

**To the Mayor and Members of:  
AUDIT COMMITTEE**

**DONCASTER CHILDREN'S TRUST- PROGRESS ON THE CONTRACT**

<b>Relevant Cabinet Member(s)</b>	<b>Wards Affected</b>	<b>Key Decision</b>
Councillor Nuala Fennelly	All	S0354

**EXECUTIVE SUMMARY**

1. This report recommends that the Council enter into a contract with Doncaster Children's Services Trust Limited (the Trust) to deliver children's social care services. Cabinet has received regular progress reports on the setting up of the Doncaster Children's Trust. Good progress continues to be made but as reported previously the project timeline is very challenging. Contract negotiations are proceeding well and there is general agreement between the Trust and the Council on the terms. The Audit Committee is asked to note the proposed contract subject to the conclusion of satisfactory negotiations between the Trust the Council and the Department for Education.
2. The Secretary of State Direction expects the Trust to be established by 30 September 2014. For this to be achieved, it will be necessary for the decisions made in respect of this report to be subject to Rule 16 Special Urgency provisions (*detailed in the Access to Information Procedure Rules set out in Part 4 of the Constitution*) to enable the decision to be implemented immediately without provision for call-in. This action will require the consent of the chair of the Children & Young Peoples Scrutiny Panel.

**EXEMPT REPORT**

Not applicable

## **RECOMMENDATIONS**

3. Audit Committee is asked to note the following recommendations:
  - Note the Directions from the Secretary of State for Education directing the Council to enter into a contract for services with the Doncaster Children's Trust and setting out the functions which will be performed by the Trust.
  - Note the content of the draft contract
  - Note that the Chief Executive be authorised to undertake the final negotiations on the contract terms and to agree the final contract in consultation with the Mayor
  - Note the draft proposed budget and agree that the Director of Finance and Corporate Services undertake the final negotiations on the on-going and one-off funding to be provided to the Trust and sign off the final budget in consultation with the Mayor
  - Note the list of current CYPS services transferring to the Trust and those remaining with the council.
  - Note that Michelle Macfarlane and Tony Baxter are the Council's nominations to become Non-Executive Directors on the Trust Board
  - Note that the Council will act as Pension Guarantor for the Doncaster Children's Services Trust
  - Note that the Council will underwrite the Trust's cash flow and enter into a financial risk sharing agreement as set out in the Financial Implications section of this report.
  - Note to allow the Trust to use I.T. and other equipment by way of a licence arrangement.
  - Note to allow the Trust to utilise various Council premises for its operations at a market-rent and to conclude licences and leases in respect of those properties.

A verbal update will be given at the Audit Committee meeting on the status of the recommendations that were discussed at Cabinet on 17<sup>th</sup> September 2014.

## **WHAT DOES THIS MEAN FOR THE CITIZENS OF DONCASTER?**

4. In the autumn of last year following representations from the Council, the Secretary of State for Education agreed to the establishment of the Doncaster Children's Services Trust, without the requirement to remove Doncaster's children's services functions entirely. This landmark initiative provides a tremendous opportunity for the Council to establish a new model for the delivery of children's services in Doncaster and to accelerate

improvement and innovation.

5. The implementation of the Trust is aimed at strengthening services to ensure maximum protection for children and young people and that they have improved life outcomes. This will enable positive contributions to be made to Council priorities particularly the economy and developing stronger communities, as well as protecting and improving children's lives

## **BACKGROUND**

6. Cabinet has received regular reports on the setting up of the Doncaster Children's Trust. Good progress has been achieved over the past few months. Eleven Shadow Board Members have been recruited subject to approval by Secretary of State. Paul Moffatt was appointed as Chief Executive and commenced working full time in July and the senior leadership structure has been designed and is being recruited to. Cabinet has received previous reports on the services to be transferred and the staff to be transferred have now been identified. The Council commenced the formal TUPE consultation on 8 August and staff are now aware that they are to be transferred, albeit that some posts that are due to transfer to the Trust, particularly in IFSS, are still being filled following recent restructures. Cabinet approved at the last meeting to secure the Blue Building as the Trust Headquarters and senior Trust staff moved to that building early in August.
7. The Council has received a draft Direction from the Secretary of State for Education. This lays out the social care functions that will be transferred and delivered on behalf of the Council by the Trust. The Council will still remain statutorily responsible for these functions and the Lead Member and Director of Children's Services will continue to have a key role in this. The Direction requires the Council to enter into a service contract for the delivery of these services. The Direction is attached as Appendix 1. The Council and the Trust have identified which services are to be transferred to the Trust and which are to remain in the council and these are summarised in Appendix 2. This Direction build upon the previous Direction (Appendix 1b) which directed the Council to establish the Trust.
8. Detailed discussions have taken place between the Council and the Trust to agree the terms of the service contract. The vast majority of the terms within the contract are agreed in principle subject to Cabinet and Trust Board approval and this report summarises the main provisions.

