

BIRMINGHAM CITY COUNCIL

**BIRMINGHAM CHILDREN'S TRUST
TRANSFER APPROACH OPTIONS APPRAISAL**

4 July 2017

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Review and revision history

| Version | Date | Revisions | Author |
|---------|-------------|---|---|
| 0.1 | 11Apr2017 | First Draft – based on Legal paper (Appendix A) | Rob Barker (Legal input) John Sidebottom |
| 0.2 | 12Apr2017 | Includes first set of review comments from Seamus Gaynor | John Sidebottom |
| 0.3 | 25April2017 | Input provided from Design Authority (19April2017) | John Sidebottom |
| 0.4 | 2May2017 | Approved at DA on 2 May 2017 and copy provided to the unions on the same day (to be discussed at next union meeting on 16 May). | DA approved (no changes) |
| 1.0 | 4 July | Elevate to version 1.0 for inclusion in the July Cabinet report | No changes |
| | | | |
| | | | |

1 Introduction

This paper is the Options Appraisal for the Birmingham Children's Trust staff transfer approach, based on the January 2017 Cabinet approving the creation of the Trust as a Wholly Owned Company (WOC) of the Council and as a Community Interest Company (CIC).

2 Background

The two staff transfer approaches being considered are:

1. Staff Secondment
2. TUPE.

As a reminder (based on the January Cabinet Report) the case for making the WOC a CIC is that it counters some of the issues around accountability, control and operational independence than would otherwise be the case.

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.

Making the WOC a CIC enforces independence from BCC at the outset and at the same time effectively closes down routes to privatisation. This is an important point in the context of an appraisal which includes TUPE, since common concerns about TUPE include exit/termination arrangements and any future concerns about transfers onto another supplier/company.

3 Evaluation Criteria

For the Cabinet Reports (September 2016 and January 2017), 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?

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”¹, 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.”

¹ Deloitte report: Birmingham children's services model, Case for change

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".

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...') |
|---|---|
| 01 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> |
| 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>... permit a broad governance structure that establishes collaborative partner and inter-council relationships and provides challenge to the service</p> |
| 03 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> |
| 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> |
| 05 Organisational agility | <p>... have the authority and ability to flex in response to changes in demand</p> |
| 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>... 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

Based on the above, all these criteria will be applied to the transfer models:

- Evaluation Criteria (4 criteria)
- Design Principles (6 principles)
- The Critical Success Factors² (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
- This evaluation should be read in conjunction with Appendix A, which outlines the legal considerations for each of the transfer approaches.

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.

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

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2. There may need to be a distinction between day to day decision making, and the more strategic decisions. Whatever transfer approach 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 (to a degree) upon independence.

| CHILDREN'S TRUST – STAFF TRANSFER APPROACH – EVALUATION AND SCORING MATRIX | | | | | |
|--|---|--|-------|---|-------|
| AREA/REFERENCE | CRITERIA | SECONDMENT | Score | TUPE | Score |
| 01 EVALUATION CRITERIA | Can the model accommodate the scope? | <ul style="list-style-type: none"> Both approaches can support the scope for Core and Support Services. <p>BOTH THE SAME SCORE</p> | 5 | <ul style="list-style-type: none"> Both approaches can support the scope for Core and Support Services. <p>BOTH THE SAME SCORE</p> | 5 |
| 02 EVALUATION CRITERIA | Does the model provide the conditions for operational independence? | <ul style="list-style-type: none"> Creates a two-tier workforce with some staff (including management) being employed by the Trust and others by BCC wef April 2018 This could create confusion and reduces the effectiveness of the Trust to manage staff to achieve the necessary outcomes and improve services BCC would constantly need to be consulted and involved, as an example, in such things as recruitment, pay & reward, performance management, returning poorly performing staff to BCC and staff leaving (for whatever reason) The main purpose of the Trust (case for change) is to move the services and related staff away from BCC in order that performance barriers could be removed and services would improve under a new structure (secondment would jeopardise these main reasons for change) <p>SECONDMENT UNDERMINES THE "CASE FOR CHANGE" AND DOES NOT PROVIDE OPERATIONAL INDEPENDENCE</p> | 0 | <ul style="list-style-type: none"> This approach involves all staff transferred being employees of the Trust As such, they are accountable to the new Board and Management Team Staff are fully performance managed and rewarded within the Trust and the Trust can make its own decisions about its own workforce This is truly independent option when compared with secondment and supports the original "case for change" <p>TUPE FULLY SUPPORTS FOR "CASE FOR CHANGE" AND OPERATIONAL INDEPENDENCE</p> | 5 |

