



## **Why Barnet's Education and Skills must be an in-house service**

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# Summary

The two options of in-house provision or establishing new Local Authority Controlled Company (LACC) are examined using 12 key criteria (see Table 1) with **in-house provision having significant advantages over the latter**.

1. The Council's draft Equalities Impact Assessment is significantly flawed because it concludes there is 'No Impact' for any of the equality groups when in fact there is a **Positive Impact for all equality groups with the in-house option** but a **Major Negative Impact for all equality groups with the LACC option**.
2. We have examined the ability of Education and Skills to retain and recruit qualified and experienced staff and conclude that the continuity of service and quality of pension schemes are fundamentally important. The LACC option fails on both these criteria.
3. A sustainable motivated workforce to provide the range and quality of services required by schools, parents and children for their physical and mental health is dependent on the retention of the existing staff and the recruitment of new qualified and experienced staff is critically important to ensure high quality services for Barnet Schools.
4. A divided, demoralised workforce as a result of a differential in terms and conditions combined with an inability to retain and recruit qualified staff is inherent in the LACC model and will have a long lasting negative impact in education and the community.
5. The Council has failed to prepare a full Equality Impact Assessment for the consultation process.
6. The Council has stated that the Equality Impact Assessment and the full business case will only be completed after the consultation feedback deadline of 4pm 3 July 2020. This contradicts Government policy set out in the Green Book, and ignores over a decade of established custom and practice in Barnet and is likely to fail to take full account of key and other unforeseen emerging issues.
7. The multinational Mott MacDonald's use of the Force Majeure contract clause raises many questions given that Barnet's Education and Skills contract represented just 0.23% of the company's £771m annual turnover in 2019. The fact that all local authorities with education responsibilities, teachers and parents are confronted by the same impact of COVID-19 raises questions over the real motives of this decision.

## Recommendations

- We strongly recommend that Barnet Council transfers Education and Skills staff from Cambridge Education back to direct employment in the Council.
- We recommend that the contract management functions of the ISS catering contract, which is going to be novated to the Council, are established in the Education Department.

# Part 1

## Appraisal of Options

The Council's own view of a LACC or Local Authority Trading Company (LATC) was evident in 2014 when it compared the potential benefits and risks of a Local Authority Trading Company and concluded the following:

- An LATC cannot secure additional external funding
- An LATC carries risks of lack of entrepreneurial expertise and associated ability to develop new products and markets
- Use of the Teckal exemption would limit the ability to trade outside the Borough
- Without additional investment from the Council and/or increased income, non-DSG funded services would be reduced to a statutory minimum
- Redundancies may still be required

### **(London Borough of Barnet (2014) Education and Skills Alternative Delivery Model)**

The above reflects the experience of Your Choice Barnet (YCB)

In addition, the Department for Digital, Culture, Media & Sport (2017) advice on alternative delivery models identified a number of potential disadvantages of a LACC (LATC) should a Teckal LATC wish to develop new (non-statutory) service lines, the income from these services is **limited to 20% of the LATC's total turnover**.

- *“the LATC may be required to transfer surpluses back to the council, limiting the LATC's ability to develop new services;*
- ***should the LATC be able to retain a proportion of the surpluses it has generated, these would be subject to corporation tax;***
- ***like any company, LATCs are required to pay VAT;***
- ***the process of establishing an LATC can be complicated, resource intensive and time consuming;***
- *the process would be undertaken ‘on top of the day job’ by library service staff, while it requires close working with a number of council departments (such as legal, finance, HR, property/premises etc.) and support from external experts;*
- *as a Teckal LATC needs to be owned and controlled by one or more councils, there is limited potential for other stakeholders (such as staff, community groups, or Friends Groups) to influence the strategic direction of the company;*
- *due to its close association with the council, a Teckal LATC is unlikely to achieve charitable status;*
- *the ability of a Teckal LATC to access external funding is limited because it is owned by a public body” (Department for Digital, Culture, Media & Sport (2017) Alternative delivery models explained).*

### **Comparison of in-house and LACC options**

The table on page 6 and 7 is based on experience of in-house services and the transfer of services to arms length trading companies in Barnet and other local authorities.

