

Bath and North East Somerset Council

HEALTHIER COMMUNITIES AND OLDER PEOPLE OVERVIEW AND SCRUTINY PANEL

Minutes of the Meeting held

Thursday, 28th October, 2010, 2.00 pm

PRESENT:

Councillors: Councillor Adrian Inker (Chair), Councillor Simon Allen (In place of Councillor Sharon Ball), Councillor Loraine Brinkhurst MBE, Councillor Anthony Clarke, Councillor Lynda Hedges, Councillor Eleanor Jackson, Councillor Bryan Organ, Councillor Will Sandry, Councillor John Whittock and Councillor Stephen Willcox

Cabinet Member:

Also in attendance: Janet Rowse (Acting Chief Executive, NHS Banes; Director of Adult Health)

13 WELCOME AND INTRODUCTIONS

The Chairman welcomed everyone to the meeting.

14 EMERGENCY EVACUATION PROCEDURE

The Democratic Services Officer drew attention to the emergency evacuation procedure.

15 APOLOGIES FOR ABSENCE AND SUBSTITUTIONS

Apologies for absence were received from Councillor Sharon Ball and Joy Davis (Joint Trade Unions Secretary). Councillor Simon Allen was a substitute for Councillor Sharon Ball.

16 DECLARATIONS OF INTEREST UNDER THE LOCAL GOVERNMENT ACT 1972

There were none.

17 TO ANNOUNCE ANY URGENT BUSINESS AGREED BY THE CHAIR

There were none.

The Chairman used this opportunity to inform the Panel that the Bristol Health Scrutiny Committee on its meeting on 19th October had GP Commissioning Consortia Consultation as one of the agenda items. Within the report there were number of options presented and the option 5 was 'One organisation covering the "Avon" area, to include Bristol, South Gloucestershire, North Somerset, and Bath and North East Somerset, with localities.' The Chairman also informed that this Council was not included in the list of stakeholders that were consulted whilst the

other 3 ex-Avon authorities were. The last day for consultation was 5th November 2010.

The Chairman felt that this was unacceptable approach and asked the Panel to agree with his recommendation to send a letter to the Bristol PCT and the Chair of the Bristol Health Scrutiny Committee expressing Panel's disappointment and stating that the Panel could not support Avon-wide consortium.

The Panel unanimously agreed with this recommendation.

It was **RESOLVED** that the Chairman will send a letter to the Bristol PCT and the Chair of the Bristol Health Scrutiny Committee on behalf of the Panel (note: all Panel Members will have to agree with the wording in the letter).

18 ITEMS FROM THE PUBLIC OR COUNCILLORS - TO RECEIVE DEPUTATIONS, STATEMENTS, PETITIONS OR QUESTIONS RELATING TO THE BUSINESS OF THIS MEETING

The Chairman informed the meeting that there were several speakers to address the Panel and they would all have the opportunity to do so as per the day order (mentioned later in the meeting).

19 MINUTES OF PREVIOUS MEETING - 14TH SEPTEMBER 2010

It was **RESOLVED** that the minutes from the meeting held on 14th September 2010 be confirmed as a correct record and signed by the Chairman.

20 COMMUNITY HEALTH AND SOCIAL CARE SERVICES - FUTURE PROVISION

The Chairman explained that this report focuses on the options for the future provision of health and social care services as a consequence of the PCT's requirement to divest themselves of directly provided community health services. The Council and the NHS Bath and North East Somerset Board would consider these options in November 2010.

An options re-appraisal is being undertaken at present and the views of this Panel are being sought prior to reporting to the meetings of the Council and the NHS B&NES Board.

This report to the Panel describes the options and provides the initial outcome of a qualitative options appraisal for the Panel to consider and add its views. A relative financial analysis of the short listed options is currently being undertaken and this would be reflected in the report to Council in November 2010.

The report would be introduced by Janet Rowse (Acting Chief Executive NHS BANES and Strategic Director for Adult Social Care and Housing) and Richard Szadziwski (Project Manager). The Panel will also hear from the Trade Unions representatives, Diana Hall Hall (Chair of the Bath and North East Somerset Local

Involvement Network) and members of the public (Anne Marie and Peter Jovic-Sas). The Panel would then debate the report and consider issues highlighted at the meeting before making their views.

The Chairman invited Janet Rowse and Richard Szadziewski to give a presentation (a full presentation is available in the minute book at Democratic Services) and introduce the report. The Chairman informed the meeting that the background document 'Key Characteristics of Various New Organisational Forms' had been circulated to the Panel Members in advance of the meeting (attached as [Appendix 1](#) to these minutes).

Janet Rowse and Richard Szadziewski gave a presentation where they highlighted following points:

- National Policy Context
- Local Context
- Benefits of Integrated Services
- Progress to date
- The Options
- Key Considerations
- The Short Listed Options
- Risks Common to all options
- Risks & Opportunities that vary between options
- Next Steps
- Project Governance

Janet Rowse and Richard Szadziewski also covered these points in their presentation at the later stage of the meeting:

- What is a Social Enterprise?
- If Social Enterprise – Requirements
- If Social Enterprise – Options
- Community Interest Company limited by guarantee explanation
- Charity limited by guarantee explanation
- Potential constituencies of interest represented within Social Enterprise
- Principles for Social Enterprise governance.

