Options for BICS supporting federating practices explored in more detail using Proactive Care

(Version 2 26/05/16)

1.0 Purpose

To provide BICS and the FWG with a worked example to explore models and options for formal collaborative working in more detail. As agreed with the FWG and BICS members, only Options 1 and 2 have been developed for this purpose in detail. Option 3 would involve the set-up of a separate corporate vehicle, with a contract for service agreement between the new corporate vehicle and BICS. This option would be for the FWG to develop in more detail.

2.0 Context

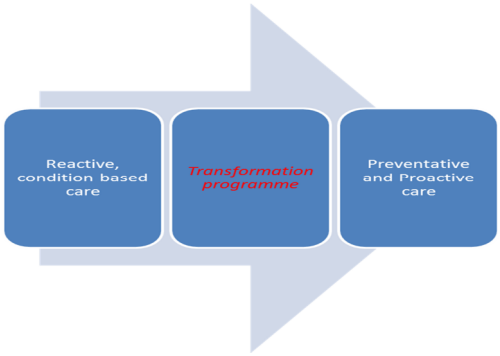
This paper uses an agreed strategic and operational programme (Proactive Care) to explore options 1 and 2 in more detail. The benefit of using this example is:

- Clear purpose for the work itself which will help explore structures, roles, responsibilities, risk and benefit sharing agreements between practices within and across Clusters, and the organisation supporting those practices and Clusters
- Some knowledge amongst practices about how this programme works and delivers its purpose, and detailed understanding of the challenges and the delivery by a smaller number of practices and Clusters that are involved operationally.
- Proactive Care is a shared and relatively contained issue to experiment and implement slowly that could test the detailed ways of working together.

3.0 Purpose of collaboration to deliver Proactive Care

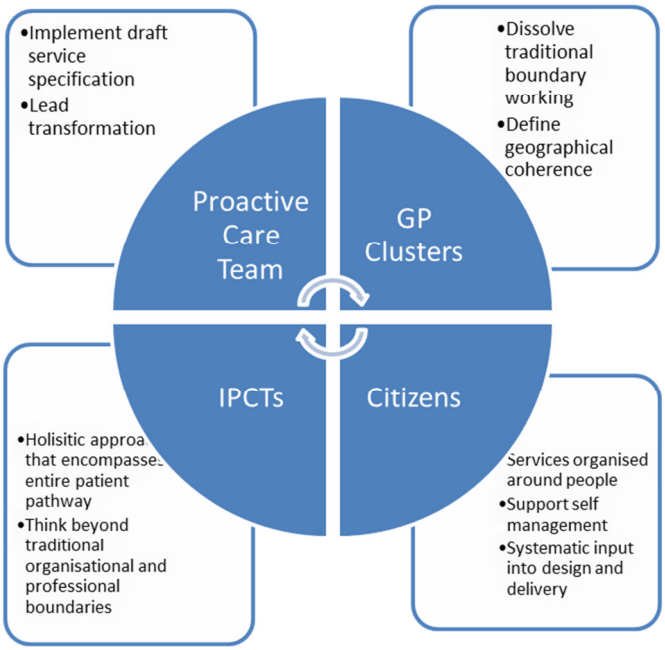
The purpose of Proactive Care as developed by the whole health and social care system locally, including GP practices, BICS and the CCG is to:

- Transform and remodel the health and social care system in Brighton and Hove
- Reduce Inequalities
- Improve health and wellbeing of population
- General Practice working in partnership



The aims are to:

- Increase focus on prevention to reduce morbidity, premature mortality and health inequalities
- Better access to primary care
- More time available to spend with patients who need it
- Well co-ordinated care
- Enable people to live in their own homes
- Enable people to manage their own health
- More engaged patients



This purpose and aims needs to act as the key driver to help make decisions about the best structures, decision making process of any way of working together. There are also 2 other types of drivers that will be useful to help shape the design of any new formal structure. These are:

- Key issues that have emerged from the FWG consultation with practices
- Operational issues that affect the deliverability of the purpose and aims.

