



Brighton and Hove Learning Disability Outsourcing: Deconstruction Report for UNISON

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prepared by Andy Mudd
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1. Introduction

- 1.1 The Brighton and Hove Council branch of UNISON has commissioned APSE Solutions to provide an analysis of the decision and subsequent procurement process to outsource the provision of accommodation for people with learning disabilities. A number of documents have been provided which are listed below. This analysis is based on a reading of these.

Documents consulted

Report to Health and Well-being Board, 10 June 2014

Minutes of Health and Well-being Board, 10 June 2014

Report to Health and Well-being Board, 3rd February 2015

Report to Policy and Resources Committee, 4th November 2015

Staff Briefing 23 February 2016

Contract Notice, Official Journal of the European Union, 15 June 2016

Families Newsletter, July 2016

Report to Health and Well-being Board, April 16, 2016

- 1.2 APSE Solutions are not lawyers and whilst care has been taken to ensure the accuracy of the content of this report it should not be relied upon as legal advice. The report has been written for UNISON and should not be relied upon by any third party.

2. The Decision

- 2.1 A formal decision to 're-provide' the learning disability care and accommodation service through a procurement process was made at a meeting of the Council's Policy and Resources Committee on 19th April 2016. This was the culmination of a series of meetings of that Committee and of the Health and Well-being Board, from which it received recommendations.
- 2.2 An officer preference for outsourcing in one form or another was established as the preferred option back in June 2014, following a 'commissioning review'. The review apparently concluded that the cost of in-house provision was significantly higher than might be obtained through outsourced arrangements. Unfortunately, the report of the commissioning review has not been made available and cannot be located on the Council web-site. It is therefore not possible to assess or comment on the validity of this conclusion.
- 2.3 A report to the Council's Health and Well-being Board, dated 10th June 2014, drew heavily on the review findings. This report states that, 'The LDAS has higher costs than equivalent services provided in the private and voluntary sector'. It goes on to assert that costs, 'are

also high against benchmarked other authorities providing in house residential services'. No information as to the actual costs or how these were calculated, is provided and the authorities that were benchmarked against are not disclosed. Crucially, there is no indication of whether this is a reference to unit costs, inefficient use of resource or over provision. In other case where comparatively high in-house costs have led to externalisation the most significant factor has been unit staff costs. External care providers often employ staff on minimum rates of pay, with minimum pension provision and so called, flexible conditions. The decision to outsource therefore amounts to a judgement about the affordability of paying, still usually low paid, mostly female, staff employed to care for the most vulnerable people in society, on comparatively decent rates of pay and conditions. It is worth noting that a number of recent changes, including the national living wage and auto- pension enrolment, have increased costs to private care providers. None of these were in place in June 2014.

- 2.4 Without access to the report of the commissioning review it is impossible to assess the accuracy of its conclusion and in particular, to gauge whether the key assertion that, 'Opportunities for reducing cost through efficiencies are now limited and will not be enough to achieve the required savings', is justifiable. The report raises no concerns around quality and provides an unequivocal basis for concluding that the sole reason for outsourcing is to reduce the cost of provision. Moreover, the report indicates that there should be no further consideration or quantification of the potential for reducing the cost of the in-house service.
- 2.5 The minutes of the Committee meeting show that the elected members declined to follow the advice of the officers following the intervention of the Chair,- 'he had asked for Item 10 – Providing Homes for People with Learning Disabilities to be deferred', following visits he had made to learning disability services which apparently led him to the conclusion that, 'it was necessary to conduct a review of all services provided to people with learning disabilities, rather than looking at separate aspects of the service'. He went on to state that the review should be led by, 'someone from another authority' and that the emphasis should be, 'from the user perspective'.
- 2.6 The new review was undertaken 'over 3 days in October' by '3 independent reviewers' and led to 26 recommendations¹. Unfortunately, as with the report of the commissioning review the report has not been published and it has not been possible to obtain a copy.
- 2.7 The Committee report states that, 'the review team talked to service users, carers, representatives from the community and voluntary sector and staff from Brighton and Hove Council & the CCG'.
- 2.8 Without sight of the report, or even the 26 recommendations, it is difficult to gauge how far this review supported the eventual decision to outsource accommodation services.

