

Cabinet – 17 December 2014

Walsall Adult and Community College (WACC) Spin Out Project - Delivering Differently

Portfolio: Councillor Hussain, Community, Leisure and Culture

Related portfolios: Councillor Cassidy, Children's Services and Education

Service: Neighbourhood Services

Wards: All

Key decision: Yes

Forward plan: Yes

1. Summary

- 1.1 This report advises and makes recommendations on the outcome of work commissioned by Walsall Council, funded via the national Cabinet Office's "Delivering Differently" programme and undertaken by KPMG and Eversheds to review the options available to the Council regarding the future of Walsall Adult and Community College. Cabinet Members should refer to the confidential reports from KPMG and Eversheds. These documents are confidential because they contain commercially sensitive information.
- 1.2 The key recommendation from KPMG is that Walsall Adult and Community College should spin out of the Council and operate independently. The legal aspects of the College spinning out from the Council and the setting up of a wholly owned subsidiary are detailed in the report which Eversheds have prepared for KPMG.
- 1.3 An independent Walsall Adult and Community College will be able to create significant and lasting positive benefits for the individuals and communities it serves. The College will be able to access additional funding enabling it to grow as an organisation, increase its support for neighbourhoods and focus more on employer led training.
- 1.4 Independence will enable the College to:
 - have greater freedom and flexibility, enabling it to be more responsive to changing needs, more effective and more efficient
 - access additional sources of funding that are not currently available to the College such as the European Structural and Investment Fund

- when the Skills Funding Agency contract is transferred to the College then it will be able to access capital grants.
- secure the future of existing provision, increase learning opportunities in local communities, support more people towards work, continuing to reduce dependency on benefits
- increase choice of learning opportunities in the borough.

- 1.5 As an independent organisation, Walsall Adult and Community College would make a significant contribution to the mix of learning and skills provision within the borough by continuing to target learners who are not yet ready to access mainstream further education.
- 1.6 By operating independently of the Council, Walsall Adult and Community College would be able to sustain and enhance the services it provides by attracting funding from other sources. This would enable the College to become financially sustainable at a time when its main source of public funding from the Skills Funding Agency is under pressure and nationally decreasing.
- 1.7 Walsall Adult and Community College is a highly successful, Ofsted grade 1, community-based college that provides outstanding and supportive learning opportunities for around 5000 people per year, many of whom have the highest needs in the borough. The College's community focused approach, combined with its strong record of tackling worklessness and raising learners' aspirations towards employment or further study, is highly beneficial to Walsall and the Black Country.
- 1.8 Both KPMG and Eversheds have suggested that the spin out could be in two stages: the first stage would see Walsall Adult and Community College become a wholly owned subsidiary of the Council, with the second stage being a fully independent entity. The reasons behind the two stage process are set out in section 3 of this report. It should be noted that the College will only proceed to the full spin out if the conditions at the time are favourable.
- 1.9 In the first two years of the spin out, the College would need the Council to provide a number of support services such as rent free accommodation, payroll and business support. The level of support would be significantly lower than the Council currently provides to the College.
- 1.10 It is envisaged that the requirement for this level of support will diminish over the first two years as the College becomes increasingly independent. In the first stage, the level of support for the College from the Council would have a value of around £176k, reducing to zero cost from the third year onwards.
- 1.11 **The spin out of Walsall Adult and Community College is a key decision because it impacts on significant numbers of people with the highest needs in the borough.** This decision will potentially secure the future of the community focused, accessible, supportive learning opportunities that Walsall Adult and Community College currently provides.

- 1.12 Recommendations for approval are presented regarding the future of Walsall Adult and Community College as an independent organisation.
- 1.13 This report compares options and presents recommendations based on the advice of Eversheds and KPMG. Cabinet Members should refer to the private session report for confidential details and commercially sensitive matters relating to this assessment.

2. Recommendations

Note: The decision will be made in private session following consideration of the confidential report containing the appendices.