## The Service Contract

	Section	Description
1.	Definitions	A standard list of contract definitions
2.	Aims	The aims of the agreement are expressed in general and specific terms. The Trust will need to agree a Business Plan that is strongly informed by these aims.
3.	Term	The term is for 10 years with a review after five years, the intention being that the Trust is given five years to improve. The break clause is subject to a review of the Trust and its performance with the inclusion of the Department for Education. In addition the draft contract has a provision to extend the Agreement beyond 10 years by a period of up to three years subject to procurement rules extant at the time.
4.	Warranties	These are undertakings that representations made and certain information given are true. These provisions are balanced between the Council and the Trust. Should a loss be proved as a result of representations and/or certain information being incorrect this could ultimately lead to a claim against the Trust or the Council.
5.	Exclusivity & Withdrawal	This clause has been included to preserve the principles of the Direction and ensures that the Council grants the Trust exclusivity in relation to the services transferred
6.	The Services	This refers to Schedule 2 – the Services Specification, which is currently being finalised. This specification reflects the legal requirements laid out within the Direction by the Secretaries of State alongside the services that will be required and the quality standards expected.
7.	Council Responsibilities & Dependencies	This is to ensure that where the Council/or a partner omits to do something (or does it incorrectly) that the Trust depends on for its performance then the Trust gets relief from the relevant performance indicators or other provisions in the contract until the position is put right. These are laid out in more detail in Schedule 4 and include such things as the Trusts use of the Council's ICT systems, buildings and support services
8.	Performance Indicators & Continuous Improvement	The performance arrangements are laid out in detail in schedule 6. The Trust is required by October 2017 to be judged as good against Ofsted criteria. However before that date the specification requires that there are no widespread or serious failures or unnecessary delays within the services that compromise the welfare and safety of children and young people. By October 2019 the services will be judged as outstanding. Performance Indicators have been agreed between the Trust and the Council and are included in the revised improvement plan. The Council will receive monthly reports from the Trust that summarise the performance of the Trust against each of the performance indicators and a summary of any performance failures. There are clear escalation processes within the contract to ensure that failures are appropriately dealt

		with. The contract also gives the power to the Council, in consultation with the Secretary of State for Education to step in in the unlikely event of catastrophic failure by the Trust.
9.	Equipment & Maintenance	The purpose of this clause is merely to outline responsibility for Trust Equipment (i.e. equipment that belongs to the Trust that it uses in the performance of its obligations).
10.	Charges & Invoices	This refers to Schedule 5 which sets out the contract sum and the additional funding from the Department for Education). Given that the Trust is a company independent of the Council and owned by the Directors there are significant issues around adequate cash flow and the management of financial risks caused by changes in activity and demand. The financial payment mechanism has been written to mitigate this risk and this is explained in more detail in of this report
11.	Promoting Tax Compliance	This ensures that the Trust pays its due taxes and complies with all applicable tax laws
12.	Governance	This refers to the governance of the agreement and requires both parties to nominate a representative empowered to act on their behalf
13.	Trust's Records & Provision of Information	A requirement for the Trust to keep proper records in line with the legal requirements and provide information to the Council as required
14.	Change Control	This refers to Schedule 8 which is a standard change control procedure.
15.	Change in Law	This refers to changes in law that the Trust may impact on the services the Trust provides and the cost implications for any of those changes. There is a process for agreeing which party will pick up the cost
16.	Contract Monitoring	This allows for the provision of monthly performance information reports and meetings (when required) to discuss performance and remedial action.
17.	Annual Review Process	This refers to Schedule 3 which commits the Trust and the Council to an Annual Review of performance, the contract and budgets. The Annual Review is forward looking as well as reviewing past performance.
18.	Staff	This states that the Council has agreed the terms of transferring staff including pensions. The TUPE and pension provisions are included in schedule 8 and 9
19.	Employees	This includes the obligation for the Trust to provide sufficient staff and supervisory staff to perform the services and associated matters and there is a reciprocal obligation on the Council.
20.	Safeguarding Vulnerable Children & Adults	This clause ensures that both parties meet their obligations under the Safeguarding Vulnerable Groups Act 2006 and adopt the Council's approved child protection policy and written code of behaviour for staff and volunteers as agreed by the Local

		Children's Safeguarding Board.
21.	Intellectual Property Rights	This gives the Trust and the Council rights to use each other's intellectual property rights including the Council gaining rights from third parties where it can.
22.	Data Protection	This requires the Trust to adhere to the Data Protection Act, a statutory responsibility. It also sets out that the Council is the data controller and the Trust the data processor.
23.	Confidentiality & Transparency	A section about the disclosure of confidential information between the Council and the Trust. It also includes the ability of the Council to publish this agreement (with the exception of confidential information defined in schedule 11).
24.	Freedom of Information Act	This recognises that the Council is subject to the FOIA and requires the Trust to co-operate with information requests within the Council's process and timescales recognising that the Trust itself may not be subject to the FOIA.
25.	Press Statements and Publicity	An agreement to not issue sensitive information to the media without first agreeing with the other party
26.	Liability & Indemnity	This sets out that either party will not be liable for any loss that arises from the performance or non-performance of the other party.
27.	Insurance	This sets the minimum levels of insurance the Council requires of the Trust and that the policies are acceptable to the Council.
28.	Relief Events	Relief Events are those that occur which relieve the Trust from its obligations to provide all or part of the service.
29.	Force Majeure	In the event of a natural and unavoidable catastrophe it allows for relief from performance of the relevant obligations under this Agreement and consequently relief from any associated liability.
30.	Termination	This will allow the council to terminate the agreement with the consent of the Secretary of State. The contract also gives the power to the Council, in consultation with the Secretary of State for Education to step in in the unlikely event of catastrophic failure by the Trust.
31.	Consequences of Expiry or Termination	This clause lays out how the termination will be dealt with and schedule 15 lays out a detailed Exit Management Plan to ensure the orderly transfer of services back to the Council
32.	Complaints	This lays out that the Trust will have a complaints procedure and the referral of complaints relating to the Council's responsibilities
33.	Local Government Ombudsman	Agreement to co-operate with the Council on Local Government Ombudsman investigations
34.	Audit Rights	The right of Council Audit access to records and staff within reason