¹ Report to Health and Well-being Board, 3rd February 2015

The Committee report provides some clues as to the thrust of its content, stating that, 'the review confirmed there are many excellent outcomes being achieved' but also apparently, 'noted a pressing need to refocus our priorities and activities to ensure these are in-line with the needs of people with learning disabilities'. The minutes of the Policy and Resources Committee that took the final decision to outsource the service include a stark interpretation of the review findings with the Statutory Director of Adult Social care reportedly stating that the 'independent expert had been shocked at the council's staff levels and resource provision'.

- 2.9 Policy and Resources Committee made a decision on 4th November 2015 to carry out a three months consultation with service users and their families'. The report presented at this meeting proposed that, 'due to the financial position the Council should no longer directly provide an accommodation service for people with a learning disability but instead people should receive an accommodation service provided by the independent sector through procurement arrangements with the Council'.
- 2.10 The report stated that, whilst savings had been achieved, 'it continues to be expensive to provide when compared to the independent sector and other local authorities'. It concluded that 'the service is unable to deliver the un-achieved savings or the required level of savings going forward'. No background documents were provided to support these statements although the report makes reference to the independent review as follows:
- 2.11 'The Independent Learning Disability Review that was completed at the end of 2014 found that the City has a skilled workforce committed to working with people who have a learning disability across all sectors including in-house, voluntary, and independent sectors, and that they were providing good services. However, there is a marked difference in the costs of these services; the in-house services are comparatively higher than the other providers'. This latter finding was not included in the earlier committee reports and cannot be verified or assessed for accuracy or robustness as the report itself has not, as discussed above, been made public.
- 2.12 Elected members were not given any indication of how the position might have now changed, for example with the imminent introduction of the National Living Wage from April 2016. This 7.5% increase in pay for those in receipt of the legal minimum has closed the gap in many areas between the cost of council provision and prices available in the private sector. Auto-pension enrolment has also added to the costs of private providers and moves to outlaw the use of zero hours contracts will further erode their ability to keep staff costs significantly below those incurred by local authorities. For one authority APSE Solutions is currently working with the cumulative impact of these changes is sufficient to prompt a detailed examination of the viability of moving currently outsourced provision back into the Council.
- 2.13 It is worth noting that the comment of the Director quoted above is, in an important respect, different to previous assertions about the cost of the in-house service in that it suggests that the comparatively high costs relate to over resourcing rather than to a like for like comparison of unit costs. If this is the case, then it is difficult to understand why a reduced level of staffing could not have been achieved through service redesign. There

is no record of any discussion or consideration of either the potential for or likely impact of reducing expenditure in this way.

- 2.14 In effect, the decision to go to consultation took the Council back to more or less the position established back in June 2014 before the intervention of the Chair of the Health and Well-being Board and the independent review. The option of continuing to receive support from the Council was not to be put to service users and their families under the consultation.

