

**BIRMINGHAM CITY COUNCIL**

**CHILDREN'S TRUST**

**OPTIONS APPRAISAL FOR THE TRUST MODEL**

**(WHOLLY OWNED COMPANY or EMPLOYEE MUTUAL)**

**5<sup>th</sup> January 2017**

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## Review and revision history

Version	Date	Revisions	Author
0.1	22Oct2016	First Draft – forwarded to Seamus Gaynor and Rob Barker for review	John Sidebottom
0.2	1Nov2016	Includes review comments from Seamus Gaynor and Rob Barker	John Sidebottom
0.3	26Nov2016	Updated after review with Steve Hart, Andrew Christie, Seamus Gaynor, Rob Barker and Peter Hay	John Sidebottom
0.4	2Dec2016	Tidying for January Cabinet Report appendix	John Sidebottom
0.5	9Dec2016	Comments from the Steering Group 6Dec and specific review comments from Brigid Jones and Seamus Gaynor	John Sidebottom
0.6	21Dec2016	Tidied up after steering group comments (21Dec)	John Sidebottom
0.7	5Jan2017	Legal (Rob Barker) review comments and additional CIC analysis (Appendix B)	John Sidebottom

# 1 Introduction

This paper is the Options Appraisal for the Children's Trust Model, based on the September 2016 Cabinet agreeing that *"both (1) the wholly owned company option and (2) the employee owned mutual option proceed to design work"*.

Cabinet also agreed to the receipt of a January 2017 report with the recommended Trust model, Trust service scope, implementation plan and shadow governance/Board arrangements.

# 2 Background

The two Delivery Model options being considered are:

1. A company limited by guarantee or shares which is owned wholly by the Council; or
2. A company limited by guarantee or shares which is owned by its employees.

Each of these two options would also be able to apply to be a Community Interest Company (CIC). This would be quick, easy and inexpensive to set up and can reassure the public, as the community purpose of the organisation is regulated by law.

The Cabinet Report (September 2016), Appendix 2 "Birmingham children's services ADM options shortlisting" also provided the following commentary on these options.

Note: these words have been copied from the Cabinet report and have not been amended for this options appraisal.

WHOLLY OWNED COUNCIL LIMITED COMPANY (Local Authority Trading Company-LATC)	A company, registered with Companies House and subject to companies' legislation, and wholly owned by the Council. The operations, assets and staff are transferred into the company.	<ul style="list-style-type: none"> <li>• Stays within Council ownership</li> <li>• Can incentivise better cost control and surplus/profit generation</li> <li>• Can continue to use existing staff</li> <li>• Is likely to meet Teckal exemption and thus avoid the need for procurement</li> <li>• Hard to realise change when management structure remains unchanged, albeit in a new entity - a clear strategic direction needs to be set underpinned by effective leadership able to deliver change</li> <li>• TUPE would apply if staff transfer employment</li> <li>• Need to establish Material Factor Defence to justify difference in pay as compared to other BCC employees</li> <li>• Note this ADM would be regarded as an 'associated employer' for the purposes of determining 'same employer' test</li> </ul>
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EMPLOYEE OWNED LIMITED COMPANY (I.E. MUTUAL)	<p>New entity taking the form of a workers' cooperative</p> <p>An independent business established by a mutual community who have a common interest in the goods and services the mutual provides. Members can be employees, customers or 'a mixed membership' model. Mutuals are funded from revenues from goods and services provided and / or contract fees.</p>	<ul style="list-style-type: none"> <li>• Some mutuals experience lower absenteeism and staff turnover than non-employee owned organisations</li> <li>• Some mutuals better protect staff terms and conditions</li> <li>• Can deliver greater customer satisfaction</li> <li>• Can present opportunities for innovation, turning a profit and being resilient to changes in the economic climate</li> <li>• A big mutual organisation may mean some members are distanced from the decision-making process</li> <li>• Smaller organisations may find that 'one person, one vote' may delay decision-making process</li> <li>• Employee committees can be used to make decisions</li> <li>• Unlikely to release cost savings without innovation and/or cost reduction and can be costly to set up</li> <li>• TUPE would apply if staff transfer employment</li> <li>• Provided BCC did not have 'controlling' interest (less than 50%) may be able to lawfully change T&amp;Cs of employees in this company as compared to BCC employees</li> </ul>
COMMUNITY INTEREST COMPANY	<p>Community Interest Companies were introduced by the Companies (Audit, Investigations and Community Enterprise) Act 2004. This is the structure that to date has been quite widely adopted by health provider entities that have been externalised as social enterprises. A CIC cannot have charitable status and therefore is unable to access the full range of tax advantages of charitable entities.</p>	<ul style="list-style-type: none"> <li>• Can reassure public, as the community purpose is regulated</li> <li>• Asset lock in place. If CIC is wound up under Insolvency Act 1986 any residual assets, after satisfying creditors, will be transferred to another asset-locked body (charity or another CIC)</li> <li>• Has transparency of operation</li> <li>• TUPE would apply if staff transfer employment</li> <li>• Company format can be tailored to a specific organisation structure, governance or membership because it is not a company form in its own right</li> <li>• Quick, easy and inexpensive to set up (once company has already been set up)</li> <li>• Provided BCC did not have 'controlling' interest (less than 50%) may be able to lawfully change T&amp;Cs of employees in this company as compared to BCC employees</li> <li>• Would need to satisfy Art 157 – 'that BCC and this Company were not a 'Single Source' for the purposes of pay and reward'</li> </ul>

### 3 Evaluation Criteria

For the Cabinet Report (September 2016), the criteria used to appraise all the Delivery Models were:

1. Can the model accommodate the scope?
2. Does the model provide the conditions for operational independence?
3. Are there risks associated with adopting this model which make it undeliverable?
4. Will the option incur significant and avoidable financial implications which would make the option unsustainable within existing levels of funding?

Since all of the 3 Delivery Models above satisfied these tests, this options appraisal needs to be more granular and apply wider tests to determine the "best" Trust Model in which to deliver social care for Birmingham City Council in the future. Therefore, the appraisal has also taken into account the Council's design principles and the critical success factors considered by Cabinet in July.

At June 2016 Council, a set of design principles were agreed and a sixth added subsequently as agreed by Cabinet on 26 July:

1. The Council must be able to sustain a focus upon the improvement in social work practice that is most needed by children and families. It should not pursue a trust option if that becomes a distraction from this task.
2. The Council must be able to design an organisational form that supports and develops the best social work support to children and families.
3. The Council must take responsibility for working with social work and related staff through this period. Their engagement and support is essential to any trust being a success. In particular it is important to stress to full Council that we understand that social workers are a scarce resource and that the trust must be well placed to compete by at least matching and preferably bettering current terms and conditions.
4. The Council must engage and develop the trust model with partners.
5. The current financial plan and Council priority must be maintained through to at least 2020.
6. The level of accountability of the Trust to the Council will be defined broadly so that all Councillors continue to exercise their corporate parenting responsibilities and senior Trust managers report to the relevant Scrutiny Committee.

Additionally, the July 2016 Cabinet endorsed the "case for change"<sup>1</sup>, based on a number of barriers associated with keeping the services within Birmingham City Council. In summary, these were clustered into six areas:

01	Focus on children	"We should have a clear purpose of why we are in children's services... if you were to ask 10 people in the service what their purpose is, each one should give the same answer"
02	Partnering and commissioning	"The board should challenge us when we aren't performing well, but they should challenge our partners too"
03	Recruitment and retention	"Our recruitment campaigns should be bold, brave and loud... the service should be seen as a great place for passionate and committed people to work"
04	Workforce capability	"Learning and development should follow a 'scaffold' approach, - coupling theory and practice, whilst ensuring a continuous learning-approach both in and out of the classroom. In short, we should follow the teaching hospital model"
05	Organisational agility	"We shouldn't be so distracted by external pressures like Ofsted inspections. Our service should always provide the support needed by families and children - using all of our staff to do so, not just social workers"
06	Technology, digital and analytics	"We should give ministers and Ofsted what they want, but our practice should be informed by the data which is most relevant to families and children"

The report identified some critical success factors linked to each "area". Critical success factors (CSFs) are the attributes required to create the environment for change in the new model.

