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| REPORT TITLE: | Charity Independence: Risks, Mitigations and Recommendation | | |
| SPONSORING EXECUTIVE: | Ruth Wilkin, Executive Director of Communications | | |
| REPORT AUTHOR: | Johnny Shah, Head of Trust Charity | | |
| MEETING: | Public Trust Board | DATE: | 11 th January 2023 |

1. Suggested discussion points [two or three issues you consider the CFC should focus on in discussion]

Your Trust Charity currently operates as a Corporate Trustee NHS charity. This means Charitable Funds Committee (CFC) acts as the charity's Trustees. An internal working group convened in April 2021 to consider the benefits and risks of the charity converting to independent status.

CFC considered the benefits and landscape for NHS charities considering charity independence in November 2021 and February 2022. This included a detailed risk assessment. Audit & Risk Management Committee also reviewed the risk assessment in September 2022, confirming that key risks had been mitigated to a satisfactory extent. In November 2022, CFC agreed to make a final recommendation to proceed with charity independence to the Trust Board.

2. Alignment to our Vision [indicate with an 'X' which Strategic Objective[s] this paper supports]

| OUR PATIENTS | | OUR PEOPLE | | OUR POPULATION | |
|--|---|--|---|---|---|
| To be good or outstanding in everything that we do | X | To cultivate and sustain happy, productive and engaged staff | X | To work seamlessly with our partners to improve lives | X |

3. Previous consideration [at which meeting[s] has this paper/matter been previously discussed?]

Action log SWBCF (05/20) 005, discussed on 10 November 2022
Action log ARC (09/22) 003, discussed on 14 September 2022

4. Recommendation(s)

The Public Trust Board is asked to:

- a. **APPROVE** the recommendation from Charitable Funds Committee to proceed with charity independence.

5. Impact [indicate with an 'X' which governance initiatives this matter relates to and, where shown, elaborate in the paper]

| | | | | | | |
|--|-------------------|--|--|---|---|-----------------------|
| Board Assurance Framework Risk 01 | | Deliver safe, high-quality care. | | | | |
| Board Assurance Framework Risk 02 | X | Make best strategic use of its resources | | | | |
| Board Assurance Framework Risk 03 | | Deliver the MMUH benefits case | | | | |
| Board Assurance Framework Risk 04 | X | Recruit, retain, train, and develop an engaged and effective workforce | | | | |
| Board Assurance Framework Risk 05 | X | Deliver on its ambitions as an integrated care organisation | | | | |
| Corporate Risk Register [Safeguard Risk Nos] | X | 4936, 4937, 4938 | | | | |
| Equality Impact Assessment | Is this required? | Y | | N | x | If 'Y' date completed |
| Quality Impact Assessment | Is this required? | Y | | N | x | If 'Y' date completed |

SANDWELL AND WEST BIRMINGHAM NHS TRUST

Report to the Public Trust Board on 11th January 2023

Charity Independence: Risks, Mitigations and Recommendation

1. Background

- 1.1 Your Trust Charity currently operates as a Corporate Trustee registered NHS charity. This means that a sub-committee of the Trust Board - the Charitable Funds Committee (CFC) - acts as the charity's Trustees.
- 1.2 In February 2021, CFC approved an outline case to achieve charity income targets. Within this, a number of future development opportunities were proposed. Several of these would require changing legal structure to become an independent charity.
- 1.3 CFC authorised an internal working group to convene in April 2021. A detailed paper including supporting documents was submitted and discussed at CFC in August 2021, and the working group met again to scrutinise the risks and benefits of the charity becoming independent.
- 1.4 The detailed risk assessment covered key risks, mitigations to those risks identified and a summary risk analysis. The summary risk analysis was updated with further details in gaps in control and planned actions (annex 1).
- 1.5 The Audit and Risk Management Committee reviewed the risk assessment in September 2022, confirming that key risks had been mitigated to a satisfactory extent. In November 2022, CFC agreed to make a final recommendation to proceed with charity independence to the Trust Board.
- 1.6 As part of CFC's due diligence, the following information was reviewed in detail:
 - Becoming An Independent Charity - CFC August 2021
 - Draft MoU - Sandwell & West Birmingham NHS Charity & SWB NHS Trust
 - Draft Stakeholder Engagement Plan Updated
 - Template Articles of Association
 - Template Memorandum of Association
 - Deed of Declaration
 - Trust Charity Risk Register as at Nov 2022
 - CFC members took part in a discussion with an independent charity of a similar income size

2. Benefits of an Independent Charity

- 2.1 In the current governance structure, Your Trust Charity is not able to undertake trading activities that exceed a combined total of £85,000 income annually (or £50,000 for VAT). This means that activities which could generate future charitable income are not possible, such as operating a number of retail outlets or shops and departments running new training courses where delegates are charged a fee.

