exhibit 1). Staff levels generally in legal departments have shown a similar annual increase.

6 Legal skills are still highly valued by local authorities, but there is increasing diversity of opinion as to how lawyers should be organised and used. While the model of the legally-qualified clerk who acts both as adviser and chief executive survives in a few (mainly small) authorities, and in some counties, the majority have transferred all the legal functions to a separate officer who acts either as solicitor to the council, or more typically combines both solicitor and secretary roles (Exhibit 2). A few of the larger authorities have placed some lawyers under the direct supervision of their...
service department clients; some have separated the giving of legal advice from the provision of legal services, and a few rely on external sources for all legal services. All are likely to buy in some elements of work or specialist advice, from time to time.

7 The Prime Minister in a recent address said 'If management is not delivering results, then it is high time to bring in a new management team. That is true of many other white collar as well as manual tasks. Legal Departments. Computer Services. Conveyancing. Aspects of planning. All of these could be on the competitive tendering list'.

8 The possible future extension of competitive tendering procedures to legal services, the desire to reduce corporate overheads (or at least to ensure that they are fully justified), and the gradual emergence of the concept of the enabling authority role, will all no doubt prompt most authorities to consider whether their present structure and policies will continue best to serve their needs. Commercial and industrial companies are increasingly finding it desirable to address these issues for much the same reasons.

9 Different authorities will want to organise in different ways, considering how closely they wish to integrate legal advice with policy making and corporate management, taking into account local circumstances and the particular skills on which they are able to draw. This paper suggests some criteria for choosing between the wide range of organisational options.

10 But whatever structure is chosen, there is a need to ensure that good advice is obtained, and at an acceptable cost. This will only be possible if authorities have identified the key roles they expect their lawyers to perform and developed means of assessing how effectively those tasks are carried out.

1. A CHANGING ENVIRONMENT

11 The local government lawyer operates in a fast-changing environment. Four developments in particular have affected, and will continue to affect, the way in which he or she is required to operate. They are:

— a greater demand for legal services;
— a changing organisational framework;
— staffing changes; and,
— an emphasis on managerial leadership.

DEMAND FOR LEGAL SERVICES

12 Local government lawyers do not, in general, provide direct services to the public. So they are not directly affected by consumer demand for better quality public services. But they are affected by higher demand for public protection, and the care and skill with which they pursue (usually at the behest of client departments) what citizens see as infringements of their rights, are more closely scrutinised. Nowhere is this more apparent than in the social services field, where the number of cases taken up by local authorities has doubled over the last 5 years, and with the length of cases similarly increasing (largely as a result of growing concern about child care). In planning, and environmental health the work load has also grown.

13 There are other council services which cannot be delivered without the involvement of lawyers at the point of service delivery. Implementation of the right to buy legislation in the early 1980s, when council house sales were running at almost 200,000 per year, led to increased demands on conveyancers – now fallen away – which not all councils were able to satisfy internally, within the time-scales purchasers were entitled to expect. More recently there has been pressure to dispose of property to generate capital receipts.

14 More demanding customers are also more willing to challenge the local authority's right to make decisions affecting them. Planning and highways proposals are more frequently contested and objectors are increasingly likely to be legally represented themselves. Increasing conflict between central and local government, and public challenge to the legality of council decisions on spending, while fluctuating from year to year, is a new element. As public challenge to council decisions has increased, so has the extent to which councils have been prepared to test legislation and ministerial orders in the courts, with a corresponding increase in their demand for legal advice.

15 These increased demands (Exhibit 3) not only require a strengthening of councils' legal resources, both in house and for specialist advice, they also create different needs at different times for specialists in particular fields. The routine conveyancing requirements that were created by the council house sales programme have now diminished. Instead, authorities are
looking to receive more specialist advice on property law as they seek to manage their commercial portfolios better, or are giving priority to drawing up contracts for services subject to competitive tendering. Social services departments' legal priorities may also change in ways that lawyers can do little to influence. And the community charge regime has given a new importance to the legal processes involved in its enforcement.

16 Many of these changes in the demands made of lawyers have been associated with changes in legislation affecting the nature of particular services local authorities are required to provide. Over the past ten years there have been nearly 100 acts specific to local government. This is not a significant increase over the previous 10 years, but some of this legislation has also required authorities to change their approach to how services are delivered and how they themselves take decisions. The limits on their powers have been defined, if not comprehensively, certainly in greater detail than before. Interpreting this legislation has not always been easy, particularly where members have felt that new restrictions are being placed on their ability to represent the wishes of their electors.

THE CHANGED ORGANISATIONAL FRAMEWORK

17 The introduction of compulsory competitive tendering for a variety of council functions has added a new dimension to the lawyer's role. The change from contracts of employment, to contracts for service provision has required the development of new skills. And where an in-house DSO has tendered for, and often won contracts, new problems have arisen in managing potential conflicts of interest between legal departments' different 'clients', perhaps seen at their most acute where the DSO, is contemplating a management buy-out, where the Council's solicitor can only advise the Council.