Key decisions

- 2.15 Regulations determine minimum requirements for key and executive decisions which are intended to ensure transparency and accountability.
- 2.16 Key decisions are defined as decisions that have a significant financial impact or which impact significantly on two or more wards of the council's area.
- 2.17 The regulations in relation to key decisions require advance notification that the decision is to be made, along with information about who is to make the decision, when they are to make it and what documents they will be taking into account and how these can be inspected. All executive decisions whether or not they are also key decisions, must be recorded, along with information such as the alternative options that were considered and rejected in making the decision. These records must also be published 'as soon as reasonably practicable'.
- 2.18 In the current case the decision to discontinue direct council provision of the service is unarguably a key decision. The decision was made at the meeting of the Policy and Resources Committee in November 2015. This meeting decided to proceed to consultation on 'alternative solutions' and purposely excluded the option of continuing with direct council provision from this exercise. So, whilst the formal decision to go to tender, i.e. to procure the services through contracts with third party suppliers, was made at the meeting held on 19th April 2016, this meeting was not given the option of retaining an in-house service. It is therefore possible to identify 2 separate key decisions:
- 2.19 The decision to cease in-house provision made in November 2015
- 2.20 The decision made in April 2016 're-provide' the service through a procurement process
- 2.21 It is difficult to see how first of these decisions was compliant with the requirements for key decision discussed above. In particular, the documents that apparently underpin it, the Reports of the Commissioning Review and of the Independent Review have not been published. There is also doubt as to whether the committee report itself was published. Whilst APSE has been provided with a copy by UNISON, it is not possible to access the document from the Council web-site.
- 2.22 The second decision was to delegate authority to the Executive Director to carry out a procurement and award contracts for services that 'aim to meet individual needs in the most cost effective way'. The only 'supporting documentation' for this decision are the

results of the consultation exercise. These documents have not been published as they contain confidential information.

3. The Consultation

- 3.1 The 19th April meeting was provided with a report of the outcome of the consultation exercise. The report has been withheld from UNISON and the wider public because it contains personal information. We do know however that it focussed on three options which were:
- That people are supported to move to alternative accommodation that meets their needs and can be provided in a more cost effective way
 - That people are supported to receive a personal budget and alternative accommodation
 - That people remain in their own homes and receive their care and support from another provider
- 3.2 Whilst it appears that, 'a number of relatives challenged why services staying as they are were not included in the options', there was no mechanism for this view to be included as an outcome from the consultation exercise. Indeed, consultees were not asked for their views on any of the substantive issues underpinning the decision to outsource the service. So, for example, they were not asked for their views on the quality of the existing service provision and whether they agreed that this would be maintained by an alternative provider operating with much reduced resources.
- 3.3 The legal requirement to consult is created by the Local Government Act 1999. The Act established a general duty on councils to make arrangements to secure continuous improvement in the way their functions are exercised having regard to a combination of economy, efficiency and effectiveness. For the purpose of 'deciding how' to fulfil this duty councils 'must consult -
- (a) representatives of persons liable to pay any tax, precept or levy to or in respect of the authority,
 - (b) representatives of persons liable to pay non-domestic rates in respect of any area within which the authority carries out functions,
 - (c) representatives of persons who use or are likely to use services provided by the authority, and
 - (d) representatives of persons appearing to the authority to have an interest in any area within which the authority carries out functions'
- 3.4 The issue of who provides a service can reasonably be considered to be an essential element of how the duty is fulfilled. In this case the initial decision to cease in-house provision was made before consultation as carried out and consultees were actively

prevented from expressing a preference for this option. There was effectively no consultation on this key decision. This may well amount to a breach of the statutory duty but perhaps more significantly, it means that the decision by Councillors to outsource was made without regard for the views of those who would be most affected by it and apparently predominately, if not entirely, on the basis of an out of date assessment of the comparative cost of provision. Given the requirement to have regard to the combination of economy, efficiency and effectiveness, the decision might also therefore be in breach of the general duty of best value.

4. Options appraisal

- 4.1 The duty to secure continual improvement, having regard to economy, efficiency and effectiveness, coupled with common law requirements to have regard to all relevant information, infers a duty to identify and consider alternative options for service delivery.
- 4.2 There are in fact a wide range of options available for the provision of learning disability accommodation/support services. These would include combinations of in-house and external provision but also some, so called, alternative delivery arrangements, such as a contract with a wholly owned council company or with a social enterprise. The latter would include organisations established by staff. This is a model that has been promoted extensively by the government, including through legislation aimed at making it easier for such organisations to win contracts from councils.
- 4.3 No options other than open contracting out were presented to members at any of the meetings considered here. Thus, even if it could be said that improvement to the in-house service were fully considered and properly discarded a range of options have been totally ignored, in apparent breach of statutory requirements and to the detriment of future service provision.

