Lincolnshire
COUNTY COUNCIL
Working for a better future

Report Reference:
Executive/Executive Councillor

Open Report on behalf of Glen Garrod, Director of Adult Social Services

Report to:	**Executive**
Date:	**03 March 2015**
Subject:	**Better Care Fund Section 75 Agreement**
Decision Reference:	**1008553**
Key decision?	**Yes**

Summary:

On 6 February 2015 the Lincolnshire Better Care Fund (BCF) submission was approved by NHS England. One of the key components within the submission is the intent to 'pool' £197m of health and social care expenditure.

The minimum national requirement is for the national allocation of £53.2m to be included in one or more pooled fund arrangements under Section 75 of the National Health Service Act 2006 (the 2006 Act). Subject to the achievement of this minimum level of formal pooling local health and social care bodies may agree a range of other contractual mechanisms to ensure the alignment of other elements of the funding contained in the BCF submission.

This report sets out a pragmatic solution to the issue of pooling and aligning BCF resources in Lincolnshire through the use of a Partnership Framework Agreement underpinned by a mixture of existing or new agreements under Section 75 of the 2006 Act and other existing contractual arrangements.

This Report seeks approval in principle to the entering into of a Partnership Framework Agreement, approval in principle to the entering into of new Section 75 Agreements and the delegation to the Executive Director of Adult Care in consultation with the Executive Councillors for Adult Care and Health, Children's Services and NHS Liaison and Community Engagement of authority to approve the final form of both the Framework Agreement and the individual Section 75 Agreements.

This pragmatic approach will ensure that the Council and the CCGs in Lincolnshire are able to achieve their ambitions as set out in the BCF submission while complying with national requirements and meeting the deadline of 31 March 2015.

Recommendation(s):

That the Executive

1. Approve the entering into by the Council of a Partnership Framework Agreement with the Clinical Commissioning Groups in Lincolnshire generally in the form attached at Appendix A

2. Approve the entering into by the Council of an agreement under Section 75 of the NHS Act 2006 with the Clinical Commissioning Groups in Lincolnshire for proactive care as generally described in Appendix B

3. Approve the entering into by the Council of an agreement under Section 75 of the NHS Act 2006 with the Clinical Commissioning Groups in Lincolnshire for corporate matters as generally described in Appendix C

4. Approve the entering into by the Council of an agreement under Section 75 of the NHS Act 2006 with the Clinical Commissioning Groups in Lincolnshire for Children and Adult Mental Health Services as generally described in Appendix D

5. Approve the entering into by the Council of an agreement under Section 75 of the NHS Act 2006 with the Clinical Commissioning Groups in Lincolnshire for Integrated Community Equipment Services as generally described in Appendix E

6. Approve the entering into by the Council of an agreement under Section 75 of the NHS Act 2006 with the Clinical Commissioning Groups in Lincolnshire for Learning Disabilities as generally described in Appendix F

7. Note the extension of an agreement under Section 75 of the NHS Act 2006 entered into by the Council with Lincolnshire Partnership Foundation Trust for Adult Mental Health as generally described in Appendix G

8. Delegates to the Director of Adult Care in consultation with the Executive Councillor for Adult Care and Health, Children's Services and the Executive Councillor for NHS Liaison and Community Engagement the approval of the final terms and form of and the entering into of all agreements and legal documentation necessary to give effect to the decisions at paragraphs 1 to 7.

Alternatives Considered:

1 Not to pool any of the resources contained in the BCF submission

Formal pooling of the BCF minimum of £53.2m is a requirement for the receipt of £53.2m of funding, £20m of which is to protect Adult Social Services. Failure to pool the minimum requirement will mean this funding

will not be received.

2 To pool only the minimum BCF requirement

The health and social care community has already indicated its ambition to 'pool' £197m of funding. This has allowed two Secretaries of State to highlight this matter in the national media as a point of success in that the national sum for the BCF is £3.8bn but with local "top ups" is £5.3bn. To fail to 'pool' that sum now would give rise to significant reputational risk for the local health and social care community with the Department of Health. Initiatives of long standing within Lincolnshire already account for a large majority of the pooled funding and therefore the level of commitment to new pooling is limited.