<b>35.</b>	Assistance with Legal Proceedings & Investigations	The Trust's assistance with legal proceedings, claims and investigations
<b>36.</b>	General Compliance	Trust compliance with health and safety, equalities, and fraud and anti-bribery legislation and the reporting of breaches
<b>37.</b>	Prevention of Fraud & Bribery	A standard clause on Prevention of Fraud and Bribery
<b>38.</b>	Variation	Establishes that variations to the agreement can only be made by written agreement
<b>39.</b>	Assignment	That assignment, novation, sub-contracting etc. of the Trust's or the Council's function must be by prior agreement
<b>40.</b>	Entire Agreement	A standard clause in a service contract
<b>41.</b>	Waiver	A requirement to put in writing any waiver or right of remedy
<b>42.</b>	Severance	A standard clause in the event that a provision within the agreement is held to be void or unenforceable
<b>43.</b>	Further Assurances	A standard clause ensuring third parties promptly execute the documents that form the agreement
<b>44.</b>	Relationship of the Parties	A standard clause defining that the agreement does not constitute a partnership or joint venture
<b>45.</b>	Third Party Rights	This clause recognises the rights conferred on the Secretary of State
<b>46.</b>	Notices	A standard clause on how notices should be served
<b>47.</b>	Disputes	Refers to the Dispute resolution procedure in schedule 11
<b>48.</b>	Governing Law	A standard clause setting out that the agreement is subject to the Laws of England
<b>49.</b>	Counterparts	A standard clause on the signing of the contract

9. The contract also contains the following schedules:

Schedule 1 Definitions	This contains all the definitions within the agreement so will be revised as the agreement is developed.
Schedule 2 Service Specification	This specification reflects the legal requirements laid out within the Direction by the Secretaries of State alongside the services that will be required and the quality standards expected. More detail on this included in the report
Schedule 3 Annual Review	This lays out the process for the annual review of the contract.
Schedule 4 Council Responsibilities & Dependencies	This specifies those dependencies that the Council must perform to allow the Trust to fulfil the contract
Schedule 5 Charges & Invoicing	This lays out the payment mechanism is explained in more detail in the body of the report
Schedule 6 Performance Levels and Performance Monitoring	Sets out the performance framework.
Schedule 7 Change Control Procedure	Standard change control procedure.
Schedule 8 TUPE/Employment	This will in effect list the staff to transfer, their terms and conditions and pension rights and any contractual policies that are capable of execution by the Trust.
Schedule 9 Pensions	In effect transferring staff will carry forward their eligibility to the Local Government Pension Scheme. New staff may also be eligible to enter the scheme. The Trust will need to enter an Admissions Agreement with the Local Government Pension Scheme which requires a guarantee of payments to the fund. Provision is made by the Council to guarantee the pension. The schedule also makes provision to ensure that the Trust does not make any unnecessary decisions that will increase the pension's liability.
Schedule 10 Commercially Sensitive Information	This lists those items that are commercially sensitive.
Schedule 11 Dispute Resolution	A standard procedure. This includes an additional step before mediation which involves the Chief Executives of the Council and the Trust attempting to resolve the dispute.
Schedule 12 Conduct of Claims	This is a standard procedure
Schedule 13 Assets and Third Party Contracts	This lists the assets to be licenced to the Trust and the contracts to be novated
Schedule 14 Improvement Plan	This is the revised improvement plan
Schedule 15 Exit Management	In effect this commits the Trust : <ul style="list-style-type: none"> <li>• To develop and agree an exit management plan at the third year of the contract</li> <li>• To agree with the Council an exit assistance plan for an orderly transfer of staff, contracts and any assets to the Council or a replacement provider.</li> </ul>



10. The Articles of Association of Doncaster Childrens Services Trust Limited, stipulate the following arrangements for the Board stipulate the following arrangements for the Board.
11. The Council may nominate 2 Directors to the Trust Board. It is proposed that these are Tony Baxter and Michelle Macfarlane. Given that under Company Law, Directors must act in the interests of the Trust at all times, it is important that the Council's nominees are not conflicted and thus prevented from fulfilling their responsibilities to the Council. For this reason senior members of CYPS management (who will have responsibility for managing and monitoring the Trust's performance) and other senior officers who have responsibilities for budgeting and financial control have not been nominated. Both of these groups of senior managers will fulfil their roles through regular performance, financial and contract management meetings with the Trust. Relevant elected members will also be able to participate in some of these meetings and continue to play a full part in Cabinet and other council meetings, which would not be possible if they were Directors of the Trust.