- 2.1 That the Cabinet approves that, by 1st August 2015, Walsall Adult and Community College becomes a separate legal entity, a company limited by guarantee with charitable status that is wholly owned by Walsall Council, with the aim of fully spinning out from the Council when the financial conditions are favourable (see section 3.5).
- 2.2 That the Cabinet approves that the reserves held by Walsall Council, accumulated from Skills Funding Agency funding grants delivered by Walsall Adult and Community College, are transferred to the new entity by 1st August 2015.
- 2.3 That the Cabinet approves that all non-property assets, furniture and equipment currently utilised by the College are transferred to the new entity by 1st August 2015.
- 2.4 That the Cabinet approves that the existing staff employed by the Council whose work is wholly, or mostly, at or for the College will, by the 1st August 2015, transfer to the new entity via the Transfer of Undertakings (Protection of Employment) Regulations 2006.
- 2.5 That the Cabinet approves that, at the point of transfer, Walsall Council employees who are members of the West Midlands Pension Fund will transfer to the new entity on a fully funded basis.
- 2.6 That the Cabinet approves that, at the point of transfer, Walsall Council will retain any historic deficit relating to the West Midlands Local Government Pension Scheme (LGPS) for employees who transfer to the new entity (the most recent actuarial report, based on fund conditions as at 30th September 2014, states initial past service liabilities of £1.449m).
- 2.7 That the Cabinet approves that Walsall Council will act as guarantor to enable the new entity to gain admitted body status to the LGPS pension scheme.
- 2.8 That the Cabinet notes that any new or increased pension liability relating to the employees that have transferred to the new entity, whether linked to past or present service, will be funded by the new entity. Increased pension liability means any additional increase in the value of the liability at the point of transfer.

- 2.9 That the Cabinet notes that the new entity will put in place, and fund from its own resources, a pension bond to cover potential unfunded LGPS liabilities that may be accumulated going forwards.
- 2.10 That the Cabinet approves that the two sites currently occupied by Walsall Adult and Community College, namely the Hawbush Centre and the Whitehall Centre, are leased to the new entity, with the lease being on a rent free basis for the first stage of the spin out and at a market rent thereafter.
- 2.11 That the Cabinet approves that Walsall Council supports the transfer of the Skills Funding Agency contract to the new entity, enabling the College to become fully independent after a period of around two years following the initial spin out.
- 2.12 That the Cabinet approves that for the first two years following spin out to a new entity, Walsall Council continues to provide support of £176k to the new organisation's operating costs per year. This support will reduce to zero once the entity becomes fully independent.
- 2.13 That the Cabinet notes that, if the actual outturn for the new entity in the first two years is more beneficial than that currently forecast, the College intends to transfer any surplus to the council, in recognition of ownership and the ongoing support that is provided.
- 2.14 That the Cabinet notes that a further report will be presented to Cabinet before 31st July 2017 to provide an update on the actual position and to seek agreement regarding the way forward.

3. Report detail

- 3.1 In February 2014, Walsall Council reviewed its potential spin out projects and selected Walsall Adult and Community College for a joint bid to the national Cabinet Office seeking to secure "Delivering Differently" funding. The bid was successful and gave access to funding support for an options appraisal for the College.
- 3.2 Following a tendering process, KPMG and Eversheds were commissioned to undertake the options appraisal. They analysed the College's financial and funding data and interviewed over twenty stakeholders.
- 3.3 In their report, KPMG sets out their preferred option and the implications, as follows:
- Our preferred option is for the College to spin out of Walsall Council and become an independent organisation operating outside the Council.
 - The flexibility and opportunity this would provide would offer the most responsive education and training solutions for Walsall's learning communities.