18 Even where competitive tendering is not compulsory, a contractual approach by the local authority to the provision of certain services can create new challenges for the lawyers concerned with the authority's contractual relationships. IT services are among those that councils have most frequently elected to buy in, so requiring their legal advisers to become familiar with a whole new area of law.

19 Similar problems for lawyers are likely to arise as local management of schools takes effect. The demands on local government lawyers increase, since agreements between LEAs and the schools for which they are responsible need to take account of the independent authority now wielded by governing bodies and head teachers.

20 The Local Government and Housing Act 1989, has been seen by some lawyers as imposing a further complication by requiring each authority to appoint a Monitoring Officer with a duty to report publicly on any illegal or improper acts he or she may consider to be, or have been, performed. To a large extent, the act merely formalises a role that has long been accepted in well-run authorities as part of the function of corporate management. A somewhat similar duty is placed upon the Chief Finance Officer as to the regulation of unlawful conduct in financial affairs. And both these powers are linked to those of the external auditor where there are...
potential problems of illegality. Although the exercise of these powers has been limited, it represents an extension of the role of the council’s principal legal adviser.

21 Lawyers may also have to consider the possibility of some of their own services also being provided on a contractual basis. Indeed the government have already indicated that legal services might be on their next list. Some authorities have already taken steps in this direction, and have chosen to make a distinction for the first time between corporate legal advice and specified legal services to departments.

STAFFING CHANGES

22 The need for new skills and changed working practices required by all these developments took place against a background of increased demand for lawyers nationally, and a weakening of local government's competitive position in the labour market, although this may again be changing as a result of the economic down-turn.

23 Many local authorities have already taken steps to ensure that highly paid professionals are not employed on tasks which can be carried out by lower graded staff. Legal executives have long been used for litigation and the majority of conveyancing transactions, and the giving of routine procedural advice to committees is increasingly left to non-lawyer committee administrators. At the same time there have been moves to widen the labour market base from which legal departments recruit.

24 These moves are having some effect, and there is evidence that the shortage of lawyers has eased and salaries have become more competitive in local government. Indeed the response to the Commission questionnaire would suggest that at the end of 1990 the vacancy rate in England and Wales as a whole was around 7%, although nearer 14% in Greater London. This is no doubt a direct consequence of the economic recession and a reduced demand for legal services within the private sector.

25 With the 1990s likely to produce fewer new entrants to the labour market than the 1980s, the future availability of the legal skills that will be required must cause concern. The precise implications of these changes on the future supply of lawyers are difficult to predict both generally and in relation to particular areas. However when the economy picks up, particularly if an increase in private sector demand coincides with a demographic down turn, as seems possible, then many authorities will have some hard decisions to take on priorities, and the balance between in-house provision and bought in services.

26 The need for corporate managerial leadership to replace the primacy of loosely-associated professionals was identified in the mid-1970s. Since then, councils have increasingly been giving precedence to managerial rather than administrative or professional qualities in selecting their chief executives and defining their accountabilities. Changes in the ways in which councils obtain legal advice and ensure the delivery of legal services flow from this growing recognition of the need for general management skills at the top.

27 Most senior managers, whether in the public or the private sector, come to general management from some professional background or other. Lawyers who have worked for some time at the centre of the organisation and been able to develop an informed but unprejudiced view of its strengths and weaknesses are often well placed to move into general management positions.

28 But a legal training and a high degree of professional expertise are no longer sufficient qualifications for appointment as a chief executive. A few officers, mainly in small authorities, are able to combine management and advisory roles and cope with the inevitable conflicts. In the majority of cases, however, the need for the chief executive to concentrate on managerial issues has made it necessary to locate legal functions with another officer, and to consider how these should be integrated with policy formulation and corporate management.

THE NEED FOR MANAGERIAL LEADERSHIP

29 In the face of all these changes, there are three tasks of a legal nature which every authority must ensure are competently performed. Two of these are corporate – they are carried out at the heart of the local authority organisation. These are the roles of:

— ensuring propriety
— giving corporate legal advice

The third, although of no less importance, is less central. This is:

— providing legal services
The responsibility for seeing that these three roles are properly carried out falls on the Chief Executive and the members. They need someone who is either a lawyer or has some other qualification (such as a chartered secretary) which has involved a significant element of legal training. All three are essentially legal in nature.

PROPRIETY ROLE

The propriety task includes the specific duties of the Monitoring Officer under the 1989 Act – it would not make sense to separate the two tasks. Propriety is concerned not only with identifying actual and potential breaches of the law, but also with their prevention and with the establishment of good procedures throughout the authority. This requires someone to have oversight of all the authority’s decision-making processes.

The role is therefore usually best combined with responsibility for the committee system and the conduct of meetings. The important decisions need to be taken by someone who is fully conversant with local government law and if not a lawyer, then, the propriety officer will need to rely on a legal adviser of wide experience both for general guidance and in particular, difficult cases.