## **SERVICE IMPLICATIONS**

12. Schedule 2 of the contract is the detailed service specification. It consists of three elements that define the service that the Council will require for children and families in Doncaster. These are: the scope of services and what the Trust will be expected to deliver, the quality standards we expect the Trust to meet or exceed, and the improvements we expect the Trust to deliver. The specification also describes any residual function remaining with the Council, particularly where this is likely to impact on the Trust's ability to improve its services. The Council remaining service delivery responsibility are in italics.
13. The specific services to be provided are detailed and are laid out in the Direction from the Secretary of State. In summary these are:
  - I. Manage and deliver an effective youth offending service – *the Director of Children's Services will be a member of the Youth Offending Management Board and will ensure effective contribution from council services*
  - II. Safeguarding children in need: including duties to investigate where a child may be at risk of harm, to initiate care proceedings, and to provide support including intensive support as part of the early help framework. *The Council will provide and support lower level help, will commission services including child and adolescent mental health services with the CCG, promote co-operation between partners, appoint the chair of the Local Safeguarding Board, deliver the Stronger Families Programme and the statutory roles of the DCS.*
  - III. Services for looked after children: including care planning, reviewing and placement duties, delivery of fostering and adoption services, management of the in-house children's homes, provide expertise to the corporate parenting panel. *Council elected members will remain the corporate parents for looked after children and are responsible for promoting their life chances. Responsibility for the virtual head and*

*promoting education of looked after children.*

- IV. Services for care leavers and unaccompanied asylum seekers: provide support to young people leaving care and moving to independence. *The Council will support through education, housing and other council services.*
- V. Services for children with special educational needs and disabilities: provide the social care safeguarding service for all children. *The Council will provide the assessment and delivery of education, health and social care plans.*
- 14. The Quality standards for the service are detailed in the specification under separate headings: general, experiences of looked after children and care leavers, and organisational standards such as dealing with complaints, responding to emergencies, addressing equalities, health and safety and working with partners.
- 15. The detail includes matters such as listening to children and young people, ensuring families get a stable response from social workers, are offered help when they need it, provide timely information, and help that is proportionate to risk. Areas such as sound decision making, clear plans that are delivered, identification of children in need and responding appropriately to allegations are also covered.
- 16. The Council and the Trust have also agreed to draft a small number of protocols covering key areas where joint working and clarity on responsibilities will be very important. This will include protocols on the following: early help, disabled children, workforce development.

## **PERFORMANCE MANAGEMENT AND MONITORING**

- 17. The detail of this will be outlined in the contract linked to the service specification requirements and the quality standards. There are a number of performance indicators that the Trust will report on a monthly basis such as the number of referrals and assessments, the length of time taken to complete assessments, the number of children in care and subject to child protection plans, the number of agency social workers and managers.
- 18. The Trust will be responsible for delivering improvements in Childrens Social Care. The range of improvement activity is outlined in the transitional improvement plan shown at Appendix 7.
- 19. The Council is intending to appoint an Assistant Director Children's Commissioning who will be responsible for the monitoring of the contract, and other residual non Education services within CYPS, and who will report to the Director of Children's Services.
- 20. The Contract will specify the scrutiny arrangements which will require the Director of Children's Services to report on the performance of the Trust

(expected to be 4 times a year) and will require the Trust to attend and answer questions on their performance. Further details regarding the monitoring of the trust are shown at Appendix 6.

#### **OPTIONS CONSIDERED**

21. Not applicable as DfE direction gives the Council no choice but to establish the Trust and transfer services to it.

#### **REASONS FOR RECOMMENDED OPTION**

22. Not applicable

## IMPACT ON THE COUNCIL'S KEY PRIORITIES

23.

	<b>Priority</b>	<b>Implications</b>
	<p>We will support a strong economy where businesses can locate, grow and employ local people.</p> <ul style="list-style-type: none"> <li>• <i>Mayoral Priority: Creating Jobs and Housing</i></li> <li>• <i>Mayoral Priority: Be a strong voice for our veterans</i></li> <li>• <i>Mayoral Priority: Protecting Doncaster's vital services</i></li> <li>•</li> </ul>	<p>The implementation of the Trust arrangements is aimed at strengthening services to ensure maximum protection for children and young people and that they have positive quality of life outcomes. This will enable positive contributions to be made to Council priorities particularly the economy and developing stronger communities, as well as protecting and improving children's lives</p>
	<p>We will help people to live safe, healthy, active and independent lives.</p> <ul style="list-style-type: none"> <li>• <i>Mayoral Priority: Safeguarding our Communities</i></li> <li>• <i>Mayoral Priority: Bringing down the cost of living</i></li> <li>•</li> </ul>	
	<p>We will make Doncaster a better place to live, with cleaner, more sustainable communities.</p> <ul style="list-style-type: none"> <li>• <i>Mayoral Priority: Creating Jobs and Housing</i></li> <li>• <i>Mayoral Priority: Safeguarding our Communities</i></li> <li>• <i>Mayoral Priority: Bringing down the cost of living</i></li> <li>•</li> </ul>	
	<p>We will support all families to thrive.</p> <ul style="list-style-type: none"> <li>• <i>Mayoral Priority: Protecting Doncaster's vital services</i></li> </ul>	
	<p>We will deliver modern value for money services.</p>	
	<p>We will provide strong leadership and governance, working in partnership.</p>	