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| CHILDREN'S TRUST – STAFF TRANSFER APPROACH – EVALUATION AND SCORING MATRIX | | | | | |
|--|---|--|-------|--|-------|
| AREA/REFERENCE | CRITERIA | SECONDMENT | Score | TUPE | Score |
| 03 EVALUATION CRITERIA | Are there risks associated with adopting this model which make it undeliverable? | <ul style="list-style-type: none"> As at 02 EVALUATION CRITERIA above performance management and operational independence are much more difficult under this approach and given that it undermines the “case for change” to move services away from BCC control and direct influence makes this approach undeliverable Combined with a clear steer from DfE that secondment would be an unacceptable approach for BCC in creating the Trust. <p>SECONDMENT WOULD MAKE THE VOLUNTARY TRUST UNDELIVERABLE</p> | 0 | <ul style="list-style-type: none"> The Trust would be in charge of its own destiny with this approach, subject to compliance with and delivery of the outcomes in the contract <p>THIS IS A DELIVERABLE APPROACH AND TRIED AND TESTED ELSEWHERE WITH OTHER TRUSTS</p> | 5 |
| 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"> No financial implications as such, but makes the whole financial landscape more complicated in terms of who pays for what and who is liable for what? Instead of the Trust having a whole budget to manage its own affairs it would have to be split and managed differently according to which staff transfer, by which method and how support services are managed There are VAT implications associated with support services adopting this approach (see Appendix A) <p>THE VAT OPTIONS MAKE THIS AN UNVAILABLE OPTION</p> | 0 | <ul style="list-style-type: none"> Under TUPE the approach needs to safeguard existing T&Cs and Pension rights. This is an approach BCC are familiar with and have undertaken before <p>STRONGER OPTION, BUT STILL COMPLEXITIES TO MANAGE</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"> A mixed (2-tier) model is less clear here and it would be a distraction to expend management time and effort on this rather than improving services It would also be a distraction to second staff now and TUPE at a later date – an unwelcome step when in a few years there will be another OFSTED inspection <p>A DISTRACTION TO MANAGE THIS MODEL AND POSSIBLY CHANGE TO TUPE IN THE FUTURE</p> | 3 | <ul style="list-style-type: none"> The preferred option here is to have a single purpose vehicle, with a clear identity which all staff can relate to, and be a party to improving The Trust “case for change” is clear in this regard and TUPE from day 1 provides a clearer identity and approach <p>STRONGER STABLE OPTION FROM DAY 1</p> | 5 |

