

5 October 2015

Agenda Item: 5

REPORT OF THE INTERIM SERVICE DIRECTOR FOR NORTH NOTTINGHAMSHIRE AND DIRECT SERVICES

PROPOSAL TO CONSULT ON ESTABLISHING A LOCAL AUTHORITY TRADING COMPANY FOR THE DELIVERY OF ADULT SOCIAL CARE DIRECT SERVICES

Purpose of the Report

1. To seek approval to consult on the proposal to establish a local authority trading company for the delivery of a range of Adult Social Care Direct Services to the residents of Nottinghamshire.

Information and Advice

The current position

2. Nottinghamshire County Council (the Council) delivers a range of high quality directly provided Adult Social Care Direct Services (Direct Services). The sustainability of the services is challenged by the current financial position of the Council, and as a result it is proposed that alternative service delivery models are considered in order to secure a long term sustainable service.
3. This proposal is similar to the programmes of work to establish arm's length models of service delivery that are already underway for the Council's Highways and Library services. However, in contrast to those services, Direct Services is a range and variety of different services with varying degrees of interdependency to each other.
4. The Council's Direct Services portfolio has an annual operating budget of £33 million and comprises the following services:
 - Learning Disability Short Breaks
 - A Learning Disability Residential Unit
 - Shared Lives
 - Day Services
 - I-Work
 - County Enterprise Foods
 - County Horticulture and Work Training
 - START Reablement and Intermediate Care
 - Care and Support Centres.

5. Some of these services have been excluded from the proposal at this stage. The START Reablement and Intermediate Care service is aligned with the health function and is therefore not appropriate to be considered for inclusion in the Direct Services local authority trading company proposal. County Horticulture and Work Training is the subject of a separate proposal. The Care and Support Centres are already working to an approved strategy as part of the development of Extra Care housing and promotion of independent living programme.
6. The range of Direct Services in scope for this work is listed below:
 - three learning disability short break units – Wynhill Lodge, Holles Street and Helmsley Road
 - one learning disability residential home – Church Street
 - a Shared Lives scheme that provides care and support to all vulnerable adult groups in a paid carer's own home
 - nine buildings-based day services for mixed service user groups (subject to the proposal to close the day service based at Ollerton)
 - the I-work team that helps people with a learning disability into employment
 - County Enterprise Foods which produces and delivers meals for vulnerable people.
7. The combined operating budget for these services for 2015/16 is £17,097,594. The services employ a total of 561 staff members (474.4 FTE). The financial out-turn for the services over the last two full financial years and the budget allocation by service area for 2015/16 is shown in **Appendix 1**.
8. The services have experienced very significant revenue budgetary reductions over the last few years, whilst at the same time dealing with increased demand. The review of services has continued to focus on the delivery of high quality, personalised care and support services which are built on reablement principles to help people to remain living independently in their own homes.
9. Many of the services are integral to supporting service users to achieve their social care outcomes and whilst short term reductions in service can and have been made, these are not sustainable in the long term and the current model of provision will become unviable unless steps are taken to address the situation.
10. Whilst the services continue to sit within the Council further savings are likely to be required. Without the ability to attract new work and income streams and without adopting more flexible operating practices it will not be possible to sustain the current range, depth and quality of Direct Services. Adopting a commercial approach, securing external business and enhancing productivity has become paramount for the future viability and sustainability of the service.
11. As part of Nottinghamshire County Council's 'Redefining Your Council' programme, a preliminary in-house options appraisal has been undertaken to identify what might be the most appropriate model to deliver a sustainable Adult Social Care Direct Services service. This work has been based on five key principles:
 - ensure that service users and carers have the opportunity to continue to have their outcomes met