We understand the key drivers that have emerged from FWG consultation process are as follows:

- GP clusters wish to have autonomy over decision making for matters that relate to general practice (e.g. LCS and Proactive Care);
- More accountability for decision making, where such decisions relate to general practice, to GP practices themselves;
- Ownership of the work of Practices to be with the Practices.

The current operational issues that impact on structures and functions are as follows:

- The programme is currently commissioned through an LCS directly to practices. There is no contract for delivery with BICS with the CCG, however there are a number of individual MoU's between practices and BICS for each element of the programme. This is both cumbersome, and not legally contractually binding, thereby not protecting any organisation involved, CCG, Practices nor BICS.
- Proactive Care is in the beginnings of a transformational programme
- The programme would benefit from having greater ownership within the practices and Clusters and it would also benefit from more collaborative leadership, with the practices themselves facing the CCG as the commissioner.

4.0 Option 2 (JVCO) and Option 1 (Sub-committee): principles and functions.

Option 2: New Joint Venture Company created

New joint venture company created New corporate vehicle ("**JVCO**") set up with GP shareholders and BICS (as a company) as a shareholder.	JVCO would need bespoke articles of association to be drafted, and a shareholders' agreement between BICS and the GP shareholders would be required. Issues to be dealt with in the articles of association and the shareholders' agreement would include rights to: - receive dividends; - appoint directors; - admit new members; - transfer shares; and - be involved in management (see also "Ownership" and "Decision Making" below). Issues or areas in which individual constituencies feel the need to be able to exercise a veto should be identified (so-called "reserved matters"). It would offer a clear legal and functional separation between GP cluster lead interests (sitting in JVCO) and BICS, while also allowing BICS to provide various services (e.g. corporate services, staffing, management and bidding expertise to JVCO) under contractual arrangements between BICS and JVCO, if necessary. BICS would be a shareholder in JVCO alongside GP shareholders and it would be open to the shareholders to agree certain matters that are reserved for the approval of BICS and/or the GP shareholders. This option would not set up two rival organisations competing with each other. In practice, JVCO could be set up with the GP cluster leads as Directors responsible for the day-to-day running and decision making.

Structure	Company limited by shares, which could be a Community Interest Company if desired and if this structure suited the purpose. A Community Interest Company is restricted in its ability to make distributions of profit to its members (a so-called "asset lock"), thereby protecting its assets and ensuring they are used for the benefit of the community.
Scope	For the purposes of this exercise and perhaps a pragmatic way to test the viability of creating a JVCO, it is suggested that the scope of this JVCO is limited, in the first instance, to the delivery of Proactive Care as defined by the CCG business case (Sept 2015). It would be possible to extend the scope of this agreement with full agreement of all shareholders, i.e. LCS at a future date. Proactive Care is currently a LCS contract commissioned by the CCG and provided by the practices. The value is in excess of £2.8 m a year for another 19 months. The creation of a JVCO would provide an opportunity for the CCG to commission the LCS using the NHS Standard Contract and directly commission from the JVCO, in order that there is one interface for the CCG for the purposes of contract management. This contract holding itself will then drive a number of other issues related to employment, legal and regulatory that are covered below.
Ownership	Ownership of the shares in the JVCO would be shared between BICS and GP Practices, in proportions to be determined. In practice, the number of shares to be owned by the various parties will be less significant than the rights attached to them. Assuming that the FWG work on differential ownership is accepted by the LMG then multiple share classes appear to be indicated. This would create different voting, management, and economic rights to be attached to the "A" and "B" GP practices, and to BICS. The GP practices could hold shares broadly in proportion to their list sizes. It would therefore be possible to incorporate the differential shareholding for practices as set out in the draft Heads of Terms and all of the rights and restrictions as set out in that document for those different practices held, whilst having a separate class of share for BICS. What is more significant is the rights that are attached to the shareholders, which is discussed below.
Decision Making	**JVCO Board structure** A governance structure would need to be created, whereby the JVCO Board would be operationally responsible for all delivery, strategic direction, and all matters relating to the business of the company and would be accountable to its membership. There are 2 options here: 1) either member practices have a majority on the Board as represented