The Cabinet report included: *"The CSFs ...have been generated from our data gathering and the problem analysis and they have been checked against the children's services design principles ...to ensure that the assessment of an appropriate model will provide an option that fits with the overall direction of travel of the service."*

The critical success factors need to be achieved in order to provide a step change in improvement for children's services.

***"The new Birmingham model will have the ability to remove barriers to improvement and sustain progress by optimising the system as a whole, rather than simply optimising the separate parts".***

<sup>1</sup> Deloitte report: Birmingham children's services model, Case for change

As an extract from the Cabinet Report, the following table shows the map of barriers to critical success factors.

System challenge area ('Meeting the objective of improving...')	Critical success factor ('For the model to achieve the required step change, it should...')
<b>01</b> Focus on children	<p>... allow for a governance structure and governance behaviours that support an uncompromised focus on good outcomes for children and young people</p> <p>... an organisational design that enables leadership and management autonomy for decision-making and accountability for the service</p>
<b>02</b> Partnering and commissioning	<p>... enable the right services to be commissioned when and where required and at the right cost for children and families</p> <p>... permit a broad governance structure that establishes collaborative partner and inter-council relationships and provides challenge to the service</p>
<b>03</b> Recruitment and retention	<p>... allow for dedicated, specialist recruitment resource and a children's services-specific recruitment strategy</p> <p>... allow for the creation and adoption of flexible packages of employment benefits</p> <p>... cater for a renewed focus on children's services</p>
<b>04</b> Workforce capability	<p>... allow for a children's services-specific workforce strategy that incorporates a clear learning and development programme with career progression and a teaching and learning culture at its core</p>
<b>05</b> Organisational agility	<p>... have the authority and ability to flex in response to changes in demand</p>
<b>06</b> Technology, digital and analytic	<p>... allow operational staff to access and manipulate real-time data about the service, independent of the wider council</p> <p>... procure technology, digital and analytics that support innovation and service improvement for children's services without compromise</p>

## 4 The Options Appraisal

### 4.1 Notes

The more granular approach therefore considers all the areas (stated above):

- Evaluation Criteria (4 criteria)
- Design Principles (6 principles)
- The Critical Success Factors<sup>2</sup> (11 CSFs).

Notes:

- The Scoring Matrix below uses a score of 0-5:
  - 5 = best fit, fully satisfies criteria
  - 4 = mostly satisfies criteria
  - 3 = 50/50 fit
  - 2 = does not satisfy the criteria (only partly)
  - 1 = very poor fit (barely satisfies criteria or not at all)
  - 0 – not scored
- It assumes all areas of equal weighting
- It compares the main 2 models (either of which can be a Community Interest Company (CIC)). For reference, Appendix B provides a CIC analysis
- This evaluation should be read in conjunction with Appendix A, which outlines the legal/procurement framework for each of the models.

### 4.2 The Evaluation Model and Score

In addition to the scoring matrix below, there are a number of other factors which will affect the ability of the Trust to deliver its services. These are noted below:

1. In relation to independence, this will be affected by a number of factors, not just the form of alternative delivery model which is adopted, namely:
  - **Corporate Governance/Structure;**
  - **Contractual independence** – this is how prescriptive or flexible is the contract with the Council for service delivery;
  - **Operational independence** – this is whether the new company has its own resources in terms of premises/ICT/service contracts/support staff to deliver the services or does it rely on the Council;
  - **Financial independence**- this is whether the new company services a single client, the Council, or whether it can generate income from other clients.

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<sup>2</sup> From the Deloitte work on options and barriers paper 5 July 2016. Including root causes.



2. There may need to be a distinction between day to day decision making, and the more strategic decisions. Whatever model is adopted the Council will need to be able to:-
- Comply with any DfE Direction;
  - Discharge its statutory functions;
  - Perform its Cabinet Member and Director of Children's Services statutory functions;
  - Facilitate performance of Overview and Scrutiny function;
- This will necessarily impact upon independence.

CHILDREN'S TRUST – DELIVERY MODEL – EVALUATION AND SCORING MATRIX					
AREA/REFERENCE	CRITERIA	WHOLLY OWNED COUNCIL LIMITED COMPANY (LATC)	Score	EMPLOYEE OWNED LIMITED COMPANY (I.E. MUTUAL)	Score
<b>01</b> EVALUATION CRITERIA	Can the model accommodate the scope?	<ul style="list-style-type: none"> <li>Both models are capable of accommodating the core and support services.</li> </ul> <p><b>BOTH SCORE THE SAME</b></p>	5	<ul style="list-style-type: none"> <li>Both models are capable of accommodating the core and support services.</li> </ul> <p><b>BOTH SCORE THE SAME</b></p>	5

CHILDREN'S TRUST – DELIVERY MODEL – EVALUATION AND SCORING MATRIX					
AREA/REFERENCE	CRITERIA	WHOLLY OWNED COUNCIL LIMITED COMPANY (LATC)	Score	EMPLOYEE OWNED LIMITED COMPANY (I.E. MUTUAL)	Score
02 EVALUATION CRITERIA	Does the model provide the conditions for operational independence?	<ul style="list-style-type: none"> <li>Stays within Council ownership</li> <li>Can incentivise better cost control</li> <li>Can continue to use existing staff</li> <li>Will meet the Teckal exemption in Regulation 12 Public Contracts Regulations 2015 and thus avoid the need for the procurement of a Service Delivery Contract</li> <li>Hard to realise change when management structure remains unchanged, albeit in a new entity - a clear strategic direction needs to be set underpinned by effective leadership able to deliver change. Although with TUPE this would also be true of the Mutual option.</li> <li>In terms of "change", there could be refinements on this model to secure better employee engagement to have a positive impact on change:               <ul style="list-style-type: none"> <li>Having one or more employees attending the directors' meetings as observers, being able to speak but with no voting rights;</li> <li>Having a form of workers' council as part of the structure of the company.</li> </ul> </li> <li>To comply with Regulation 12, the Council needs to exercise a degree of control over the Trust which is similar to that which it exercises over its own departments so operational independence is going to have to be built into the governance and Service Delivery Contract. This is likely to be a compromise situation between control and independence.</li> <li>However, a strong mitigation is to ensure the "design" of the core and support services is constructed to remove as many of the current service improvement barriers as possible. The scope of these services will be important in order to ensure operational independence, as well as the removal of barriers to service improvement.</li> </ul> <p>THE BALANCE OF THE CASE HERE IS THAT A MUTUAL CAN BE MORE OPERATIONALLY INDEPENDENT THAN A WOC. BUT A MUTUAL HAS RISKS ABOUT BEING TOO INDEPENDENT WHICH MAY CREATE DIFFICULTIES IN THE EVENT OF POOR TRUST PERFORMANCE</p>	3	<ul style="list-style-type: none"> <li>Public service mutuals are organisations with the following 3 characteristics:               <ul style="list-style-type: none"> <li>They have left the public sector (also known as 'spinning out');</li> <li>But continue to deliver public services; and,</li> <li>Importantly, staff control is embedded within the running of the organisation.</li> </ul> </li> <li>Arguably a Mutual could be seen as too independent from the Council (see also risk below). For example, in a Mutual the General Meeting of members may remove a director by an ordinary resolution. However if a Multi Stakeholder Model is applied then there would be more than one class of member, with the Council as a stakeholder being able to appoint a director(s). The Council may seek to preclude its director having their appointment terminated on the standard grounds or an extraordinary resolution (75% vote of members).</li> <li>Concern for a Mutual is that it would be more difficult for BCC to step in and remove the Board in an extreme circumstance of poor performance, since the employees would have these voting rights, not the Council. Whilst BCC as a stakeholder might have voting rights it would not have a majority. Equally BCC might be vulnerable to its own appointed director being removed by a vote of the membership.</li> </ul> <p>THE BALANCE OF THE CASE HERE IS THAT A MUTUAL CAN BE MORE OPERATIONALLY INDEPENDENT THAN A WOC. BUT A MUTUAL HAS RISKS ABOUT BEING TOO INDEPENDENT WHICH MAY CREATE DIFFICULTIES IN THE EVENT OF POOR TRUST PERFORMANCE</p>	3