- Over the longer term the ideal solution would be for an independent Walsall Adult and Community College to contract directly with the Skills Funding Agency and the Education Funding Agency, although it may be necessary initially for the Council to retain the Skills Funding Agency and Education Funding Agency contracts.
- 3.4 Although the KPMG report proposes full spin out, it has become clear that full spin out cannot be achieved immediately as the Skills Funding Agency, the College's main source of funding, will not fund a new organisation that has not yet acquired an independent financial track record.
- 3.5 The preferred model is therefore for the College to spin out in two stages, firstly to become a wholly owned subsidiary of the Council, followed by full spin out when the conditions are favourable:
 - the transfer of the Skills Funding Agency contract has been confirmed
 - the financial position of the new entity is secure
 - pension arrangements for staff have been secured.
- 3.6 As a wholly owned subsidiary, the College will be able to continue its member status of the LGPS. In addition, staff in the Teachers' Pension Agency will continue to access that scheme. Full spin out will require LGPS Admission Body status, with a "community of interest" established between the College and the Council. The Constitutional documents of the new entity will need to demonstrate this link. In addition, confirmation will be needed that staff in the TPA can continue to access the scheme.
- 3.6 In the first stage, the College would build up its financial history as an independent organisation whilst receiving the Skills Funding Agency grant via the Council.
- 3.7 The College has worked with KPMG to analyse its current and future financial situation and has produced a five year financial forecast that has been scrutinised by Council Finance Officers. This forecast will form part of the College's comprehensive Business Plan which sets out its aspirations for the future and its plans to achieve these aspirations for the benefit of its learners, the community and local employers.
- 3.8 Becoming a wholly owned subsidiary of the Council would not impact on the College's ability to continue to work with its current and future local delivery partners.
- 3.9 The Eversheds report states that there are significant financial advantages to the College becoming a charity and that the expected legal structure for the new entity to be a charity would be a Company Limited by Guarantee with charitable status. This legal structure has been selected because it gives the College the freedom to access other sources of funding, such as European grants and Skills Funding Agency capital funds and affords the College the ability to take advantage of the tax exemptions available to charities.
- 3.10 There are clear advantages to the College spinning out from the Council as, even in the first stage of the spin out, the College will be able to apply for other

sources of funding and reduce its overall reliance on the Skills Funding Agency grants. The Council and the College will need to ensure that they do not jeopardise the company's Teckal status (see point 7.2).

- 3.11 The key advantage for the Council of the College spinning out is that the spin out will reduce the risk to the Council from the ongoing reduction in the level of core funding provided to the College by the Skills Funding Agency. This funding is reducing in line with national austerity measures.
- 3.12 The College's spin out proposals were recently discussed at the Neighbourhood Services Scrutiny and Performance Panel and also an informal meeting of the Cabinet. Both groups were satisfied with the responses to their questions and supported the spin out proposal in principle, with no recommendations.
- 3.13 Throughout the spin out process and beyond, the College fully intends to maintain its same Vision and Mission, and its focus on employability, creating a "line of sight to work" for people in local communities, not least those who are most disadvantaged, with few or no qualifications.

4. Council priorities

- 4.1 Walsall Adult and Community College's established role in providing high quality learning and skills for the most disadvantaged in Walsall ensures that, post spin out, it would continue to make an important contribution to all four council corporate priorities:

- **supporting businesses to thrive and supporting local people into work** – the college provides high quality (Ofsted grade 1) learning opportunities that give "line of sight to work" and improve the economic opportunities of learners through the completion of their learning programmes, the achievement of qualifications and the positive move towards work or further training.
- **improving health and wellbeing** – the increase in learners' sense of worth when they progress in their studies, many for the first time in their lives, and make a positive contribution to society through reduced dependence on the state. Many learners also increase their understanding of healthy lifestyles through their learning programmes and the advice and support received at college.
- **creating safe, sustainable and inclusive communities** – by working with learners to raise their aspirations; increase their likelihood of accessing work and reduce their dependency on benefits; increase their positive involvement with the diverse communities of Walsall through engagement in college activities; where relevant, improve parenting skills.

The college actively promotes sustainability of the environment and the development of skills for sustainable communities.

- **improving safeguarding, learning and life chances for children and young people** – through the provision of outstanding education and

training for young people in a supportive environment, that enables them to thrive and work towards economic independence.

- 4.2 It is of crucial importance to the achievement of the Council's strategic objectives that the most disadvantaged people of Walsall are able to access the supportive, local provision provided by Walsall Adult and Community College. This provision meets the needs of local communities and enables individuals and groups to work towards and achieve appropriate qualifications, progress to employment and/or further training and make a positive contribution within the borough.