Table 1: Comparison of in-house and LACC options using key criteria

	In-house	LACC	
✓	<b>Retain and recruit qualified and experienced staff to maintain quality of services</b>		✗
	Ability to retain existing staff and recruit new qualified and experienced staff from other local authorities is a very significant advantage to maintain and improve quality of service.	Current recruitment difficulties will continue and potentially worsen. LACC will be competing for staff from local authorities with better terms and conditions. Gaps in service delivery will be inevitable.	
✓	<b>Flexibility to adapt, innovate and develop new services</b>		✗
	Scope to nurture innovation with staff involvement.	Innovation frequently exaggerated and not achieved.	
✓	<b>Respond effectively to needs of different types of schools</b>		✓
	Equal ability to meet this objective.	Equal ability to meet this objective.	
✓	<b>Focus on needs of children and young people in Barnet</b>		✗
	Single focus on needs in Barnet and drawing on lessons on other Councils.	Focus on Barnet will reduce in direct relation to the LACC contract wins.	
✓	<b>Avoidance of a two-tier workforce</b>		✗
	Unified terms and conditions is essential to retain staff and to create a cooperative working environment which is reflected in service delivery.	A two-tier workforce is divisive, creates workforce churn, reduces consistency and reliability and promotes inequalities in the workplace.	
✓	<b>Reduce inequalities and discrimination</b>		✗
	Corporate commitment to reducing inequalities, occupational risk assessments and to reduce inequalities caused by wider determinants of health.	This model increases likelihood of discrimination of female and BAME employees due to promotion of two-tier terms and conditions.	
✓	<b>Strengthen partnership between Council and schools</b>		✗
	Direct collective representation of Heads through the Primary Heads and Secondary Heads Forums already exists and could be strengthened if necessary.	Another Board of Directors, possibly with Head representation, but indirect and frequently a slow process.	
✓	<b>Increase Council operational and financial control</b>		✗
	Council will have direct control of all education services plus management control of ISS catering contract.	Indirect control and of the ISS catering contract.	
✓	<b>Greater integration with children's social care and other council services</b>		✗
	Scope to increase integration with other council services which is increasingly important in early intervention.	Less likely as organisation will be focused on obtaining contracts in other local authorities.	
✓	<b>Cost of implementing option</b>		✗
	Very small transfer costs and removal of contract management costs.	Set-up legal and company costs for a LACC will be significant for the Council.	

✓	<b>Commercial risks</b>		X
	No increased risks over and above Council provision.	No market analysis available or information about new contracts obtained by Cambridge Education and there is evidence that some schools withdrew from the ISS catering contract.	
✓	<b>Financial risks</b>		X
	No increased risks.	Increased risks – procurement and bid costs, contractual performance cost risks, management & delivery costs in other local authorities.	

### **Lack of option appraisal criteria in staff briefing**

The initial analysis of options is crudely based on comparing the advantages and disadvantages of the in-house and LACC options but does not establish clear criteria for the comparison. For example, a claimed advantage for the LACC is *“increased ownership from schools who could be represented on the Board of Directors”* but that issue is absent from the in-house option. In addition, there is an attempt to detail the potential advantages of the LACC to a far greater extent than the in-house. Two key commercial statements about selling services to generate new income and profit are considered not have a potential disadvantage despite the fact that these issues have previously been crucial issues for Barnet (and many other local authorities).

Barnet Council already has an existing LATC, The Barnet Group Ltd, which operates the Barnet Homes housing service and Your Choice Barnet (YCB).

The Council is extending the corporatisation of the local authority which reduces democratic accountability and is little more than a vehicle **to cut terms and conditions of staff delivering public services.**

### **Financial impact**

The Council has indicated that the transfer of staff in-house is “estimated to be £640k per annum”. This option would include the transfer of the ISS catering contract to the Council which could save “an estimated £300k” on management overheads. The LACC option would also save on management overheads “estimated to be £250k.” The set-up costs of the LACC are not identified.