3 To pool resources in some contractual way other than as recommended

The contractual options are set out and analysed in the section of the Report headed "Pooling £197m – the options".

Reasons for Recommendation:

Agreement of arrangements meeting the national minimum requirement to formally pool £53.2m of BCF funding must be in place by 31 March 2015. In Lincolnshire this requires the four Clinical Commissioning Groups and the County Council to agree the funding arrangements which will then allow the Health and Wellbeing Board to endorse the application as required by the Government. The recommendations represent a pragmatic solution utilising existing arrangements overlain by a partnership framework agreement.

1. Background

Introduction

The history of and detail surrounding the Better Care Fund or BCF has been well documented in previous reports to the Executive (April 2014 and September 2014), Informal Executive (latest January 2015) and the Health and Wellbeing Board (latest December 2014). This is in addition to multiple presentations to the four Clinical Commissioning Groups during the course of the past 12 months.

The value of the national allocation in 2015/16 is £53.2m, of which £20m has been agreed with the CCGs to 'Protect Adult Social Services'. This sum also includes an allocation to support implementation of the Care Act.

The Lincolnshire BCF submission to Government has been approved. However, to secure the available national funding the minimum BCF allocation must be pooled in one or more formal pooled funds under Section 75 of the National

Health Service Act 2006. Without this level of agreement this funding will not materialise. If any of the five Governing bodies fails to approve the proposed arrangements there will be no transfer of the nationally available sum.

Although the minimum requirement is to pool £53.2m, one of the key components within the Lincolnshire BCF submission is the intent to 'pool' £197m of health and social care expenditure. This represents a step change in the way in which funding for health and care services are organised within the health and care community in Lincolnshire. The approach is in line with national policy and the level of local ambition as detailed in previous BCF reports and a variety of related reports within the Lincolnshire community.

The level of 'pooling' places Lincolnshire as one of only five health and care systems in the country with this level of ambition over and above the national BCF allocation of £53.2m. It also allowed two Secretaries of State to highlight this matter in the national media as a point of success in that the national sum for the BCF is £3.8bn but with local "top ups" is £5.3bn.

The final BCF submission detailing this level of ambition was approved by the Executive on 2 September 2014.

Notwithstanding the national imperative and the local ambition the 'pooling' of such a substantial sum must be framed and that framework understood across the partners. At this point it is important also to note that none of the proposals detailed in this report change the current arrangements for the setting of policy or decision-making: these remain with respective Governing Bodies - the County Council and the four CCGs.

Pooling £197m – the options

The contractual options can be summed up generally as follows

- The creation of a number of separate Section 75 pooled fund and other contractual arrangements without any overarching framework
- The creation of a single pooled fund for the full £197m governed by a single Section 75 Agreement
- The creation of an overarching framework governing a number of separate Section 75 pooled fund agreements with other spend within the £197m sitting outside the framework in separate arrangements
- The creation of an overarching framework governing the whole £197m but consisting of a number of different Section 75 pooled fund arrangements and other contractual arrangements ("the framework partnership agreement")

Single framework or separate agreements

The first consideration in choosing between the general options above is whether a model that involves an overarching framework for some or all of the £197m is preferable to a number of separate agreements. It is proposed that an overarching

framework is essential to give effect to the main purpose of the Better Care Fund which is the allocation of the national minimum sum to Lincolnshire (£53.2m) and greater integration between health and social care.

The need to have a contractual agreement in place for 1 April 2015 requires a high degree of pragmatism at this stage. Governance arrangements already exist for taking forward much of the BCF work involving the themes of Proactive Care, Adult Specialised, System Resilience (including Urgent Care) and Women and Children's with their Joint Delivery Boards reporting to the Joint Commissioning Board and accountable to each of the five Partner Governing Bodies. The conditions exist therefore for creating an overarching contractual governance framework without undue additional work.