Councillor Brinkhurst asked about the GP Commissioning Consortia role as a replacement for the Primary Care Trust (PCT) in commissioning services.

Janet Rowse responded that when the Primary Care Trust (PCT) cease to exist from April 2013, the Council would need to decide how best to engage with the new GP Commissioning Consortia, which would replace the PCT, and determine whether or not to retain the current commissioning arrangement that exists between the Council and PCT.

Bridget Musselwhite from the RUH Bath asked if the legal and financial matters for the RUH integration option business case would be completed by the PCT and the Council.

Janet Rowse confirmed that the PCT and the Council would provide legal and financial information related to the RUH integration option. The key date for the transfer of community services is 11th April 2011 and the NHS and Council would be looking at which configuration would be the best for the community.

Councillor Sandry asked who in the Council made the decision on the shared costs for corporate governance on this matter.

Janet Rowse replied that £350k had been allocated from the Council's Change Programme resources.

Peter Jovic-Sas asked if the Royal National Hospital for Rheumatic Diseases in Bath had been considered as one of the options.

Janet Rowse replied that the Royal National Hospital for Rheumatic Diseases in Bath had been included in the original list. However, the services delivered by that hospital were mainly secondary care.

Councillor John Bull said that the weighting scores were quite close to each other when the assessment of options was conducted in October 2010. He asked what made social enterprise the preferred option.

Richard Szadziwski replied that the scoring criteria and the analysis used for the assessment indicated that the social enterprise option had been in a slight advantage to other options.

Councillor Sandry asked about the outcome of the consultation with the staff.

Janet Rowse replied that there was understandable anxiety between members of the staff on employment issues and anger that people had no choice to have their say on whether or not they want Transfer of Community Services. There was also some anxiety that some of the options were the first step towards a profit organisation. However, in some instances, people showed enthusiasm about the whole issue.

Councillor Brinkhurst quoted paragraph 2.2 of the cover report where it said that 'The Council will be required to take over the public health services currently within the PCT and to establish a new Partnership Board which amongst other duties takes over the statutory function of the Health O&S Committee'. Councillor Brinkhurst expressed her concern that the Panel would not be able to represent residents' views on health issues in the future.

Janet Rowse replied that although the report was on Transfer of Communities Services it also focuses on the outcome of the White Paper. She also said that she would be the lead officer on the set up and implementation of the new Partnership Board and that she personally thinks that the Overview and Scrutiny adds a value to the decision making process and that the Panel should continue to exist.

The Chairman asked what would happen if the decision of the PCT Board (which meets on 18th November) is different from the decision made by the Full Council (which meets on 16th November) in terms of the preferred option.

Janet Rowse replied that she hopes there would be no different decisions between the PCT Board and the Council. If that happens it would put at risk both services and it would lead to the failure of the system. A consensus would be made if there were two different decisions.

The Chairman asked if the timescales were set only on the health aspect.

Janet Rowse responded that although the timescale had been directed by the NHS nationally, the aim is also to meet local authority timescales.

The Chairman asked if there had been any hard evidence showing the benefits of integration. Janet Rowse replied that more time was needed to see the full benefits.

The Chairman invited Richard Gurney (UNISON branch representative) to address the Panel.

Richard Gurney gave apology for Joy Davis (Joint Trade Unions Secretary) and read a statement on behalf of the Joint Trade Unions.

In his statement Richard Gurney said that the staff expressed their concerns about the way in which the requirements for the Transfer of Community Services had been interpreted and that the options appraisal process did not fully consider all of the options. The Trade Unions believed that there could be 'an engagement without a marriage' which would preserve all the benefits of working together without a formal merger. The Trade Unions also believed that this was driven by the national policy regarding the NHS and the Council that had been asked to make a leap into unknown in order to preserve a partnership with the NHS. The Trade Unions also believed that this was driven more by the needs of senior managers than being an absolute requirement. Staff Side also had major concerns that a Social Enterprise was really back door privatisation, for which there was no mandate or desire from the public. There were no guarantees as to what would happen if the Social Enterprise did not work and went bankrupt. There was a considerable pride in both social services and the NHS in providing a public service, but when the service is taken out of the public sector the quality of the service could suffer due to the loss of pride in working for a business. Richard Gurney concluded his statement by saying that the Staff Side was proposing that council staff should remain with the Council and colleagues from the health sector should remain with the NHS.

A full copy of the statement from Trade Unions is available in the minute book at Democratic Services.

Councillor Sandry asked how many staff, out of 1,700, were Trade Union members.

Richard Gurney replied that out of 1,700 staff 700 of them were from the Council. However, not all of them were in any of Trade Unions. 25% of staff turned up at consultation events and the majority of feedbacks were that everything was happening very quickly.