This financial data is very vague and it is essential that the financial implications of the options are verified together with their liability for corporation tax and VAT.

This reinforces our concern that the Council is taking serious risks both to the services to Schools and the workforce by not carrying out and publishing full details for the Option Appraisals and Full Business Cases including Equality Impact Assessments on the two options including a EIA of the two tier workforce that currently exists in this workforce.

## Part 2

### Terms and conditions are critical for quality of service

The Council has established arms length companies primarily as a means of cutting the terms and conditions of staff in services transferred to The Barnet Group Limited (TBG). TBG now operate Barnet Homes (managing the Council housing stock), Your Choice Barnet (YCB) services to people with learning and physical disabilities and TBG Flex, a recruitment company within the group for the recruitment and employment of new staff. There are several subsidiary services or 'sub-brands' within TBG.

The transfer of learning and physical disability services to the newly established YCB in 2012 was followed by a financial crisis, **a £1m loan from Barnet Homes** and a restructure which merged some services and meant job and wage cuts despite strong trade union and community opposition (Campaign Against Destruction of Disabled Support Services, 2013). **There are no longer any shift enhancements and only Christmas Day is paid at extra rates. This gave workers in Supported Living and the respite unit around a minimum 10% wage cut. One year later all staff pay was cut further by 9.7%.**

**The pay cuts meant those workers were issued with new contracts** and were out of NJC terms and conditions. YCB gave an undertaking that they would not pay below the London Living Wage. All other terms and conditions remained. TBG agreed that the £1million loan from Barnet Homes to YCB would not have to be paid back by further cuts to terms and conditions. However, apart from those on the London Living Wage, **other staff have not had a pay rise.**

Three years later TBG established TBG Flex as another LATC to provide recruitment and employment agency services to supply workers to YCB and Barnet Homes. However, its terms and conditions are very much less favourable than YCB and Barnet Homes. Critically there is no access to the Local Government Pension Scheme (LGPS). TBG Flex employees who work on the Barnet Homes contract receive the NJC pay awards (2% last 3 years). Those working on the YCB contract through TBG Flex have not received these pay awards.

#### Key employment issues

##### Continuity of employment - Modification Order

The Redundancy Payments (Continuity of Employment in Local Government etc (Modification) Order 1999 gives an employee the right to count employment service with an 'associated employer' towards the service requirement for a redundancy payment. We understand that Cambridge Education does not recognise length of service and the existing LATCs in Barnet **are not covered by the Order**. Requests to Barnet Council officers to confirm whether the new LACC will be covered by the Order have not yielded a response.

If the LACC is not covered by the Modification Order then the LACC will have **significant difficulty in recruiting qualified and experienced staff** on which it is dependent for the delivery of professional services in Education and Skills. It means that potential recruits will have to sacrifice years of continuous service which makes jobs in Barnet's Education and Skills services much less attractive for staff to join.

**Professional staff in Education and Skills** have recently expressed concern about the service's ability to retain and recruit experienced staff which has a direct bearing on the quality and continuity of services available to schools, parents and children in Barnet.



## **Pension Scheme**

Of the **151 employees on the TUPE list** to transfer to the Council or a LACC, 69 employees are former Barnet staff previously transferred to Mott MacDonald. 65 of these employees are in the LGPS, 3 are in the TPS and one is not in a pension scheme. The remaining **82 employees** were appointed by Cambridge Education of whom 65 are in Mott MacDonald pension scheme with Aviva. In the Aviva scheme employees are automatically enrolled at the minimum level of 4.5% of their reference salary and Mott MacDonald will match up to a 7% contribution if employees increase their contribution above the minimum level. The basic pension contribution would be 9% (4.5 plus 4.5) with a maximum joint equal contribution of 14% (7.0 plus 7.0). The remaining 17 employees are not in a pension scheme.