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| CHILDREN'S TRUST – STAFF TRANSFER APPROACH – EVALUATION AND SCORING MATRIX | | | | | |
|--|--|--|-------|--|-------|
| AREA/REFERENCE | CRITERIA | SECONDMENT | Score | TUPE | 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 | A mixed employer and 2-tier model is not the best organisational form for a Trust which was created to be a single purpose vehicle away from BCC to focus on improving children's social care and related services LOWER SCORE FOR SECONDMENT AND THE MIXED MODEL | 3 | A mixed employer and 2-tier model is not the best organisational form for a Trust which was created to be a single purpose vehicle away from BCC to focus on improving children's social care and related services A SINGLE, TUPE MODEL IS THE STRONGER OPTION HERE | 5 |
| 03 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 | Deliverable under both transfer options, T&C changes would require full consultation and involvement of BCC since the Trust is a WOC of BCC SAME SCORE | 5 | Deliverable under both transfer options, T&C changes would require full consultation and involvement of BCC since the Trust is a WOC of BCC SAME SCORE | 5 |
| 04 DESIGN PRINCIPLES | The Council must engage and develop the trust model with partners | Deliverable under both transfer options SAME SCORE | 5 | Deliverable under both transfer options SAME SCORE | 5 |
| 05 DESIGN PRINCIPLES | The current financial plan and Council priority must be maintained through to at least 2020 | Deliverable under both transfer options SAME SCORE | 5 | Deliverable under both transfer options SAME SCORE | 5 |

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| CHILDREN'S TRUST – STAFF TRANSFER APPROACH – EVALUATION AND SCORING MATRIX | | | | | |
|--|---|---|-------|--|-------|
| AREA/REFERENCE | CRITERIA | SECONDMENT | Score | TUPE | 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. | Deliverable under both transfer options SAME SCORE | 5 | Deliverable under both transfer options SAME SCORE | 5 |
| 01 FOCUS CHILDREN | ON ...allow for a governance structure and governance behaviours that support an uncompromised focus on good outcomes for children and young people <i>Root Cause analysis (Deloitte paper): ... a lack of an effective, and overarching, governance structure across the council</i> | <ul style="list-style-type: none"> Governance structure is achievable under both transfer options, but secondment (due to the Operational issues identified above at 02 EVALUATION CRITERIA) will make the "single focus" of the Trust more difficult to deliver MORE DIFFICULT | 3 | <ul style="list-style-type: none"> Governance structure is achievable under both transfer options, but secondment (due to the Operational issues identified above at 02 EVALUATION CRITERIA) will make the "single focus" of the Trust more difficult to deliver EASIER TO ESTABLISH AND DELIVER | 5 |

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| CHILDREN'S TRUST – STAFF TRANSFER APPROACH – EVALUATION AND SCORING MATRIX | | | | | |
|--|--|---|-------|---|-------|
| AREA/REFERENCE | CRITERIA | SECONDMENT | Score | TUPE | 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"> Organisation design is achievable under both transfer options, but secondment (due to the Operational issues identified above) will make decision-making and accountability more difficult for secondment <p>MORE DIFFICULT</p> | 3 | <ul style="list-style-type: none"> Organisation design is achievable under both transfer options, but secondment (due to the Operational issues identified above) will make decision-making and accountability more difficult for secondment <p>EASIER TO DEFINE AND DELIVER</p> | 5 |
| 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"> Despite the operational independence problems with secondment this should be deliverable under both transfer options <p>SAME SCORE</p> | 5 | <ul style="list-style-type: none"> Despite the operational independence problems with secondment this should be deliverable under both transfer options <p>SAME SCORE</p> | 5 |

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| CHILDREN'S TRUST – STAFF TRANSFER APPROACH – EVALUATION AND SCORING MATRIX | | | | | |
|--|---|--|-------|---|-------|
| AREA/REFERENCE | CRITERIA | SECONDMENT | Score | TUPE | Score |
| 01 FOCUS ON CHILDREN 02 PARTNERING AND COMMISSIONING 05 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; ... often ineffective or overly complex processes and; ... inadequate integration between council services</i></p> | <p>Inter-Council relationships would be far more complicated under this option in terms of who works for whom, who pays for what and lack of dedicated support services</p> <p>MORE DIFFICULT TO DELIVER</p> | 3 | <p>A single company and single employer entity would allow governance to be clear and unambiguous driven via a single Trust strategy and approach (and not have to address the issues of a 2-tier workforce based on multiple employers)</p> <p>CLEARER DELIVERY OPTION</p> | 5 |
| 03 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> | <p>There are currently dedicated recruitment resources in place as part of service improvement. There would not be a dedicated retention capability under this approach and this is one of the current barriers to service improvement</p> <p>NOT FULLY VIABLE UNDER THIS APPROACH</p> | 3 | <p>There are currently dedicated recruitment resources in place as part of service improvement. The Trust would be able to adopt its own retention strategy under this approach</p> <p>ONLY VIABLE OPTION HERE</p> | 5 |