Councillor Organ asked what is the view from the NHS Trade Unions was on these issues.

Richard Gurney replied that the NHS Trade Unions would prefer to stay with the NHS after the PCT cease to exist.

Councillor Sandry asked was the view from the NHS on suggestion of having Council staff staying with the Council and the NHS staff to stay with the NHS. Janet Rowse replied that although the Council has commissioning resources to employ the staff, once the PCT cease to exist the successor body would not be licensed to commission work.

Councillor Brinkhurst commented that the statutory duty of the Council is to provide services for vulnerable people and therefore the Council would have to keep some of the social services in-house. The Panel already voiced their concerns about the short timescales on these important issues but the Council and the NHS have no choice other than to go ahead with the transfer of services due to the directives from the government.

The Chairman invited Diana Hall Hall, Bath and North East Somerset Local Involvement Network (LINK) Chair to address the Panel.

Diana Hall Hall said that it has been extremely difficult for the LINK to formulate comments on these option proposals within the time between receiving the report and the meeting today. The LINK recognised the pressure that the PCT had been under to produce these proposals in the circumstances of a new Coalition Government with an urgent agenda, but they felt that this is no way to reconfigure health services that were critically important to the people of Bath and North East Somerset. The problems that can arise when different agencies have responsibility for health care and for social care have in the past created huge problems for patients and their families. The LINK considers it an absolute priority that the great steps forward that have been made under joint commissioning arrangements should not be lost or diminished under any new arrangements. The LINK asked following questions:

What steps have been taken to ensure that the future commissioners - the GP Consortium - will be prepared to take responsibility for any proposed model of service when they become responsible for its effectiveness and risks?

Why two of the Options that were excluded in March (Integration with RUH Trust, and Integration with Mental Health Trust) have been re-included in the current option proposal?

Would the option on the integration with GP Services be included now if the assessment had been purely on the grounds of quality of services provided for patients?

Diana Hall also read out LINK's views on the assessment of all options and process issues related to the move towards Social Enterprises. She concluded her statement by saying that the LINK should be involved in the governance arrangements of any Social Enterprise, if that is the preferred option, in its representative role for the people of Bath and North East Somerset.

A full copy of the statement from LINK is available in the minute book at Democratic Services.

Janet Rowse replied that the GP Consortiums have only just started to explore their new roles. They were interested in their role as providers of services. However, it was still too early to engage them as commissioners as well because they need to learn more about investing in services, understanding the market and similar. The Council and the PCT worked with the existing mechanisms but they would also consider GP Consortiums once they learn their role. Current understandings were that after some period GPs would start to understand the provision of services.

Peter Jovcic-Sas commented that the Coalition have made rushed decision on these issues.

The Chairman invited Anne Marie Jovcic-Sas to address the Panel.

Anne Marie Jovcic-Sas read out her statement in which she highlighted the needs of the hard to reach and black and ethnic minority (BME) communities. She was concerned with the sketchy outline describing the process by which the Council was planning to conduct Equality Impact Assessment on this matter. Anne Marie Jovcic-Sas made a plea for the inclusion of a dedicated Health Improvement Officer for BME communities in these plans. The new arrangement aiming to improve the quality of care, better experience of services, as well as safer services and that the ability to respond quickly to the latest practice in health and social care would only be achieved in the case of vulnerable BME communities through the offices of a dedicated Health Improvement Officer.

A full copy of the statement from Anne Marie Jovcic-Sas is available in the minute book at Democratic Services.

The Chairman invited Peter Jovcic-Sas to address the Panel.

Peter Jovcic-Sas informed the meeting that he would address the Panel as the member of the public and also as the Chair of the Co-operative Party South West Regional Council. He introduced the UK's co-operative business sector which has a combined annual turnover of £33.5bn (2009), employing 237,800 people and has 12.9m members. Co-operatives generate £644m per week. Co-operatives are run according to seven key principles: voluntary and open membership; democratic member control; member economic participation; autonomy and independence; education, training and information; co-operation among co-operatives; and concern for the community. Peter Jovcic-Sas read out what the different co-operative business models were, principles of management and decision making within the co-operative company, funding and tax, legal and financial issues related to the co-operative companies. Profit distribution would be decided by the members. Typically it would be a third distributed to members, a third retained for growth and a third used to benefit the community.

A full copy of the statement from Peter Jovcic-Sas is available in the minute book at Democratic Services.

Councillor Jackson commented that the last paragraph under Cooperative Society on page 89 of the report seemed like missing few words.

Richard Szadziewski apologised for the way how the paragraph was written and explained that the Council and the PCT would have no intention to distribute profits.

Richard Szadziewski introduced the rest of the presentation related to Social Enterprise.

The Chairman commented that the timescale was an issue on this matter. He reminded the Panel when the Council commissioned its services to the Somer Housing it took 6-12 months of consultation before an option was agreed whilst on this matter the Council had much less time.

Councillor Sandry asked if the co-operative society could be a charity.

Richard Szadziewski responded that a charity status could be included in the constitution of the co-operative society.