**Not being part of a defined benefits pension LGPS or Teachers Pension Scheme is also a very obvious disadvantage for anyone joining Education and Skills.**

TBG Flex employees do not have LGPS or TPS pensions. Their Flex Choice pension scheme has two schemes dependent on grade. In the 5% Flex Fund the employer will contribute up to a maximum of 5% to match employee contributions, although the employee can contribute over 5% but this will not be matched by the employer. The 10% Flex Fund operates on the same basis to employer maximum contribution of 10% (TBG Flex Pension and Benefits, 2019).

## Part 3

# Equalities, fairness and equity

The Council's draft Equalities Impact Assessment is significantly flawed because it concludes there is 'No Impact' for any of the equality groups when in fact there is a **Positive Impact for all equality groups with the in-house option** but a **Major Negative Impact for all equality groups with the LACC option**.

Only a **partial Equalities Impact Assessment** has been made available to trade unions based on the Council's Equalities Impact Assessment Template – July 2019. It consists of a comparison of Cambridge Education Staff Data with London Borough of Barnet Data. The data reveals the Cambridge Education contract:

- has a predominately female workforce - 79.05% compared to the Council workforce which is 58.74% female.
- a slightly younger workforce with 62.16% being aged under 49 compared to 55.15% in the Council.
- a larger proportion of Asian workers 12.84% compared to 8.46% in the Council workforce.
- a smaller proportion of black workers – 14.18% compared to 15.93% in the Council.
- a larger proportion of white British – 48.65% plus 15.55% white British - Greek Cypriot, Turkish, Irish and other – a total of 64.2% white compared to 40.76 white British and 10.89% in the same other white categories of 51.65%

Table 2 compares equality information in the 2015 Equality Impact Assessment and the draft information available in 2020. In both cases the data is exclusively for the Education and Skills services and excludes the ISS school catering contract.

Table 2: **Comparison of 2015 and 2020 Equality Data**

	2015	% of service	2020	% of service
Number of employees	135		148	
Female	115	85.0	117	79.05
Male	20	15.0	31	20.95
Age 18-49	126	55.0	92	62.16
Ethnic Group				
Asian and other	12	9.0	19	12.84
Black and other	0	0	15	14.18
Mixed	0	0	9	6.08
White and other	92	68.0	95	64.20
Unknown	15	11.0	3	2.03

Sources: Equalities Impact Assessment of Cambridge Final Tender, 2015 and Appendix 1: Comparison of Cambridge Education Staff Data with LBB Data, 2020.

Key changes between 2015 and 2020 include:

- Increase of 13 employees;
- The number of female employees remained virtually static but male employees increased by 11;
- The number of employees aged 18-49 increased from 55% to 62% by 2020;
- The ethnicity data is more difficult to compare because of the high level in the unknown category in 2015;
- The number and percentage of Asian employees has increased by 7 and 3.8% respectively;

- The percentage of white employees increased slightly but had a small decline as a percentage of the total number of employees

The consequences of the COVID-19 pandemic and its unequal impact on Black, Asian and Minority Ethnic communities led Public Health England to publish recommendations which are applicable to policy making in all public services. It has **exacerbated existing inequalities and discrimination and highlighted the need for much stronger and proactive strategies to eliminate inequalities.**

We reprint the recommendations in full:

“1. Mandate comprehensive and quality **ethnicity data collection and recording** as part of routine NHS and social care data collection systems, including the mandatory collection of ethnicity data at death certification, and ensure that data are readily available to local health and care partners to inform actions to mitigate the impact of COVID-19 on BAME communities.

2. Support **community participatory research**, in which researchers and community stakeholders engage as equal partners in all steps of the research process, to understand the social, cultural, structural, economic, religious, and commercial determinants of COVID-19 in BAME communities, and to develop readily implementable and scalable programmes to reduce risk and improve health outcomes.

3. Improve **access, experiences and outcomes of NHS, local government and integrated care systems commissioned services** by BAME communities including: regular equity audits; use of health impact assessments; integration of equality into quality systems; good representation of black and minority ethnic communities among staff at all levels; sustained workforce development and employment practices; trust-building dialogue with service users.