In order that the arrangements do not become a strait jacket preventing further change an overarching framework will allow for the implementation of integrated change control processes in which impacts can be assessed within and across Joint Delivery Board workstreams and business cases assessed with a view to impacts across the system.

In this way, regardless of the degree to which formal pooling takes place, all the monies covered by the BCF contract arrangement can be treated as a single resource and managed and monitored under framework arrangements.

Nature of the contract – single Section 75 or framework partnership agreement

Consideration has been given to whether the £197m should be formally pooled in a single Section 75 pooled fund arrangement. However this is not recommended because the creation of a formal pooled fund for the full £197m would need agreement to be reached on who should be the host and who would be the pooled fund manager. It is also likely to require an actual transfer of monies to the host.

On the other hand there are already a number of existing contractual and Section 75 arrangements that could be incorporated into a general framework with a minimum of change or bespoke drafting. This is an attractive way of proceeding given the time constraints.

In the circumstances it is recommended that an overarching framework be created which governs a number of different contractual arrangements some of which may be Section 75 pooled funds but some of which may be agreements to align separate commissioning activity.

Further it is recommended that where there are existing pooled fund and other arrangements in place that have already been approved and tested over time such as the CAMHS service, the Integrated Community Equipment Service, the Learning Disability Services and the Adult Mental Health Services that these arrangements are brought under an overarching framework.

In addition to this two new Section 75 agreements are recommended to ensure the full amount from Government is received and that we reach the £197m agreed ambition.

This approach has been checked with the National Programme Team overseeing the BCF and agreed as acceptable. Indeed, it is the understanding of officers that a number of other areas in the country with similar levels of 'pooled' ambition are taking a similar approach. It should also be noted that this general agreement is for 2015/16 and will be reviewed once the new government has decided the policy direction for integration between health and care and, specifically the future of the BCF.

Before moving on to a more detailed description of the Framework and the individual agreements it is worth saying something first about governance and risk.

Governance

Delegation of Functions

One of the flexibilities available under section 75 of the 2006 Act is the ability of health bodies to authorise the Council to exercise its functions or for the Council to authorise a health body to exercise its functions. That is the case with some of the existing Section 75 Agreements. The CAMHS Section 75, the Learning Disabilities Section 75 and the ICES Section 75 all involve the Council undertaking lead commissioning and exercising authority to commission health services on behalf of the CCGs. Conversely the adult mental health Section 75 authorises LPFT (as opposed to any of the CCGs) to exercise certain of the Council's adult mental health functions.

Where this happens decision-making falls to the body exercising the function and must be carried out in accordance with that organisations' internal governance arrangements.

Where no delegation of function has occurred then each of the bodies entering into the Framework Agreement (the Council and each of the four CCGs) retain all of their functions and their decision-making powers in relation to those functions.

Decision-making

Decision-making within each of the corporate bodies (whether exercising their own functions or a delegated function) will be governed by their internal constitutional arrangements. In the County Council that means that ultimate decision-making will remain vested in the Executive and relevant Executive Councillors and with officers where they have delegated power under the Constitution or are given delegated powers by the Executive.

It is important to note that nothing in the proposals for either the Partnership Framework Agreement or individual arrangements make any changes to this position. Each body will, for instance, continue to make decisions in accordance with their own internal procedures on such issues as:-

- Any extension or variation to the Framework or individual agreements
- Any proposals for new Section 75 arrangements

- Any decisions as to what should be commissioned under individual schemes and how they should be commissioned

At the same time, the Health and Wellbeing Board (HWB) will continue to play a role in providing a forum for the joint consideration of issues affecting the health and social care community in Lincolnshire and in fulfilling its responsibility to encourage integration.