4.10pm - At this point the Chairman adjourned the meeting for 15 minutes comfort break.

4.25pm – Meeting reconvened.

The Chairman thanked to all contributors who participated and opened the meeting for a general debate.

Councillor Brinkhurst felt that some speakers raised national political issues at this forum. She felt that this was wrong place to do so as the Panel was here to represent their residents and do what is best for them.

Councillor Clarke agreed with this comment by saying that primary job of this Panel is to represent their residents.

The Chairman commented that the role of the Panel was to be non-political and that any political issues should be raised at the Full Council meeting.

Councillor Jackson said that the principal responsibility of the Council was to get the best deal for their residents. She said that it was quite unacceptable to have such a short timescale for a very important issue. Councillor Jackson questioned if there was enough accountability on this issue and she expressed her concern on how the safeguarding, which was one of Council's main responsibilities for its residents, would be delivered from other source. Councillor Jackson welcomed what the LINK said in their statement about the trust in awarding a contract with a value of £50m to a new organisation with no trading or financial management record.

Councillor Sandry thanked Janet Rowse and Richard Szadziewski for the comprehensive report. He also said that he was impressed with the input from all of

the contributors today. He recalled that Trade Unions stated that the decision had been made considering officers recommendations for Social Enterprise. Councillor Sandry concluded that for him, based on the evidence heard today, integration with an NHS Trust was quite interesting option as well as the Council as the Social Enterprise.

Councillor Organ said that the integration between the Council and the PCT had been quite successful and that he doubt that anything suggested in the report and presentation would go wrong. He said that, based on the evidence heard today, he would support social enterprise, non profit, non charity, community interest company limited by guarantee.

The Chairman informed the Panel that the Panel should not make recommendations on the options as this should be decided at the Full Council meeting on 16th November. However, the Panel should make their views based on the evidence heard today and those views would be presented to the Full Council along with the report.

Janet Rowse said that each of the options would have the same quality of services regulator in Care Quality Commission. There would also be a number of financial regulators and quite a number of ways to hold any organisation to account.

The Chairman said that his concern about Social Enterprise was based on how viable it would be in the long term, security for service users and provision of social care. He felt that the integration with an NHS Trust (such as the RUH) seems to be the better option. He also felt that the co-operative society should be considered as an option. The Chairman concluded by saying that the issues raised by the Trade Unions should require more discussion.

Councillor Jackson said that at the end of the day the community would need something with the proven track record. She also said that we would need to keep the expertise from the Council and the NHS staff. Councillor Jackson concluded that the preferred option for the community would be integration with the RUH.

Councillor Brinkhurst felt that she would not be comfortable with the co-operative option and she asked that this should not be part of the Panel's general view. The Chairman agreed with the view from Councillor Brinkhurst.

The Chairman thanked to everyone who participated in the debate.

The Panel **AGREED** with the following scrutiny:

- 1) The Panel noted the national timescale to which the NHS is required to work and acknowledged the efforts on the part of the Partnership to work within this, but remained concerned that lack of time might hamper effective decision making;
- 2) The Panel considered the advantages and disadvantages of the range of options presented in the report and by the contributors at the meeting;

- 3) The Panel supported the following range of options for the current health and social care services to be assessed:
 - a. Standalone community provider services: Social Enterprise
 - b. Integration with local authority
 - c. Integration with an NHS Trust (Possible integration with the Royal United Hospital was discussed at some length)

Note: The Panel want to be clear that the support for those options was based only on evidence provided at the meeting including submissions from the NHS, Trade Unions, Bath and North East Somerset Local Involvement Network and members of the public. The Panel are aware that the final decision on preferred option/s would be made at the full Council meeting on 16th November and the PCT Board meeting on 18th November. For both meetings it is expected that the report would contain more information, including financial;

- 4) The Panel considered and noted the principles to be used in establishing the governance arrangements should a social enterprise be chosen as the way forward by the Council and the PCT. The Panel felt that the Council and Service Users should be represented in the membership and trustee arrangements of such organisation;
- 5) The Panel noted the project governance arrangements and next steps and welcomed its role in the implementation of any solution prior to the establishment of any new Partnership Board under the Coalition Government's proposals as contained in the recent NHS White Paper;
- 6) The Panel welcomed comprehensive report from Janet Rowse (Acting Chief Executive NHS BANES and Strategic Director for Adult Social Care and Housing); and
- 7) The Panel welcomed contributions from the Trade Unions, Bath and North East Somerset Local Involvement Network and members of the public.

Appendix 1

The meeting ended at 5.15 pm

Chair(person)

Date Confirmed and Signed

Prepared by Democratic Services

Bath & North East Somerset Council

Healthier Communities and Older People Overview and Scrutiny Panel

28 October 2010

Community Health and Social Care Services – Future Provision

Background Paper to Appendix 4 – Key Characteristics of Various New Organisational Forms

COMMUNITY INTEREST COMPANIES LIMITED BY SHARES

Summary overview

A community interest company (“CIC”) limited by shares has community-based objectives that it must solely focus on. It also has the ability to provide limited dividends and was created as a compromise between a charity and a company limited by shares (i.e. it is a company that is demonstrably acting for the community whilst also having the ability to pay directors and leverage in funding through equity investment).