4. Accelerate the development of **culturally competent occupational risk assessment tools** that can be employed in a variety of occupational settings and used to reduce the risk of employee’s exposure to and acquisition of COVID-19, especially for key workers working with a large cross section of the general public or in contact with those infected with COVID-19.

5. Fund, develop and implement **culturally competent COVID-19 education and prevention campaigns**, working in partnership with local BAME and faith communities to reinforce individual and household risk reduction strategies; rebuild trust with and uptake of routine clinical services; reinforce messages on early identification, testing and diagnosis; and prepare communities to take full advantage of interventions including contact tracing, antibody testing and ultimately vaccine availability.

6. Accelerate efforts to **target culturally competent health promotion and disease prevention programmes** for non-communicable diseases promoting healthy weight, physical activity, smoking cessation, mental wellbeing and effective management of chronic conditions including diabetes, hypertension and asthma.

7. Ensure that **COVID-19 recovery strategies actively reduce inequalities caused by the wider determinants of health** to create long term sustainable

change. Fully funded, sustained and meaningful approaches to tackling ethnic inequalities must be prioritised” (Public Health England, 2020).

There is a clear **two-tier workforce** operating in Cambridge Education. We have requested an EIA for the former LBB TUPE'd staff and those staff on CE Terms and Conditions. **To date this has not been provided.** It is our view that the LACC option is inherently unfair and its financial model appears to perpetuate inequality in the workforce at a time when employers should be looking to combat inequality in the workplace.

## Part 4

# Mott MacDonald use 'Force Majeure' to terminate Barnet Education and Skills contract

Barnet Council outsourced the Education and Skills services including catering to Mott MacDonald trading as Cambridge Education in 2016. Mott MacDonald then sub-contracted the catering service to ISS.

### Force Majeure

In April 2020 Mott MacDonald informed Barnet Council that they intended to use the Force Majeure contract clause to withdraw from the contract.

*“As a result of the complexities and consequences of the COVID-19 crisis there would need to be substantial revisions to the way in which Mott MacDonald delivered the Education and Skills contract. This could include changes to the terms and conditions of staff and salary arrangements and other commercially confidential conditions, which would be unacceptable to the council and would undermine the delivery of the service.*

*In the light of this, the council and Mott MacDonald have agreed that the termination of the Education and Skills contract may be the most appropriate course of action” (London Borough of Barnet: Consultation document for Schools, 2020).*

The contract agreement between the London Borough of Barnet and Mott MacDonald Limited trading as Cambridge Education defines Force Majeure as:

*“any event outside the reasonable control of either Party affecting its performance of its obligations under this Agreement arising from acts, events, omissions, happenings or non-happenings beyond its reasonable control and which are not attributable to any wilful act, neglect or failure to take reasonable preventative action by that Party, including acts of God, riots, war or armed conflict, acts of terrorism, acts of government, local government or regulatory bodies, fire, flood, storm or earthquake, or disaster or for a period of twelve (12) months from the Services Commencement Date any industrial dispute in relation to Transferring Authority Employees (save for such industrial dispute arising from the actions of the Supplier) but otherwise excluding any industrial dispute relating to the Supplier or the Supplier Personnel not arising from an act or omission of the Authority prior to the Service Commencement Date or any lawful general strike arising from the actions of the Authority or any other failure in the Supplier’s or a Sub- contractor’s supply chain;”*

The contract gives the Council and the contractor full or partial termination rights *“...if a Force Majeure Event endures for a continuous period of more than one hundred and eighty (180) days.”*

International lawyers Dillon Eustace report *“There is no standard definition of force majeure, so what will constitute such an event will depend on how the particular contract is drafted.”* Furthermore, they conclude:

*“Force majeure clauses have generally been interpreted quite strictly and any ambiguity has been construed against the party seeking to rely on the clause. In interpreting the application of a force majeure clause to COVID-19, the Courts will consider the contract as a whole and whether, as a result of the virus, performance has been rendered impossible or whether it has merely been hindered. It will not be sufficient to show that the relevant party’s obligations have just become more difficult or expensive to perform. It must also be demonstrated*

*that the COVID-19 pandemic is the sole reason for not meeting those obligations.” (Dillon Eustace, 2019).*

On 29 January 2020 the two patients in York were the first to test positive for Covid-19 in the UK. On the 30 January the World Health Organisation (WHO) declared a global health emergency. The first case of Covid-19 to be passed inside the UK was confirmed on 29 February 2020 and the same day the WHO raised the Covid-19 alert to the highest level (British Foreign Policy Group, 2020).