There is still a need, however for a level of governance below that of formal decision-making. This level is concerned with the management of partnership arrangements including monitoring the arrangements and receiving reports and information on the operation of the arrangements

Pooled Funds

Where the partnership arrangements consist of a pooled fund there is a requirement in law to have a host organisation for the pooled fund. The host must be one of the parties to the Section 75 Agreement. The regulations state that the host has the responsibility "for the accounts and audit of the pooled fund arrangements".

Legally the host partner is then required to appoint one of its officers as the pooled fund manager. Under the Regulations the pooled fund manager is responsible for

- Managing the pooled fund on the host partners behalf 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 governance arrangements for the BCF pooling arrangement will be structured as follows:

- Decision-making will sit with the individual corporate bodies as set out above
- Overall management and monitoring of the framework will be carried out through the existing BCF officer governance arrangements consisting of an overarching Joint Commissioning Board and three Joint Delivery Boards covering thefour BCF Themes – Specialised Services, System Resilience,Proactive Care and Women's and Children's.
- Management and monitoring of individual Section 75 and other agreements will be carried out in accordance with the arrangements (if any) specified in the Agreement and more particularly described in the Appendix relating to that Agreement.

Risk Management

Like governance, risk management needs to be dealt with at more than one level.

At the level of the individual agreement there will be individual risk management arrangements especially with respect to underspends and overspends on the

relevant pooled budget. These risk arrangements are described in the individual Appendix relating to each agreement.

Some risks however are incurred at the level of the BCF framework as a whole and in particular the risk that (up to) £3.7m may be clawed back by the government if targets for reductions in non-elective admissions are not met. This risk is being managed by the creation of a contingency of £3.7m. This is drawn from underspends in the BCF for 2014 and does not affect the £20m agreed to protect adult social care. This will sit in an individual Section 75 Pooled Fund under the Joint Commissioning Board. This contingency will be risk assessed from time to time and judgments made as to whether this contingency can appropriately be reduced.

In addition to this risk there are a number of financial risks to the CCGs which will need to be managed arising partly out of the fact that their contribution of £20m to adult care is not fully funded and will need to be met from savings.

This risk is being partly managed by recognition that if the £3.7 contingency is not required then consideration will be given to that being used to contribute to the NHS deficit created in (amongst other things) transferring £20m to protect adult social care.

The principles for risk management are set out in more detail in Schedule 3 to the Partnership Framework Agreement at Appendix A.

The next section describes in more detail the Partnership Framework Agreement before addressing individual components of the contractual structure.

The Partnership Framework Agreement

A copy of the draft Partnership Framework Agreement is attached at Appendix A. The following aspects of the Agreement are drawn to members' attention.

The Framework Agreement has a duration of one year reflecting the uncertainty of the future of BCF. The Agreement can be extended by the agreement of all the parties as long as they reach such agreement before the expiry of the first year.

The expiry of the Framework Agreement, however, does not affect the continuation of the individual Section 75 Agreements. Where those Section 75 Agreements have a duration in excess of the one year of the Framework they will continue in force until they expire or are terminated in accordance with their own terms. This reflects their longstanding value and in relation to the CAMHS and ICES Agreements the need for the Section 75 Agreement to underpin longer term service contracts.

Although they are incorporated under the Framework, the individual agreements are generally governed wholly by their own terms.

For the Pooled Fund arrangements in particular, however, there are three areas in which the Framework will prevail over the individual Agreements if they are in conflict:-

1 Pooled Fund management and monitoring

The Framework Agreement contains drafting to ensure that the Joint Commissioning Board, Health and Wellbeing Board and five Partner Governing Bodies receive regular reports and information to enable them to be sure that all of the agreements that sit under the framework are meeting financial and performance targets and the whole of the £197m of the BCF funding is being well managed.

2 Governance

The Framework Agreement will give the Joint Delivery Boards and the Joint Commissioning Board a wider role within individual arrangements. In particular it is proposed that variations and change controls will go to the Joint Delivery Boards and Joint Commissioning Board for assessment before being recommended where appropriate to the individual partners to approve through their decision-making arrangements.