Key characteristics

A CIC is a company with certain unique characteristics that place restrictions on what actions the company can take. The key characteristics of a CIC are the asset lock and the community interest test.

Asset Lock

The main elements of the asset lock are as follows:

- CICs may not transfer assets at less than full market value unless they are either transferred to another asset locked body or transferred for the benefit of the community. An ‘asset locked body’ is defined as a CIC or a charity.
- If its constitution allows a CIC to pay dividends (other than to another asset locked body – another CIC or a charity) these will be subject to a cap that limits the amount of dividend payable (the “**Dividend Cap**”). A similar cap applies to performance related interest rates on loans where the rate of interest is linked to the CIC’s performance.
- On dissolution of a CIC any surplus assets must be transferred to another asset locked body.

There is no statutory definition of ‘assets’ within the legislation governing CICs. However, the CIC Regulator has stated that ‘assets’ must be given a wide interpretation and would include land, cash and revenue streams. This means, for example, that payments to staff and directors must not be disproportionately high.

A CIC can raise debt finance for its activities in the same way as any other corporate body, provided that the loans are subject to commercially reasonable interest rates. However, an “interest cap” applies where the rate of return for the lender is performance related. Any loan where the rate of interest charged on the loan is

linked partially or fully to the profitability of the CIC, its activities as a whole or any particular activity will be classed as a performance-related loan and the cap will apply. The cap is currently set at the Bank of England Base Rate + 4%.

Community Interest Test

In order to qualify as a CIC, a company must satisfy the community interest test. The test is that: *"a reasonable person might consider that its activities are being carried on for the benefit of the community"*.

The test is one of the underlying purposes of a company's activities and it is a question of what ultimately the activities are directed at. "Community" is given a wide meaning and can include a section of the community defined by geography, interest or need. However, it is necessary that the community is not an unduly restricted group of beneficiaries. This is a much wider and simpler test to satisfy than that required for an organisation to be a charity and the provider of health services to the general public has been held to satisfy the test.

A statement setting out how the community interest test will be met must be lodged with the initial application to form a CIC, along with the usual documents required for company registration. Compliance with the community interest test is an ongoing requirement. The CIC Regulator will monitor how the CIC is satisfying the community interest test via the annual form that the CIC has to submit to the CIC Regulator setting out its activities in the preceding year.

If ultimately the CIC Regulator is not satisfied that the community interest test is being met it has wide powers including the power to appoint and remove directors, appoint a manager of the CIC and in extreme situations order the transfer of shares or present a petition to the Court for the winding up of a CIC.

There is a clear inter-relationship between the asset lock and the community interest test in that the test may not be met if a reasonable person might consider that the activities of the CIC are being carried on for the benefit of the company's directors, employees or service providers rather than for the benefit of the community. This is on the basis that in such an eventuality the assets are being used to provide benefit to third parties rather than being used for the community. This will be monitored through the annual report.

Governance structure

A CIC limited by shares has a governance structure of shareholders and directors in the same way as a normal share company. Directors have the role of managing and running the day to day business of the company usually associated with company directors. In addition directors of a CIC will have the responsibility (along with shareholders when they take collective decisions about the company) for ensuring that the CIC continues to satisfy the community interest test. Unlike with charitable companies directors can be paid.

The shareholders of a CIC will have the same rights as normal shareholders, that is they will retain ultimate control over the CIC and have responsibility for major policy and decisions. For example, the shareholders will have the right to dismiss the directors, delegate powers to the directors, declare dividends, approve major transactions and change the constitution of the company.

Constitution

In the same way as normal companies CICs are governed by memorandum and articles of association which are prepared by the promoters of the CIC and can be subsequently amended by the shareholders of the CIC. The articles will include all substantive provisions including the community interest statement and the details of the asset lock.

Regulators

CICs are registered with the CIC Regulator (an independent office). The CIC Regulator is a light touch regulator and will principally rely on CIC shareholders and other interested parties to draw matters of concern to its attention. The CIC Regulator has significant enforcement powers, but these are only intended to be used in serious circumstances.

The CIC Regulator's powers include the power to appoint and remove directors, appoint a manager of the CIC and, in extreme situations, order the transfer of shares or present a petition to the Court for the winding up of a CIC. The consent of the CIC Regulator must also be obtained in relation to matters such as proposed changes in a CIC's objects.

CICs have to produce an annual CIC report, which will be delivered with their accounts to Companies House and placed on the public record. The report must record what the CIC has done to pursue the community interest and involve its stakeholders during the year. Stakeholders would be people or groups that are affected by the activities that the CIC pursues. The annual report must also contain additional financial information such as any payments to directors or declarations of dividends in the preceding year.

CICs are also subject to Companies House regulation. Companies House is a very light touch regulator. A company would typically only interact with Companies House through the requirement to file annual accounts / directors' reports as well as notices following various actions, such as a name change or appointing or removing a director.

