

Commissioning Partnership Board Report

Decision Maker	Commissioning Partnership Board
Date of Decision:	25th March 2021
Subject:	Approval of Revised Section 75 Agreement for 2020/21
Report Author:	Anne Ryans (Director of Finance, Oldham Council) Ben Galbraith (Chief Finance Officer, Oldham CCG)
Report Reference:	

Reason for the decision: To give approval for the final version of the 2020/21 Oldham Section 75 legal document, schemes included and financial contributions of the CCG and OMBC.

Summary: To update the Commissioning Partnership Board (CPB) on proposals for a new pooled fund for Hospital Discharge Funding and a one off variation in contributions of the CCG and OMBC to the Section 75 Pooled Funds for 2020/21 and the final version of the Section 75 legal agreement.

What are the alternative option(s) to be considered? Please give the reason(s) for recommendation(s):

Recommendation(s):

- a) Note the strong history of joint working and funding arrangements in Health and Social Care in Oldham
- b) Approve the creation of a new Scheme for Hospital Discharge Programme funding as described below and included as “Scheme D” in the Section 75 documentation;

c) Note the significant challenges in OMBC's long term financial position and specifically the increases in funding it has provided to Adult Social Care over the past several years;

d) Approve the variation in contributions to the Section 75 Pooled Budget by the CCG and OMBC for 2020/21;

e) Approve the Section 75 Agreement attached at Appendix 2, and specifically the intention to adopt a flexible approach to contributions to support delivery of the best services for Oldham residents.

f) Authorise the Director of Legal Services to sign the Section 75 Agreement on behalf of OMBC; and

g) Delegate approval jointly to OMBC Director of Finance and the CCG Chief Finance Officer to finalise the financial expenditure and contribution figures included at Schedule 8 as part of year end processes, with final version to be reported back to CPB in May.

Implications:

*What are the **financial** implications?*

Financial implications are within the body of the report

*What are the **procurement** implications?*

N/A

*What are the **legal** implications?*

The draft Section 75 Partnership Agreement has been subjected to a review by the external legal advisers acting for the CCG and the Council's in-house legal service. The proposed amendments update the document in accordance with the recent amendments to Data Protection Legislation following the UK's departure from the EU. Other amendments are included for the sake of clarity and to ensure that all proposed variations to contributions from the respective partners are confirmed in writing. (Elizabeth Cunningham Doyle)

*What are the **Human Resources** implications?*

N/A

***Equality and Diversity Impact Assessment** attached or not required because (please give reason)*

N/A

What are the **property** implications? N/A

Risks: N/A

Has the relevant Legal Officer confirmed that the recommendations within this report are lawful and comply with the Council's Constitution/CCG's Standing Orders? Yes

Has the relevant Finance Officer confirmed that any expenditure referred to within this report is consistent with the S.75 budget? Yes

Are any of the recommendations within this report contrary to the Policy Framework of the Council/CCG? N/A

Reason(s) for exemption from publication: N/A

Reason why this Is a Key Decision Financial Implications

List of Background Papers under Section 100D of the Local Government Act 1972:

Background papers are the reports as follows:

Oldham Council Month 9 Financial Monitoring report March 2020

<http://decisionrecording.oldham.gov.uk/ieListDocuments.aspx?CId=144&MId=7668&Ver=4>

Oldham Council Statement of Accounts 2019/20

https://www.oldham.gov.uk/info/200145/performance_and_spending/486/financial_publications

Report Author Sign-off:	
	Anne Ryans & Ben Galbraith
Date:	19 th March 2021

Appendix number or letter	Description
Appendix 1 Appendix 2	Legal Opinion Section 75 Agreement 2020/21

Background

- 1.1 Section 75 (S.75) agreements exist between Local Authorities and the NHS nationally for the pooling of budgets to facilitate closer working. The enabling legislation is the NHS Act 2006. Oldham Council and Oldham CCG have entered into such an agreement for a number of years. Originally the S.75 agreement covered expenditure funded by the Better Care Fund. The agreement initially expanded to include the Improved Better Care Fund and the Winter Resilience Grant. The Council and the CCG have chosen to further widen the scope of the agreement to incorporate a number of areas where services are being commissioned jointly. The main purpose is to facilitate a whole system approach to deliver care where and how it can be best delivered to the citizens of Oldham.
- 1.2 The Oldham system has a strong history of joint working and of organisations providing support where flexibility allows. Some examples of the financial system working include:
 - Oldham CCG providing additional funding to Adult Social Care through the Better Care Fund of over £6m between 2014/15 and 2016/17
 - OMBC providing investment funds of £5.9m in 2019/20
 - Oldham CCG and Pennine Acute Hospitals NHS Trust agreeing financial contracts that moved away from activity tariffs to move to a more constructive relationship focussed on joint working