This is to ensure that changes are not made to individual arrangements without regard to impacts across the whole health and care system.

3 Risk Management

The Framework Agreement will take precedence to ensure that underspends can be managed in accordance with the risk share arrangements which are described in general in Schedule 3 to the Partnership Framework Agreement at Appendix A to this report.

This is considered to represent a pragmatic and light-touch framework approach to meeting BCF minimum requirements whilst giving the maximum degree of prominence to the individual agreements many of which are long-standing and of proven worth.

The proposed individual arrangements

Seven individual arrangements are proposed to be included within the scope of the Partnership Framework Agreement. Five of those are formal pooled fund arrangements under Section 75 of the 2006 Act. Two of them are separate contractual arrangements that the Council and the CCGs will, if the recommendations are approved, align under the framework. Of the five formal pooled funds, three are already existing arrangements and two are new proposed arrangements.

Each is listed below with detailed descriptions where relevant being contained in Appendices B to G inclusive.

Formal pooled fund arrangements

Existing Arrangements

(1) Children and Adult Mental Health Section 75 Agreement described in Appendix D

(2) Learning Disabilities Section 31 Agreement described in Appendix F

(3) Integrated Community Equipment Service (ICES) Section 75 Agreement described in Appendix E

New Pooled Fund Section 75 Agreements

(4) Proactive Care Section 75 Agreement described in Appendix B

(5) Corporate Section 75 Agreement described in Appendix C

Aligned existing arrangements

(6) Adult Mental Health Section 75 Agreement between the Council and Lincolnshire Partnership Foundation Trust described in Appendix G

(7) National Health Service contract between the CCGs and LPFT for adult mental health services. This contract will continue to be operated separately by the CCGs and is not described or dealt with further in this report

As indicated in each Appendix relating to an individual arrangement, those at paragraphs (2) to (6) are at a stage where they require decisions of the Executive to continue with them or otherwise enter into them. Each one is therefore the subject of a recommendation that the entering into of the agreement is approved. In reaching that decision the Executive must have regard to certain statutory pre-conditions, namely:-

(1) the partnership arrangements must be likely to lead to an improvement in the way in which the functions are exercised; and

(2) the Partners must have consulted jointly such persons as appear to them to be affected by the arrangements.

The way in which these pre-conditions are met in relation to each proposed agreement is set out in the relevant Appendix.

There are no such pre-conditions to the entering into of the Partnership Framework Agreement which is not a Section 75 Agreement.

Overall Financial Picture

The overall financial position including the amounts being contributed by the Council and the CCGs jointly to each of the Agreements is set out in the spreadsheet at Appendix H.

Specific Issues

Included in the Proactive Care Section 75 described at Appendix B is £2.97m funding for Disabled Facilities Grant. This sum will be passported direct and in full to District Councils for them to manage the sums in accordance with their statutory powers and responsibilities.

Legal Considerations

The Council's duty under the Equality Act 2010 needs to be taken into account when coming to a decision.

The Council must, in the exercise of its functions, have due regard to the need to:

(1) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010;

(2) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(3) foster good relations between persons who share a relevant protected characteristic and persons who do not share it: Equality Act 2010 s 149(1). The relevant protected characteristics are age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; sexual orientation: s 149(7).

Having due regard to the need to advance equality of opportunity involves having due regard, in particular, to the need to:

(1) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(2) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(3) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to tackle prejudice, and promote understanding.

Compliance with the duties in this section may involve treating some persons more favourably than others.

This duty cannot be delegated and must be discharged by the decision-maker. To discharge the statutory duty the decision-maker must analyse all the relevant material with the specific statutory obligations in mind. If a risk of adverse impact is identified consideration must be given to measures to avoid that impact as part of the decision making process.

Generally all of the services which are delivered under any of the agreements that are covered by the Partnership Framework Agreement approach directly impact on people with a protected characteristic particularly elderly people and young people and people with a disability. The proposals set out in this report which relate to the organisational and contractual structures that will be put in place between the Council and the CCGs as commissioners of service are not considered to directly impact.