5. Risk management

- 5.1 Key risks for the council have been identified as:

- if Walsall Adult and Community College does not spin out then the Council will have to continue to invest resources in the College at a time when the College's core funding is decreasing and the Council's priority is to focus on its own core services.
- if the College's predicted growth is not achieved and the College becomes financially unviable then there is a financial risk to the Council (covered further in the financial implications section below).
- a reputation risk if the new college fails in the early years for reasons that were within the Council's control at the point of spin out.
- a financial risk to the Council if, at the point of transfer, there has been a change in the fund conditions that informed the pension deficit valuation.
- if the amount of any financial support which is provided to the College after it is fully spun out exceeds the threshold of 200,000 Euros then there is a risk that the Council does not comply with State Aid regulation.

- 5.2 Key risks for Walsall Adult and Community College have been identified as:

- if Walsall Adult and Community College does not spin out, it is likely to become financially unviable in the next few years as it will be unable to replace its main funding sources, which are decreasing due to public sector spending reviews.
- a financial risk to the College if the predicted growth is not achieved and the College becomes financially unviable (again, this is covered further in the financial implications section below).
- if reserves accumulated by Walsall Adult and Community College from Skills Funding Agency contracts are not transferred to the new college then the new college will not have sufficient funds to invest in the growth needed to be financially viable in the longer term.

- if the existing historical pensions deficit for the West Midlands Pension Fund is transferred to the College, then the College's ability to invest and grow would be seriously hampered, as this would have a significant impact on the strength of the balance sheet.
- if a leasing arrangement for the council owned accommodation currently occupied by the College (Hawbush and Whitehall Centres) cannot be confirmed then the College is at risk of not having suitable premises from which to operate.
- if the Council does not support the transfer of the Skills Funding Agency contract to the College, then there is a risk that the College will not be able to become fully independent.
- if the pension liability increases, or there is a new liability, the College's operating costs will increase and there is a risk that the College will not be able to achieve a breakeven operational position within the time-scale proposed, which may have an impact on the financial health rating as assessed by the Skills Funding Agency and the transfer of the Skills Funding Agency funding contract.
- if the governing documents for the setting up and registration of the wholly owned subsidiary and the ongoing governance of the wholly owned subsidiary do not ensure that the arrangements are a genuine and compliant use of the Teckal exemption (see point 7.2) there is a risk of challenge on the basis that the wholly owned subsidiary is a merely a device to avoid the application of the European Procurement regime, as opposed to a bespoke corporate and charitable model which is designed to achieve the outcomes which this project is actually being set up to generate.
- there is a risk that the College's ability to achieve the forecast increase in income may be diminished by the competitors in the market place, both current and new. This may have an impact that continues past the 5 year forecast period, continuing to erode reserves until they are all utilised.

5.3 These risks have been discussed at meetings between Council Officers, the College, KPMG and Eversheds. The outcomes of these meetings have informed the recommendations in the KPMG report (**Appendix A**) and this Cabinet report.

5.4 A Delivering Differently Spin Out Board has been established to drive the project. This Board has representation from Walsall Adult and Community College's governing body and includes a local Councillor, an Executive Director of the Council and representation from the Skills Funding Agency and the Local Economic Partnership (LEP). There is mutual agreement within this board to work towards spin out.