CHILDREN'S TRUST – DELIVERY MODEL – EVALUATION AND SCORING MATRIX					
AREA/REFERENCE	CRITERIA	WHOLLY OWNED COUNCIL LIMITED COMPANY (LATC)	Score	EMPLOYEE OWNED LIMITED COMPANY (I.E. MUTUAL)	Score
03 EVALUATION CRITERIA	Are there risks associated with adopting this model which make it undeliverable?	<ul style="list-style-type: none"> <li>This is the simplest and quickest model to establish at pace and therefore is less risk than a Mutual.</li> <li>In a WOC BCC may as shareholder have the right to appoint and terminate the appointment of a director.</li> <li>Both models would have a step in provision in the Service Delivery Contract. But possible that step in/intervention in the event of poor performance is less difficult with this type of model, which brings in the “operational independence” evaluation.</li> </ul> <p>MUTUAL IS A FAR RISKIER OPTION HERE, REFLECTED IN SCORE</p>	5	<ul style="list-style-type: none"> <li>There are no social care mutuals of this size and complexity to learn from, so the Council would be leading the way with this type of Model.</li> <li>The risk of change of organisation structure would be subject to the extraordinary resolution mechanism. In addition the Council may seek to include a provision in the Service Delivery Contract so that certain types of change of ownership without the Council's consent constitute a termination event.</li> <li>It will be more complex and lengthy to set up (than the WOC). There is likely to be a considerable degree of refinement particularly if there are multiple stakeholders.</li> <li>A WOC can become a Mutual but the other way around is more difficult to achieve and a procurement process would be required under Regulation 77 Public Contracts Regulations 2015. Also the contract can only be for those services set out for certain CPV codes in Regulation 77(2). So, less flexible.</li> <li>However, the consideration here is that the maximum term of contract for a Mutual is limited to 3 years and the direction from the Children's Trust Steering Group is that the contract should be a 5-10 year term.</li> <li>If the Council contracts with the Mutual using the reserved process for which any mutual has to be allowed to compete under Regulation 77 Public Contracts Regulations 2015 (PCR 2015) then at the end of the 3 year period there would be open competition for the Service Delivery Contract.</li> <li>Therefore there is a risk that at the end of the contract term, the Trust could spin-out to something the Council would not normally endorse or be exposed to an open procurement.</li> </ul> <p>MUTUAL IS A FAR RISKIER OPTION HERE, REFLECTED IN SCORE</p>	2

CHILDREN'S TRUST – DELIVERY MODEL – EVALUATION AND SCORING MATRIX					
AREA/REFERENCE	CRITERIA	WHOLLY OWNED COUNCIL LIMITED COMPANY (LATC)	Score	EMPLOYEE OWNED LIMITED COMPANY (I.E. MUTUAL)	Score
04 EVALUATION CRITERIA	Will the option incur significant and avoidable financial implications which would make the option unsustainable within existing levels of funding?	<ul style="list-style-type: none"> <li>Stays within Council ownership.</li> <li>Can incentivise better cost control.</li> </ul> <p>RISK THAT A MUTUAL CAN BE A MORE COSTLY OPTION, SCORE SLIGHTLY LOWER</p>	5	<ul style="list-style-type: none"> <li>Can present opportunities for innovation and being resilient to changes in the economic climate.</li> <li>Unlikely to realise cost savings without innovation and/or cost reduction and can be costly to set up.</li> <li>The downside is that a Mutual is likely to take longer and be more expensive to establish (e.g. governance, consideration of all the different Mutual options, Service Delivery Contract).</li> </ul> <p>RISK THAT A MUTUAL CAN BE A MORE COSTLY OPTION, SCORE SLIGHTLY LOWER</p>	4
01 DESIGN PRINCIPLES	The Council must be able to sustain a focus upon the improvement in social work practice that is most needed by children and families. It should not pursue a trust option if that becomes a distraction from this task	<ul style="list-style-type: none"> <li>A relatively straightforward set up and transition so unlikely to be a distraction. BCC has done this before.</li> </ul> <p>RISK THAT A MUTUAL COULD BE A MAJOR DISTRACTION (SO SCORE LOWER)</p>	5	<ul style="list-style-type: none"> <li>Can deliver greater customer satisfaction.</li> <li>Can present opportunities for innovation and being resilient to changes in the economic climate.</li> <li>A more complicated transition (than a WOC), which will involve significant management and staff time to agree on and establish the Trust Model and associated governance (internally and externally).</li> <li>A Model with majority employee involvement and voting rights may make it more difficult to get agreement across the organisation about improvement changes needed to deliver the Trust outcomes.</li> </ul> <p>RISK THAT A MUTUAL COULD BE A MAJOR DISTRACTION (SO SCORE LOWER)</p>	3

CHILDREN'S TRUST – DELIVERY MODEL – EVALUATION AND SCORING MATRIX					
AREA/REFERENCE	CRITERIA	WHOLLY OWNED COUNCIL LIMITED COMPANY (LATC)	Score	EMPLOYEE OWNED LIMITED COMPANY (I.E. MUTUAL)	Score
02 DESIGN PRINCIPLES	The Council must be able to design an organisational form that supports and develops the best social work support to children and families	<ul style="list-style-type: none"> <li>Hard to realise change when management structure remains unchanged, albeit in a new entity - a clear strategic direction needs to be set underpinned by effective leadership able to deliver change. Although with TUPE this would also be true of the Mutual option.</li> <li>In terms of "change", there could be refinements on this model to secure better employee engagement to have a positive impact on change: <ul style="list-style-type: none"> <li>Having one or more employees attending the directors' meetings as observers, being able to speak but with no voting rights;</li> <li>Having a form of workers' council as part of the structure of the company.</li> </ul> </li> </ul> <p>BOTH HAVE PLUS AND MINUS POINTS - SCORE THE SAME</p>	4	<ul style="list-style-type: none"> <li>Can deliver greater customer satisfaction.</li> <li>Can present opportunities for innovation, turning a profit and being resilient to changes in the economic climate.</li> <li>Mutuals create an environment where staff involvement and ownership improve the quality of work and retention.</li> <li>It is possible that decisions about improvements can be more difficult because of the wider engagement which is mandated with employees.</li> <li>In reality day to day decision making will be by directors. The directors may wish to delegate their powers to Committees consisting of members of the Co-operative. This may facilitate more involvement of members. There is however a risk that key improvements could be slow to get agreement on or in extreme circumstances be blocked.</li> </ul> <p>BOTH HAVE PLUS AND MINUS POINTS - SCORE THE SAME</p>	4