5. The Procurement

- 5.1 The Committee Report of 19th April 2016 set out the proposals as follows:
 - 'Learning Disability Residential Services including Preston Drove, Leicester Villas, Windlesham Road: these services will be provided as residential care services through a procurement process:
 - 'Learning Disability supported Accommodation at Hawkshurst Road (two properties), Beaconsfield Villas, Rutland Gardens, Cromwell Road, Burwash Lodge, Mantell House, will be re-provided as supported living services through a procurement process that seeks an alternative support provider'.
 - 'Learning Disability supported accommodation services at Ferndale Road will be re-provided as supported living through a procurement process that seeks alternative housing and support'
- 5.2 The proposals set out in the first paragraph are difficult to understand as it not clear whether it is the support alone or the accommodation and the support that are to be

outsourced. The second paragraph is clearer in that it refers explicitly to an alternative support provider, indicating that the accommodation will continue to be provided by the council. The final paragraph clearly refers to both housing and support, suggesting that current residents of the unit will be re-housed in accommodation provided by a private provider, who will also provide support.

- 5.3 The procurement process commenced with the publication of a Notice in the Official Journal of the European Union (OJEU). The Notice states that the contract is to be let as lots. This means that there could be more than one contract – one for each lot or potentially a single contract to cover all lots. It is very unclear how many lots there are actually are. On the face of it there are just 2 but it might also be inferred that there are 7. This is because whilst the Notice clearly state that there are two lots, it lists each individual property as a part lot of each whole lot, i.e. 1.1, 1.2, 1.3 etc. Lot One is for 'support providers' for Hawkshurst Road, Beaconsfield Villas, Rutland Gardens and Mantell House. This clarifies that the contract in relation to these properties is for support, not accommodation
- 5.4 Lot two is also for 'support providers' and relates to Preston Drove, Leicester Villas and Windlesham Road.
- 5.5 There is some confusion in the Notice over the numbering of lots. As noted above, each establishment is individually numbered as lot 1.1, 1.2 etc. However, a drafting error adds to the confusion by listing the establishments within lot 2 with the same whole numbers as are used for lot 1. That in itself is not of great concern but further confusion is created by the statement that appears under each lot that 'bidders may apply for any combination of lots' inferring that it would be possible to bid in relation to just one or a combination of establishments from within each lot.
- 5.6 It is a fundamental requirement of the public procurement legal regime that contracting is conducted in an open and transparent manner to avoid any possibility of discrimination between suppliers. The OJEU Notice in this case is confusing and opaque and creates potential for misunderstanding that could lead to smaller suppliers deciding not to bid because they don't feel able to run services at multiple establishments or conversely that bigger providers don't bid because they don't want to compete against smaller suppliers where the contract can be let as up to 7 different contracts.
- 5.7 Cromwell Road, Burwash Lodge and Ferndale Road are not mentioned in the OJEU Notice. It is understood that these are to be the subject of a separate procurement process.
- 5.8 The procurement is being conducted through the so called, Open Procedure. This means that any interested supplier from within the European Union can submit a full bid which must then be evaluated in accordance with criteria set out in the OJEU Notice and the Invitation to Tender documents (ITT). There are in fact a range of options available to local authorities seeking to procure the services concerned in this contract as the Regulations effectively allow for the process to be tailored to meet local requirements. Available options specifically include restricting the type of organisations that can bid for the contract to social enterprises. This reflects the UK Government's attempts to

incorporate the direct award of contracts to staff mutuals into the European procurement Directives, as an exception to the general rules requiring competition. As pointed out above, none of the reports or committee papers make reference to alternative delivery options and Councillors were not given an opportunity to consider them.