6. Financial implications

- 6.1 The College achieved an operational deficit of (£123k) in 2012/13 and an operational deficit of (£226k) in 2013/14 which was due to interim cover for senior posts and a higher spend than planned on learner support. Currently, for the 2014/15 academic year, the College has budgeted to achieve a surplus of £136k, based on assumed income of £4.647m and operating costs of £4.511m.
- 6.2 However, in addition to these operating costs, the Council supports the College by providing a range of professional services (HR, Legal, Payroll, Finance, Audit etc) and with premises costs such as maintenance, caretaking and cleaning, and other costs such as insurance. This support from the Council currently has a value of around £220k per year; this would be reduced to £176k per year in each year of the first stage of spin out and then further reduced to zero when the College completes the spin out process.
- 6.3 Furthermore, there is an additional benefit to the College whilst it is part of the Council in terms of recoverable VAT and depreciation, both of which will be a cost to the College when independent. In total these costs are estimated to be in the region of £230k, per annum, giving an overall total of £450k additional cost that the new entity will incur.
- 6.4 Based on the recommendations set out within this report (sections 2.1 – 2.15 above), a financial forecast for the academic years 2015/16 to 2019/20 has been compiled to ascertain the potential position of the new entity over this period.
- 6.5 From the budgeted position of a surplus of £136k for 2014/15, the financial forecast shows a deficit for 2015/16 of (£94k), a deficit for 2016/17 of (£87k), a breakeven position for 2017/18, a surplus of £136k for 2018/19 and a surplus of £308k for 2019/20 – therefore a total accumulated surplus of £263k over the 5 years. This assumes a contribution of £176k from the Council in each of the years, 2015/16 and 2016/17; if this contribution is not made then the operating deficits for these two years would be (£270k) and (£263k) respectively.
- 6.6 In addition to the forecast financial position for the new entity there is a potential opportunity for the Council to reduce the costs that it currently incurs in supporting the College within the organisation. As set out above, the cost of current professional support / property costs that the Council provides is around £220k per year. By year 3 these costs are forecast to be fully met by an independent entity. The Council would therefore have the opportunity to sell these as traded services to the new organisation (if the independent entity wishes to continue to procure them from the Council), or to review the costs in each area and seek to reduce them (if the independent entity does not want to continue to procure them from the Council).
- 6.7 There is also a potential opportunity for the new entity to operate a closed pension scheme for LGPS members, such that transferred staff continue in the LGPS scheme but it is 'closed' to new members and an alternative stakeholder scheme is offered to new staff. However, this option has been discounted because it is likely to have an adverse impact on the historical deficit and employer contributions in the future as income into the scheme reduces due to

staff leaving the College's employment. Furthermore, when there are no staff in the scheme the scheme will close and any historical liability will become payable.

- 6.8 The potential opportunity for the historical LGPS pension liability, currently valued at £1.449m, to transfer to the new entity has also been considered. However, this would impact on the College's reserves as follows:

	2015/16 £000's	2016/17 £000's	2017/18 £000's	2018/19 £000's	2019/20 £000's
Net Assets without pension deficit	1,521	1,409	1,409	1,545	1,853
Net Assets with pension deficit	(70)	(185)	(188)	(55)	250

This is likely to have an adverse impact on the credit worthiness of any new entity, and any assessment by the Skills Funding Agency in terms of the overall financial position of the entity. Therefore this course of action has been discarded.

- 6.9 Another option that has been considered is the potential opportunity for the reserves held by the council to not transfer to the new entity, or only transfer the proportion that is required to cover the forecast deficit in the first 2 years, with the remainder retained by the council until full independence to manage any risk to the achievability of the forecast position. This option has been discounted as the new entity will need to be highly responsive to opportunities as they present themselves and this would not be possible if all of the unused reserves were held by the council.
- 6.10 Consideration has also been given to the potential opportunity for the current reserves to be utilised to fund the ongoing support from the council of £176k for the first stage of the new entity. However, to be fully financially independent from the council in the first stage of spin out may make defending the Teckal exemption difficult, therefore this option has been discounted.
- 6.11 The first stage of spin out will give the College the opportunity to access funding opportunities that are currently not available to it, for example, the European Structural and Investment Fund and the Big Lottery Fund. Having charitable status will also give access to wider sources of funding.

7. Legal implications

- 7.1 As the Council will continue to receive the Skills Funding Agency and Education Funding Agency grants of around £4m, there must be a lawful mechanism by which the Council can make the grants available to the wholly owned subsidiary that will be delivering the services that the grants are intended to pay for. However, such a sub-contracting arrangement is potentially subject to the public procurement regime which is embodied in the Public Contracts Regulations 2006 and the underlying European Directives. This legislation is designed to ensure that public bodies that award contracts above the specified thresholds in the legislation, only do so after fair and transparent competition and then only on the basis of the lowest bid or the most economically advantageous offer.