CHILDREN'S TRUST – DELIVERY MODEL – EVALUATION AND SCORING MATRIX					
AREA/REFERENCE	CRITERIA	WHOLLY OWNED COUNCIL LIMITED COMPANY (LATC)	Score	EMPLOYEE OWNED LIMITED COMPANY (I.E. MUTUAL)	Score
<b>03</b> DESIGN PRINCIPLES	The Council must take responsibility for working with social work and related staff through this period. Their engagement and support is essential to any trust being a success. In particular it is important to stress to full Council that we understand that social workers are a scarce resource and that the trust must be well placed to compete by at least matching and preferably bettering current terms and conditions	<ul style="list-style-type: none"> <li>For the purposes of evaluating this, it has been scored based on this being an engagement and communication activity.</li> <li>The terms and conditions evaluation is include at CSF 03 RECRUITMENT AND RETENTION BELOW.</li> </ul> <p>SCORE THE SAME</p>	5	<ul style="list-style-type: none"> <li>For the purposes of evaluating this, it has been scored based on this being an engagement and communication activity.</li> <li>The terms and conditions evaluation is include at CSF 03 RECRUITMENT AND RETENTION BELOW.</li> </ul> <p>SCORE THE SAME</p>	5
<b>04</b> DESIGN PRINCIPLES	The Council must engage and develop the trust model with partners	<ul style="list-style-type: none"> <li>For the purposes of evaluating this, it has been scored based on this being an engagement and communication activity.</li> </ul> <p>SCORE THE SAME</p>	5	<ul style="list-style-type: none"> <li>For the purposes of evaluating this, it has been scored based on this being an engagement and communication activity.</li> </ul> <p>SCORE THE SAME</p>	5
<b>05</b> DESIGN PRINCIPLES	The current financial plan and Council priority must be maintained through to at least 2020	<ul style="list-style-type: none"> <li>This has been scored above in 04 EVALUATION CRITERIA</li> </ul> <p>NOT SCORED AGAIN HERE</p>	0	<ul style="list-style-type: none"> <li>This has been scored above in 04 EVALUATION CRITERIA</li> </ul> <p>NOT SCORED AGAIN HERE</p>	0

CHILDREN'S TRUST – DELIVERY MODEL – EVALUATION AND SCORING MATRIX					
AREA/REFERENCE	CRITERIA	WHOLLY OWNED COUNCIL LIMITED COMPANY (LATC)	Score	EMPLOYEE OWNED LIMITED COMPANY (I.E. MUTUAL)	Score
06 DESIGN PRINCIPLES	The level of accountability of the Trust to the Council will be defined broadly so that all Councillors continue to exercise their corporate parenting responsibilities and senior Trust managers report to the relevant Scrutiny Committee.	<ul style="list-style-type: none"> <li>This “accountability” has been covered above in 02 (operational independence) EVALUATION CRITERIA and 03 (risks) EVALUATION CRITERIA, where the overall picture is that a Mutual is more difficult to control and hold to account.</li> <li>To mitigate this risk BCC will need a robust governance and Service Delivery Contract in place (which in theory should basically be the same for whichever model is adopted).</li> </ul> <p>NOT SCORED AGAIN HERE</p>	0	<ul style="list-style-type: none"> <li>This “accountability” has been covered above in 02 (operational independence) EVALUATION CRITERIA and 03 (risks) EVALUATION CRITERIA, where the overall picture is that a Mutual is more difficult to control and hold to account.</li> <li>To mitigate this risk BCC will need a robust governance and Service Delivery Contract in place (which in theory should basically be the same for whichever model is adopted).</li> </ul> <p>NOT SCORED AGAIN HERE</p>	0
01 FOCUS CHILDREN	<p>ON</p> <p>...allow for a governance structure and governance behaviours that support an uncompromised focus on good outcomes for children and young people</p> <p><i>Root Cause analysis (Deloitte paper): ... a lack of an effective, and overarching, governance structure across the council</i></p>	<ul style="list-style-type: none"> <li>This is one of the main drivers for creation of a Trust with operational independence. Covered on 02 EVALUATION CRITERIA (Operational Independence) above</li> </ul> <p>NOT SCORED AGAIN HERE</p>	0	<ul style="list-style-type: none"> <li>As per WOC</li> </ul> <p>NOT SCORED AGAIN HERE</p>	0

CHILDREN'S TRUST – DELIVERY MODEL – EVALUATION AND SCORING MATRIX					
AREA/REFERENCE	CRITERIA	WHOLLY OWNED COUNCIL LIMITED COMPANY (LATC)	Score	EMPLOYEE OWNED LIMITED COMPANY (I.E. MUTUAL)	Score
01 FOCUS ON CHILDREN	<p>... an organisational design that enables leadership and management autonomy for decision-making and accountability for the service</p> <p><i>Root Cause analysis (Deloitte paper):</i> ... the large remit of leadership roles across children's services and the people directorate</p>	<ul style="list-style-type: none"> <li>This is one of the main drivers for creation of a Trust with operational independence. Covered in 02 EVALUATION CRITERIA (Operational Independence) above but also via the establishment of the new Trust governance and management structure and an appropriate scope and shape for core and support services.</li> </ul> <p>NOT SCORED AGAIN HERE</p>	0	<ul style="list-style-type: none"> <li>As per WOC</li> </ul> <p>NOT SCORED AGAIN HERE</p>	0
02 PARTNERING AND COMMISSIONING	<p>... enable the right services to be commissioned when and where required and at the right cost for children and families</p> <p><i>Root Cause analysis (Deloitte paper):</i> ... commissioning strategy is not clearly understood or embedded in operational activity</p>	<ul style="list-style-type: none"> <li>This is not model dependent.</li> <li>This will be addressed via governance/commissioning and getting the shape and design of the core and support services correct.</li> </ul> <p>NOT MODEL DEPENDENT, SCORES THE SAME</p>	5	<ul style="list-style-type: none"> <li>As per WOC</li> </ul> <p>NOT MODEL DEPENDENT, SCORES THE SAME</p>	5



CHILDREN'S TRUST – DELIVERY MODEL – EVALUATION AND SCORING MATRIX					
AREA/REFERENCE	CRITERIA	WHOLLY OWNED COUNCIL LIMITED COMPANY (LATC)	Score	EMPLOYEE OWNED LIMITED COMPANY (I.E. MUTUAL)	Score
<b>01</b> FOCUS ON CHILDREN <b>02</b> PARTNERING AND COMMISSIONING <b>05</b> ORGANISATIONAL AGILITY	<p>... permit a broad governance structure that establishes collaborative partner and inter-council relationships and provides challenge to the service</p> <p><i>Root Cause analysis (Deloitte paper): inadequate sense of shared vision and clarity and;</i></p> <p><i>... often ineffective or overly complex processes and;</i></p> <p><i>... inadequate integration between council services</i></p>	<ul style="list-style-type: none"> <li>Either Trust model once into shadow mode and transition will innovate/transform and establish its own relationship and working arrangements with partners.</li> </ul> <p>ON BALANCE MUTUAL SLIGHTLY LOWER SCORE THAN WOC</p>	5	<ul style="list-style-type: none"> <li>In an employee mutual there will be a majority of employee representatives. To that extent that may mean that the width of representation may be narrower than for the WOC.</li> </ul> <p>ON BALANCE MUTUAL SLIGHTLY LOWER SCORE THAN WOC</p>	4
<b>03</b> RECRUITMENT AND RETENTION	<p>... allow for dedicated, specialist recruitment resource and a children's services-specific recruitment strategy</p> <p><i>Root Cause analysis (Deloitte paper): ... lack of HR capacity</i></p>	<ul style="list-style-type: none"> <li>This will be addressed via the decisions around the shape and design of support services related to HR (not Trust Model dependent).</li> </ul> <p>NOT MODEL DEPENDENT, SCORES THE SAME</p>	5	<ul style="list-style-type: none"> <li>As per WOC</li> </ul> <p>NOT MODEL DEPENDENT, SCORES THE SAME</p>	5