Brief comparisons with other social enterprise models

A CIC limited by shares represents a compromise between a conventional company limited by shares and a charitable company in that it can distribute profit, pay directors and is subject to light touch regulators whilst at the same time it has to satisfy a community interest test, has an asset lock and is accountable to the CIC Regulator for its conduct as a CIC.

A CIC limited by shares is therefore more flexible than any of the charitable models whilst, by virtue of the asset lock and community interest test, being more restrictive than a company limited by shares. The fact that it can distribute profit (albeit that any distributions are restricted) means it does not qualify for national non domestic rates ("NNDR") relief or for VAT exemptions available to non profit distributing organisations ("NPDO") (i.e. charities, CICs limited by guarantee or non-charitable companies limited by guarantee) and has much more limited opportunities to benefit from grant funding. In addition as a CIC it does not benefit from the tax exemptions available to charities.

COMMUNITY INTEREST COMPANY LIMITED BY GUARANTEE

Summary overview

A CIC limited by guarantee has community based objectives that it must solely focus on. In the same way as a company limited by guarantee, rather than shareholders it has members who guarantee to contribute a nominal sum in the event that the company is wound up. A CIC limited by guarantee is prohibited from distributing profits. There is a very broad range of organisations formed as CICs, many of which are involved in service delivery at a community level – including in particular health, as set out above.

Key characteristics

A CIC is a company with certain unique characteristics that place restrictions on what actions the company can take. The key characteristics of a CIC are, as set out above, the asset lock and the community interest test.

A CIC limited by guarantee does not have share capital and is not able to provide dividends. In other respects the organisational form is the same as a CIC limited by shares.

Brief comparisons with other social enterprise models

A CIC limited by guarantee is less restrictive than any of the charitable models as it is not subject to charity law or the regulation of the Charity Commission. It nevertheless does have an asset lock (including a prohibition on providing any dividends), has to satisfy the community interest test and is subject to the regulation of the CIC Regulator.

The difference to a CIC limited by shares is that a CIC limited by guarantee cannot distribute any profit (a CIC limited by shares may distribute up to 35% per annum), a fact that qualifies it as an NPDO. As an NPDO a CIC limited by guarantee is eligible for 100% discretionary NNDR relief in the same way as a non-charitable company limited by guarantee is. As it is not a charity it does not benefit from the tax benefits associated with charitable status (including exemption from corporation tax).

In terms of tax / VAT treatment a CIC limited by guarantee is therefore in the same position as a non-charitable company limited by guarantee. However, a CIC has the additional requirements of an asset lock, satisfying the community interest test and is subject to additional regulation and an additional regulator. These factors may facilitate engagement with the wider third sector, allow for more opportunities of grant funding and offer greater comfort to government agencies as to the community focus of the company.

COOPERATIVE SOCIETY

Summary overview

A co-operative society is an industrial and provident society that is being conducted for the benefit of its members. A co-operative society is significantly different from other social enterprise models in that the entire rationale for a co-operative is to operate for the benefit of its members rather than for the benefit of the public. As a cooperative is explicitly set up for the benefit of its members it cannot be a charity because it does not provide sufficient public benefit.

Key characteristics

A co-operative society is a corporate body. As a corporate body it has its own legal personality meaning that it may enter into contracts in its own name and be sued by and sue third parties in its own name. This means that the members of the society benefit from limited liability and can only be pursued personally for their actions where they have acted in breach of their duties.

In order to be established as a co-operative society the society must be a bona-fide co-operative society. There is no statutory definition of a 'bona fide co-operative' society but there are criteria laid down by the Financial Services Authority. The criteria are:

- conduct of the business must be for the mutual benefit of the members with the benefits they receive deriving mainly from their participation in the business;
- control of the society must be vested in the members equally, the principle of 'one man, one vote' is fundamental;
- interest on capital will not exceed a rate necessary to obtain and retain sufficient capital to carry out the society's objects;
- profits, if distributable amongst the members, will be distributed in relation to the extent members have either traded with the society or taken part in the society's business; and
- membership must not be artificially restricted with the aim of increasing the value of any proprietary rights and interests.

Governance structure

A co-operative society has a two tier governing structure broadly analogous to a company. It comprises of members in the society who appoint committee members who have responsibility for the day to day operation of the society.

The members of the co-operative are, in some ways, analogous to shareholders with capital payable in order to become a member and dividends payable from profits of the cooperative. However, whilst dividends can be paid, the purpose of a co-operative cannot be to provide dividend payments to members and in practice it may be more typical for the membership to decide to reinvest all profits into the business of the cooperative.

As noted above, the principle of one man one vote is fundamental to the concept of a cooperative.

Constitution

A co-operative society's constitution is known as its 'rules'. The rules deal with the same items that are dealt with in a company's memorandum and articles of association including the society's objects, place of its registered office, the terms of admission of members, the holding of meetings and voting rights.