Budget position 2020/21

- 1.3 The NHS Budget Regime 2020/21 has been very unusual for both NHS organisations and those providing services to the NHS. For Months 1-6, the financial regime was that all CCGs would be retrospectively brought to a breakeven position to the end of the period (i.e. no surplus/deficit). For Months 7-12 the CCG is operating within a fixed financial envelope with funding allocated through Greater Manchester system work and approved by the GM Partnership Executive Board.
- 1.4 Whilst NHS budget planning guidance for 2021/22 is still to be issued, it has been confirmed that current (Month 7-12) budget arrangements of fixed system envelopes will continue for at least the first quarter of 2021/22. In addition, national announcements have been made regarding CCG arrangements from 2022/23 with regard to 'Integrating Care: Next steps to building strong and effective integrated care systems across England'. However, there are many aspects of the 2021/22 NHS finance regime which will not be confirmed before at least the end of Quarter 1.
- 1.5 During 2020/21 the Oldham Directors of Finance have worked together to set out the system wide financial challenge being faced. Based on the financial plans developed by each organisation at the start of 2020/21 the underlying gap was £87.8m for the Oldham system before savings plans and use of reserves. Whilst there has been some movement in the elements and drivers of this position, the current draft plans are still showing an underlying financial gap of approximately £90m at the end of 2020/21.
- 1.6 Within this position, the CCG is currently showing an underlying gap (2020/21 exit run rate) of a £30m deficit. As allocations and planning guidance for 2021/22 has not been published then the gap for next year is not confirmed, albeit it is clear that there will still be a very large financial challenge.

- 1.7 OMBC, as is statutorily required, has prepared a balanced budget for 2021/22. This includes £8.8m of recurrent savings and £18.8m of one-off measures, the majority of which is general reserves. Based on the latest estimates there are headline budget gaps, after the further use of reserves, of £13.6m in 2022/23 and £17.1m in 2023/24.

2 Report Details

New Pooled Fund: Hospital Discharge Funding

- 2.1 From the 19th March 2020 funding has been available from NHS England to support the cost of discharging patients from hospital as quickly as possible either following confirmation that they are medically fit, or to support costs involved in putting care plans in place which would otherwise necessitate a hospital admission. NHS England has confirmed that this scheme will cease at the end of 2020/21 with final patients discharged on 31st March 2021.
- 2.2 Care packages have been directly commissioned by both the CCG and OMBC with a monthly claim being submitted by the CCG on behalf of both parties. There have been no claims rejected to date reflecting strong joint working to support the process.
- 2.3 The current forecast spend for the full financial year is £12.127m of which £10.883m is on behalf of OMBC.
- 2.4 This report asks for formal confirmation from the Commissioning Partnership Board on the creation of a new Pooled Fund at Scheme D in the s.75 agreement.

Variation to Pooled Fund Contributions

CCG Budget Position

- 2.5 For a variety of reasons, the CCG has significant scope to contribute additional funds into the pooled budget. This has principally arisen due to:
- £38m higher than normal baseline funding during 2020/21;
 - Acute contracts lower than expected, in particular the impact of lower levels of planned treatments as well as changed NHS England funding arrangements for AQP and elective care; and
 - Delays to investments and costs covered in-year under block contracting arrangements with NHS providers.
- 2.6 The result of the changes above has resulted in the CCG being able to vary its contribution into the pooled budget for 2020/21 by approximately £16.823m.
- 2.7 The Commissioning Partnership Board gave approval at its meeting on the 25th February 2021 to delegate jointly to the OMBC Director of Finance (DoF) and CCG Chief Finance Officer (CFO) the authority to agree the management of year end flexibilities for part of this amount.

Explanation of Powers used for additional CCG contributions

2.8 The intention is that the additional funds will be used to vary the contributions made by the CCG and OMBC into the S.75 Pooled Fund. There are a number of tests which the CCG External Auditors have confirmed must be met and the rationale is set out against each of these below.

