



FOR PUBLICATION

DERBYSHIRE COUNTY COUNCIL

IMPROVEMENT AND SCRUTINY COMMITTEE – HEALTH

21 November 2022

Report of the Director of Legal Services

Review of Section 75 Agreements – Final Report

1. Purpose

To inform the Committee of the outcomes of the review of the use of Section 75 Agreements between the County Council and partner organisations and to seek approval to the report recommendations.

2. Information and Analysis

The Committee, at its meeting on 17 January 2022 agreed to undertake a review of the use of Section 75 Agreements between the Council and partner organisations in the joint provision of Adult Care and Health Services. The health and wellbeing of Derbyshire people is a crucial part of the Council Plan and the development of effective and efficient partnership working arrangements is important for both the County Council and local NHS Commissioners and Providers.

Partnership working has developed over recent years between the County Council and external organisations. This includes the establishment of the local Integrated Care System (ICS) which was formally adopted on 1 July 2022, and which saw the transfer of the Derby and Derbyshire Clinical Commissioning Group (CCG) to the new Integrated Care Board (ICB). The national initiative of introducing and developing Integrated Care Boards to deliver Integrated Care Systems is intended to ensure greater effective and efficient collaboration between Local Authorities and NHS partners when delivering health and social care services across the county.

This review by the Health Scrutiny Committee was proposed by Cllr. Jean Wharmby, the Committee Chairman. The aim of the review was to consider the current use of Section 75 agreements between the Council and other service commissioners and providers. The review would investigate the

benefits – or otherwise – of the use of Section 75 Agreements and identify any areas for improvement or potential extension of their use.

Section 75 of the NHS Act 2006 allows partners (NHS bodies and councils) to contribute to a joint fund which can be used to commission health or social care related services. This power allows a local authority to commission health services and NHS commissioners to commission social care. It enables joint commissioning and the commissioning of integrated services.

To facilitate the review, a working group of Committee Members was established with representatives from the Majority and Minority Groups. Cllrs. Wharmby, Foster, Musson, Sutton and Allen were appointed to the working group and a series of meetings was held to obtain information from appropriate officers.

Research and Information Gathering

Throughout the review, meetings were held with officers from the County Council's Public Health and Adult Care teams, Commissioning and Finance Officers and staff of one of the Council's major NHS partners, Derbyshire Community Health Services (DCHS).

These meetings enabled the working group Members to receive the following information:

- Section 75 of the NHS Act 2006 is a vehicle to make contracts for services. Officers believed that this is preferable to the traditional method of contracting in some circumstances, as it allows for changes to be made to service specifications quickly and easily.
- Services provided via Section 75 Agreements take up a substantial spend of the Public Health Grant. Details of what the local Public Health Grant will be over future years are not available well in advance and this can sometimes make it difficult to plan long-term spending on all services, including Section 75 Agreement services.
- Prior to the use of Section 75 Agreements, NHS provided services were commissioned and provided under tendering processes. The tender process can be challenging for both commissioners and service providers for a number of reasons;
 - It can be difficult for the provider organisation to be involved in shaping the requirements of new services due to the competition perception issue.
 - Providers may worry about losing the service contract and the impact this has on staff wellbeing due to uncertainty created by the tendering process
 - Staff may also worry about losing their jobs if a tender bid is unsuccessful and sometimes this results in staff seeking

employment elsewhere, resulting in the provider losing good, experienced employees.

- The commissioner risks losing a good provider, should they choose to not bid in for a newly tendered service.
- There was a good relationship between the Council's Public Health and Adult & Social Care commissioners and NHS service providers which enabled them to work together to improve services without the concern of potentially losing the contract. Section 75 Agreements formalise these arrangements and allow Council and NHS officers to collaborate and create a partnership agreement which has mutual risk and benefit for both parties.
- Under the tender method, if the provider was at risk of being unable to offer a particular element of the service – however small – they were at risk of defaulting on their full contractual requirement. This would have a negative impact on any future contracts the provider bid for as it is legally required that this be declared in procurement processes. Section 75 Agreements allow an “improvement aspect” to agreements where both parties can work towards continual improvement without impacting on the service during the process.
- Under Section 75 Agreements, officers from both the Council and NHS organisations are in constant dialogue to provide services most effectively, especially in reacting to changes to population and community needs. The tender process is more restrictive whereas Section 75 Agreements allow a quick response to changing needs. Staff particularly appreciate this as they can raise concerns about any aspect of a service which they feel needs altering, without the risk of endangering contract commitments under a tender. This helps ensure that the patient/service user is always at the forefront of any decisions about their care.
- The tender process allows bidders from organisations from anywhere in the UK who often use a set model of service provision and may include an element of profit margin within their financial modelling. Whilst this may be in keeping with achieving best value for money, the experience and knowledge of local services providers can be more important when developing specific services for individual clients. As an example, the Section 75 Agreement for Children's Services has ensured services are delivered by a local provider with significant knowledge of the needs of Derbyshire children, along with the benefit of a vast number of long-established connections with professionals and voluntary organisations. Section 75 Agreements facilitate the sharing of knowledge and expertise between parties. This helps structure the best method of providing a service using systems established with partners that have extensive experience and knowledge of the needs of local service

users. This ultimately results in all parties contributing to a seamless service for individual clients.