CORPORATE LEGAL ADVICE

Supporting, if not also discharging the propriety role may be one of the corporate legal adviser’s tasks. But the adviser’s duties go beyond propriety, to include a watching brief over all the authority’s affairs. This officer needs to monitor developments outside as well as inside the authority, and advise members and officers both of the likely impact of legislative changes and of the legal implications of their proposals, whether or not specifically requested to do so. This requires a wide knowledge of the law, so it will always be carried out by a lawyer, with unrestricted access to the important management and decision making processes of the authority.

That means that the adviser must enjoy a relationship of trust with both members and officers, and particularly with the Chief Executive. The adviser will normally be a member of the management team of the authority (unless, exceptionally, an external solicitor is retained for this purpose when attendance may not be appropriate). However at the very least the adviser should be kept thoroughly informed of what is going on and be able to attend team meetings at his or her option.

‘...the legal adviser should be concerned with the quality of legal services, whether these are provided in-house, by private firms of solicitors, or by counsel...’

Unlike the propriety officer, the legal adviser is not required to be an officer of the authority. But (except in very small authorities) it is unlikely that any outsider will have sufficient acquaintance with the authority’s workings, however well briefed by the chief executive, to be able to perform effectively. So even if only one lawyer is employed, corporate legal advice should be among his or her duties.

Although managers will be able to judge the legal services by the timeliness and clarity of advice, it is difficult for a non-lawyer to know what legal services are required, and even more difficult to judge the worth and quality of the services that are provided. The outcomes of some aspects of lawyers’ work are difficult to measure, since they often involve the assessment of risk rather than the delivery of any perceptible benefit. So as well as advising on the law, the legal adviser should be concerned with the quality of legal services, whether these are provided in-house, by private firms of solicitors, or by counsel.

PROVIDING LEGAL SERVICES

The duties of the corporate legal adviser clearly lie on the client side. At present, in most authorities, and for most transactions, the legal adviser also provides legal services, running an integrated legal department which provides advice to individual departments as well as to the corporate centre, conducts litigation, drafts contracts and provides conveyancing services (Exhibit 4).

But increasingly authorities need to recognise the distinction between these service roles and the corporate ones, particularly if legal services are to be subject to some form of competitive tendering. While it is not necessary to separate these functions organisationally, a few authorities have done so. But regardless of organisation, all authorities require outside assistance, for unusual or difficult cases, to cope with peaks of works, or to cover staff shortages. These they obtain on a contractual basis, by means of Counsel, or specialist and
general solicitors. Even some who are most successful in recruiting and retaining their own lawyers are choosing to re-consider their criteria for putting legal work out to contract.

39 So it is important to distinguish between corporate legal advice and the provision of legal services, whether 'in-house' or outside the organisation. And if provided 'in house' to decide whether such services report directly to the legal adviser or through some other channel. Legal services can often be as crucial to the achievement of an authority's goals as services of a more direct nature, so their effectiveness, and relationship to service delivery and to the legal adviser is important.

40 In the face of all the changes described in section 1, every authority needs to recognise the requirement to clarify responsibility for each of these three roles. They need to consider:

— first how they organise the corporate legal roles and define their relationships with corporate management;
— next how legal services are identified so as to ensure that these are effectively and economically delivered within the constraints of the local situation; and,
— finally, how they ensure accountability and satisfactory performance of each of the three roles.

The remainder of this paper suggests some ways in which authorities might approach each of these issues.

3. ORGANISING AT THE CENTRE

41 As with all professionals, Lawyers could be scarce and are expensive. So no local authority will wish to employ more of them than are strictly necessary to ensure that the three key legal roles are properly performed. Organisation structures will depend on the size and functions of the authority, which will determine any scope for combining legal roles with other functions. Some structures too will be conditioned by personalities or particular skills, or be determined by the Chief Executive's professional background.

42 Authorities are not required to appoint a Chief Executive as such, but the Local Government and Housing Act 1989 requires every authority to appoint a Head of Paid Service. The responsibilities of this person are for a corporate approach to service staffing needs, structures and proper management of staff.

43 This section looks at how the two corporate legal roles relate to each other and to the corporate management role of the Chief Executive.

RELATIONSHIP TO THE CHIEF EXECUTIVE

... FOR PROPRIETY

44 It is difficult for any individual to provide the strong managerial leadership that is expected of today's chief executives – particularly in the areas of policy formulation and organisational development – if he or she also takes first-line responsibility for the prevention of impropriety. The Chief Executive will naturally be concerned to see that arrangements to monitor propriety are in place, and will normally be the person to whom the propriety officer reports. In the Commission's view, the roles of Chief Executive and Monitoring Officer should normally be kept separate.

45 But in some small authorities there may be no officer other than the Chief Executive with sufficient knowledge of local government law to be able to carry out the role. In smaller authorities too, the exercise of corporate
Managerial tasks may not require a large amount of the Chief Executive's time, particularly where it is effectively provided by a small management team operating in close harmony and sharing common values, allowing the Chief Executive the opportunity to also effectively exercise this monitoring role. These conditions may be regarded as the exception, and if the risk of impropriety is also seen as low, then the likelihood of conflict between the two roles may perhaps be discounted. Otherwise the need for a separate propriety officer remains.