- ensure the services are sustainable in a competitive adult social care market
 - protect the long term future of staff working in these services
 - contribute to Council savings and to the 'Redefining Your Council' programme
 - allow for more flexibility and freedom to develop new and innovative services.
12. Of equal importance are the changes brought about by the Care Act 2014 which are wide-ranging and cover all adults with care and support needs and their carers. Councils must work with organisations that provide care and support services to make sure people have a choice of high quality services in their local area. If a care provider fails, the Council must make sure people using the service are supported.
 13. In undertaking the preliminary in-house options appraisal, the Council has sought advice from a range of existing companies in other local authority areas. Nationally, since 2010, local government has increased the variety and number of alternative delivery models it uses. £4billion is now awarded annually to these types of companies for the delivery of council services.
 14. Based on the conclusions of the preliminary work, the initial recommendation is that, based on the range of services identified, a local authority trading company is perceived to be the best developmental model to satisfy the above criteria. This model will best maintain the commitment and flexibility engendered by the public sector ethos whilst providing the opportunity to build on and enhance commercial skills. **Appendix 2** provides information about some local authority trading companies that are already in existence in other parts of the country. The options appraisal is available as a background paper to this report.
 15. Based on the initial recommendation, permission is sought to consult and engage with staff, service users and their carers and the public on the proposal at this early stage, in order to ensure that they can be involved in the subsequent development of any new company.
 16. Other delivery models (e.g. a registered charity or social enterprise) have been considered as part of the preliminary options appraisal but the advice of other companies who have gone through a similar process having been previously in-house is that moving directly to a radically different trading model presents a greater degree of uncertainty and risk than a local authority trading company. Other delivery models would involve a much more significant level of change for the Council and for staff and are perceived to take longer to establish and complete a transition to. However some local authority trading companies have evolved over time into other delivery models and this may be something that the Council may wish to consider for the new company in the future.
 17. A more detailed options appraisal will be required as part of the development of the full business plan to test the preliminary conclusion that a local authority trading model is the best model for both Nottinghamshire County Council and for the Direct Services described as in scope for this proposal; and to test that the services in scope are the optimum range of services to build a sustainable company on.
 18. Further work would also be required to develop the governance and contractual structure of the new company. It is likely that the Council will need to seek external legal advice to ensure that these are compliant with the legal framework within which the Authority

operates. An outline of the timescales for the work is shown in the table below (see also **Appendix 3** (flow diagram)):

Description	Date
<ul style="list-style-type: none"> • Consult with key stakeholders • Run an engagement programme with key stakeholders to design, develop and co-produce the new company • Develop a full business case 	October 2015 to April 2016
Member consideration of full business case for the new company	April 2016
Transition to the new company	May 2016 to December 2016
New company established	January 2017

The proposed new arrangement

19. The proposal remains at a very early stage and further appraisal may conclude that some of the other options discussed in the preliminary in-house options appraisal may merit further consideration. However, based on the preliminary recommendation, the following section sets out what a new arrangement could look like if the local authority trading company route was explored.
20. The proposed local authority trading company would be established as a “Teckal Company” (see a, b and c below for explanation) for the purposes of the Council making an award of a service contract to the new company to provide adult social care services. To meet the requirements of a Teckal arrangement, Regulation 12 of the Public Contract Regulations 2015 ("PCRs 2015") must be complied with. This Regulation codified 'Teckal arrangements' which had been established previously by case law. Regulation 12(1) provides an exception to the requirement that a contracting authority (i.e. the Council) complies with the PCRs 2015 when awarding a public contract where the following conditions are met:
 - a. the Council exercises over the new company concerned a control similar to that which it exercises over its own departments
 - b. more than 80% of the activities of the new company are carried out in the performance of tasks entrusted to it by the Council
 - c. there is no direct private capital participation in the new company.

This means that the proposed new company could provide services to persons other than the Council provided that this trading is less than 20% of the new company's activities.

21. Establishing a 'Teckal Company' is not a simple process and is open to complex legal interpretation. The Council will need to seek appropriate legal advice about this as the business case is developed.

22. In the preliminary assessment of services to be included in the new company, consideration has been given to the services which would be most likely to both benefit from the advantages offered up through the establishment of a local authority trading company and that also complement each other in terms of a suite of delivered services. These services are predicated on: meeting the service user needs and outcomes for adults with disabilities; supporting and promoting independence; and helping service users to obtain employment. The services, taken together, have the potential to provide an exciting future for a sustainable and integrated new trading company.
23. If the proposals are approved, it is anticipated that the newly formed company, which will be wholly owned by Nottinghamshire County Council, could commence trading from January 2017, following consultation with staff and other stakeholders and subject to approval by elected members.
24. Once the new local authority trading company had been established, Nottinghamshire County Council would enter into a contract (via a direct award) with the new company. Should the Council wish to cease the arrangement, the key terms of the contract would provide that it could be reviewed after a designated amount of time and ended if appropriate. This would mean that the services and staff would need to transfer back into Nottinghamshire County Council.
25. The principle of the arrangement is that the Council would lay out what it wanted the company to deliver and what resource it could afford to provide, i.e. outcomes and budget allocation. It would be up to the new company to determine the best way to deliver this, i.e. the operational practices and procedures, and the how. As now, annually (or for a defined number of years in advance) Nottinghamshire County Council would determine the budget to be allocated to the local authority trading company for the delivery of those services, this having been worked up through negotiation between the Council and the new company. The company would use the budget allocation along with its own forecasts of commercial growth to form its business plan for the following year. The business plan would be subject to unanimous sign off by the board (further work will need to be undertaken on the composition of the board but could include representation from staff, senior staff, the Council, finance and external partners e.g. education/health). If the Council needed to further reduce budgets or change priorities this could be done and the new company would advise on the implications and determine the best approach to deliver the revised service. In summary, the Council would continue to set priorities and monitor service delivery.
26. Staff employed by the Council in the Direct Services in scope would transfer to the new company under Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended) (TUPE) provisions.
27. The full costs of establishing the new company, including legal costs and mobilisation of the new company would be explored as part of the development of the full business case for the proposal: this will include consideration of the provision of support services to the new company.
28. It is proposed that the responsibility for managing contract and performance management issues will be retained by the County Council Adult Social Care and Health (ASCH) Market Management and Care Standards Team.