- 7.2 While any arrangement between the Council and the wholly owned subsidiary will constitute a public contract which is potentially subject to a requirement for open competition under the public procurement regime, the provision of educational services is covered by Part B of the Public Contracts Regulations 2006 (as amended). Therefore there is no mandatory requirement to subject the contract to the full EU procurement requirements. The Council must still act in an open, transparent and non-discriminatory way and secure best value. **However if the wholly owned subsidiary is wholly owned by the Council it can also take advantage of what is known as the Teckal exemption.** This means that the wholly owned subsidiary can be treated as an ‘in-house’ Council department and thus completely avoid triggering the application of the public procurement regime. Thus the Council can let a contract to the wholly owned subsidiary and pay over the Skills Funding Agency and Education Funding Agency grant funding as the consideration for this, without first running a tender process.
- 7.3 The Teckal exemption was established in 1999 by the European Court, case C-107/198 and is codified in the new Public Contracts Directives which were published by the EU on 17 April 2014. These must be transposed into national law by member states within 2 years and are likely to become law in the UK in 2015 before the College spins out, which is expected to be by 1 August 2015.
- 7.4 In order for the ‘Teckal’ exemption to apply as the law stands currently, the local authority must exercise a level of control over the company which is similar to that which it exercises over its own departments (**the ‘control test’**) and the wholly owned subsidiary must carry out an essential part of its activities for the controlling local authority (**the ‘function test’**). The draft Public Contract Regulations 2015 incorporates both tests and in particular the function test is clarified to mean that the company must undertake at least 80% of its activities for the controlling local authority.
- 7.5 In summary, in order to ensure that the wholly owned subsidiary can benefit from the Teckal exemption and comply with the provisions of the new Public Contracts Directive:
- there can be no private ownership or involvement and preferably no possibility of issuing shares to private sector participants at a later date
 - the constitution of the wholly owned subsidiary must give “decisive influence” to the Council and this should include the ability to determine the strategic objectives and significant decisions of the company, with any proposal to move outside an agreed business plan to be referred back to the Council for approval
 - the Council must have an ability to appoint at least one representative to the board
 - the constitution of the wholly owned subsidiary should include Objects which are clearly focused upon the public interest and there should be an appropriate limit on pursuing private sector commercial activity, or a complete prohibition

- it must be clear that at least 80% of the business activities of the wholly owned subsidiary is for the Council
- 7.6 Once the wholly owned subsidiary is established and operating successfully, the wholly owned subsidiary can negotiate with the Skills Funding Agency and the Education Funding Agency to contract with them direct, at which point the Council could then step out of the company, leaving it in a good position to compete in the open market as an independent undertaking. At this point any residual public contracts with the wholly owned subsidiary would then have to be re-tendered.
- 7.7 There are further legal implications associated with the establishment of the proposed new entity, a wholly owned subsidiary of Walsall Council that is a company limited by guarantee with charitable status:
- the wholly owned subsidiary will qualify as a body governed by public law and will have to comply with public procurement law when letting contracts on behalf of the Council
 - The wholly owned subsidiary will not have any share capital, but the Council (as the sole member of the company) will have to agree to contribute a nominal amount (commonly £1 or £10) if the company has insufficient funds/assets to cover its liabilities in the event that it were wound up (i.e. the guarantee). This would limit the Council's liability to any creditors
 - The wholly owned subsidiary must register with Companies House under the Companies Acts which will entail drafting of appropriate Memoranda and Articles of Association
 - The wholly owned subsidiary must also be registered as Charity at the Charity Commission under the Charities Acts
 - By securing charitable status the wholly owned subsidiary will be exempt from Corporation Tax and Stamp Duty Land tax. The wholly owned subsidiary will also be able to reclaim tax on gift aid donations and claim mandatory relief from business rates (currently 80%)
 - The wholly owned subsidiary will need to send its accounts and an annual return to both the Charity Commission and Companies House each year
 - A non-charitable subsidiary of the wholly owned subsidiary would have to be set up to undertake any non-charitable trading, however any resulting profits could then be gifted back to the wholly owned subsidiary and the wholly owned subsidiary would then be able to reclaim basic rate tax relief on the donations from its taxable profits (i.e. Gift Aid).
- 7.8 The wholly owned subsidiary will need to act for the public benefit and have educational objects which can be legitimately categorised in law as 'charitable'. This is known as the **public benefit requirement**. In practice this means that the wholly owned subsidiary must have charitable aims that fall within the various