Regulator

A co-operative society is registered with and regulated by the Financial Services Authority to whom it must submit annual accounts and an annual report. The FSA is a relatively light-touch regulator in respect of cooperatives not providing financial services with its resources focused on other forms that it regulates, in particular those operating within the financial sector.

Brief comparison with other social enterprise models

A co-operative society is a distinctly different type of social enterprise vehicle in that it is by definition run for the mutual benefit of its members rather than for the benefit of society. As a profit distributing organisation it would not be eligible for NNDR relief and would not benefit from tax exemptions available to charities.

CHARITABLE COMPANY LIMITED BY GUARANTEE

Summary of legal form

A charitable company limited by guarantee is a company limited by guarantee with exclusively charitable objects. As a limited company it is subject to company law (in particular the Companies Act 2006) and as a charity it is subject to charity law (in particular the Charities Act 1993 and Charities Act 2006).

A company limited by guarantee is the legal format most widely used for charities. This is because it offers limited liability for the directors and members of the company and is a widely known form that both the public and private sector are used to working with and are comfortable with.

Key characteristics

A company limited by guarantee has its own legal personality meaning that it may enter into contracts in its own name and be sued by and sue third parties in its own name. This means that the directors and members of the company benefit from limited liability and can only be pursued personally for their actions where they have acted in breach of their duties, for example wrongful trading.

In order to be established as a charity a company must have:

- exclusively charitable objects;
- demonstrate sufficient public benefit.

These tests would be assessed by the Charity Commission upon registration and would need to be complied with on an on-going basis. A charity's objectives are stated within its memorandum of association and must be exclusively charitable in order for the company to qualify as a charity. A charity can only undertake activities that further its stated objectives. The Charities Act 2006 sets out 13 different purposes that are accepted as being charitable. These include, for these purposes, the advancement of education, the advancement of health and the advancement of community development.

The Charities Act 2006 introduced a requirement for all charities to positively demonstrate what public benefit they provide. There are two elements to the public benefit test:

- there must be an identifiable benefit or benefits;
- the benefit must be to the public or a section of the public.

In assessing whether the benefit is to the public the Charity Commission will assess the level of private benefit that the charity would provide. 'Private benefits' are benefits that people or organisations receive other than as beneficiaries of the charity. Such benefits must be no more than incidental.

A fundamental feature of a charity is that it cannot distribute profits. All profits of a charitable company must therefore be reinvested into the activities of the charity. A charity may only transfer its assets to third parties either for full market value or in furtherance of its charitable purposes.

Governance structure

A charitable company limited by guarantee is primarily run by a board of directors. The directors of a charitable company are also, by virtue of having the overall control and responsibility for the company, trustees of the charity (the term director will be used in this paper unless specially referring to a point that applies to an individual by virtue of him or her being a trustee). There is a general prohibition on charity trustees being remunerated for their role as trustee meaning that directors / trustees of a charitable company are invariably non-executive.

The directors, as charity trustees, are under various duties under charity law. At its broadest there is a duty to act independently and only in the best interests of the charity. Directors are also subject to duties under company law including the duties introduced by the Companies Act 2006 (these include a duty to promote the best interests of the company and a duty to avoid conflicts of interests).

The duty to avoid conflicts of interests exists under both company and charity law. It is important to note that it is not as easy for either non-conflicted directors or members to authorise conflicts for directors of a charitable company in the same way as it is for normal companies. This is as a result of the additional duties of independence associated with trusteeship and the additional regulation of the Charity Commission.

Depending on the size of the charity the executive functions of a charitable company would ordinarily be delegated to a senior management team who would be full time employees of the charity and responsible for overseeing the charitable company's day to day activities and managing the rest of the staff. However, importantly the directors retain overall responsibility for the activities of the charity and senior management would be accountable to and controlled by the board of directors.

A company limited by guarantee has members rather than shareholders so that the governance structure is of members and directors. Members do not own the company in the same way that shareholders do but rather provide a guarantee (usually a nominal £1) to contribute to the company in the eventuality that it is wound up. The members retain ultimate control over the company through the power to appoint and remove directors and to change the memorandum and articles of association.

Constitution

A charitable company limited by guarantee is governed by its memorandum and articles of association. The memorandum of association states that the subscribers wish to form a company and agree to become members of the company.

The articles of association sets out all substantive provisions relating to the company including the governance structure of the company; the provisions governing conduct of meetings and decision making by both the directors and members; the charitable objects of the company; the powers of the company; dissolution provisions; a prohibition on distribution of profits; and what benefits the directors and members of the company are permitted to receive.

Regulator

Charitable companies are subject to regulation by Companies House and the Charity Commission.

Companies House is a very light touch regulator. A charitable company would typically only interact with Companies House through the requirement to file annual accounts and directors' reports as well as notices following various actions, such as a name change or appointing or removing a director.

The Charity Commission is a much more proactive and powerful regulator than Companies House. In the same way as with Companies House, annual accounts and reports have to be filed with the Charity Commission. This includes a report on how the charitable objectives of the charity have been pursued in the previous year and how public benefit has been provided. In addition the consent of the Charity Commission is required for various actions, such as changing the charitable objectives of the company, or the sale of land between connected parties.