	by Cluster Leads and BICS has a minority, or 2) an equal partnership between BICS and Practice members. We are open to either option, but these different options will affect our ability to participate in decision making and therefore our risk appetite. The Cluster representatives would be elected by the membership. The BICS representatives would be appointed by BICS according to the skills required to support the Board. **Membership decision making** The articles of association and shareholders' agreement would need to reflect the various parties' agreed positions concerning (for example) rights to appoint directors, proceedings at directors' and shareholders' meetings, reserved matters etc. The JVCO Board would require decision making of the entire membership on the following issues: • Membership • Scope • Termination/wind up of company • Allocation of surplus • Changes to articles of association • Any other issues the membership wishes to add BICS would have minority shareholding by nature of the different classes of shares, and ***if*** we also had minority decision making at Board level we would want to have the ***same rights*** as other shareholders and Directors within the governance arrangements. On the following issues BICS would seek to see unanimous agreement of either the Board or all members articulated within the articles: • Changes to the scope of delivery of the JVCO, i.e. an extension to its stated purpose • Material changes to any high value contract • Termination of the JVCO • Changes to the governance arrangements • Proposed action that might lead to possible litigation • Changes to the articles of association and shareholding agreement Other areas in which BICS would not want to see unanimity or a high level of consensus include: • Asset acquisitions and disposals; • Significant financing decisions; • Payment of dividends; • Issues of shares; • Litigation; • Appointment of auditors; • Remuneration of directors; • Employment matters (particularly for senior management);

	and • Conflicts of interest. There is always a possibility of deadlock in a company in which no one stakeholder has control over its management. Techniques for managing this situation include contractual dispute resolution provisions, but ultimately the possibility of either liquidating the JVCO or allowing individual shareholders to transfer or surrender their shares should be covered. To avoid the possibility of the company being able to be bought by a third party we would recommend that no share could be transferred to a third party.
Intellectual Property	An agreement over Intellectual property (IP) would need to be reached that protected BICS and practice members, and acknowledged prior IP and any shared IP that was developed.
Risk	BICS' risk appetite would be low in this governance structure. Risk would sit with the practice members and the Board where they retain decision making control over the running of the company. If BICS have a greater role in decision making, it may be prepared to take more risk operationally. This will depend on agreeing the detail of rights attaching to the different classes of shares (see paragraph on Ownership). The set-up of a company limited by shares means that there is limited liability, so financial risk of the members is, as a general rule, equivalent to the amount invested in the company. If the head contract for delivery of Proactive Care was to be held by the JVCO then the contracts BICS currently holds with Age UK Brighton and the contract with SOLLIS would need to be novated to the new body, subject to agreement from the contractor and CCG. This would mean that the obligations under those contracts would attach to JVCO rather than BICS. It is equally possible to leave these contracts in place with BICS, and for the JVCO to take on a role as sub-contractor for delivery of parts of the services, subject to commissioner consent.
Delivery	Agreeing on what delivery vehicle best suits the purpose and aims of this contract is very important. There are 2 possible options within this option for delivery that could be explored: 1. The JVCO holds the head contract and sub contracts all delivery to individual practices and may request the support of BICS in the transformation programme. This would require legal sub contracts with other suppliers. As set out this would bring employment, regulatory, tax, legal, resources to manage the process, including managerial staff, premises, infrastructure, HR, payroll, and a range of other cost issues into play. 2. The JVCO could request that BICS holds the contract and sub