- 2.2 In addition, a transfer of assets that may be currently underutilised, the holding of assets, or the set-up of a 'charity subsidiary' to hold assets would not be possible.
- 2.3 The following is taken from 'NHS Charities - Conversion to Independent Status' (Dept of Health & Social Care/Association of NHS Charities, Nov 2018):

Possible advantages of conversion:

- If set up as either a Company Limited by Guarantee (CLG) or a Charitable Incorporated Organisation (CIO), the New Charity's contractual liability will be limited.
- NHS Charities are within the public procurement regime; the New Charity will not be.
- NHS Charities where the NHS body is corporate trustee will be subject to the Freedom of Information Act 2000. The New Charity will not be subject to the Act and will not have the consequent administrative burden.
- There will be no risk of consolidation of the New Charity's accounts with either the NHS body or the Department of Health and Social Care (provided no NHS body has 'control' over the New Charity - e.g. power to appoint a majority of the board).
- The New Charity will not have to provide data to the Office of National Statistics (because it will not be classified as a public-sector organisation).
- The New Charity can choose its own trustees and advisers (including auditors). NB – a majority of Trustees would have to be completely independent from the Trust i.e. 5 out of 8.
- Where there is the prospect of NHS re-organisation affecting the related NHS body, the New Charity will not be directly affected by the process (although it may subsequently wish to adjust its grant-making to reflect the change), whereas the NHS Charity would be caught up in it.
- The New Charity will be able to adopt wider charitable purposes (for new money) and to enter into more innovative fund-raising initiatives, collaborations and mergers.
- The New Charity will be able to demonstrate to donors and the Charity Commission its independence of decision-making. This is especially important for NHS bodies which are at present corporate trustees of an NHS Charity.

3. Learnings from Other NHS Charities

- 3.1 Although it is mostly major university Trust charities or specialist cancer and children's Trusts that have converted to independence, there are now an increasing number of NHS charities considering this route.
- 3.2 The membership organisation for the sector, NHS Charities Together, has provided further support and guidance on charity independence. This includes a capacity building grant scheme, which could be used towards offsetting the cost of conversion to independence.
- 3.3 A number of directors of independent NHS charities have been informally consulted on this matter. In summary from case studies and informal consultations, the 'art of the possible' for Your Trust Charity includes:
- Becoming more recognised as an 'anchor institution' - leading on and collaborating in further partnerships & consortia with other third sector and ICS stakeholders, rather than competing with others

- Establishing further commercial operations, i.e. retail outlets, shops, and trading courses
- Utilising the charity's investment portfolio to purchase property, either through selling investments, or potentially through secured loans. This could be used to further charitable activities, engage in regeneration opportunities with the Trust, support the creation of keyworker housing, or hold 'mixed motive' social investments
- Advantages in relation to VAT
- Securing further donations from the general public as the 'official' independent charity of the Trust

4. Summary Risk Assessment

- 4.1 In consideration of charity independence a detailed risk assessment was carried out with risk identified as:
- 4.1.1 There is a risk of the independent charity not being recognised by staff and donors, caused by a loss of the charity's identity, which will result in reduced donations
- 4.1.2 There is a risk of reduced expenditure on NHS Trust activities, caused by an independent Trustee board making decisions on expenditure, which will result in some Trust departments / services receiving less
- 4.1.3 There is a risk of failure to meet Trust charity fundraising targets in the next 12-18 months, caused by charity time and resources focusing on conversion to independence, which will result in reduced donations to the charity