It is at the level of changes to service that the greater potential for impact arises. The potential impact of the changes which form part of the BCF resubmission on people with a protected characteristic will be the subject of detailed analysis prior to their implementation so that the appropriate mitigation strategies can be put into effect.

Further, in reaching a decision, the Council must have regard to the Lincolnshire Child Poverty Strategy, the Joint Strategic Needs Assessment (JSNA) and the Health & Well Being Strategy.

Child Poverty

The BCF is not designed to address child poverty. However, some of the elements within the BCF will support families where there are children and help children in transition into adulthood.

JSNA and Joint Health and Wellbeing Strategy

These underpin the BCF and the ways in which the BCF has been developed in accordance with the Joint Strategic Needs Analysis and the Joint Health and Wellbeing Strategy were detailed in the BCF submission that has now been approved.

2. Conclusion

The intended consequence of the Better Care Fund at both a national and local level was a level of ambition to 'pool' resources and make further progress on integrating health and social care as described by Lincolnshire Health and Care (LHAC). The approach recommended is an evolutionary step towards that ambition and yet, is a pragmatic solution building on what already works and has stood the test of time leaving the existing Governance arrangements untouched.

3. Legal Comments:

The Council has power to enter into the Partnership Framework Agreement and the Individual Agreements under section 1 of the Localism Act 2011 and Section 75 of the National Health Service Act 2006.

Under Section 3 of the Care Act 2014 which will come into force on 1 April 2015, the Council will be under a duty to exercise its functions under that Act with a view to ensuring integration of social care and health provision where it considers this would promote the wellbeing of adults in its area in need of care and support and the wellbeing of carers in its area; contribute to the prevention or delay of the development of need for care and support for adults or support for carers; or improve the quality of care and support for adults and support for carers.

The legal considerations that the Executive must consider in reaching a decision are set out and addressed in detail in the report.

The decision is consistent with the Policy Framework and within the remit of the Executive if it is within the budget.

4. Resource Comments:

The report identifies Lincolnshire's ambition of pooling £197m of health and social care investment in 2015/16, rather than the national minimum requirement of £53.2m.

The County Council has negotiated that a £20m sum from within the £53.2m be made available to protect adult social care and this is to be invested in (a) projects to transform how services are provided, (b) in projects that will help minimise future required investment (c) in additional budget provision to fund demographic pressures and other budgets experiencing funding pressures, (d) required developments to ensure compliance with the Care Act

Key to the protection of the council (and the health community) is the Risk Management paper included as Schedule 3 within the Framework Partnership Arrangement

5. Consultation

a) Has Local Member Been Consulted?

n/a

b) Has Executive Councillor Been Consulted?

Yes

c) Scrutiny Comments

Adults Scrutiny Committee are receiving a copy of the report on 25 February 2015 and their views will be reported at this meeting.

d) Policy Proofing Actions Required

Please refer to the sections within the papers on legal considerations.

6. Appendices

These are listed below and attached at the back of the report	
Appendix A	Partnership Framework Agreement
Appendix B	Description of proposed Section 75 Agreement for proactive care
Appendix C	Description of proposed Section 75 Agreement for corporate matters
Appendix D	Description of proposed Section 75 Agreement for Child and Adolescent Mental Health Services
Appendix E	Description of proposed Section 75 Agreement for Integrated Community Equipment Services
Appendix F	Description of proposed Section 75 Agreement for Learning Disabilities
Appendix G	Description of proposed Section 75 Agreement for Adult Mental Health
Appendix H	Spreadsheet Detailing the Allocation of Funding

7. Background Papers

Document	
Better Care Fund submission to Department of Health dated 9 January 2015	Katrin.Howe@lincolnshire.gov.uk

This report was written by Paula Pilkington, David Coleman, Glen Garrod, who can be contacted on 01522 550808 or by email to glen.garrod@lincolnshire.gov.uk.