A) Allowable Spend for CCG

2.9 Firstly, the expenditure which the CCG is contributing funds towards must be within the allowable types of expenditure for a CCG.

2.10 The CCG's funding derives from allocations given to the Department of Health and Social Care, and then allocated to NHS England and ultimately down to the CCG. As such, all spend must be in line with the overall objectives of the Department of Health and Social Care and the intentions of Parliament when funding was agreed.

2.11 All Section 75 expenditure is considered to be in line with Parliament's intention because the NHS Act 2006 gives CCGs and Local Authorities the right to enter in to pooled budget under S.75. Such a pooled budget allows payments to "be made towards expenditure incurred in the exercise of both prescribed functions of the NHS body or bodies and prescribed health-related functions of the authority or authorities." Given that the types of services funded from the S. 75 are permitted under the NHS Act, then any expenditure on them is legitimate for the CCG to fund.

2.12 The Oldham S.75 Pooled Funds incorporate the Better Care Fund (BCF). This requires the CCG to make a at least a minimum contribution towards the costs incurred by the local authority in the provision of Adult Social Care. This is contained within guidance issued jointly by the Department for Health and Social Care and the Ministry of Housing, Communities and Local Government in the Better Care Fund: policy statement 2020 to 2021. As such, given the BCF requires the CCG to make at least a set minimum contribution towards the costs of Adult Social Care, it is considered that the costs of Adult Social Care constitute regular expenditure of the CCG, and further increased contributions to the S.75 in respect of Adult Social Care similarly are allowable spend for the CCG.

B) Permissible under the Section 75 legal document

2.13 This test requires that the CCG is acting within the rules that have been agreed locally between Oldham CCG and OMBC.

2.14 The S.75 document itself is set out as an overarching document supplemented by detailed "Scheme" descriptions. There are four such Schemes within the Oldham Section 75 document:

- A. Community Equipment Scheme (existing);
- B. Health and Social Care (existing);
- C. Transformation Funds (existing); and
- D. Hospital Discharge Programme (new).

2.15 There are two key elements to the documentation regarding overspends and contributions.

- 2.16 Firstly, within the overarching S.75 document, it sets out in paragraphs 10.1 and 10.2 that both the CCG and OMBC may vary their contributions as desired subject to agreement in writing. There are no limits or caveats to such changes. In 10.4 it also makes allowance for either party to make additional one off payments.
- 2.17 The CCG's Scheme of Delegation gives authority for all matters relating to the S.75 agreement to the Commissioning Partnership Board.
- 2.18 Secondly, within Schedule 1: Scheme B (starting on page 34), which gives the detailed rules relating to the main Health and Social Care Pooled Fund, Sections 8 (part II) and 16 are both explicit as to the ability of partners to vary their contribution by mutual agreement.

C) Spend relates to 2020/21

- 2.19 NHS funding is approved for use by organisations within the financial year in which Parliament has voted it for. The auditors require confirmation that this has been adhered to.
- 2.20 The CCG is not seeking to vary the elements of expenditure within the pooled budget. All of the expenditure relates to this financial year and is subject to all normal financial governance within each of the partner organisations.

D) Authority given during 2020/21

- 2.21 During 2020/21 there has been ongoing reporting of the expenditure position both of the CCG finances and the S.75 Pooled Funds. During the first part of the year this was undertaken directly to Governing Body as other committee meetings were initially not held. However, for the second half of the year this has been through the normal routes of Commissioning Partnership Board and Statutory Duties Committee.
- 2.22 These additional contributions have been discussed by the Commissioning Partnership Board and the CCG's Statutory Duties Committee during 2020/21 and are formally approved through this paper.
- 2.23 In addition, Mills and Reeves, as CCG legal advisers, have provided a note confirming their view that the increased CCG contributions to the Pooled Funds represents a legitimate use of CCG funds and is consistent with the S.75 legal framework. This is attached for information at Appendix 1.

3 Rationale for Contribution

- 3.1 Adult Social Care services play a key role in the delivery of health services. Specifically, the support that is given to Oldham residents in being cared for and supported at home by the OMBC Social Care team and how this alleviates some of the burden from Royal Oldham Hospital through pro-active and integrated support.
- 3.2 Notwithstanding the budgetary pressure the Covid-19 pandemic has had on adult social care budgets this year, OMBC has been increasing contributions into adult social care for the past three years since the pooled budget was expanded and aligned in 2018/19.