## **RISKS AND ASSUMPTIONS**

24. There are significant risks inherent in transferring a children's social care service that is under-going a major improvement programme. It is critical, therefore, that the focus remains on safeguarding vulnerable children and delivering the required progress laid out in the Children's Services Improvement Plan.
25. The main risks are:
- Possible disruption to services caused by the transfer
  - Financial risks associated with the fact that the Trust will be a new body without any significant financial backing, which will be responsible for delivering risky and financially volatile services
  - That the Council will have to substantially underwrite the Trust in a variety of ways including Pension and contractor guarantees, taking a substantial risk share of any losses made by the Trust, providing protection against potential cash flow difficulties by way of advance payments to the Trust for services not yet provided and an interest free loan facility. All of these carry substantial financial risk for the Council
  - That substantial costs of disaggregation occur in the future should the Trust move away from using council systems and support services. The Trust have so far either chosen to use existing council services or take on the staff providing those services and provide the services for themselves, this has kept disaggregation costs to around £205k which are being paid by the DfE
  - That the restrictions imposed on the Council, by the DfE and the Direction prevent it being able to adequately manage the contract with the Trust
  - That DfE funding for the additional costs of the Trust and the Council (which total over £3m a year of which 90% is for the Trust) is not maintained for the full 10 years of the contract by the DfE.
  - If the TUPE process is not correctly handled, employees may be entitled to significant compensation payments in respect of failure to consult and other potential employment law issues.

## **LEGAL IMPLICATIONS**

26. The legal powers directing the intervention are set out in the Directions of 17 April 2013 and 16 August 2013 and the draft Direction which will be made during September 2014 (and which is annexed to this report).
27. Those Directions required the Council to co-operate fully with the Commissioner to establish a Children's Trust. In accordance with the Directions, the delivery of specified children's services functions will be the responsibility of the Trust.
28. The Secretary of State does not intend to use his power under section 497A(4A) of the Education Act 1996 ("the 1996 Act") at this stage to establish

the Trust, as his nominee, to exercise functions, but instead intends to direct Doncaster MBC under section 497A(4) of the 1996 Act to enter into arrangements with the Trust to exercise functions on behalf of Doncaster MBC

29. A further draft Direction has been issued to the Council and is expected to be formally issued during September 2014, this Direction sets out the specific services to be provided by the Trust on behalf of the Council. It is important to note that under the Direction, the Trust will be performing Services on behalf of the Council. However the legal powers and duties in relation to safeguarding children remain with the Council and court proceedings will continue to be brought in the name of the Council.
30. Doncaster Children's Services Trust Limited ("the Trust") is a Company Limited by Guarantee. The Council may appoint 2 Directors to the Company & must be consulted with in relation to the appointment of both the Chair and the Chief Executive of the Trust. Directors of the Trust will be registered at Companies House and are legally obliged under the Companies Act 2006 to act in the best interest of the Company (the Trust). The Council will need to carefully consider who to appoint to these positions given that there is a possibility of conflict between the day-to-day Council roles of such appropriately qualified candidates and their required duties as a Trust Director.
31. The Trust will be owned by its Directors (each of whom will be a "Member" of the Company"). It is expected that when a Director leaves office that they will cease to be a Member and that their "Share" will be transferred back to the Company. The liability of Members will be limited to the sum of £1.
32. The Trust will be a Contracting Authority for the purpose of the European Procurement Regulations and so will be expected to procure its services in the same manner as the Council does.
33. Council staff currently carrying out the services which are transferring to the Trust will transfer to the Trust in accordance with the provisions of TUPE. TUPE imposes obligations on the incoming and outgoing employers of transferring staff. Analysis has been carried out of each role to confirm whether or not the post will transfer to the Trust. Specific legal advice has been sought regarding the obligations of the outgoing employer and an appropriate consultation process is on-going with affected staff.

### **Contract Provisions**

34. As set out in the draft contract, the Trust will provide the services and in exchange the Council will make payments to the Trust in accordance with an agreed payments profile.
35. The Trust is restricted from assigning the services to another provider. Although the use of third party providers is acceptable, major sub-contracting arrangements must be in consultation with the Council.

## **Contract Monitoring**

36. The Contract requires the Trust to provide the Council with monthly monitoring reports showing achievements against the performance levels set out in the Contract. There will also be an Annual Review process carried out each Contract Year to assess whether the Agreement is operating in the most satisfactory manner and whether the Services are being delivered to the standard set out in the Contract.

## **Contract Term, Termination & Step In**

37. The contract with the Trust is for an initial period of 10 years. As currently drafted at the time of writing, the Council may terminate the contract (having first received the consent of the Secretary of State) in the instance of either “Consistent Failure” (the issuing of 3 rectification notices during a rolling 12 month period) or “Catastrophic Failure” (serious failure to deliver services which either breaches the Councils Statutory duties or in the Councils reasonable opinion results in increased risk of harm to Children and young people in Doncaster). The Contract will also terminate upon the revocation of the Secretary of State’s Direction. At the end of the contract term, the Council will need to either arrange alternative provision or return the Services to the Council. The staff employed by the Trust at that point will be subject to the provisions of TUPE and if they meet the TUPE test will transfer accordingly.
38. If the Council reasonably believes that an act, omission or breach by the Trust has caused an emergency resulting in adverse impact on the wellbeing of children the Council may with the consent of DfE step in & arrange for alternative service provision to take place.