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| CHILDREN'S TRUST – STAFF TRANSFER APPROACH – EVALUATION AND SCORING MATRIX | | | | | |
|--|--|---|-------|---|-------|
| AREA/REFERENCE | CRITERIA | SECONDMENT | Score | TUPE | Score |
| 03 RECRUITMENT AND RETENTION | <p>... allow for the creation and adoption of flexible packages of employment benefits</p> <p><i>Root Cause analysis (Deloitte paper):</i> ... an unattractive total reward package, and; ... BCS being unable to change the existing T&Cs</p> | <ul style="list-style-type: none"> As per the January Cabinet Report analysis of WOC vs Mutual, all options require adherence to BCC T&Cs The Trust would need to follow the BCC approach to change any reward packages for employment and would not be any more able to do so, than BCC Note: this is consistent with the evaluation and scoring in the January options appraisal for WOC vs Mutual <p>SAME SCORE</p> | 3 | <ul style="list-style-type: none"> As per the January Cabinet Report analysis of WOC vs Mutual, all options require adherence to BCC T&Cs The Trust would need to follow the BCC approach to change any reward packages for employment and would not be any more able to do so, than BCC Note: this is consistent with the evaluation and scoring in the January options appraisal for WOC vs Mutual <p>SAME SCORE</p> | 3 |
| 03 RECRUITMENT AND RETENTION | <p>... cater for a renewed focus on children's services</p> <p><i>Root Cause analysis (Deloitte paper):</i> ... cater for a 'clean break' from the past, representing a fresh start for Children's Services</p> <p>... <i>Birmingham's enduring reputation</i></p> | <ul style="list-style-type: none"> This is possible with both approaches, however in this instance with the issues identified above with Operational Independence there would be confusion about who works for whom <p>LOWER SCORE THAN TUPE</p> | 3 | <ul style="list-style-type: none"> A single employer, single approach would have a clearer identity which staff could relate to and all staff would be a party to ensuring it happened (common goals and interest) <p>A STRONGER APPROACH THAN SECONDEMENT</p> | 5 |

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| CHILDREN'S TRUST – STAFF TRANSFER APPROACH – EVALUATION AND SCORING MATRIX | | | | | |
|--|--|--|-------|---|-------|
| AREA/REFERENCE | CRITERIA | SECONDMENT | Score | TUPE | 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"> Not independent from BCC, any workforce strategy would need to be agreed with BCC and BCC would need to be fully "involved" <p>NOT INDEPENDENT FROM BCC</p> | 0 | <ul style="list-style-type: none"> Independent from BCC and provides the Trust with the ability to run with its own workforce strategy <p>INDEPENDENT FROM BCC</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"> No, would need to consult BCC to flex the workforce related to staff seconded from BCC (the same issue as lack of Operational Independence) <p>NOT A FLEXIBLE APPROACH</p> | 0 | <ul style="list-style-type: none"> Yes, the Trust would be fully in charge of its services, workforce and how it uses support services within the context of the contract agreed with BCC <p>PROVIDES THE TRUST WITH MAXIMUM FLEXIBILITY (ALBEIT AS A WOC)</p> | 5 |