The Charity Commission has the power to carry out inquiries into charities where it has concerns over the conduct of the charity and in extreme cases has the power to remove and appoint trustees, freeze bank accounts and seize documents.

NON-CHARITABLE COMPANY LIMITED BY GUARANTEE

Summary of legal form

A company limited by guarantee is a limited company that has members who, rather than purchase shares, provide a nominal guarantee in the eventuality that the company is wound up. It is established under and subject to company law in the same way as companies limited by shares with the exception of law relating to shares.

Although not a legal requirement, a company limited by guarantee would typically have restricted objects and a prohibition on distribution of profits. In this paper only a company limited by guarantee with these characteristics will be considered. This is because without these characteristics the company would not offer any material benefits compared to a company limited by shares and if the company is to distribute profits a company limited by shares would be the more appropriate model, though this is unlikely to be considered appropriate in the context of a health-related social enterprise.

Key characteristics

A company limited by guarantee has its own legal personality meaning that it may enter into contracts in its own name and be sued by and sue third parties in its own name. This means that the directors and members of the company benefit from limited liability and can only be pursued personally for their actions where they have acted in breach of their legal duties, for example wrongful trading.

Although not a legal requirement of the form, a company limited by guarantee typically has a prohibition within its memorandum of association on the distribution of profits. The prohibition on distribution of profits enables a company limited by guarantee to qualify as a NPDO. Qualifying as an NPDO enables a company to be eligible for NNDR relief and also possible VAT savings.

A company may only pursue activities that are within or reasonably incidental to its stated objects. A company limited by guarantee would typically have more specific objects than the general commercial objects used in a conventional company limited by shares. The company's objects would ordinarily relate to the particular community that it is being established to work within. This, together with the prohibition on distribution of profits, is used to ensure, and demonstrate to third parties, that surpluses will only be used for the particular purposes stated in the objects.

Please note that there is no legal requirement for this nor would the community objects have to satisfy any particular test (as is the case with charitable companies and community interest companies). Nevertheless, it is unlikely to be considered appropriate not to adopt these arrangements for a health-related social enterprise. In any event, the objects could be changed by the members without the need of a regulator's consent.

It is possible for a company limited by guarantee to be used in a flexible and commercial way as part of a group structure. For example, it can be possible for a parent company to exercise control over the company and directors connected to parent or other companies being appointed to the board. The requirements of independence associated with charities and community interest companies do not allow for this with charitable companies or CICs. It is important to note, however, that in order to qualify for NNDR relief the company in question needs to be in control and occupation of the premises and therefore reasonable commercial terms should be in place between the company limited by guarantee and the rest of the structure. Equally, in order to benefit from certain VAT exemptions that are available to companies limited by guarantee, the company must be independent of third party control or commercial influence.

Governance structure

A company limited by guarantee has a governing structure of members and directors. Directors have the role of managing and running the day to day business of the company usually associated with company directors. Unlike with charitable companies directors can be paid and there are not the same requirements in relation to independence that directors of charities and CICs are subject to. This means that directors of a company limited by guarantee could for example be connected with associated third parties and individuals can be paid for carrying out their role as directors.

The members of a company limited by guarantee do not own the company in the same way that shareholders do in respect of a company limited by shares as there is

no notion of equity. Rather than having a shareholding, the members guarantee to provide a sum (usually a nominal £1) in the eventuality that the company is wound up. The members of a company limited by guarantee do however otherwise have the role given to shareholders (i.e. they can appoint and remove directors and have the sole power to amend the memorandum and articles of association).

Constitution

A company limited by guarantee is governed by its memorandum and articles of association. The memorandum of association will state that the subscribers wish to form a company and agree to become members of the company.

The articles of association sets out the: governance structure of the company; the provisions governing conduct of meetings and decision making by both the directors and members; the charitable objects of the company; the powers of the company; dissolution provisions; a prohibition on distribution of profits; and what benefits the directors and members of the company are permitted to receive.

Regulator

Companies limited by guarantee are subject to the regulation of Companies House.

Companies House is a very light touch regulator. A company would typically only interact with Companies House through the requirement to file annual accounts/directors' reports as well as notices following various actions, such as a name change or appointing or removing a director.

Brief comparisons with other social enterprise models

A non-charitable company limited by guarantee is a lot less restrictive than any of the charitable models or either form of CIC, for the following reasons:

- there is no additional regulator, such as the Charity Commission or CIC Regulator, which has to be satisfied upon registration, and on an on-going basis, as to the proper conduct and independence of the company;
- there is no specific test to be met in relation to the objects of the company;
- the directors are under no additional legal duties regarding independence; and
- there are not the same restrictions on transferring assets to third parties as there are with charities and CICs.

A company limited by guarantee would not have the same opportunities for grant funding as a CIC or charity and would not be eligible for mandatory NNDR relief in the same way as a charity. However, it would be eligible for discretionary NNDR relief and as a NPDO may still be able to benefit from certain social enterprise funding opportunities.