29. Initially, vehicles, equipment and other assets used to deliver the Direct Services would remain in the ownership of the Council and be leased to the company for the remainder of its useful life. However, subject to clarification as part of the ongoing development of the business case, replacement of assets could be the responsibility of the new company.
30. The new company would operate from the existing Direct Services bases and where necessary the buildings would be sub-let to the new company who would be responsible for utility charges and other service charges for a specified duration.
31. Alongside the development of the business case and the mechanics of the transition to the new company, cultural change would be required. Managers who transferred into the company from the Council would be expected to embrace change, extend their skills, provide leadership and become role models for the values of the company. Where the requirement for additional skills is identified, that are not already available internally, the company would seek these from the marketplace at the earliest opportunity through training or recruitment.
32. As part of the formal consultation on this proposal it is intended to develop an engagement strategy to ensure that all staff, service users, carers, delivery partners and the wider community have an opportunity to have their views heard and to be involved in the design, development and co-production of the new company.
33. It is the Council's intention to seek support from key stakeholders in the local economy e.g. community groups, local businesses, universities etc. to support the Council to work more creatively and innovatively and to ensure that the business case for the proposal is developed with a focus on meeting local people's needs at the heart of it.

Governance

34. The Corporate Leadership Team will undertake regular reviews in accordance with current practice for all Redefining Your Council (RYC) programmes of work.
35. If final authority was given for the creation of the trading company, Nottinghamshire County Council would seek to create a new company. In the event that it is a local authority trading company, the new company would be 100% owned by Nottinghamshire County Council. Ownership is not the same as control. Control of the new company would be exercised in several ways, including through the company board and the service contract. The company would be governed by its board of directors.
36. It is intended that there would be political representation on the board of the local authority trading company.
37. The structure of the board for the new company, and who will have responsibility for appointment to the board, would be explored as part of the development of the full business case.
38. A key consideration in setting up the new company is quality of service. The performance required by the Council would need to be described in the service contract

between the Council and the company. The company would be required to provide periodic reports to the ASCH Committee on its operational and financial performance. The Council would continue to set Adult Direct Services policy and strategy and determine priorities.

The benefits

39. The primary benefit from the establishment of these new arrangements would be the long-term sustainability of quality Direct Services provision. This would predominantly be achieved by increasing the commerciality of the service. This would include transparency and the opportunity to look at new markets and attract new sources of income. The new company would have the opportunity to build up external earnings year-on-year up to the maximum permissible under the Teckal legislation of up to 20% of its turnover.
40. Other impacts/benefits are:
 - a) For the Direct Services:
 - captures the brand value of Nottinghamshire County Council which will be attractive to all key stakeholders
 - enables access to new funding streams and income that could be used to grow the business, e.g. attract Direct Payments or Personal Health budgets; or deliver new services for the Council as a trusted and reliable supplier (at present these new services would only be sought from the independent sector)
 - allows the services the above freedoms and opportunities whilst also protecting the special relationship with the Council, through the services being granted status as “provider of last resort” and “provider of first choice”
 - can allow the services to operate with greater flexibility and quicker decision-making, to put in place and test more creative solutions and produce new savings
 - any changes will be under the overall control of the Council
 - enables strategic control of the services (through objective setting, contractual arrangement or service level agreement) whilst transferring operational control
 - allows the potential for some currently threatened ‘unprofitable’ services to survive within an overall profitable service or to borrow to invest to become more profitable.
 - b) For the workforce:
 - the owner of the company remains the Council and this is a reassuring fact for many staff
 - TUPE transfer will protect terms and conditions on existing staff whose jobs will also be protected.
 - c) Financially:
 - ability to increase income

- one of the ways that other local authority trading companies have made savings is by changing terms and conditions of new starters in order to be competitive
- profit can be reinvested in the company or returned to the Council
- allows the service to increase its share of the care market
- Corporation Tax will be payable on profits – this requires further detailed consideration
- VAT will be payable but this can be minimised – this requires further detailed consideration
- could continue to buy 'back office' costs from the Council which would help maintain the per head economies of scale for running the 'back office' service for NCC.

d) Legal:

- the Council retains control over the company and controls direction of travel
- under 'Teckal' exemption allows work to be given to the company without tender if more than 80% of turnover is spent by the Council
- can join up with other organisations if required e.g. joint venture with the NHS or other local authority trading company.