## **Pension Deficit & Guarantee**

39. The Trust will have admitted body status and be a member of South Yorkshire Pension Authority (SYPA). Therefore transferring staff will be able to remain within the pension scheme. The Council will retain responsibility for the accrued pension deficit in respect of the transferring staff. SYPA require the provision of a third party guarantee before it will allow the Trust to become an admitted body. The DfE has asked that the Council provide that guarantee. The guarantee is drafted in very wide terms and SYPA will not accept any amendments to it. This is potentially a large liability to the Council and it is important that the Council retains a vigilance and some influence and control over the Trusts employment practices via the Services contract in order to limit its liability going forward. For instance decisions by the Trust to pay increased salaries, offer redundancy and early retirement packages or give “additional years” to departing staff will all have an effect on pension costs going forward.

## **Transferring 3<sup>rd</sup> Party Contracts & Guarantees**

40. CYPS currently purchase various services under contracts entered into by DMBC. These contracts are currently being novated to the Trust who will take responsibility for them going forward. It is possible some suppliers may require a guarantee from the Council due to the Trusts lack of trading history and thus unknown credit-standing.

41. The Trust will be headquartered in the Blue Building which is currently leased by the Council from its landlord. The Council have agreed to sub-let the building to the Trust and have provided a guarantee to the landlord as requested in case the Trust defaults upon its obligations under the lease. Other Trust staff will remain in a wide range of other Council buildings.

### **Trust Costs**

42. The Memorandum of Understanding entered into between the Council and DfE states that the Council will not be expected to meet the additional costs relating to the establishment or operation of the Trust. There is however no contractual guarantee that the additional costs will not fall to the Council. It would be appropriate to enter into a further Memorandum of Understanding with the DfE to cover the additional costs going forward, however the DfE have indicated they will not enter into commitments beyond the Comprehensive Spending Review period.

### **Council Services, Equipment & Property**

43. The Council will continue to provide various services such as ICT services to the Trust via Service Level Agreements. These services will be market tested by the Trust within the first 2 years of its existence and may be terminated at that point in time. The individuals carrying out those services at that point will potentially transfer to either the Trust or any replacement service provider via TUPE.
44. The Equipment currently utilised by the transferring elements of Children's Services will be passed to the Trust under licence to use. The Council will maintain ownership of the equipment. The Trust will continue to operate from a number of Council owned buildings. The Trust will occupy the buildings by virtue of serviced leases/licences.

### **FINANCIAL IMPLICATIONS**

45. The Memorandum of Understanding between the Mayor and the Secretary of State for Education, November 2013 is clear that the Council will not bear the additional costs of delivering its children's social care functions through the Trust arrangements:
46. *Doncaster MBC is not expected to meet the set up costs of the Trust, nor any of the additional costs incurred by virtue of its social care functions being delivered by the Trust. The Department for Education will: meet the reasonable costs of setting up the Trust; provide a project team that will work with Doncaster MBC on the initial set up of the Trust; and meet the reasonable financial costs of the Doncaster project team. Doncaster MBC will agree an initial three year budget for the Trust with the Chairperson of the Trust. The Participants will work together to understand current and future demand for children's social care services in Doncaster. In the first year, the Department for Education will meet the full additional running costs incurred by virtue of Doncaster MBC's social care functions being delivered by the Trust, at a level to be agreed during initial budget discussions between the Department for Education, Doncaster MBC, the Chairperson and Chief*



### *Executive of the Trust.*

47. On 4<sup>th</sup> July the Department for Education confirmed that the Minister had agreed to meet the initial set up costs for the Trust incurred by the Council. This amount is estimated to total £1.7 million to cover costs from April to September 2014.
48. Discussions about meeting the on-going additional costs throughout the life of the contract have been more protracted. The due diligence exercise undertaken by Deloitte has identified an additional cost of £3.5 million in 2015/16 reducing to £3.2 million in 2017. These additional costs are identified in Appendix 5. The Secretary of State has indicated agreement to these costs and formal notification of the detail of this funding agreement is awaited in writing, all of which, bar approximately £200k, will be paid by the DfE to the Trust.

## **Financial Arrangements for the Trust**

### **Pensions**

49. The Trust will seek Admitted Body Status to the South Yorkshire Pension Fund. This will enable Trust staff to stay in the Local Government Pension Scheme. Despite the Trust being a legally separate body to the Council, the Government have made clear their expectations that the Council will 'guarantee' the Trust's pension payments and liabilities in the SYPF.
50. The arrangements are likely to be that the size of the pension deficit relating to staff transferring to the Trust will be independently valued. This sum will remain the council's responsibility to repay over the next 21.5 years, for which the Council has set aside revenue budgets to meet this estimated but highly variable sum. The draft valuation shows the pension deficit relating to staff transferring as being almost £14m, but this draft was based on incomplete data relating to transferring staff and the actual figure based on those transferring on the 1<sup>st</sup> October could be around 25% larger. The initial repayment rate for the Trust to cover ongoing pension entitlements has been estimated by the actuarial valuation as 13.1% of salaries, which is marginally more than the 12.9% that the council pays. The council will be expected to pick up this cost by way of transferring additional budget to the Trust, but this only applies should the final figure remain small (0.2% equates to under £20k per year). Should the figure end up larger the DfE will be approached for funding.
51. The Trust will need to monitor and control its activities in terms of recruitment and early retirement, such that it does not build up future pension liabilities in relation to its staff that are more than the annual ongoing pension budgets that the Council will transfer to it. In order to monitor this the DfE has been asked to fund an annual actuarial valuation of the Trust's pension liabilities (normally undertaken every 3 years).
52. In theory the pensions guarantee that the Council will issue should not be called upon and the Trust will manage its affairs in such a way as to be able to meet its normal staff pension payments and any additional payments that arise due to its recruitment and early retirement decisions. However in the

unlikely event that this was not possible the Council would need to meet these payments. No financial limit can be put on the extent of the Council's guarantee and the Council must use the all-encompassing wording for the guarantee s prescribed by the Pensions Authority.