46 A small majority of authorities seem to accept this (Exhibit 5)

...FOR CORPORATE LEGAL ADVICE

47 The role of corporate legal adviser may also, in many authorities, be incompatible with that of the Chief Executive. The question of combining the two roles does not, of course, arise where the Chief Executive is one of the increasing number from a non-legal background or, although qualified, has ceased to practice. But even where the Chief Executive is fully competent to do both jobs, it may be desirable to separate them. The Chief Executive may have too heavy a burden of management to keep up to date with the law, so from sheer necessity the work is delegated to a lower level, even if the title remains; or the management style that is appropriate to the one job may be irreconcilable with that required for the other.

48 Table 1 sets out the issues that should be taken into account when deciding whether or not to combine either of the corporate legal roles with the role of the Chief Executive. Where the circumstances are all as described in column A, the Chief Executive will have little difficulty in sustaining the role either of propriety officer or corporate legal adviser. But where two or more of the circumstances in column B apply the managerial and corporate legal roles should be kept separate.

THE CORPORATE LEGAL ROLES

49 If the Chief Executive discharges neither role, should the legal and propriety roles, particularly those centering around committee administration – be combined or separated? Many authorities have a single individual called 'solicitor and secretary' responsible for legal advice, for committee administration, and for propriety. This would seem to make sense. Table 2 shows the distribution of the different patterns of organisation across a range of authorities. This shows that free standing Chief Executive models of organisation apply at approximately two-thirds of all authorities replying, with combined

Table 1

<table>
<thead>
<tr>
<th>Feature</th>
<th>Possible e.g. Small Districts A</th>
<th>Very Difficult e.g. Met Districts B</th>
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<tr>
<td>Size of Authority</td>
<td>Small</td>
<td>Large</td>
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<tr>
<td>Volume of legal work</td>
<td>Low</td>
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<tr>
<td>Complexity of legal work</td>
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<td>Availability &amp; cost of legal</td>
<td>Hard to get</td>
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<tr>
<td>CE's knowledge of law</td>
<td>Thorough</td>
<td>Slight</td>
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<tr>
<td>Managerial leadership</td>
<td>Depends on COs or members</td>
<td>Depends on CE</td>
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<tr>
<td>Political conflict</td>
<td>Low</td>
<td>High</td>
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50 The size and range of functions of the authority concerned will always be a factor in this decision, and in small authorities there may only be one individual with the qualifications for both propriety and legal advice, or economies of scale push in that direction. Equally, where trust between service chief officers and committees, and communication between service departments and the corporate centre is good, the responsibility for propriety and committee administration may fit well with the normal responsibilities of the legal adviser.

51 But in some circumstances, officers responsible for committee administration may also be required to ensure, as well as to advise on, good procedure. They may be expected to keep a close eye on the conduct not only of committees, but of the whole range of formal and informal meetings where decisions may be made, and to keep senior management constantly aware of potential breaches of propriety. A department with these priorities is likely to require a different style of leadership from a group whose primary focus is legal, and may well be separated from it, thus requiring a split of the propriety role from that of legal advice.

4. PROVIDING LEGAL SERVICES

52 Clarifying responsibilities for the two corporate legal roles leads on to the relationship between the corporate legal adviser and the provision of legal services. Legal services can be provided in a number of ways. These range from almost total in-house provision at one end of the spectrum, to the buying-in of part or the whole service from the private sector at the other.

53 The in-house legal services department is the source from which the majority of authorities meet most of their needs. Traditionally, legal services have been under the direct control of the solicitor to the council, so that giving corporate legal advice and providing legal services have been, for most purposes, one and the same. The distinction between these roles has only been apparent when specialised advice has been bought in to meet unusual circumstances, yet the majority of the cost of legal departments is for legal services that could be bought in.

54 Some will argue that this traditional structure of combining corporate legal advice and legal services has many strengths. They suggest that the line between legal services and corporate legal advice is, in many instances, difficult to draw, that some legal services are difficult to specify, and the creation of artificial barriers between clients and contractors can cause as many difficulties as it purports to overcome.

55 But their customers who may be managing in a more competitive environment, who may be affected by formula funding, or cash limited budgets, are exerting pressures to make legal services, and central support services generally, more accountable. So as more service delivery transfers to a more cost conscious, competitive, environment there are pressures for legal services to operate in the same way too.

56 With this more competitive environment there is, therefore, a growing recognition of the need to distinguish between the two roles, even when both are carried out in-house. Members, chief executives and some legal advisers want to satisfy themselves that the legal services the council needs are provided on an economical basis. This requires comparisons to be
made with alternative sources of supply, and to consider the advantages and disadvantages of the ranges of in-house/buy-in options.