Other Options Considered

41. No change: the Council could continue to manage the Direct Services under County Council control. This will not provide a sustainable, long-term solution for the services as in the context of reduced funding from Central Government the services will be subject to further savings requirements.
42. Establish a larger company: consideration has also been given to the inclusion of a wider range of services within the new company. There are risks from this approach as some of the services are not viable in their current form and may cause issues for the new company.
43. Outsourcing: alternatively the Council could ask someone else to deliver the services. This would involve moving elements of Council business to one or more private or voluntary sector providers. Control over the operations of these companies would be maintained through contract management, following a procurement exercise. This option is not recommended because it is likely to be unpopular with stakeholders and because it would take the Council further out of the direct provision market. To retain an element of directly provided service is seen as an advantage as it allows the Council some leverage and oversight over the market in terms of price and quality. At this stage, a substantial amount of market testing would be required to assure the Council that it would be appropriate to cease all direct provision.
44. Other delivery model: in addition, consideration has been given to other models such as social enterprises (community interest companies, community benefit companies, mutuals, co-operative societies etc.) and charities. These have been discounted at this initial stage. As part of the development of the full business case for the proposal, a more detailed options appraisal will be required to test the preliminary conclusion that a local authority trading model is the best model for Nottinghamshire. It should be noted

that some local authority trading companies have evolved over time into other delivery models and this may also be something that the Council may wish to consider for the new company in the future.

45. Subject to the outcome testing of the recommendation from the preliminary in-house options appraisal the Council may wish to re-explore the options listed above.

Reason/s for Recommendation/s

46. To contribute to a sustainable future to help to meet the financial challenges facing the Adult Social Care Direct Services provision while retaining a good level of service.

Statutory and Policy Implications

47. This report has been compiled after consideration of implications in respect of crime and disorder, finance, human resources, human rights, the NHS Constitution (public health services), the public sector equality duty, safeguarding of children and adults at risk, service users, sustainability and the environment and ways of working and where such implications are material they are described below. Appropriate consultation has been undertaken and advice sought on these issues as required.

Financial Implications

48. The full financial costs of establishing a new company will need to be explored as part of the development of a full business case by April 2016.

Human Resources Implications

49. These proposals will affect 561 staff members and throughout the consultation period the proposals will be discussed with the recognised trade unions and staff in accordance with the Council's agreed protocols. Any decision to proceed with a local authority trading company will take place in line with legislative requirements and will draw on existing good practice and experience of setting up other arm's length organisations and TUPE transfers of staff.

Public Sector Equality Duty implications

50. An initial equality impact assessment has been undertaken and is available as a background paper to this report. This will be revisited in tandem with the development of the full business case for the new company and also in response to the outcome of consultation with staff and key stakeholders.

Safeguarding of Adults at Risk Implications

51. The new company would be subject to the same level of scrutiny in respect of identifying and managing safeguarding issues as any provider service.

Implications for Service Users

52. Service users currently in receipt of a service from Direct Services would continue to have their outcomes met. Additionally Service Users could use their Direct Payment to purchase a service from the new company.
53. Service users and their families will have the opportunity through the formal consultation and engagement processes to provide their views on the proposal and to be involved in the design of the new company.

Ways of Working Implications

54. This will need to be explored as part of the development of the full business case.

RECOMMENDATION/S

That the Committee:

- 1) gives approval to consider the establishment of a local authority trading company for the delivery of a range of Adult Social Care Direct Services to residents of Nottinghamshire.
- 2) gives approval to consult on the emerging proposals contained in this report.
- 3) agrees that progress reports will be brought to Committee as part of the general reporting arrangements.

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Constitutional Comments (SLB 09/09/2015)

55. Adult Social Care and Health Committee is the appropriate body to consider the content of this report.

Financial Comments (KAS 14/09/15)

56. The financial implications are contained within paragraph 48 of the report.

Background Papers and Published Documents

Except for previously published documents, which will be available elsewhere, the documents listed here will be available for inspection in accordance with Section 100D of the Local Government Act 1972.

[Redefining Your Council: Transformation & Spending Proposals 2015/16 – 2017/18, 12/11/2014 Report to Policy Committee](#)

Options Appraisal of Alternative Service Delivery Models for In-House Adult Social Care Direct Services Preliminary Options Appraisal – July 2015

Equality Impact Assessment – Proposal to establish a Nottinghamshire County Council owned Local Authority Trading Company for the delivery of Adult Social Care Direct Services

Electoral Division(s) and Member(s) Affected

All.