CHILDREN'S TRUST – DELIVERY MODEL – EVALUATION AND SCORING MATRIX					
AREA/REFERENCE	CRITERIA	WHOLLY OWNED COUNCIL LIMITED COMPANY (LATC)	Score	EMPLOYEE OWNED LIMITED COMPANY (I.E. MUTUAL)	Score
<b>03</b> RECRUITMENT AND RETENTION  NOTE: BEING REVIEWED BY KATE	... allow for the creation and adoption of flexible packages of employment benefits  <i>Root Cause analysis (Deloitte paper):</i> ... an unattractive total reward package, and; ... BCS being unable to change the existing T&Cs	<ul style="list-style-type: none"> <li>Need to establish Material Factor Defence to justify difference in pay as compared to other BCC employees.</li> <li>Note this ADM would be regarded as an 'associated employer' for the purposes of determining 'same employer' test.</li> <li>A bit of a confused picture here about what is possible in a WOC (see footnote)?</li> <li>For the purposes of scoring here, assumed a WOC would not be able to address this barrier.</li> <li>Feedback from the visit to Doncaster was that terms and conditions were not the major barrier to recruitment and retention; creating the Trust, with a new identity, drive and management team made a significant difference in a relatively short timescale.</li> </ul> <p>T&amp;Cs INFLEXIBLE WITH WOC. A MUTUAL IS POTENTIALLY MORE FLEXIBLE, BUT A RISK THIS MAY BE OPEN TO CHALLENGE AND AS SUCH IS SCORED LOW AS WELL</p>	3	<ul style="list-style-type: none"> <li>Provided BCC did not have 'controlling' interest (less than 50%) may be able to lawfully change T&amp;Cs of employees in this company as compared to BCC employees</li> </ul> <p>T&amp;Cs INFLEXIBLE WITH WOC. A MUTUAL IS POTENTIALLY MORE FLEXIBLE, BUT A RISK THIS MAY BE OPEN TO CHALLENGE AND AS SUCH IS SCORED LOW AS WELL</p>	3
<b>03</b> RECRUITMENT AND RETENTION	... cater for a renewed focus on children's services  <i>Root Cause analysis (Deloitte paper):</i> ... cater for a 'clean break' from the past, representing a fresh start for Children's Services  ... Birmingham's enduring reputation	<ul style="list-style-type: none"> <li>This is a key element of the case for change and the rationale for moving to a voluntary Children's Trust Model (so applies equally to both models).</li> </ul> <p>EQUAL SCORE</p>	5	<ul style="list-style-type: none"> <li>As per WOC</li> </ul> <p>EQUAL SCORE</p>	5

CHILDREN'S TRUST – DELIVERY MODEL – EVALUATION AND SCORING MATRIX					
AREA/REFERENCE	CRITERIA	WHOLLY OWNED COUNCIL LIMITED COMPANY (LATC)	Score	EMPLOYEE OWNED LIMITED COMPANY (I.E. MUTUAL)	Score
04 WORKFORCE CAPABILITY	<p>... allow for a children's services-specific workforce strategy that incorporates a clear learning and development programme with career progression and a teaching and learning culture at its core</p> <p><i>Root Cause analysis (Deloitte paper):</i> ... managers not proactively spending time on staff development, and; ... training being inconsistently embedded in practice</p>	<ul style="list-style-type: none"> <li>This is not model-related (for this comparison) but is the case for change and the service improvement plan. And the ability of the Trust to "step up a gear" once up and running.</li> </ul> <p>APPLIES TO BOTH, SO SAME SCORE</p>	5	<ul style="list-style-type: none"> <li>As per WOC</li> </ul> <p>APPLIES TO BOTH, SO SAME SCORE</p>	5
05 ORGANISATIONAL AGILITY	<p>... have the authority and ability to flex in response to changes in demand</p> <p><i>Root Cause analysis (Deloitte paper):</i> ... staff deployment being inflexible</p>	<ul style="list-style-type: none"> <li>This is one the main drivers for creation of a Trust with operational independence. Covered on 02 EVALUATION CRITERIA (Operational Independence) above.</li> </ul> <p>NOT SCORED AGAIN HERE</p>	0	<ul style="list-style-type: none"> <li>As per WOC</li> </ul> <p>NOT SCORED AGAIN HERE</p>	0

CHILDREN'S TRUST – DELIVERY MODEL – EVALUATION AND SCORING MATRIX					
AREA/REFERENCE	CRITERIA	WHOLLY OWNED COUNCIL LIMITED COMPANY (LATC)	Score	EMPLOYEE OWNED LIMITED COMPANY (I.E. MUTUAL)	Score
06 TECHNOLOGY, DIGITAL AND ANALYTIC	<p>... allow operational staff to access and manipulate real-time data about the service, independent of the wider council</p> <p><i>Root Cause analysis (Deloitte paper): corporate IT does not have an exclusive focus on children's services and; ... insufficient time spent mining children's services related data</i></p>	<ul style="list-style-type: none"> <li>This is about the case for change and the operational independence. It also relates to the shape and scope of support services (and whether they are in the Trust or not) and how flexible the Data and ICT arrangements are. The workstreams within the transition programme will address these barriers as part of service improvement (specifically the Governance/commissioning and Data/ICT workstreams).</li> </ul> <p>APPLIES EQUALLY TO BOTH MODELS, SO SAME SCORE</p>	5	<ul style="list-style-type: none"> <li>As per WOC</li> </ul> <p>APPLIES EQUALLY TO BOTH MODELS, SO SAME SCORE</p>	5
06 TECHNOLOGY, DIGITAL AND ANALYTIC	<p>... procure technology, digital and analytics that support innovation and service improvement for children's services without compromise</p> <p><i>Root Cause analysis (Deloitte paper): ... a cumbersome procurement process that delays improvement and innovation</i></p>	<ul style="list-style-type: none"> <li>This is about the case for change and the operational independence. It also relates to the shape and scope of support services (and whether they are in the Trust or not) and how flexible the Data and ICT arrangements are. The workstreams within the transition programme will address these barriers as part of service improvement (specifically the Governance/commissioning and Data/ICT workstreams).</li> </ul> <p>APPLIES EQUALLY TO BOTH MODELS, SO SAME SCORE</p>	5	<ul style="list-style-type: none"> <li>As per WOC</li> </ul> <p>APPLIES EQUALLY TO BOTH MODELS, SO SAME SCORE</p>	5
TOTAL SCORE			75		68
%SCORE (excluding those areas not scored, max score 85)			94%		85%

### 4.3 Conclusions and Preferred Model

It is clear in evaluating these models that a number of barriers are not delivery model (i.e. WOC or Mutual) dependent. The main factor for many barriers are the shape, design and scope of core and support services and how these service are provided to (and within) the Trust in the future.

Also, the VAT risk needs to be mitigated for either model in terms of how the regulatory, governance and commissioning framework is established.

Based on the Evaluation Score (94% vs 85%) alone the "best Model" is the WOC.