PROVIDING IN-HOUSE

57 The first step therefore for any authority is to install a process whereby the costs and performance of in-house services can be distinguished between those that are corporate, central to the organisation as a whole, difficult to define, and in all probability would remain in-house, from those that relate to services that could be bought in. The moves towards Competitive Tendering, delegation of budgets, and the voluntary creation of internal markets for support services are, in any event, pushing in that direction. Such an arrangement would enable the authority generally to specify the legal services it requires, and to compare costs and quality of parts of, or the whole service, with what private firms have to offer. This should happen regardless of how corporate legal roles and the provision of legal services are organised.

58 The majority of authorities legal departments combine corporate legal roles and provision of legal services. But a few large authorities concerned to place direct service provision on as competitive a basis as possible have set up, or are considering legal services DSOs, either as a separate arm of the legal department, or 'free-standing', or within a DSO organisation that spans a number of different services.

59 Where the two functions are structurally separated, the legal services DSO needs to be headed by an individual with no less experience or professional authority than the traditional solicitor to the council. At the same time, the client role demands a legal adviser whose advice carries weight with both service department clients and with the legal DSO, and who is on at least an equal footing with his or her colleagues on the management team.

60 The authorities that have made changes of this type to their organisational structures have generally been large. A large authority will have staff who only provide legal services and they may see benefits in exposing their legal services department to competition that outweigh the additional cost of separating the client and contractor functions. For most smaller authorities, though, the latter will be the critical factor, since their staff may exercise both these functions.

‘...There will always be legal services that local authorities will need to buy-in from the private sector, both solicitors and barristers....’

61 A variation of separating legal services from corporate legal advice, or charging out time for both advice and legal services via a practice account, may be through a decentralisation of some or all of legal services staff.

62 This option of decentralisation is only likely to be cost effective, where the legal services department, is large, and the volume of work of a particular kind and sufficient to justify the establishment of a complete team within that department. The disadvantages of such an option – loss of professional independence, inhibitions on professional leadership, perceived career disadvantages – can be minimised by the adoption of a secondment or out-posting approach rather than a direct employment approach.

63 The claimed advantages of increased closeness to customers – greater customer understanding, easier achievement of service goals and priorities – can as easily be achieved by ensuring that close working relationships are maintained at all levels between the two departments, that the service department knows who to contact for advice or when inter-departmental problems arise, and that arrangements exist for the short term out posting of specialist staff to a particular service department on the fairly rare occasions when that department’s circumstances so require.

64 For most purposes and in most authorities an all-purpose legal department is likely to be the most effective means of meeting the regular needs of service providers. This does not mean that everything needs to be done in-house, but it does imply that some capacity is required to oversee the supply of the various legal services and advice that might be required. Buy-in options can be better assessed and co-ordinated, specialist skills can be made available to departments, by legal staff being located in some departments, for fixed periods, or on a case-by-case basis from a pool of expertise, backed up by a charging system and a review of performance. Professional standards can be maintained and learning encouraged more easily than when legal resources are distributed. Most auth-
orities will need to balance cost/flexibility advantages of centralising work, which helps staff development and retention, while keeping legal advice and services close to the customer.

**BUYING IN**

65 There will always be legal services that local authorities will need to buy in from the private sector, both solicitors and barristers. The reasons for buying-in services will vary from authority to authority, and over time, but typically would be:

— the need for specialist advice which is so occasionally required that the maintenance of an in-house resource would be unnecessarily expensive;

— shortage of staff to cope with peak work loads or as a consequence of short or longer term vacancies;

— the absence of a right of audience before certain courts;

— that it is more cost effective in particular instances or for certain categories to put the work out; and,

— that it is deliberate policy for a proportion of the work to be handled otherwise than in-house. (Exhibit 6)

66 The extent of these bought in services will similarly vary from authority to authority, and within an authority from year to year, depending on availability of in-house expertise, staffing levels and types and frequency of particular legal issues. Returns from authorities suggest a total buy-in of approximately £19m (Exhibit 7) which is the equivalent of just under 10% of total legal costs in local government.

The development of costing systems and improved service specifications will enable authorities to better compare their prices and quality with those available in the private sector, either for parts of their legal services, or for the whole.

67 When buying in the whole service is being considered, authorities need to take into account the size of their present and future requirement for each category of work and the extent to which specialist knowledge will be required. Private firms generally charge higher hourly rates than in-house legal services departments, but the overall cost of going outside may be less than that of maintaining an in-house resource which is inefficiently managed, or ineffectively used.

68 The scope to contract out may itself, however, be limited, and authorities need to be aware of the limitations. In small towns there may not be a private firm with the necessary breadth of expertise to handle council business. Even where there is a range of larger firms, there may be
problems of conflict of interest between the council and the other clients of the firm that is chosen. The cost of putting legal services, – the value of some of which is notoriously hard to measure, – out to contract may still be greater than that of employing lawyers directly. And when contracting it out, control over the work still needs to be maintained, requiring some corporate legal capacity whether directly employed or bought-in, to specify the contract and to monitor its performance.