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| CHILDREN'S TRUST – STAFF TRANSFER APPROACH – EVALUATION AND SCORING MATRIX | | | | | |
|--|--|---|-------|---|-------|
| AREA/REFERENCE | CRITERIA | SECONDMENT | Score | TUPE | 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"> Not dependent on the transfer approach taken, so not applicable <p>NOT APPLICABLE</p> | 0 | <ul style="list-style-type: none"> Not dependent on the transfer approach taken, so not applicable <p>NOT APPLICABLE</p> | 0 |
| 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"> Not dependent on the transfer approach taken, so not applicable <p>NOT APPLICABLE</p> | 0 | <ul style="list-style-type: none"> Not dependent on the transfer approach taken, so not applicable <p>NOT APPLICABLE</p> | 0 |
| TOTAL SCORE | | | 54 | | 92 |
| %SCORE (excluding those areas not scored, max score 95) | | | 57% | | 97% |

4.3 Conclusions and Preferred Model

Based on the Evaluation Score (57% vs 97%) the “best transfer approach” is the TUPE.

Notwithstanding the significant difference in scoring, there are important factors related to secondment that make it an unviable approach:

- it jeopardises and undermines all the main points in the original “case for change” for the Trust
- it does not allow for full operational independence from BCC
- it makes delivery of the Trust and its outcomes more difficult to achieve (and a distraction) to delivery of the changes and improvements needed (including removal of barriers)
- it creates a confusing environment for staff and management because of the 2-tier workforce with multiple employers. A distraction from the main task of improving social care
- there are financial and VAT implications
- DfE would not support a secondment approach. BCC are currently under intervention and as such DfE need to be fully on board with how the Trust is set up and organised operationally. A secondment approach would probably result in DfE mandating the approach BCC should take to create and organise the Trust operationally.

This evaluation does not take account of the views of unions or staff and any concerns therefore need to be addressed. It is purely an options appraisal based on the criteria agreed in the previous Cabinet Reports supporting creation of the Trust.

It is important to include in union and staff engagement regarding the clear reasons for TUPE being the preferred and recommended option in terms of supporting of the “case for change” and creation of the Trust.

4.4 Recommendation

That TUPE is included in the July 2017 Cabinet report as the preferred and recommended approach for the transfer of BCC staff to the Trust at April 2018.

That steps and plans are included to address, as far as possible, any union and staff concerns with this recommendation.

APPENDIX A – ANALYSIS OF IMPLICATIONS OF EMPLOYMENT OPTIONS

| ISSUE NO | ISSUE | TUPE | SECONDMENT |
|----------|-----------------|--|--|
| 1 | DEFINITION | The transfer of the employment of an employee from a transferor or employer to a transferee employer. The transfer is of the contractual rights and obligations of both the transferor employer to the transferee employer. The transfer is by operation of law as a consequence of either the transfer of an undertaking or a service provision change. | A secondment is the making available by an employer of an employee (a secondee) to work for a host organisation under their supervision. The employer, and not the host organisation, remains the employer of the secondee. |
| 2 | STATUTORY BASIS | The Transfer of Undertakings (Protection of Employment) Regulations 2006 SI 2006 No 246 (TUPE) and also Council Directive 2001/23/EC on the approximation of the law relating to business transfers | Section 112 Local Government Act 1972 together with Section 111 Local Government Act 1972. |
| 3 | EFFECTIVENESS | <p><u>This is a critical issue as if the employment solution is not effective then if there is a real risk of it unravelling during the life of the Children's Trust then it may undermine the viability of the services.</u></p> <p>As it arises as a matter of law it is not dependent on an agreement for it to take effect. However it is necessary to determine whether what is proposed may trigger TUPE is either the transfer of an undertaking or a service provision change. If either applies then employees who are assigned to the undertaking/service will transfer. If they object to the proposed transfer then that objection may be taken by the transferor employer as a resignation. Whilst there may be disputes, resulting in applications to the Employment Tribunal to determine whether an employee is within the scope of a TUPE transfer, once the TUPE transfer has taken effect and the transferred employee is working for the transferee employer, there is no real risk of any unravelling of that new employment relationship.</p> <p>Also Regulation 18 TUPE and Section 203 Employment Rights Act 1996 preclude contracting out of the application of TUPE which strengthens the certainty TUPE is designed to achieve.</p> | <p><u>This is a critical issue as if the employment solution is not effective then if there is a real risk of it unravelling during the life of the Children's Trust then it may undermine the viability of the services.</u></p> <p>In Celtec-v-Astley [2006] the Department of Employment attempted to avoid a TUPE transfer of staff to a newly created Training and Enterprise Council in 1990. The DoE informed staff they were being seconded. There was no dispute until redundancies occurred at a later date. Both the UK House of Lords and the European Court of Justice determined that there had been a TUPE transfer in 1990.</p> <p>Since then the Retention of Employment (RoE) model has been developed in the health sector. This is a 3 Stage process.</p> <ul style="list-style-type: none"> At Stage 1 following consultation the affected employees decide to opt-out of the transfer of their employment to a new service provider. Such opt-out has to be communicated prior to the transfer date. Stage 2 takes place at the same time as Stage 1 and comprise the employees accepting an offer of re-engagement by their employer. They are re-engaged immediately on the transfer taking effect on their pre-existing terms and conditions of |