Mott MacDonald informed the Council of its decision to withdraw from the contract in early April but this was just over 90 days into 2020 and only half the time period when a Termination Notice could be issued under the terms of the contract.

### **Barnet situation**

Barnet Council keeps referring to Mott MacDonald as “an employee-owned company” (London Borough of Barnet, 2020) but more importantly is ‘a global engineering, management and development consultancy’ with a £771m turnover in 2019 and a post-tax profit of £22m (Mott MacDonald, 2020). Barnet’s education contract represents just 0.23% of its annual turnover in 2019.

There seems to be more to this decision than the impact of COVID-19. The conditions the company faced were no different from those confronting local authorities and other private contractors. Why has there not been an avalanche of similar contract terminations? And why did the Council keep the Mott MacDonald’s decision secret for so long? Every school in Britain is facing complex problems but teachers and local authorities don’t abandon education.

It is entirely reasonable for service users, staff, trade unions, elected members and the public to know the full reasons why Mott MacDonald decided to withdraw from or abandon Barnet Council’s Education & Skills £1.8m annual contract in April 2020 which was not due to end until March 2023 and could have been extended for a further three years. They did not wait to see the how the pandemic developed and how the lockdown would gradually be reduced.

Significantly, Barnet Council knew about Mott MacDonald’s decision for 11 weeks before it informed staff and the trade unions about the company’s decision on 17 June 2020. Staff and trade unions were recently presented with a briefing outlining a timetable to consider two options of returning the service in-house or transferring it to a new Local Authority Controlled Company (LACC or LATC) with a very tight timetable to decide on the option on 6 July and transfer the service on 1<sup>st</sup> September. The school catering contract, which Cambridge Education subcontracted to ISS, will be novated to the Council and managed in-house or by the LACC.

The Council does not intend to publish the final business case or the final Equalities Impact Assessment. This raises three important issues.

**Firstly**, the Council has broken custom and practice in Barnet because there the trade unions always had an opportunity to respond to outline and full business cases.

**Secondly**, they are **ignoring the Government’s Green Book** which sets out best practice on these matters. Para 3.11 states *“Research, consultation and engagement with stakeholders and the wider public, should be conducted at an early stage. This provides understanding of the current situation and valuable insights into potential improvements.”*

**Thirdly**, it questions what the Council has been doing between early April and 17 June before it started consultation with headteachers, staff and trade unions. Either it had done very little work other than to rule out two other options of retendering the contract or asking Cambridge Education/Mott MacDonald to continue to deliver the service, neither of which

were not viable options given the timeframe, or it may have developed a more detailed options appraisal and business case but refuses to make them available for consultation. Furthermore, there is no reference to an impact assessment being undertaken which we consider essential in the circumstances.

## Part 5

### Conclusion and recommendations

The quality of many, if not most, of Education and Skills services is highly dependent on the retention and recruitment of qualified and experienced staff. This is hindered by a lack of continuity of service and/or limited defined contributory pension schemes where the final pension is highly dependent on the level of individual employee and employer pension contributions in contrast to collective defined benefit schemes.

**The analysis of the two options in Table 1 illustrates the significant advantages of an in-house provision.**

The establishment of a new LACC for Education and Skills is a high-risk strategy and given the short timetable to develop a response to Mott MacDonald's decision to exit the contract, the best overall solution is to transfer the services to in-house provision.

#### Recommendations

- We strongly recommend that Barnet Council transfers Education and Skills staff from Cambridge Education back to direct employment in the Council.
- We recommend that the contract management functions of the ISS catering contract, which is going to be novated to the Council, are established in the Education Department.



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