69 There may be some scope for pooling of resources by authorities, provided due consideration is given to potential conflicts of interest. Such arrangements exist between counties and districts, and between neighbouring authorities in the same tier, and have the advantage of sharing ideas and expertise, which might not be possible in a competitive environment.

5. ENSURING PERFORMANCE

70 Having found an organisational structure that enables the key legal roles to be most effectively carried out in the context of its overall needs, every authority needs to see that these roles are in fact being performed.

THE PROPRIETY ROLE

71 The performance of the propriety role can sometimes be the hardest for councils to assess, since doing it properly may sometimes appear to conflict with the managerial objectives of the authority. The propriety officer needs to maintain a large measure of independence, but working closely with those who have the day-to-day responsibility for regulating council and committee processes.

72 Both the importance of the work and the value of independence need to be recognised at the highest levels of corporate management, and by members of all political parties. The job can only be done if the officer concerned has access not only to decision-making processes but also to those places where the overall performance of the authority is reviewed. The propriety officer needs to understand management processes even while keeping at a distance from them. That should lead all authorities to ask themselves:

<table>
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<tr>
<th>Questions</th>
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<tbody>
<tr>
<td>• Is the need for propriety, explicitly recognised, by members and Chief Officers?</td>
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<tr>
<td>• Does the propriety officer report directly to the Chief Executive and the policy committee?</td>
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<tr>
<td>• Does the propriety officer have a good understanding of the law, contribute to the development of management processes, while maintaining professional detachment and objectivity?</td>
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</table>

CORPORATE LEGAL ADVICE

73 It is clearly essential that the corporate legal adviser be trusted, and have a good understanding of the Council’s business. But trust and a good understanding are not sufficient if the corporate legal adviser is not also competent in the relevant areas of the law, and sufficiently confident of his or her own competence to give a clear opinion in the majority of cases. There will always be occasions when advice needs to be sought from counsel, or from a solicitor with specialist knowledge of the law. But the quality of decision-making overall will be improved if legal advisers are able and willing to give a prompt and authoritative view on the issues that regularly confront their authorities.

74 Authorities and their lawyers need to be aware of the conflicts that can arise between advisory and managerial responsibilities, and ensure that the burden of the latter does not prevent effective discharge of the former and vice versa. The adaptability of the officer concerned and the range of working styles he or she has acquired will often be the factor that determines the best organisational structure to adopt.

75 In reviewing the role of the corporate legal adviser, the main issues that authorities need to think about are:

<table>
<thead>
<tr>
<th>Questions</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Is there a nominated lawyer with a watching brief over all the council’s affairs?</td>
</tr>
<tr>
<td>• Does that lawyer enjoy the trust of members and officers and have access to decision-making processes?</td>
</tr>
<tr>
<td>• Does the adviser enjoy professional independence?</td>
</tr>
<tr>
<td>• Are the adviser's opinions well-grounded, and readily and clearly expressed?</td>
</tr>
</tbody>
</table>

PROVIDING LEGAL SERVICES

76 Legal services can be provided within a wide range of organisational structures. While there is at present
no obligation on councils to test legal services against the outside market, it can pay to act as if there were. That means knowing what legal work is currently undertaken and for which client department, drawing up clear specifications of the services required and identifying the source from which each service can be most economically provided. One approach is to expose part or all of the legal service to competitive tendering. In reviewing where they source their legal services all authorities should consider:

Questions

- Does the legal department know what categories of legal work and in what volumes it is doing for each of its client departments?
- How does the total cost of maintaining in-house expertise compare with that of contracting-out the jobs that are likely to be required?
- Should any part of the service be exposed to competitive tendering?
- Could a private firm provide a comparable service in whole or in part more economically?

77 The customers for legal services are, in the first instance, the service departments. It follows that departments should pay for the legal services they require whether:

— they enter into agreements with the council’s legal services department,
— or whether legal advice or expertise comes from outside the authority.

78 The need for the adviser to take a corporate view means that it is not always appropriate for costs to be charged to departments in the same way as for legal services that departments have themselves requested.

79 Where an in-house legal services department is used, its relationship with its customers should be set down in writing, possibly in the form of a service level agreement. This need not be an elaborate document: indeed, it will normally contain rather less detail of the service to be provided (in terms of outcomes) than most other service level agreements between client and contractor departments. It should, however, set out the broad nature and volume of the services expected to be required; the basis of charging (including the arrangements for authorising and charging disbursements such as external legal advice); arrangements for both regular and ad-hoc review of performance, including the setting and monitoring of deadlines; and the authorities and accountabilities of officers in both the departments concerned.

80 Much will depend on the size of the legal section, since charging systems need to be cost effective. Time devoted to each job needs to be recorded and the cost invoiced to the client department. For the larger authorities a proper system of practice accounts is likely to be necessary. Some work might be covered by a retainer or a standard charge, but for the remainder some form of time recording would be necessary. The cost should be computed as the number of hours worked times a pre-set rate appropriate to the seniority and experience of the staff involved. The rate should include an allowance for overheads, but expenses related to the particular job (such as out-of-pocket expenses and fees for external advice) should be charged and itemised separately. (Box 1, overleaf, demonstrates how this would work).