- 5.9 The use of the open procedure, whilst lawful, seems an odd choice but there is some basis for believing that the authority may not have been fully aware of the current legal framework and therefore, the options available. The OJEU Notice refers to Directive 2004/18/EC. This was superseded by Directive 2014/24/EU and is now incorporated into UK law as the Public Contract Regulations 2015. Along with the ability to restrict bidding to social enterprises for contracts for certain services the Regulations also lay down the circumstances under which a contract can be awarded to a company owned by the Council. This is a model that has been widely used in relation to adult social care but which has not apparently been considered in Brighton and Hove.
- 5.10 One requirement of the 2015 Regulations (Reg 101) is that Contract Notices are published on the UK government web-site, Contracts Finder. APSE has been unable to find the Notice on that web-site. If it was not published on Contracts Finder any potential bidders relying upon Contracts Finder to find out about opportunities would have been unaware of it and therefore prevented from bidding. This would be a serious breach of Regulations, opening up the prospect of judicial challenge from anybody who felt they were deprived of an opportunity to submit a bid.

6. Workforce Issues

- 6.1 The minutes of the 19th April meeting of Policy and Resources stated that the Head of Adults Provider said that, 'council staff would transfer across to an alternative provider under TUPE regulations however any future recruitment would be based on the new provider's terms and conditions. In relation to the costs, an alternative provider was likely to have lower on-costs, have more flexibility which enabled them to have lower rates than the council.' This was in response to a question from an elected member concerned that the level of provision might be reduced in order to reduce cost. It makes it clear that costs are expected to fall as a result of new staff being employed on reduced terms and conditions, with lower, i.e. pension, on-costs and greater flexibility which can mean a number of things from zero hours contracts through to not paying staff for time spent travelling. There is no indication that the committee was provided with any information about how these changes would impact on the morale, turnover or general welfare of the workforce and no consideration of how this might impact on service quality or continuity.
- 6.2 There are very few references to workforce matters in the committee reports beyond that quoted above. UNISON will be aware of the consultation requirements under the Transfer of Undertakings (Protection of Employment) Regulations (TUPE). Given the advanced stage of the current procurement it is reasonable to expect consultation on the proposals to have begun. Under the provisions governing service changes it is essential to establish that the service post-transfer is to be fundamentally the same as pre-transfer. For staff to transfer they would have to be integral to the service and be part of a group of employees

dedicated to it. It is likely that TUPE will apply in so far as the services delivered at the establishments that are the subject of the current procurement. It is not so clear whether it will apply to any homes that close, with residents moving to new accommodation. The detail of the proposals should be shared and consulted upon under the TUPE Regulations with the relevant trade unions.

7. Conclusions

- 7.1 APSE Solutions is not in a position to judge the merit of the decision to outsource learning disability services in Brighton and Hove. This is because the evidence underpinning the first of two key decisions – to cease Council provision has not been published or otherwise made available. Committee Reports indicate that officers considered in-house costs to be high and critically, that nothing could be done to reduce them. Thus, neither elected members nor statutory consultees were given an opportunity to express a preference in favour or otherwise of continued direct provision.
- 7.2 The non-disclosure of key documents and the narrowing down of the consultation exercise cast doubt on the robustness of the decision making process and could well constitute a breach of statutory duty. Perhaps more importantly, elected members have not had an opportunity to explore and consult with service users and their families on the wide range of service delivery options that are available. In any event no delivery options, other than an open tender or fully in-house, were considered at any stage in the process.
- 7.3 The conclusion that in-house provision was no longer affordable stems from the 'commissioning review' referred to in June 2014. This report was not published and evidence from it was not detailed in the committee report. No further evidence to support the affordability argument was provided to any of the subsequent committee meetings and significantly, members were not given any information as to how changes such as the implementation of the national minimum wage would impact on the cost calculation. The effect of this is that members did not consider all relevant information before deciding on the preferred course of action.
- 7.4 APSE has identified some technical issues with the procurement process. These include a confusing description of the Lots in the Contract Notice and an apparent failure to publish the Notice on the Contracts Finder web-site. It is possible, if unlikely, that this could lead to the eventual contract award being challenged by any provider that felt they had not had an opportunity to submit a bid.

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