This is validated by taking a closer look at the low scores (3 or less):

<p>For a <b>WOC</b> the low scores are:</p> <ul style="list-style-type: none"> <li>operational Independence (because of Teckal, the Trust needs to be run as an extension of the Council, the mitigation is the governance and commissioning framework and the relative freedom of an outcome based contract)</li> <li>removal of barriers around recruitment and retention (T&amp;C restrictions still apply to a WOC and there is a risk that this applies to a mutual also).</li> </ul>	<p>For a <b>Mutual</b> the low scores are:</p> <ul style="list-style-type: none"> <li>operational independence (potentially too independent, making (for example) "step in" difficult in the event of any poor performance)</li> <li>removal of barriers around recruitment and retention (T&amp;Cs and risk that this applies to a mutual also).</li> <li>time, cost and complexity to implement. There are no children's social care mutuals; this would be the first one and it would take longer and be more complex to set up (there any many types of mutual model and each would need its own appraisal)</li> <li>the initial 3 year contract term restriction and in addition the risk of open procurement at the end of the term (for which competition can be reserved just to mutuals) and which could be happening in the same timeframe as a future Ofsted inspection</li> <li>potential disruption to service improvement resulting from transition, one of our key design principles. A mutual would take more resources and time to set up; risk this will be a distraction; risk that decision-making could be slower within a mutual and key improvement changes could be hindered or blocked.</li> </ul>
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The WOC operational independence can also be strongly mitigated by ensuring barriers are removed by shaping the core and support services properly and the governance/commissioning framework.

The risks for a mutual have limited mitigations and are therefore significant. Not being able to move at pace and potential disruption to service improvement present major problems with this option. Also, the initial 3 year contract term and open procurement in the near future are real risks.

Finally, a WOC can become a mutual, if the Council so determines, but the other way round is difficult. This would indicate that a WOC would be the safe, proven and quick option and avoids all the significant risks of a mutual.

#### **4.4 Recommendation 1**

**On balance the recommended option is for the Trust to be set up as a wholly owned company limited by guarantee.**

This is the same set up as 'Achieving for Children'.

#### **4.5 The Case for a Community Interest Company (CIC)**

The next consideration is whether the WOC should be a CIC and there is a strong case here to make the Trust company a CIC early rather than wait until a later date.

The features of a WOC are (repeated from above):

- can reassure public, as the community purpose is regulated.
- asset lock in place. If CIC is wound up under Insolvency Act 1986 any residual assets, after satisfying creditors, will be transferred to another asset-locked body (charity or another CIC).
- has transparency of operation.
- TUPE would apply if staff transfer employment.
- company format can be tailored to a specific organisation structure, governance or membership because it is not a company form in its own right.
- quick, easy and inexpensive to set up (once company has already been set up).
- provided BCC did not have 'controlling' interest (less than 50%) **may** be able to lawfully change T&Cs of employees in this company as compared to BCC employees.
- would need to satisfy Art 157 – 'that BCC and this Company were not a 'Single Source' for the purposes of pay and reward'.

The case for making the WOC a CIC is that it counters some of the issues around accountability, control and operational independence. It establishes the clear intent from the very outset about the purpose of the Trust and establishes an asset lock.

That is:

- to protect its assets for community purposes.
- surpluses are re-invested in the company or in the local community (cannot be returned to the Council).
- it has an asset lock, meaning that its assets can only be used for the good of the community; they may only be sold to another CIC or, if sold at full market value, the proceeds from the sale must be used for community purposes.
- a Community Interest Company is obliged to pursue the community interest and has to report annually on how it does this to the CIC Regulator. A company satisfies the community interest test if a reasonable person might consider its activities are being carried out for the benefit of the community.

It should not take too much longer to set up a CIC as a WOC than just a WOC. It does depend on how different what is proposed is from the CIC Regulator's Model Documents (of which there are several). There is some detail to validate here as part of setting up the governance and commissioning framework, because the asset lock will impact on how the payment mechanism will work and also exit alternatives are more limited.

#### **4.6 Recommendation 2**

**To establish the Trust (wholly owned company) as a community interest company.**

This is the same set up as 'Achieving for Children'.

## APPENDIX A – WOC vs MUTUAL CONSIDERATIONS

ITEM NO	FEATURE/ISSUE	WHOLLY OWNED COMPANY	MUTUAL
1	What is the basic type of organisation	This is a company limited by shares or by guarantee.	This is a co-operative society <sup>3</sup> .
2	What are the key features	<p>A company will be controlled by its members if it is limited by guarantee, and by shareholders if it is limited by shares.</p> <ul style="list-style-type: none"> <li>○ <b>Companies limited by shares</b> have a share capital", which is a nominal figure used to represent the total net assets of the company. Shares are issued to shareholders, who become the owners of the company. The shareholders' potential liability is limited to the amount of their investment.</li> <li>○ <b>Companies limited by guarantee</b> do not have a share capital and the members (equivalent to the shareholders in a company limited by shares) give a nominal guarantee to cover the company's liability, normally limited to £1. By not having a share capital, a company limited by guarantee does not have the inbuilt for-profit framework which companies limited by shares do allowing investors in the company to receive a return on their investment.</li> </ul> <p>A wholly owned company (WOC) in procurement terms is called a Teckal company. This has to satisfy the tests set out in Regulation 12 Public Contracts Regulations 2015.</p> <ul style="list-style-type: none"> <li>• The first is the <b>control test</b>. The Council has to exercise over the WOC a control which is similar to that which it exercises over its own departments. This means a decisive influence over both the strategic objectives and significant decisions</li> </ul>	<p>A society for carrying on any industry, business or trade may be registered by the Financial Conduct Authority (FCA) if:-</p> <ul style="list-style-type: none"> <li>○ The FCA is satisfied that the conditions for a co-operative society are fulfilled;</li> <li>○ The society has at least 3 members;</li> <li>○ The society's rules contain provisions regarding matters listed in Section 14 Co-operative and Community Benefit Societies Act 2014<sup>4</sup>.</li> <li>○ The registered office of the society is in Great Britain or the Channel Islands.</li> </ul> <p>A co-operative society is not a society that carries on or intends to carry on business with the object of making profits mainly for the payment of interest, dividends or bonuses on money invested or deposited with or lent to the society or any other person.</p> <p>The FCA considers a society to be a bona fide co-operative where it is an "autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise."</p> <p>The FCA guidance on what constitutes a bona fide co-operative is:-</p> <ul style="list-style-type: none"> <li>• There should be a common, economic, social or</li> </ul>

<sup>3</sup> This is different from a Community Benefit Society which is another form of organisation regulated by the FCA under the Co-operative and Community Benefit Societies Act 2014.

<sup>4</sup> A registered society's rules must contain provision about the following matters—

1. Name 2. Objects 3. Registered office 4. Membership 5. Meetings, voting, changes to rules 6. Committees and officers 7. Maximum shareholding 8. Borrowing powers 9. Shares 10. Audit 11. Withdrawal 12. Application of profits 13. Seal 14. Investment of society's funds



ITEM NO	FEATURE/ISSUE	WHOLLY OWNED COMPANY	MUTUAL
		<p>of the controlled legal person.</p> <ul style="list-style-type: none"> <li>• The second is the <b>market test</b>. More than 80% of the activities of the WOC have to be carried out in the performance of tasks entrusted to it by the Council.</li> <li>• The third is the <b>private involvement test</b>. There can be no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by applicable national legislative provisions which are in conformity with the EU Treaties.</li> </ul>	<p>cultural need or interest among the members of the co-operative;</p> <ul style="list-style-type: none"> <li>• The business should be run for the mutual benefit of the members so that the benefit that the members obtain will stem principally from their participation in the business. Participation may vary according to the nature of the business and may consist of:- <ul style="list-style-type: none"> <li>○ Buying from or selling to the society;</li> <li>○ Using the services or amenities provided to it; or</li> <li>○ Supplying services to carry out its business.</li> </ul> </li> <li>• Control of the co-operative lies with all the members. Control should be equal and not based on the level of investment. The principle of one member, one vote should apply.</li> <li>• Officers of the co-operative should be elected by members who may also vote to remove them.</li> <li>• Interest on share and loan capital must not be more than a rate necessary to obtain and retain enough capital to run the business.</li> <li>• Distribution of profits to members must be done in line with the rules of the society. Each member should receive an amount that reflects that they have traded with the society or have taken part in its business. Rather than distribute profits to members, the society could benefit members through cheaper prices or improved amenities.</li> <li>• Membership should be open but restrictions that do not offend co-operative principles are permitted.</li> </ul>
3	Has the Council set up this type of model previously?	Yes – Acivico Limited is a WOC.	No
4	Is it a separate legal entity to the Council	Yes	Yes
5	Who is the regulator	The Registrar of Companies at Companies House	FCA