## **Assets**

53. The Council will need to transfer rights to use a number of council assets to the Trust. These mainly consist of I.T. and other equipment. An inventory and valuation will need to be produced and a basis of transfer agreed. The Council cannot simply 'gift' the assets to the Trust for free, as there would be no justification for doing so with the Trust being a separate company, yet the Trust is not in a position to buy the assets. It is therefore proposed that assets will be operated under a licence by the Trust.

## **Financial Risk Share/Cash Flow**

54. The DfE have insisted on the Trust being a separate legal body. As such it has no financial or other backing behind it, has no financial 'history', no reserves etc. This could lead to difficulties should the Trust overspend or should its cash flow be uneven with payments and liabilities falling prior to income being received under contract from the Council. In order to mitigate these risks and give the Trust the best chance of financial success/survival the Council will need to offer the Trust the following facilities:-
- i. An interest free loan of £1m. This would only be drawn down in the event that the Trust could not meet its payment requirements for a temporary period, but there is obviously some risk for the Council and a small interest cost for the provision of such a facility if it is used.
  - ii. The Council will pay the Trust 2/7ths of its budget at the start of October and 1/7<sup>th</sup> each of the following months. It will then pay the Trust 2/13ths of its budget followed by 1/13<sup>th</sup> a month for a full year. This will enable the Trust to have a cash "Buffer" against unforeseen cash flow issues
  - iii. The council will provide the Trust with the opportunity to receive payments from it's redundancy/early retirement funds and its IT development funds. This will be on the same basis and meeting the same criteria as other council departments. Thus if Trust have plans that involve redundancies and/or early retirements and will over time deliver contract savings to offset the upfront costs, the council will meet those costs subject to the normal criteria set by the council which applies to its internal managers and departments. Similarly the Trust will be able to bid for IT development projects, systems refresh and upgrades, mobile working initiatives and the Trusts bids will be evaluated and treated and funded equitably by the IT Governance Board ( on which the Trust will be offered a seat) with other competing bids for IT funding.
55. The most significant issue is that as the Trust lacks an owner with funds and has no financial backing it cannot be expected to take all of the risk on the variability of its costs, particularly those for Children in Care, which together with other external payments make up about 50% of the Trust's budget. The

DfE do not appear to have given much consideration to this issue, but it is clear that the Trust would bear an unacceptable level of financial risk/volatility should it be entirely responsible for these potential budget/cost variances. It should also be remembered that at present the Council has to cover any overspend in Children's Services, and whilst it was expected that all of this risk would pass to the Trust, this clearly is not feasible. The Council is negotiating with the Trust about the proportion of over or underspend that it will be willing to take responsibility for and thus limit the Trusts exposure to risk. No final agreement has been reached, but the core elements of the council's offer to share financial risk are likely to be:

- That the Council share risk with the Trust on the basis of the council taking 90% of the risk (either upwards or downwards) in the first 6 months and then 80%, 75% and 70% in each of the next 3 years as the Trust matures operationally and financially.
- That this % be applied to the entire financial position of the Trust. This is for clarity/simplicity purposes and to avoid potential disagreements about the nature and causes of overspends (underspends)

### **The Trust Budget**

56. The Trust budget is likely to be around £47m per year of which an estimated £41.6m (full year figure) will be transferred from the Council. See Appendix 4. About 40% of this will be spent on Children in Care (placements, fostering, residential homes etc) and adoption, guardianship and other allowances.
57. In addition the Council needs to recognise that whilst the actual/projected overspends in Children's services have been reducing from over £3m to £1.8 m in 2013/14 to a projected £1.3m in 2014/15, the Council will need to fund the Trust on a one-off basis for the first 6 months for the net additional spend in areas of the budget transferring to the Trust. This will mean that the Trust will be funded
  - a) For a period during which the Trust works to address these overspends (mainly on placements, 16 + service, family contact etc).
  - b) For some additional temporary capacity to address these problems, the majority of which are outstanding issues from the Improvement Plan and;
  - c) To provide financial resources to address one or two known inadequacies relating for example to systems and the use of systems.
58. Work is still going on to assess these issues, but it is likely that between £1m and £1.5m of one-off funding will need to be provided of which is it anticipated that £0.4m will come from the existing CYPS Improvement budget and the rest from the Council's Service Transformation budgets.
59. Improvement funding: the Council has agreed to provide one off funding of £650k from the CYPS Improvement Plan budget & the Service Transformation Fund to support work on Liquid Logic, placements for children in care and over 16, and also to deliver agreed savings.