- 3.3 Since 2018/19 OMBC has increased its annual expenditure by more than £9m into supporting adult social care as detailed below. This is before any adjustments for money received from the CCG.

Year	Budget	Outturn
	£000	£000
2018/19	62,426	62,425
2019/20	66,451	68,663
2020/21	64,013	71,528

- 3.4 Resources received by the Council by a variation to the S.75 agreement as described above will be treated as contributions to the costs of Adult Social Care and reflected in the published Statement of Accounts as such. The accounts of the Council are subject to External Audit.
- 3.5 Incorporation of varied contributions into the S.75 and agreement of such variations is essential otherwise any transactions would be subject to challenge. However, as it is considered that the costs of Adult Social Care constitute regular expenditure of the CCG, and further increased contributions to the S.75 in respect of Adult Social Care similarly are allowable spend for the CCG, then the receipt of such contributions by the Council (backed by the approved S.75 Agreement) is also supportable.
- 3.6 The Council's External Auditor will review the approved S.75 Agreement and the application of the CCG resources as part of the audit of the 2020/21 Statement of Accounts. The correct accounting treatment is therefore essential.
- 3.7 It is important to note that the variation to contributions will have an impact on the final outturn of the Council and will improve the projected position for Adult Social Care services. The contribution in relation to the HDP has been included in reports, however, the full £16.823m impact of additional CCG support could not have been included in financial monitoring reports prior to agreement, although on-going discussions in this regard have been referenced.

4 Recommendations:

- 4.1 CPB and GB are requested to:
- a) Note the strong history of joint working and funding arrangements in Health and Social Care in Oldham
 - b) Approve the creation of a new Scheme for Hospital Discharge Programme funding as described below and included as "Scheme D" in the Section 75 documentation;
 - c) Note the significant challenges in OMBC's long term financial position and specifically the increases in funding it has provided to Adult Social Care over the past several years;
 - d) Approve the variation in contributions to the Section 75 Pooled Budget by the CCG and OMBC for 2020/21;

- e) Approve the Section 75 Agreement at attached at Appendix 2, and specifically the intention to adopt a flexible approach to contributions to support delivery of the best services for Oldham residents.
- f) Authorise the Director of Legal Services to sign the Section 75 Agreement on behalf of OMBC; and
- g) Delegate approval jointly to OMBC Director of Finance and the CCG Chief Finance Officer to finalise the financial expenditure and contribution figures included at Schedule 8 as part of year end processes, with final version to be reported back to CPB in May.

5 Appendices

- 1) Legal Opinion
- 2) Section 75 documentation

Appendix 1: Legal Opinion

MILLS & REEVE

Your reference:
Our reference: BRVA/4044523-0014
Document number: 244558959_1

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11 March 2021

Ben Galbraith
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Sent by email to: ben.galbraith@nhs.net

Dear Ben

Section 75 Agreements

We write further to your request for information on the statutory requirements of Section 75 agreements and specifically on the ability to vary contributions to a pooled fund established under such an agreement.

Varying Contributions

There is nothing in Section 75 of the NHS Act 2006 or the Regulations¹ which prohibits the CCG from varying its contributions to a pooled fund established under Section 75 of the NHS Act 2006.

Regulation 7(3) requires, amongst other things (see below for the full list), that any pooled fund agreement be in writing and must specify the contributions to be made to the pooled fund by each of the partners and how those contributions may be varied. Therefore, it is for the parties to specify the process for varying contributions. It is sensible to include safeguards around varying contributions to ensure sufficient money remains in the pooled fund in order to cover the costs of the services contracts commissioned. These could include requiring both parties to consent to the variation. All variations to the contributions should be made in writing.

Statutory requirements

A CCG has the power to enter into partnerships with local authorities in accordance with Section 75 of the NHS Act 2006 provided that the requirements in Section 75 and the Regulations are adhered to (details of those requirements are set out below).