ITEM NO	FEATURE/ISSUE	WHOLLY OWNED COMPANY	MUTUAL
6	Who is responsible for the management <sup>5</sup> of the day to day business of the model	This will be the directors whose position will be governed by the Companies Act 2006 and the Articles of Association of the company. Companies have a two-tier structure consisting of a small group of individuals responsible for the day-to-day running of the organisation (the board of directors), which is accountable to the members (in a company limited by guarantee) or the shareholders (in a company limited by shares), who may or may not be the same people as the board. The members or shareholders have a number of fundamental powers: in particular, the power to dismiss the board and to change the constitution.	This will be the directors whose position will be governed by the Co-operative and Community Benefit Societies Act 2014 and the Rules of the co-operative society.
6	What is the legislation that governs this model.	Companies Act 2006	The Co-operative and Community Benefit Societies Act 2014.
7	Can this organisation become an admitted body? <sup>6</sup>	Yes	Yes
8	What are the constitutional documents which will govern the operation	These will comprise the Articles of Association which will be registered at Companies House.	These will comprise the Rules of the Co-operative Society which will be registered with the FCA.
9	Can the model be changed to a Community <sup>7</sup> Interest Company?	Yes	Yes

<sup>5</sup> This issue of representation on management boards is sometimes expressed as follows:-

**Oligarchy.** The individuals who make up the board are the same people as the members. This is a straightforward structure for new and relatively small organisations.

**Representative oligarchy.** This is used by organisations that want to have members who are organisations instead of individuals (for example, the members may include the local authority, which has the right to appoint an individual to serve on the board).

**Membership.** Here, the membership group is wider than the individuals on the board and elects the board. This structure is often used by co-operatives

<sup>6</sup> Where the model involves a service provision change under TUPE and therefore affected employees transfer to the employment of the new organisation (NewCo) the Council will ordinarily require NewCo to enter into a pension admission agreement with Wolverhampton City Council. NewCo will be eligible to be an admission body if it comes within one of the categories set out in Part 3 of Schedule 2 to the Local Government Pension Scheme Regulations 2013 SI 2013 No 2356 (the Pension Regulations 2013). The category in Part 3 that is most frequently used by Birmingham is Paragraph (d) a body that is providing or will provide a service or assets in connection with the exercise of a function of a Scheme employer as a result of (i) the transfer of the service or assets by means of a contract or other arrangement. The Council will invariably select this option having regard to the requirement of the The Best Value Authorities Staff Transfers (Pensions) Direction 2007. DCLG is consulting on draft amendments to the 2013 Regulations which if enacted will require employees who are compulsorily transferred from local authorities and other employers listed in the Pension Regulations 2013 are to be given continued access to the LGPS.

ITEM NO	FEATURE/ISSUE	WHOLLY OWNED COMPANY	MUTUAL
10	What are the example models of the constitutions of such models.	These can be found in the Companies ( Model Articles) Regulations 2008 SI 3229:- <ul style="list-style-type: none"> <li>Model articles for companies limited by shares – Schedule 1</li> <li>Model articles for companies limited by guarantee – Schedule 2</li> </ul> There are also models published on the Companies House website.	Co-operatives UK have published a number of models including:- <ul style="list-style-type: none"> <li>Community Finance Model; and</li> <li>Worker Co-operative Model<sup>8</sup>.</li> </ul> as well as;- <ul style="list-style-type: none"> <li>Community Interest Company Limited by Shares;</li> <li>Community Interest Company Limited by Guarantee.</li> </ul> There are also on the FCA website a list of sponsoring organisations whose rules have been accepted as models rules by the FCA which comply with the 2014 Act.
11	Can the Council enter into an agreement with this organisation without	Yes at it falls within what was formerly termed the Teckal exemption <sup>9</sup> in Regulation 12 Public Contracts Regulations 2015.	The Council may limit competition to mutuals where such mutuals falls the categories in within Regulation 77 Public Contracts Regulations 2015 <sup>10</sup> .

<sup>7</sup> Community Interest Company - A Community Interest Company is a company which is limited by shares or guarantee. Charitable companies cannot be Community Interest Companies. A key feature of a Community Interest Company is that it contains a lock on its assets. This precludes its profits being distributed to members or shareholders other than in certain circumstances. A Community Interest Company is obliged to pursue the community interest and has to report annually on how it does this to the CIC Regulator. A company satisfies the community interest test if a reasonable person might consider its activities are being carried on for the benefit of the community. A local authority may wish to establish a CIC in order to ring-fence activities in a distinct corporate vehicle. They may be suitable for the transfer of publicly held assets to community groups.

<sup>8</sup> This refers to Co-operative Principles defined in the International Co-operative Alliance Statement of Co-operative Identity.

**Voluntary and open membership.** Co-operatives are voluntary organisations, open to all people able to use its services and willing to accept the responsibilities of membership without gender, social, racial, political or religious discrimination.

**Democratic member control.** Co-operatives are democratic organisations controlled by their members, who actively participate in setting their policies and making decisions. Men and women serving as elected representatives are accountable to the membership. In primary co-operatives members have equal voting rights (one member, one vote) and co-operatives at other levels are also organised in a democratic manner.

**Members' economic participation.** Members contribute equitably to, and democratically control, the capital of their co-operative. At least part of that capital is usually the common property of the co-operative. Members usually receive limited compensation, if any, on capital subscribed as a condition of membership. Members allocate surpluses for any or all of the following purposes: developing their co-operative, possibly by setting up reserves, part of which at least would be indivisible; benefiting members in proportion to their transactions with the co-operative; and supporting other activities approved by the membership.

**Autonomy and independence.** Co-operatives are autonomous, self-help organizations controlled by their members. If they enter into agreements with other organisations, including governments, or raise capital from external sources, they do so on terms that ensure democratic control by their members and maintain their co-operative autonomy.

**Education, training and information.** Co-operatives provide education and training for members, elected representatives, managers and employees so they can contribute effectively to the development of their co-operative. They inform the general public - particularly young people and opinion leaders - about the nature and benefits of co-operation.

**Co-operation among co-operatives.** Co-operatives serve their members most effectively and strengthen the co-operative movement by working together through local, national, regional and international structures.

**Concern for community.** While focusing on member needs, cooperatives work for the sustainable development of communities through policies approved by their members.

<sup>9</sup> This principle arises from the European Court of Justice case of Teckal Srl v Commune di Viano Case C-107/98 [1999] ECR I-8121.

<sup>10</sup> 77.—(1) Contracting authorities may reserve to qualifying organisations the right to participate in procedures for the award of reservable public contracts.