	contracts in its entirety to the JVCO as above; this may reduce the employment, regulatory, tax, cost, legal issues, although subcontracting would still need to be in place, it may be possible to minimise some of the regulatory aspects and employment through this relationship. It would still require a governance structure and infrastructure to manage a contract for this size.
Employment	BICS currently employs GPs, managers, pharmacists, and project staff for the purposes of the delivery of Proactive Care LCS. If the JVCO wished to be the delivery vehicle (option 1 above), then TUPE law would apply and all these staff would be subject to TUPE to the new body. The JVCO would then be responsible for the associated staffing liabilities. These staff have access to NHS Pensions and the new body would need to apply to the NHSPA for independent Provider Status. This would probably be necessary in any event as the Directors of the new company would need to be employees, and not independent contractors, requiring NHS Pensions if any of these were GPs or if that was desirable. If the JVCO agreed to sub contract some or all of the delivery to BICS then the staff could remain employed by BICS. In any event, any new staff providing LCS could be employed by the company, and then the HR and payroll functions, as well as normal company legal requirement, would need to be invested in.
Finance	The principle that money follows the function that has been adopted in Proactive Care already, and where a function is delivered by a practice this attracts an overhead, where a function sits with BICS this attracts equal amount of overhead. As already agreed with Practices, BICS does not make any surplus from this workstream and all benefit sits with the practices (if there is any), therefore any surplus would be available for reinvestment in practice membership or available for the Directors to decide how to allocate to the benefit of the citizens, subject to commissioner agreement. This agreement would need to be reviewed depending on the scope of the JVCO.
Competition	By agreeing a shared and clear purpose and an agreed scope of the JVCO, competition between BICS or Practices is avoided; as the JVCO develops it would be possible to agree further developments to scope as set out above, however it would not be desirable to create a competitive environment, and BICS would not want to enter into any agreement that created this as a result.
Other	BICS as part owner would be able to act as a parent company and offer a guarantee to commissioners if it was an equal partner, thereby

	offering the use of its balance sheet for future or current developments. BICS would need to take financial advice as to the implications of offering a guarantee on its own financial position.
Regulatory, tax and business as usual issues	Depending on the services that JVCO will provide, the following issues will need to be considered in further detail, and legal and financial advice will need to be sought, both by BICS and GP practices: - Tax - Pensions (if access to NHS Pensions required?) - CQC registration - Any other licencing conditions (e.g. NHS Improvement) - Eligibility to hold primary care contracts - Sub-contracting to GP practices - Provision of back office services, such as finance, HR, IT, etc. - Leases / licences that may be required for the purposes of JVCO Some of these issues could be reduced and mitigated but never wholly removed through different models of delivery by the JVCO. The most significant is the CQC registration, Pensions, and Tax, all of which would create additional need for infrastructure.
Potential Set Up Costs	Consideration of the costs to deal with all of these issues would need to be factored in, and BICS would expect its costs for professional advice and participation to be met should this option be pursued. A number of different factors affect the costs of creating this new organisation. These are: • Level of agreement between all parties and their understanding of what each other are trying to achieve. Our experience with over 4 different joint ventures delivering complex NHS services is that the greater the lack of clarity over purpose, roles, responsibilities and rules of engagement, the greater the cost to resolve in both professional fees, leadership and management time • Purpose, scope and remit of the JVCO itself • Delivery vehicle choices The creation of a new JVCO would require significant time from the leaders, would need co-ordination at a senior level, and would require project support. Working on our experience of doing this in other services, an estimated £40 k - £60k over a fixed period of 3 – 6 months would be necessary. The professional support fees (legal, accounting), depending on the complexity, could start at £15k - £30k; this does not factor in costs of each practice seeking legal advice.