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| | | | <p>employment (subject to Stage 3).</p> <ul style="list-style-type: none"> Stage 3 is the secondment by the employer of the employees to the new service provider. <p>There is no case law which has ruled on the effectiveness of RoE.</p> <p>In Capita Health Solutions –v- BBC and McLean [2008] M was employed as an occupational health nurse. This function was transferred to Capita in 2006. Prior to this M had objected to the transfer. The BBC gave her the option of a reduced notice period on secondment to Capita. M agreed. The Employment Appeal Tribunal decided that M's employment had transferred to Capita as she had not validly objected to the transfer. The EAT stated at Paragraph 44 of its judgment:-</p> <p>“What has happened was not secondment in its proper sense, which connotes a temporary assignation regarded, at least at its outset, as being on the basis that the employee will return to work directly for the seconding employer. It was never intended that this would happen. The [BBC] had, post transfer, no requirement for [M] to carry out work of the type she had carried out for them prior to the transfer. Their whole requirement for occupational health services were, post transfer, to be carried out by [Capita] for a period of ten years. They no longer maintained any such unit within their organisation. There was no work for her to do within the [BBC's] organisation after 1 April 2006.”</p> <p>In Fitton –v- City of Edinburgh Council Dr Fitton was seconded from the Council to Edinburgh Lifelong Partnership (ELP) on what was at the outset a short-term secondment. This was later changed at her request to an indefinite arrangement. It was made clear to her that she could not return to her pre-secondment post at Edinburgh. The EAT determined that her employment was with ELP not Edinburgh.</p> |
| 4 | FINANCIAL IMPLICATIONS | The Council will ordinarily enter into a pension admission agreement, as transferor employer, with the transferee employer and Wolverhampton City Council (WCC) as administering authority to the West Midlands Pension Scheme. This is designed | The Council would as employer pay the employment costs of the secondees. The Council may in turn seek reimbursement from the Children's Trusts of the employment costs. There would be a VAT payable by the Children's Trust in respect of the services of the secondees. |