ITEM NO	FEATURE/ISSUE	WHOLLY OWNED COMPANY	MUTUAL
	competition?		This will need to be validated as part of the agreement of the scope of services to be provided by the Trust.
12	Can a WOC become a Mutual and vice versa?	<p>Yes. There is a process to convert a company registered under the Companies Act 2006 into a registered society (which includes a co-operative society) under Section 115 Co-operative and Community Benefits Societies Act 2014. This will start with the passing of a special resolution by the company.</p> <p>However a procurement issue may well arise. The Council will have entered into a Service Delivery Contract with a Teckal company which is not subject to procurement under the Public Contracts Regulations 2015. If the Mutual has therefore not competed for the Service Delivery Contract in accordance with Regulation 77 PCR 2015, the Council will have made an illegal direct award under PCR 2015 (i.e. awarded a contract without competition and therefore be at risk of infringement action under the remedies regime in Part 3).</p>	Yes. It is more complex than the conversion of a WOC into a mutual. This is governed by Sections 112 to 114 Co-operative and Community Benefits Societies Act 2014. This will start with the passing of a special resolution of the members of the company.
13	How can staff be more involved in a WOC or BCC in a Mutual?	<p>One option is to have representation of employees on the Board of Directors. The UK government may be promoting legislation for this to happen.</p> <p>In Norway and in Sweden with a single tier board structure -</p>	<p>How involved can BCC be in a Mutual. Although noting it will be an outcome based contract (so BCC should not be involved in the day-2-day running)</p> <p>In addition to standard Employee Members, there could be a</p>

(2) For that purpose, a contract is a reservable public contract only if it is exclusively for one or more of the services which are covered by CPV codes 75121000-0, 75122000-7, 75123000-4, 79622000-0, 79624000-4, 79625000-1, 80110000-8, 80300000-7, 80420000-4, 80430000-7, 80511000-9, 80520000-5, 80590000-6, from 85000000-9 to 85323000-9, 92500000-6, 92600000-7, 98133000-4, and 98133110-8.

(3) In this regulation, "qualifying organisation" means an organisation which fulfils all of the following conditions:—

- (a) its objective is the pursuit of a public service mission linked to the delivery of services referred to in paragraph (2);
- (b) profits are reinvested with a view to achieving the organisation's objective, and any distribution of profits is based on participatory considerations;
- (c) the structures of management or ownership of the organisation are (or will be, if and when it performs the contract) —
  - (i) based on employee ownership or participatory principles, or
  - (ii) require the active participation of employees, users or stakeholders; and
- (d) the organisation has not been awarded, pursuant to this regulation, a contract for the services concerned by the contracting authority concerned within the past 3 years.

(4) The maximum duration of a contract awarded under this regulation shall not be longer than 3 years.

(5) Where a contracting authority exercises the power of reservation conferred by paragraph (1), the call for competition shall make reference to Article 77 of the Public Contracts Directive.

ITEM NO	FEATURE/ISSUE	WHOLLY OWNED COMPANY	MUTUAL
		workers take their place directly on the Board of Directors. But in other countries (Austria and Germany), there is a Supervisory Board, which is a grouping of people who meet regularly to approve the decisions of the Boards of Directors upon which worker representatives sit. Others have flexibility and choice within the system – for instance, it is possible for companies in France to opt for either of the above two systems of representation.	category of membership for stakeholders which provides for membership criteria which BCC officers may satisfy. The Co-operative Members as a whole would appoint X directors from Employee Members, and Y director(s) from the Stakeholder Members. There would be a Performance Framework/Contract Management tools in the Service Delivery Contract.

## APPENDIX B – ANALYSIS IN RELATION TO ESTABLISHMENT OF COMMUNITY INTEREST COMPANIES

FEATURE	DETAILS
<b>Statutory basis</b>	Community Interest Companies were created by the Companies (Audit, Investigations and Community Enterprise) Act 2004 (" <b>2004 Act</b> "). They are also subject to the Companies Act 2006.
<b>Community benefit</b>	They are formed primarily for social enterprises that are being carried out for the benefit of a community. CICs may generate a profit/surplus but the purpose of CIC is one of community benefit rather to maximise a profit/surplus.
<b>Community interest test</b>	<p>A CIC must satisfy the community interest test at formation and continue to do so for as long as it remains a CIC. A CIC will satisfy the community interest test if it can show that a reasonable person might consider that its activities are being carried on for the benefit of the community. A company will not satisfy the test if its activities only benefit members of a particular body or its activities are political. Not all of the activities carried on by a CIC need to have a direct benefit to the community to which it serves but everything a CIC does should somehow contribute to benefiting the community it is set up to serve.</p> <p>Achieving for Children is a CIC.</p>
<b>Reporting</b>	<p>A CIC has to deliver to the Registrar of Companies an annual community interest company report with its annual accounts. This report records:-</p> <ul style="list-style-type: none"> <li>• a fair and accurate description of the company's activities that have benefited the community;</li> <li>• details of the consultations with persons affected by the company's activities (if any);</li> <li>• details of the directors' remuneration (which has to be reasonable) (unless full details are provided in the annual accounts of the CIC);</li> <li>• the value (or a fair estimate of the value) of transfers of assets made at less than full consideration;</li> <li>• details of dividends declared on shares and compliance with the capping rules set by the Regulations; and</li> <li>• information on any performance-related interest paid on loans or debentures.</li> </ul>
<b>Limited liability</b>	A CIC must be a limited company whether by shares or by guarantee. It can therefore be a wholly owned company of the Council.

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<b>Incorporation</b>	<p>CICs are formed under the Companies Act 2006 (CA 2006) like any other limited company. The Regulator of CICs has produced various forms of model memoranda and articles of association for CICs. There will therefore be time necessary to determine the most suitable form of model. There is not an obligation to use a model form but the use of a non model form may mean that incorporation will take longer.</p> <p>Form CIC36 contains the community interest statement which will set out:-</p> <ul style="list-style-type: none"> <li>• a declaration that the company will not be a political party, a political campaigning organisation or a subsidiary of either a political party or a political campaigning organisation (that is organisations that are excluded from being CICs);</li> <li>• a declaration that the company will pursue activities for the benefit of the community;</li> <li>• a description of the community or section of the community that the CIC intends to serve;</li> <li>• a description of the company's activities and how they will benefit the community; and</li> <li>• a description of how any surpluses will be used.</li> </ul> <p>If therefore the Council wishes to develop a model which provided employees with additional rights (e.g. board membership) the process may take longer.</p>
<b>Asset lock</b>	<p>The Community Interest Company Regulations 2005 (as amended) specify that the CIC cannot transfer its assets (including any profits or other surpluses generated by its activities) for less than market value unless:-</p> <ul style="list-style-type: none"> <li>• transferring them to another CIC or charity (that is either specified in its articles or consented to by the Regulator); or</li> <li>• if the transfer is for the benefit of the community it was set up to serve (known as the asset lock).</li> </ul> <p>This asset lock is set out in the articles of association of the CIC. CICs must consider the asset-lock when entering into commercial relationships and when deciding remuneration for its employees and directors. The asset lock protects the assets of the CIC and ensures that the assets and profits of the CIC will be devoted to the benefit of the community and not for rewarding shareholders and directors.</p> <p>The Council would need to ensure that its payment mechanism in its service delivery agreement with the Children's Trust does not infringe this e.g. by requiring the return of any surplus payment. It is also likely to impact upon any profit sharing mechanism [e.g. a mechanism whereby the benefits of an underspend on a budget are shared by a pre defined formula to incentivise financial efficiency].</p>
<b>Regulation</b>	<p>CICs are regulated by the Regulator who is appointed under the 2004 Act and ensures that the CIC satisfies the community interest test and pursues its community interest objects. The Regulator has powers of intervention which include removing or appointing directors, transferring the CIC's property or shares and taking action in the name of the CIC.</p>

FEATURE	DETAILS
<b>Cessation</b>	<p>A CIC may only cease to be a CIC by dissolution, conversion to a charity or an registered society (an asset locked form of community benefit society). If a company has become a CIC it cannot become an ordinary non charitable company.</p> <p>Therefore there is less flexibility as to what a CIC may become than a limited wholly owned company.</p> <p>On dissolution the CIC should not hold any assets as any assets held by the dissolved CIC would go to the Crown.</p>