As you know, we have only been asked to carry out a light touch review of the section 75 agreement and we were not involved in drafting it. Therefore, we have not reviewed all of the clauses in detail. We cannot therefore provide a letter which confirms that the CCG has

¹ *NHS Bodies and Local Authorities Partnership Arrangements Regulations 2000 (SI 2000/617)* (the "Regulations") (as amended by *SI 2003/629* and *SI 2012/3094*)

complied with each and every one of the requirements below. In particular, we cannot comment on the appropriateness of any financial arrangements as this is a matter for finance experts. However, we can set out the statutory requirements for others at the CCG to confirm they have been addressed and provided they have been addressed then the CCG can exercise its power to enter into a section 75 agreement.

Legislative powers

Under Section 75 of the NHS Act 2006 local authorities and NHS bodies (including CCGs) can enter into partnership arrangements to provide a more streamlined service and to pool resources, if such arrangements are likely to lead to an improvement in the way their functions are exercised. The powers permit:

- The formation of a pooled fund made up of contributions by both parties "out of which payments may be made towards expenditure incurred in the exercise of both prescribed functions of the NHS body or bodies and prescribed health-related functions of the authority or authorities".
- The exercise by a CCG of a local authority's prescribed health-related functions in conjunction with the exercise of the CCG of its prescribed functions.
- The exercise by a local authority of a CCG's prescribed functions in conjunction with the exercise by the local authority of its prescribed health-related functions.
- The provision of staff, goods or services, or the making of payments between the two partners, in connection with the above arrangements.

Exercising of prescribed functions

Regulations 5 and 6 specify which NHS and local authority health-related functions fall within the scope of these powers. The list has been amended over time by several statutory instruments, for example, see the *NHS Bodies and Local Authorities (Partnership Arrangements, Care Trusts, Public Health and Local Healthwatch) Regulations 2012 (SI 2012/3094)*.

NHS functions that cannot form part of a section 75 agreement include surgery, radiotherapy, termination of pregnancies and other invasive treatments.

Local authority functions that cannot form part of a section 75 agreement include adoption panels, inspection of children's homes and registration of residential care homes.

Regulations 8 and 9 set out the requirements in the event that the CCG exercises health-related functions of the local authority in conjunction with the exercise of their own NHS functions (reg. 8) or a local authority carries out NHS functions in conjunction with the exercise of their own health-related functions (reg. 9). In that case, the section 75 agreement must be in writing and specify:

- The agreed aims and outcomes of the arrangements.
- The payments to be made by the CCG to the local authority or by the local authority to the CCG.
- How those payments may be varied.

- The NHS functions and the health-related functions which are the subject of the arrangements.
- The persons and the kinds of services likely to be affected by the functions.
- The staff, goods, services or accommodation to be provided by the partners in connection with the arrangements.
- The duration of the arrangements and provision for the review or variation or termination of the arrangements.
- The arrangements for determining which services may be subject to a charge and how service users and informed of such charges.
- The arrangements in place for monitoring the exercise by the local authorities and the CCG of the functions.
- The arrangements for sharing information between the CCG and local authority.

The parties are both required to report quarterly and annually to the other on the exercise of the other's that are the subject of the arrangements.

Creation and management of a pooled fund

Regulation 7(3) requires any pooled fund agreement to be in writing and specify:

- The agreed aims and outcomes of the pooled fund arrangements.
- The contributions to be made to the pooled fund by each of the partners and how those contributions may be varied.
- Both the NHS functions and the health-related functions the exercise of which are the subject of the arrangements.
- The persons and the kinds of services likely to be affected by the functions exercised by the partnership.
- The staff, goods, services or accommodation to be provided by the partners in connection with the arrangements.
- The duration of the arrangements and provision for the review or variation or termination of the arrangements.
- How the pooled fund is to be managed and monitored, including which body or authority is to be the host partner.
- The host partner is responsible for the accounts and audit of the pooled fund arrangements and is required to appoint an officer of theirs (often known as the "pooled fund manager") to be responsible for managing the pooled fund on behalf of the host partner and submitting to the partners quarterly reports, and an annual return, about the income of, and expenditure from, the pooled fund and other information by which the partners can monitor the effectiveness of the pooled fund arrangements.
- The host partner shall arrange for the audit of the accounts of the pooled fund arrangements.

Please do not hesitate to contact me should you require any clarification regarding the above.

Yours sincerely

A handwritten signature in black ink that reads "Rhian Vandrill". The signature is written in a cursive, flowing style.

Rhian Vandrill
Partner for Mills & Reeve LLP