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| | | <p>to ensure that transferring employees who are members of WMPS may continue in the scheme following their transfer. There are consequent financial consequences:-</p> <ul style="list-style-type: none"> • The transferee will need to pay WCC the cost of an actuarial assessment to determine the employer's pension contributions to be paid by the transferee employer in respect of the profile of transferring employees; • The transferee's pension contributions in respect of the transferring employees may be different and higher than those of the Council; • There may be a deficit to be funded on the expiry of the pension admission agreement. • There would also be the cost of the Children's Trust securing of a pension admission agreement bond if this was required by the Council. | |
| 5 | NEW JOINERS/TWO TIER WORKFORCE | If the Trust has a group of employees who have transferred to it under TUPE and then recruits such additional employees as it requires to perform the Children's Services [e.g. where any of the original transferring employees leave or it determines it needs new joiners to undertake different roles] then the Trust can minimise the risk of different employees/groups of employees being employed on different terms and conditions of employment. | If the Trust has a group of employees who are seconded to it by the Council and has in addition its own directly employed employees (whether recruited before or after 1 April 2018) there will be a two tier workforce. This means that the Trust will need to manage any tensions between different groups of staff [e.g. different entitlements to benefits] which may arise on account of there being employed by two different employers. |
| 6 | CHANGES TO TERMS AND CONDITIONS OF EMPLOYMENT. | The Children's Trust as employer may be in a better position to build up a material defence factor and objective justification to warrant changes to the terms and conditions of their employees. | As the seconded employees will continue to be employed by the Council then the Council will be in no different position that it is currently with being able to justify to build up a material defence factor and objective justification to warrant changes to the terms and conditions of those employees. |

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| 7 | INDEPENDENCE OF TRUST | If the Children's Trust has control as employer over the workforce that is undertaking the Children's Services, then this is a material factor in giving the Trust greater independence. | As the Children's Trust will not be the employer of the seconded employees it will not have then this will necessarily adversely impact upon the independence of the Children's Trust. |
| 8 | SUFFICIENCY RISK | If the Children's Trust employs any new employs it needs following the initial TUPE transfer on 1 April 2018 (instead of relying on recruitment by the Council and secondment to the Children's Trust) then this additionally reinforces the independence of the Trust. | Equally if the Children's Trust has to rely on the Council recruiting and seconding any further secondees that the Children's Trust requires following the initial secondment on 1 April 2018 (whether such need arises from secondees leaving the Council's employment or secondees returning to the Council's direct supervision on account of their performance) then this will equally adversely impact upon the independence of the Children's Trust. |
| 9 | PERFORMANCE RISK | If the Children's Trust employ their employs then they will be able to effectively manage the performance of their employees. | The Council as employer would ordinarily be expected to deal with any management issues concerning the employee which arise during the secondment period. This would include performance issues, pay review and award, annual sick or other leave, complaints and grievances. The Children's Trust may properly wish to terminate an individual secondment if that secondee fails to adequately perform the services for which they are responsible or reaches a particular stage under the Council's disciplinary procedure. This would result in firstly that secondee returning to the Council's management where the Council may not have a role for that employee and secondly, if the Council remains responsible for resourcing, the Council being responsible to recruit a suitable replacement. |
| 10 | EXIT RISK | Where the Council outsources a service and TUPE applies it will ordinarily include a standard provision set of exit provisions in respect of employees. This will be to the effect that on termination or expiry of the agreement the Council will endeavour to ensure that there is a TUPE transfer of the employees performing the services at termination or expiry so that they either transfer to any successor service provider, or where there is no new successor service provider, they are insourced to the Council under TUPE. Whilst, as with the original outsourcing there may be disputes as to whether certain employees are assigned to the undertaking/service, the uncertainty as to the applicability of TUPE is substantially reduced. | The trigger events which result in an individual secondment ending would need to be carefully considered as well as what is the position of a secondee. For instance if the secondee returns to the Council's supervision and management:- <ul style="list-style-type: none"> • Will they return to their original or another post? • Will their time served on secondment be reflected in progression within the Council? • What will happen if there is no post for the secondee to return to? |

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| 11 | LEGAL CONSTRAINTS IN RESPECT OF PARTICULAR FUNCTIONS | The Children and Young Persons Act 2008 excludes delegation of IRO functions and of adoption agency functions unless the other party to CYPA already excludes delegation of independent reviewing officer functions, and of adoption agency functions unless the other party to the arrangement is a registered adoption society. | To the extent that a function may be performed by a Council officer it may continue to be performed by a Council officer as secondee. The terms of that officer's individual secondment may need to specifically address the performance of that role so that any assistance the secondee needs from the Council to discharge that function is identified. |