5. Mitigations to Risks Identified

- 5.1 Independent charity not being recognised - the charity will:
- 5.1.1 Re-assure all fund ambassadors in the workshops that previous designations and restrictions remain in place, with new donations and gifts received by the charity being attributable to original funds.
- 5.1.2 Draft an MoU between Trust and the independent charity recognising them as 'official charity' of the Trust
- 5.1.3 Deliver a programme of engagement workshops and 'Q & A' sessions - both pre and post charity conversion to independence. All staff will be invited, with particular emphasis on fund ambassadors attending as part of their 'essential training'.
- 5.1.4 Update previous fund ambassador essential training materials with: a) introducing the 'official charity' of the Trust, funding over and above NHS provision; b) what this will mean to staff; and c) how they can continue to play a role and be involved.
- 5.1.5 Review branding examples of independent NHS charities to ensure there is no 'loss of identity' of the new charity with the Trust
- 5.1.6 Deliver workshops at least quarterly for all new fund ambassadors, and include as a mandatory condition within the draft MoU. A Teams recording of a workshop will be provided to OD to request inclusion within new starter induction.
- 5.1.7 Track this activity in the draft stakeholder engagement plan.
- 5.2 Reduced expenditure on NHS Trust activities - the charity will:
- 5.2.1 Work with the Trust Executive and Board to identify most appropriate members to constitute independent Trustee board

- 5.2.2 Ensure the new charity's objects in their Articles of Association and Memorandum of Association are precisely the same as those within the Corporate Trustee charity's Deed of Declaration.
 - 5.2.3 Work towards the draft MoU with the Trust, which will be reviewed by all Trustees six monthly. This ensures the new charity's priorities are precisely the same as those of the Corporate Trustee charity, with a target spend on these priorities to be agreed annually.
 - 5.2.4 Ensure any special resolutions (including written changes to the MOU or Articles of Association) require a majority of not less than 75%, as detailed in Clause 23 of the Articles of Association. This will ensure suitable control measures are in place regarding independent charity governance and surety of decision-making, and that Trust representatives cannot be outvoted.
- 5.3 Risk of failure to meet Trust charity fundraising targets - the charity will:
- 5.3.1 Convene a working group to act as a 'shadow board' of the independent charity, including a selection of Executive and Non-Executive Directors as well as community members. Recent applicants for Non-Executive Director vacancies can be re-approached. This is shown in the draft stakeholder engagement plan.
 - 5.3.2 Develop a specification to include a panel of specialist advisers as part of the shadow board, such as those with experience of: a) recruiting and establishing a new charity Trustee board, ideally for an independent NHS charity; b) establishing new systems or alternative arrangements required from those the existing charity currently receives; and c) supporting the TUPE transfer of employees to the new charity, and establishing HR policies and processes. Where these advisers are external, three competitive quotes will be sourced. This is shown in the draft stakeholder engagement plan.
 - 5.3.3 Appoint a project lead to undertake the conversion to independence. The Head of Trust Charity has previous experience of registering a new charity with the Charity Commission.
 - 5.3.4 Enact the charity's five-year fundraising and business development summary plan. Approved by CFC in August 2022, this has costed for increased recruitment in stages to the charity team. Up to March 2024, a number of 'internships' have been created in order to meet the outcomes of the charity's SCORE contract in providing health & social care work opportunities for young people. This additional staffing resource will be providing surety that income targets (including the Midland Met fundraising campaign which has banked almost 75% of target to date, with 25% actively in the pipeline) can be met whilst the project lead focuses on conversion to independence.
 - 5.3.5 NHS Charities Together is running a capacity building grant scheme, where a £30,000 has been applied for. This could go towards offsetting the cost of conversion to independence.

6. Additional Considerations

- 6.1 There will be an increase of operating expenditure for an independent charity. Additional costs will be incurred, potentially including costs of mandatory training, IT support, corporate support and office space. There may also be amendments to processes i.e. financial (change of bank account/auditors/investments), governance (recruitment & training of Trustees), & human resources (implementing new policies).
- 6.2 To manage this expenditure appropriately, an independent charity can opt to retain existing arrangements and processes, proposing to continue 'in kind' arrangements i.e. mandatory training, IT support and office space. These elements can be included in the draft MoU.