81 These systems, which have now been adopted by a large number of local authorities (Exhibit 8), do not give the client department complete

Exhibit 8

MANAGEMENT PROCESSES USED

Practice accounts have not yet been extensively developed.

Source: Audit Commission Questionnaire
SOLICITOR’S DEPARTMENT – LEGAL PRACTICE ACCOUNT
RESULTS TO MARCH 1991

<table>
<thead>
<tr>
<th>Month</th>
<th>Budget</th>
<th>Actual</th>
<th>Year to Date</th>
<th>Budget</th>
<th>Actual</th>
<th>Variances* £000</th>
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<tr>
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<td></td>
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<td></td>
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<tr>
<td>Highways &amp; Transport</td>
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<tr>
<td>Education</td>
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<td>180</td>
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<td></td>
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<tr>
<td>Police</td>
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<tr>
<td>Departments</td>
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<td>142</td>
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<td>Chief Executive</td>
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<td></td>
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<tr>
<td>Departments</td>
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<td>8.9</td>
<td>81</td>
<td>77</td>
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<tr>
<td></td>
<td>161.1</td>
<td>146.5</td>
<td>1,932</td>
<td>1,843</td>
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<td><strong>Expenses</strong></td>
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<td>Professional Staff</td>
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<td>Support Staff</td>
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<td>Administration</td>
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<td>19.3</td>
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<tr>
<td></td>
<td>161.0</td>
<td>142.4</td>
<td>1,932</td>
<td>1,808</td>
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<td><strong>PROFIT/(LOSS)</strong></td>
<td>0.1</td>
<td>4.1</td>
<td>0</td>
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<td><strong>Charges Billed Direct to Clients</strong></td>
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<tr>
<td>Bought-in legal services</td>
<td>3.9</td>
<td>4.2</td>
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<td>98</td>
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<td>Disbursements</td>
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<td>2.1</td>
<td>38</td>
<td>34</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**COMMENTARY**

Total billings fell 4% below budget, due entirely to shortage of staff. Hence also the much greater spending on outside legal services. The XYZ Enquiry meant that priority had to be given to Social Services, and we are somewhat behindhand in our work for other departments.

The overall result is positive because staff achieved a higher utilisation rate. But the department is over stretched and badly needs to fill its vacancies – currently 3 from the establishment of 35. It is proving hard to recruit, and hard to retain qualified staff; turnover last year amounted to 9 staff.

**ANALYSIS OF RESULTS**
12 MONTHS TO MARCH 1991

<table>
<thead>
<tr>
<th></th>
<th>Budget</th>
<th>Actual</th>
<th>Variances* £000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Practitioners Employed fte</td>
<td>35.0</td>
<td>32.0</td>
<td>(101)0</td>
</tr>
<tr>
<td>Income per Practitioner:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Avg Rate/Hour</td>
<td>£45.41</td>
<td>£45.41</td>
<td></td>
</tr>
<tr>
<td>x Avg Hrs charged pa</td>
<td>1,216</td>
<td>1,261</td>
<td>66 (2)</td>
</tr>
<tr>
<td>Gross Income pa</td>
<td>£55,200</td>
<td>£57,258</td>
<td></td>
</tr>
<tr>
<td>Avg Employment Cost</td>
<td>£21,686</td>
<td>£21,686</td>
<td></td>
</tr>
<tr>
<td>Net Contribution</td>
<td>£33,514</td>
<td>£35,572</td>
<td>(35)</td>
</tr>
<tr>
<td>Total Contribution</td>
<td>1,173</td>
<td>1,138</td>
<td>(35)</td>
</tr>
<tr>
<td>Overhead Costs</td>
<td>1,173</td>
<td>1,102</td>
<td>71</td>
</tr>
<tr>
<td>Net Result</td>
<td>–</td>
<td>36</td>
<td>36</td>
</tr>
<tr>
<td>Hours Charged per Practitioner</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Available hours pa less:</td>
<td>1,633</td>
<td>1,633</td>
<td>–11%</td>
</tr>
<tr>
<td>Sickness</td>
<td>72</td>
<td>64</td>
<td>–29%</td>
</tr>
<tr>
<td>Training</td>
<td>72</td>
<td>51</td>
<td>–6%</td>
</tr>
<tr>
<td>Non-chargeable time</td>
<td>273</td>
<td>257</td>
<td>–6%</td>
</tr>
<tr>
<td>Charged hours</td>
<td>1,216</td>
<td>1,261</td>
<td>4%</td>
</tr>
</tbody>
</table>

* These figures explain reasons for variance in contribution, using standard costing assumptions, e.g:

(1) 3 fewer practitioners, @ £33,500 pa, lost £101,000 income.

(2) 45 more hours charged, @ £45 per hour, for 32 practitioners, added £66,000.

(3) There was no variation in Rate per Hour or Average Employment Cost.