descriptions of purposes in the Charities Act 2006. The two key principles of public benefit are that there must be an identifiable benefit or benefits, and the benefit must be to the public, or a section of the public. In this case the wholly owned subsidiary will therefore be 'for the advancement of education' (as prescribed by the 2006 Act) and this benefit may be restricted to the Borough of Walsall and the relevant age group. The precise wording of the charity's objects will be finalised in its governing document.

- 7.9 A Commercial Transfer Agreement (CTA) will need to be concluded between the Council and the new corporate college entity immediately prior to the spin out. This Agreement will document what equipment and other assets (excluding land and premises) will transfer to the new corporate college entity from the Council's ownership. It will also record what current contracts which have been entered into by the Council (for the College) will transfer to the new corporate college entity. The CTA will also list the staff whose employment is to transfer from the Council to the new college corporate entity under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE").
- 7.10 At the point of spin out, new contracts will be established between the Council and Walsall Adult and Community College for any key back-office services that the new college corporate entity chooses to purchase from the Council, such as pay roll, HR, finance and legal services.
- 7.11 It is proposed that at the point of spin out, the two freehold sites currently occupied by Walsall Adult and Community College (namely the Hawbush Centre and the Whitehall Centre) will be leased to the College on a rent free basis for the first stage of the spin out. Any such Lease will constitute a business tenancy under the Landlord and Tenant Act 1954, so that there will be a statutory right for the College to require a new tenancy when the initial tenancy expires, unless the parties 'contract out' of the 1954 Act. This issue and the term of each lease, the amount of rent payable by the new corporate college entity when it spins out fully, the extent of any break clause options available to either of the parties and the other main terms and conditions of the proposed leases, remain to be negotiated.
- 7.12 The leases will also incorporate a detailed Schedule of Condition for each site, so that this can be taken into account in any future exercise to establish a market rent, or otherwise to agree dilapidations.
- 7.13 All staff currently employed by the Council to work at the College will transfer to the new corporate entity with effect from 1 August 2014 under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended). This will entail the Council carrying out a formal consultation with the affected staff, providing full details of the terms and conditions of employment of the affected staff to the wholly owned subsidiary and otherwise complying with the Council's obligations as the 'employer' under the TUPE Regulations. The TUPE transfer will also apply to other individual members of staff who work for the Council in circumstances where the majority of their duties entail providing support services to the College.
- 7.14 It is important to ensure that the spin-out arrangements do not constitute unlawful state aid. If the Council provide financial support for the wholly owned subsidiary

during the first stage, via rent free periods under the proposed leases, or subsidised access to back-office services, or otherwise, this will not constitute unlawful state aid as long as the company remains genuinely Teckal compliant.

- 7.15 When the company becomes an independent entity separate from the Council the Teckal exemption would no longer apply. However, a state aid de minimis threshold of 200,000 Euros will apply from that point onwards over a rolling period of three consecutive financial years; any support from the Council may count towards this threshold.
- 7.16 Contractual and other arrangements for the spin out of Walsall Adult and Community College from Walsall Council do not imply precedence for any future spin outs from Walsall Council.