Option 1 GP cluster-led sub-committee

GP cluster-led sub-committee BICS creates a sub-committee and autonomous business unit within the existing governance structure, delegating decision making for defined matters to GP cluster leads. BICS largely retains its corporate structure save for some new governance arrangements at sub-committee level. No new legal entity is formed.	GP cluster leads given decision making authority for defined matters. GP cluster have full decision making authority for defined matters that affect them directly. GP cluster able to utilise BICS trading history, CQC registration, insurance arrangements, corporate services and expertise. Avoids creating two separate (and potentially competing) organisations focussed on primary care in Brighton and Hove. Sub-committee terms of reference would need to be drafted to clearly set out the parameters and operational details for the sub-committee.
Structure	A formal sub-committee of BICS with the option of having Cluster Leads represented at the BICS Board as Directors.
Scope	For the purposes of this exercise and perhaps a pragmatic way to test the viability of creating a sub-committee, it is suggested that the scope of this is limited, in the first instance, to the delivery of Proactive Care as defined by the CCG business case (Sept 2015). It would be possible to extend the scope of this agreement with full agreement of all shareholders, ie LCS at a future date. There is a separate and pre-existing sub-committee for the Pharmacy in Practice service involving 6 practices. This is currently a LCS contract between practices and the CCG. The value is in excess of £2.8 m a year for another 19 months. This may provide the opportunity for the CCG to commission using a standard NHS contract, giving all parties more security.
Ownership	We could change individual membership to practice membership for some members; if this was agreed by all members, these would sit alongside all other individual members as shareholders, either by creating shares held in trust at practice level or by introducing a new class of shares. These practice members would have rights to elect their representatives onto their sub-committee. They could also have differential shares as set out in the previous Option, and could have rights that were exclusive to the delivery of the terms of reference to

	committee, thereby giving full autonomy and ownership.
Decision Making	The sub-committee would be operationally and strategically responsible for delivery and all business relating to the scope, and would be accountable to the membership that elected them. It would be made up of representatives of the practices based along present Cluster Lines. The sub-committee would have full decision making powers and autonomy to act as set out within its own terms of reference, with the responsibility and authority to make its own decisions. The BICS Board has no right to intervene save for reasons that might contravene the health and safety of patients and staff, compromise the articles of association, or break our financial rules. The Board would act in an advisory capacity only, and would have no right of veto over any decision as long as the committee acted within the terms of the articles of association that binds each member and the Standing Financial Instructions of the organisation. BICS SFI (financial rules) delegate all financial and risk management responsibility to the budget holder, who in this case would be the nominated representative of the sub-committee. This risk is ultimately underpinned by the whole organisation and not the individuals. Example of draft terms of reference for the pharmacy service is set out below  Primary Care pharmacists - Project
Intellectual Property	There would be no need for an IP agreement as IP would belong to the membership as a whole.
Risk	BICS risk appetite would be the same as for all other projects/services and the organisation would be focussed on mitigating risks and making the overall service/project a success. This may mean including additional financial resources or human resources as the service progress.
Employment	BICS employs GPs, managers, pharmacists and project staff to deliver Proactive Care. These arrangements would stay the same and there would be no change to Pension arrangements, no need to apply for new status, no creation of any new employment liabilities and therefore infrastructure. The Directors of the sub-committee could set their own pay and pay structures, and be pensionable covered by BICS NHS Pension EA status.

Finance	The principle that money follows the function that has been adopted in Proactive Care already, and where a function is delivered by a practice this attracts an overhead, where a function sits with BICS this attracts equal amount of overhead. This would not change in this model, and the principle would need to be to seek to get as much delivered in General Practice and not in BICS. Any in year surplus could be divided up amongst member practices or invested in the programme or any other decision made by the group.
Competition	The scope of the committee would be limited to avoid competition with BICS or Practices on any other issues.
Other	As an integral part of the organisation and membership the sub-committee would be able to utilise all the benefits of the organisation including balance sheet, all HR, Finance support premises, regulatory frameworks, governance structures.
Regulatory Issues	The committee would be able to use the CQC registration of BICS and its Monitor provider licence. There would no additional issues.
Costs	The costs of this option are not insignificant as our articles would need to change; the cost of this would be £5-10k and would be met within our existing budget.