So the net contribution variance was £66,000 – £101,000 = –£35,000
control over costs – it is impossible to give an accurate assessment at the outset of the complexity of any piece of legal work – but it does enable it to budget with greater confidence, to see how its money has been spent and to make a judgment of the value it has received. The hourly rate and the hours taken for different pieces of work can be compared with those for other jobs and the total cost compared with what it might have been if directly-employed lawyers or private firms had been used.

82 Both chief executives and the heads of service departments, as well as legal officers, therefore need to ask:

Questions
- Are client departments paying the correct cost for the legal services they use?
- Are there simple and mutually understood agreements between the legal services department and its clients for services to be delivered?
- Is the cost of corporate legal advice appropriately charged?
- Are the costs of legal services monitored by client departments and centrally?

83 Cost comparisons alone do not, however, enable a judgment on value for money to be formed. Quality of service is an essential, if often intangible, element. Client perceptions are important, and their values of the legal departments performance (along with that of central departments generally) Chief Executive. But client departments are not always in a position to judge whether their suppliers of legal services have taken all the action necessary – and, equally important, whether they have done unnecessary work as a result of incorrect judgment on the risks involved.

84 Quality control of legal services therefore requires the involvement of someone who enjoys both the confidence of the client departments and the professional respect of those whose work he or she is judging. It will normally be best to entrust this important task to the council's corporate legal adviser, who should exercise this role for any in-house and bought in services.

85 This assessment is, however, no substitute for a commitment to quality on the part of those involved in the delivery of legal services. The Law Society and the British Standards Institution have together established a Code of Quality Assurance Management for Solicitors which could be equally applicable to council legal departments as to private firms. (Box 2, overleaf, summarises the main points).

86 But whatever means they use to ensure quality, all councils need to ask:

Questions
- Is there a systematic approach to performance review of legal services?
- Are there clear policies and procedures to ensure quality?
- Are client assessments of the service they have received communicated regularly?
- Is the corporate legal adviser responsible for ensuring quality of work from all sources.

87 However they are provided, legal services like all professional services, are expensive. So every client department needs to consider to what extent it needs to use lawyers at all. Referring an issue to a lawyer can sometimes be a way of avoiding responsibility as a manager. Conversely, managers need to recognise that when they have a legal issue on their hands, early involvement is the key to sensible use of legal services.

88 Many legal functions do not require the services of a lawyer, particularly where these are of a routine nature. Officers from other disciplines may often be able to provide a large part of the service required, subject to advice on the training they require being given by a legally-qualified officer, and their performance being monitored. No authority can avoid the questions:

Questions
- Are departments unnecessarily referring to lawyers management matters which they could and should be dealing with themselves?
- Is the maximum possible amount of legal work being delegated to non-lawyers under appropriate supervision?
- Is the legal department pro-active in setting up and supporting systems which enable departments to suitably handle many more of their own problems.
- Conversely are managers recognising at a sufficiently early stage when they have a legal problem on their hands.
**Box 2**

**A CODE OF QUALITY MANAGEMENT FOR SOLICITORS**

1. The firm shall have, as policy, a commitment to quality and shall clearly define the partner and staff responsibilities for implementing that policy.

2. The quality system shall be fully documented in a systematic way, usually in the form of a Quality Manual.

3. The form shall establish clear procedures for:
   (a) taking instructions from clients;
   (b) planning the progress of a case;
   (c) document control.

4. The firm shall be responsible for material and documents provided by clients.

5. The firm shall establish:
   (a) a policy for the selection of sub-contractors, including barristers and technical experts;
   (b) a case reference system;
   (c) a case monitoring system;
   (d) a system for verifying all work, including that of sub-contractors, whilst in progress and on completion, with arrangements for adequate storage and documentation of completed matters; and,
   (e) a system for keeping up-to-date legal reference material and for staff training in the law.

6. The firm shall have procedures to ensure:
   (a) that problems are identified and necessary remedial action is taken; and,
   (b) that all documents and material are safeguarded both in storage and in transit.

7. The firm shall:
   (a) monitor its verification procedures and record its findings; and,
   (b) audit its quality system at least annually.

8. All partners and staff shall be trained to deliver services in accordance with the terms of the Code.

9. The Code may be used as a set of guidelines enabling any firm to establish a procedure for managing the quality of its work. It establishes an internationally recognised quality standard for the delivery of legal services. It does not set a standard for the legal advice or assistance given. [The Local Government Group of the Law Society is currently considering what modifications of the Code may be required to make it appropriate to the legal departments of local authorities in England and Wales].

* * * *

89 Recent developments have made propriety, legal advice and services more than ever necessary to the good conduct of local government. Demand is unlikely to ease in the near future, and supply is uncertain. While there is scope in some areas to economise in the use of scarce professional resources, and to buy, in legal services from outside, every authority needs to ensure that it is receiving proper advice from an appropriately recognised source. It should also ensure that this should also ensure that it has the mechanisms in place to ensure legality and proper procedures throughout its activities, and is obtaining the best value for money in legal services.