## **Future Budget Setting**

60. A range of options have been discussed with the Trust with regard to future budget setting. These range from at one extreme the council and Trust jointly estimating the future costs to the Trust of inflation, pay, pensions, service pressures, legislative change, National Insurance etc and then the Trust coming up with proposals to meet those additional costs; through to a situation where discussion on what future savings the Trust will commit to achieving is separated out and based on service issues and the financial pressures faced by the council, meaning that the savings could come to more or less than the increases in budgets. The latter approach is similar to the Council's current budget setting process, but gives the Trust less freedom/separation. The Trust have indicated that they would prefer the latter approach and this is the council's preferred option as it fits with our current approach.

## **Support Services**

61. The potential costs of the Trust totally separating from the Council and buying all its own support services could give rise to "disaggregation" cost of £1.3-£1.5m a year. Mutually agreed arrangements for transferring legal staff and finance staff and for the Trust buying IT and other services have currently reduced these costs to about £0.2m per year (which the DfE has indicated it will pay). There does however, remain a significant risk (which has been raised with the DfE) that if and when the Trust contracts for these services they may choose another supplier and this will leave the Council with further significant (up to £1.3m?) potential cost of disaggregation. These are costs that should be met by the DfE under the terms of the MoU should they occur and the Council will be seeking assurance from the DfE on these issues.

## **HUMAN RESOURCES IMPLICATIONS**

62. There are significant HR implications for the Council arising from the report. Currently the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) protect the rights of employees in a transfer situation enabling them to be protected on the same contractual terms and conditions and their continuity of service is also preserved. All employees who were employed in the transferring services immediately before the transfer automatically transfer from the Council (the transferor) to the Trust (the transferee). Where employees transfer the Trust will take over the rights and obligations arising from those contracts of employment, except criminal liabilities. Any liabilities relating to employees who were dismissed before the transfer (for a reason connected with it) also transfer to the transferee.
63. The Council has a responsibility to conduct a full and meaningful consultation with employees at the earliest practicable time. The Council is also obliged to give the Trust written information about the employees who are to transfer. Not all contractual provision may be capable of transfer and the Trust will need to inform the Council of any "measures" that it intends to take to change these. Failure to do any of these could result in a liability for the payment of compensation.

64. There can be HR issues when identifying people whose role is partly to undertake activities for the area transferring. Normal practice is that where the majority of the role is related to it then it will be subject to transfer and where it is less it will not. The council has tried to assess such roles carefully and may have to address any imbalance in staff resources that can occur.

65. The Council will also need to ensure it complies with the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2013 which applies to all transfers after May 2014

The changes in these regulations include:

- The ability to renegotiate terms of a collective agreement after one year from the transfer
- Confirming recent case law that collective agreements are static and only the terms and conditions in the collective agreement existing at the time of the transfer will apply to the employment with the new employer
- If the transferor and transferee agree, the transferee can count any period of meaningful pre-transfer consultation towards the minimum collective redundancy consultation period.
- Employee liability information must be provided by the transferor to the transferee at least 28 days before the transfer.
- Dismissal will only be automatically unfair if the reason for the dismissal is the transfer itself. This removes the provision for 'a reason connected with the transfer'.
- A variation to an employment contract will not be automatically void even if the reason for the variation is the transfer itself if 'the terms of that contract permit the employer to make such variation'. This wording reflects the Acquired Rights Directive more closely.
- A change in location can be an ETO reason. If the place of work changes after a TUPE transfer, any redundancies due to that change will not be automatically unfair.

66. Approximately 450 staff will be TUPE transferred to the Trust and this will leave a similar number of staff in CYPS providing youth, children centre, commissioning, contract management, early help and education services.

67. All known staff to be TUPE transferred have been written to in order to commence consultation, apart from staff in IFSS (where a major restructure is being completed) and they will be written to in early September. Staff meetings have been held and staff queries are being addressed.

68. There has been some difficulties over about 30 casual relief staff who are not covered by TUPE, but the Trust has indicated that it will treat these staff on a TUPE equivalent basis. There are also some complexities being addressed with regard to a significant number of CYPS staff who were on

temporary (time limited) contracts, over 20 of which were due to end before the 1 October. These issues are being actively addressed.

69. The Trust is considering applying for RPMO status, this will give continuity of service rights for redundancy purposes to staff joining or leaving the Trust, (other than under TUPE).

## **EQUALITY IMPLICATIONS**

70. As part of the Children's Services Trust project work, the Council is using and analysing a range of data to demonstrate its compliance with the general equality duty for people who share a protected characteristic who are either its service users; its employees; and other people who could be affected by its policies and practices and a due regard statement has been initiated for the project. As the work on establishing the Trust has progressed, indications are that, when the Trust is first set up, the way it is going to operate will differ very little from the way that services, that are moving to the Trust, currently operate and the anticipated impact on staff and service users will be negligible. An analysis of the data collected by the Council regarding young people who are 'Children in Need', 'Children in Care' and the Council's Foster Carers, in the main, does not indicate the need to give additional considerations in ensuring compliance with the general equality duty when taking forward the work to establish the Trust.

## **CONSULTATION**

71. This report has significant implications in terms of the following:

Procurement	x	Crime & Disorder	
Human Resources	x	Human Rights & Equalities	X
Buildings, Land and Occupiers	x	Environment & Sustainability	
ICT	x	Capital Programme	

## **BACKGROUND PAPERS**

72. None

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