7. Recommendations

The Public Trust Board is asked to:

- a. **APPROVE** the recommendation on charity independence from Charitable Funds Committee

Johnny Shah
Head of Trust Charity

11th January 2023

Annex 1: Charity Independence Working Group - Summary Risk Analysis Updated

Annex 1: Charity Independence Working Group - Summary Risk Analysis Updated

| Severity | Likelihood | | | | |
|-----------------|------------|----------------|------------|----------|------------------|
| | 1 Rare | 2 Unlikely | 3 Possible | 4 Likely | 5 Almost Certain |
| 5 Catastrophic | Score:5 | Score:10 | Score:15 | Score:20 | Score:25 |
| 4 Major | Score:4 | Score:8 | Score:12 | Score:16 | Score:20 |
| 3 Moderate | Score:3 | Score:6 | Score:9 | Score:12 | Score:15 |
| 2 Minor | Score:2 | Score:4 | Score:6 | Score:8 | Score:10 |
| 1 Insignificant | Score:1 | Score:2 | Score:3 | Score:4 | Score:5 |

| Risk statement | Initial Risk Rating | Existing controls | Risk Rating | Owner | Review Date | Gaps in control and planned actions | Target risk rating |
|---|---------------------|---|-------------|----------|-------------|---|--------------------|
| There is a risk of the independent charity not being recognised by staff and donors, caused by a loss of the charity's identity, which will result in reduced donations | 3x4=12 | <p>1) Previous designations and restrictions remain in place, with new donations and gifts received by the charity being attributable to original funds</p> <p>2) 'Clear blue line' for donors that charity funds things over and above current NHS provision</p> | 3x3=9 | Trustees | Six monthly | <p>1) Draft MoU between Trust and the independent charity recognising them as 'official charity' of the Trust</p> <p>2) Deliver programme of engagement workshops and 'Q & A' sessions, as shown in draft stakeholder engagement plan</p> <p>3) Update previous fund ambassador essential training materials, introducing the 'official charity' of the Trust</p> <p>4) Workshops to be delivered quarterly for all new fund ambassadors as</p> | 3x2=6 |

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|---|-------|---|-------|----------|-------------|---|-------|
| | | | | | | a mandatory condition within MoU 5) Request OD to include recording of workshop in all new starter inductions. | |
| There is a risk of reduced expenditure on NHS Trust activities, caused by an independent Trustee board making decisions on expenditure, which will result in some Trust departments / services receiving less | 3x3=9 | 1) NHS Trust still represented - majority of Trustees would have to be completely independent from the Trust 2) Further details on MoU between Trust and the independent charity (appendix 2). Also ensuring that control measures are in place regarding independent charity governance and surety of decision-making | 2x3=6 | Trustees | Six monthly | 1) Trust Executive and Board to identify most appropriate members to constitute independent Trustee board 2) New charity's objects in Articles of Association and Memorandum of Association the same as Corporate Trustee charity's Deed of Declaration 3) MoU reviewed by all Trustees annually. New charity's priorities the same as Corporate Trustee charity, including target spend on priorities to be agreed annually. 4) Any special resolutions (including written changes to the MoU or Articles of Association) require a majority of not less than | 1x3=3 |

| | | | | | | | |
|---|-------|--|-------|----------|-------------|---|-------|
| | | | | | | 75%, as detailed in Clause 23 of Articles of Association. | |
| There is a risk of failure to meet Trust charity fundraising targets in the next 12-18 months, caused by charity time and resources focusing on conversion to independence, which will result in reduced donations to the charity | 4x2=8 | 1) Existing governance and legal expertise 2) MMUH campaign on track (£1.5m of £2m net target banked as at 30 th Sep 2022) | 4x2=8 | Trustees | Six monthly | 1) Convene working group to act as a 'shadow board', including a selection of Executive/Non-Executive Directors, including community members. 2) Develop specification for panel of specialist advisers within 'shadow board'. Obtain 3 competitive quotes for external advisers. 3) Appoint project lead to undertake the conversion to independence 4) Enact charity's five year fundraising and business development summary plan (approved by CFC in August 2022). 5) NHS Charities Together is running a capacity building grant scheme, where £30,000 has been applied for. This could go | 3x2=6 |

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|--|--|--|--|--|--|--|--|
| | | | | | | towards offsetting the cost of conversion to independence. | |
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