- The tender process can also be intense for the commissioner, requiring resources to go through the process at the end of which, nationally, approximately 85% of contracts are awarded to the incumbent provider. In addition, Section 75 Agreements offer the benefit to the commissioning body in that they are not at risk of losing a very experienced provider. This was highlighted during a meeting with officers from Derbyshire Community Health Services (DCHS) who believed that this has been recognised by the Council's Director of Public Health who supported the use of Section 75 Agreements.

Potential Improvement to Section 75 Agreement arrangements

- The use of Section 75 Agreements has already improved the historic relationship between contracting parties which had previously been perceived as a relationship where "power" was a key factor. For example, the provider was vulnerable to financial penalties being imposed if an area of service provision was underperforming. This could result in the service provider focussing on those KPIs that potentially risked the financial stability of the contract and therefore detract from considering the performance of the service as a whole.
- A Strategic Governance Group has been established to oversee joint service provision but, due to delays imposed by the covid pandemic, there was still work ongoing to embed how the group operates. When planning joint care services, it is important to maximise the benefit of having the right people around the table who can offer an understanding of needs for a service, what should be provided, and how.
- It was suggested that the Strategic Governance Group should link closely to the Joined Up Care Derbyshire (JUCD) Children's Board. The JUCD Children's Board has real potential to do further early intervention and prevention work. Providing key services at an early stage in a child's life would reduce the need for additional services further down the line. Officers who raised this suggested that there should be a higher profile/presence of early intervention and prevention services within JUCD.

Financing Care Packages

- In order to establish if the use of Section 75 Agreements could be used more widely across jointly funded care provision, the working group met with an Accountant in the Corporate Services and Transformation department who had previously worked on Adult Care funding and the Service Manager for the commissioning team responsible for providing care packages and supported living for young people with disabilities (including learning disabilities). Although they were not directly involved

in funding services via Section 75 Agreements, they had experience of alternative funding arrangements. The review working group asked for details of their experiences of joint funding arrangements.

- The officers explained that individuals' needs may be complex and/or consistent and that these can only be met in conjunction with the provision of housing. In such cases the Council relies heavily on the private sector.
- Care packages can give rise to significant costs with support staff charges amounting to up to £3500 per week for one staff member and total care packages costing up to £10000 in some cases.
- On occasion, Sec. 117 of the Mental Health Act and Continuing Healthcare funding results in many care packages being jointly funded by the Council and NHS partners. Periodically, disputes can arise as to the funding arrangements, particularly as eligibility criteria differs between the two Authorities/agencies. Whilst there is an expectation for the parties to work collaboratively to resolve funding disputes, there would be significant benefit in developing a joint local protocol to provide a clear procedure to determine the responsibility for funding and for dispute resolution to avoid protracted delays occurring when agreement is not possible. Disputes can give rise to large cost and resource implications with the need for ongoing meetings involving staff from the Council and Mental Health Services.
- Section 75 of the NHS Act 2006 does not govern funding responsibility for joint care packages nor provides any framework for dispute resolution. However, as Sec 75 Agreements are used where both sides contribute money to a pooled budget, there could be scope to set out in detail the expectation of the parties as to the relative areas of responsibility in joint packages of care. This, in turn, should reduce the volume of disputes arising.
- It was noted that the Adult Social Care Department was looking at overarching systems as part of its work with the ICB. This could be a good time to raise the matter of parity of funding with senior managers of both the Council and NHS organisations.
- Although the concerns raised during the meeting were not directly relevant to the review of the use of Section 75 Agreements, the working group had a subsequent meeting with Adult Social Care and Health senior managers to explore this issue further. Details of these discussions are set out in the following section.

Information from Adult Care Senior Management Team

The review working group met with Linda Elba-Porter, Adult Care Service Director, Partnerships and Transformation and Dominic Sullivan – Adult Care Assistant Director, Prevention.

Cllr Wharmby outlined the remit of the Health Scrutiny Committee's review of the use of Section 75 Agreements and the discussion the working group members had had previously with officers (the Accountant from the Council's Finance team and the Adult Care Commissioning Service Manager) who had raised the issues they had with joint funding arrangements. These concerns had been shared with Linda and Dominic previously and the meeting was an opportunity for Members to learn more about the process of joint funding with NHS partners and how the system would change with the formalisation of the ICS and the introduction of the ICB.

Linda Elba-Porter gave an overview of the strategic perspective for joint funding services between the Council's Adult Social Care Service and NHS partners. During the Covid pandemic, follow-on care for anyone leaving hospital was funded by the NHS via Government funding. This included other streams of funding such as "Continuing Health Care", which is fully funded by the NHS, "Joint Funding" with joint agreement between partners, and funding under Section 117 (of the Mental Health Act) Agreements which is for people with complex mental health needs and is usually provided jointly by Adult Care and NHS partners. These funding streams were used prior to the covid pandemic and are continuing post-covid.