8. Property implications

- 8.1 The two sites occupied by Walsall Adult and Community College, the Hawbush Centre in Leamore and the Whitehall Centre in Caldmore, are owned by the Council. Major repairs and maintenance are carried out by the Council and the College undertakes renovations and minor repairs which it pays for out of its own budget.
- 8.2 In order to be financially viable, the College will need a rent free period for the first two years. Following that, the College will pay the Council a market rent, currently assessed as £60,000 per annum for the Hawbush Centre and £20,000 per annum for the Whitehall Centre.
- 8.3 Prior to the spin out, both properties occupied by the College will be surveyed to ascertain the condition at the time of spin out and to inform an agreement between the Council and the College on future maintenance obligations.
- 8.4 Assuming a 5 year lease term, it is proposed that the Council retains responsibility for the structure of the building (main walls, roof and foundations). The College would be responsible for maintaining the state and condition of everything else to at least as good a condition as at the lease commencement date. This would include decorations, windows and doors, rainwater goods, hard and soft landscaping, mechanical and electrical plant and installations etc. The College would also be responsible for complying with statutory premises management responsibilities.
- 8.5 The College has begun to review its accommodation needs for the longer term.

9. Health and wellbeing implications

- 9.1 The move to independence will enable the College to continue to support learners to progress, thereby increasing their sense of worth through achievement. In addition, the College enables many learners to reduce their dependence on the state and become positive contributors to their local community.

- 9.2 Many learners also increase their understanding of healthy lifestyles through their learning programmes and the advice and support received at college.
- 9.3 The College is mindful that some staff, learners and other stakeholders may have concerns about the impact of the spin out. The College has therefore developed a Communications Strategy to ensure that all stakeholders are kept informed about the spin out process and its implications for them.

10. Staffing implications

- 10.1 At the point of spin out, staff employed by the Council whose role is fully or mostly at Walsall Adult and Community College will transfer to the new entity. Transfer of Undertakings (Protection of Employment) Regulations 2006 will apply to these staff. Full consultation will be held with staff affected.
- 10.2 The **indicative numbers of staff** at Walsall Adult and Community College who will transfer to the new organisation are: 33 teaching staff, 40 sessional tutors, 43 business support staff, 13 sessional support workers and 19 managers, an overall total of 148 staff. Note that not all sessional tutors have teaching hours every year, but all will transfer to the new entity.
- 10.3 In addition, four cleaning staff employed by the Council whose work is mostly at the College, will transfer to the new organisation, unless there is an agreement in place between the Council and the College for the College to purchase their service directly from the Council.
- 10.4 The College is committed to maintaining the pension rights for staff at the point of transfer. For staff in the West Midlands Pension Fund, transfer would be under a “fully funded” arrangement.

The financial implications of the transfer of staff who are members of the West Midlands Pension Fund are set out in sections 2.5 – 2.8 of this report.

- 10.5 Staff who are members of the Teachers’ Pension Association will continue that membership in the new entity.

11. Equality implications

- 11.1 Walsall Adult and Community College directly supports inclusion by targeting its learning programmes and support services to the most disadvantaged individuals and groups locally, including those with protected characteristics as defined by the Equality Act 2010.
- 11.2 Many of the College’s learning programmes are designed to address worklessness and to reduce the number of local young people who are not accessing education, employment or training. The College also offers a wide range of community provision that encourages those who are not yet ready to access mainstream programmes to attend a local first-step course.

- 11.3 The College supports inclusion by promoting community cohesion and reducing inequalities through the delivery of targeted programmes across the borough via its nine community partners.
- 11.4 Equality Impact Assessments have been undertaken to ensure the proposed changes to the college will maintain the learning opportunities and support that are currently provided to the most disadvantaged groups and individuals in Walsall.

12. Consultation

- 12.1 Extensive consultation with key stakeholders was undertaken by KPMG in July and August 2014. Detailed outcomes of the consultation are given in the KPMG Report (**Appendix A**).
- 12.2 If Cabinet approves the spin out of Walsall Adult and Community College from the council, formal consultation will be undertaken with staff and trade unions.

Background papers (All Confidential)

Appendix A

Walsall Adult and Community College “**College Structure and Prospects Appraisal**” produced by KPMG October 2014.

Appendix B

Report on the strategic options for Walsall Adult and Community College - Eversheds

Appendix C

Confidential financial information.

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9 December 2014

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Portfolio Holder



9 December 2014