Service provider partners are now in a new era with the formalisation of the ICS and funding arrangements between Health and Social Care will be more integrated. To facilitate this, there are a number of initiatives such as "Living Well", which is a joint initiative with the NHS to help people with early-stage dementia and "Team Up" which addresses how teams work together to provide the right help at the right time.

In addition, there has been a "deep dive" investigation into joint care packages. The care packages referred to by the finance officer and the commissioning service manager were for people with very complex needs and these were much more difficult to agree. The Council and the NHS are currently looking at better ways of working together to provide different and complex care packages.

From a national perspective, more funding is coming into Adult Social Care via the NHS and it is recognised that ill-health prevention is as important as health care. The new ICS mechanism is a good opportunity to channel this funding to Adult Care Services and the use of Section 75 Agreements will be changing as a result. However, it was noted that, at present, no legislation had been tabled around future funding therefore, Section 75 Agreements will continue to be used positively until any changes are made to legislation. The Director and

Assistant Director undertook to notify the Committee of any developments in this respect.

The working group members stressed that they believed there should be a robust monitoring and auditing process, both for Section 75 Agreements and any new arrangements introduced via the ICS/ICB. It was important that Members were reassured that the Council was making the best use of available funds.

Summary of key findings

The review working group wishes to highlight the following points:

- The way both parties in a Section 75 Agreement work together seems a good approach to adopt for the effective and efficient provision of services. It offers an improvement on the contract tendering method in some circumstances, and it especially helps retain services provided by organisations that have local knowledge and expertise and not by remote, profit based organisations.
- The review outcomes should include the recommendation that Children's Services Early Intervention and Prevention receive a high priority with the JUCD Children's Board.

Report to Cabinet

If agreed by the Committee, the review outcomes will be reported to Cabinet with recommendations that any actions to facilitate improvements be agreed by Cabinet.

The review findings and recommendations will also be shared with the Council's partners who have participated in the review.

The implementation of recommendations accepted by Cabinet and the Council's Section 75 Agreement partners will be monitored by an action plan which will identify those who will be responsible for any changes and will set out a timeline for implementation.

After an appropriate time, the Committee may wish to revisit any areas where changes have been recommended, to ascertain the success – or otherwise - of any new arrangements.

3. Alternative Options Considered

3.1 None

4. Implications

4.1 Appendix 1 sets out the relevant implications considered in the preparation of the report.

5. Consultation

5.1 Throughout the review process, the working group has engaged with service commissioners, providers to enable them to contribute.

6. Background Papers

6.1 Documents held on behalf of the Committee by the report author.

7. Appendices

7.1 Appendix 1 – Implications.

8. Recommendations

That the Committee:

- a) Notes the findings of the Review of Section 75 Agreements;
- b) Recognises the benefits of the use of Section 75 Agreements, in appropriate circumstances, between the Council and NHS partners and supports their continued use.
- c) Promotes that the Children's Services Early Intervention and Prevention receive a high priority with the JUCD Children's Board.
- d) Submits the findings of this review to the Integrated Care Board and the Integrated Care Partnership to recommend that future joint funding structures between the Council and the NHS are a key element of the new partnership working arrangements to ensure parity and transparency for all funding contributors.
- e) Submits a report to Cabinet seeking agreement to the recommendations of this report.

9. Reasons for Recommendation(s)

The Review, undertaken by this Committee, found that the use of Section 75 Agreements is beneficial to officers of the County Council and those of our NHS partners, in providing a more streamlined mechanism for joint funding health and care services. The Committee wishes to highlight the advantages of the use of Section 75 Agreements and suggest that their use could be extended further across other health and care options.

With the development of the local Integrated Care System (ICS), the formal adoption of ICS's nationally on 1 July this year, and the transformation of the Derby and Derbyshire Clinical Commissioning Group to the new Integrated

Care Board (ICB), it is very timely that this review has investigated methods of joint funding between parties to the ICS.

The outcomes and recommendations of this review should be shared with ICS partners with a view to enhancing relationships involved in the joint provision of health and care services across the county.

Acknowledgements

The review working group would like to thank the following contributors to this review:

Derbyshire County Council

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Implications

Financial

1.1 The review will promote that the best use of available budgets are maximised in commissioning and providing health and care services across the county.

Legal

2.1 The review acknowledges that joint funding arrangements between the Council and partner organisations will adhere to legal regulations as appropriate.

Human Resources

3.1 n/a

Information Technology

4.1 n/a

Equalities Impact

5.1 n/a

Corporate objectives and priorities for change

6.1 The corporate objectives and priorities for change are embedded in the formalisation of the local Integrated Care System and the partnership arrangements with the Integrated Care Board.

Other (for example, Health and Safety, Environmental Sustainability, Property and Asset Management, Risk Management and Safeguarding)

7.1 n/a