Cabinet 5 January 2016	
Report of: Luke Addams, Acting Director: Adult's Services	**Classification:** Unrestricted
Future commissioning arrangements for domiciliary care services previously commissioned from Majlish Homecare Services	

Lead Member	**Councillor Amy Whitelock Gibbs, Cabinet Member for Health and Adult Services**
Originating Officer(s)	Karen Sugars, Acting Service Head: Commissioning and Health, Adults' Services
Wards affected	All wards
Key Decision?	Yes
Community Plan Theme	**A Healthy and Supportive Community**

Executive Summary

The council assumed, in March 2014, direct responsibility for the provision of domiciliary care services previously provided under contract by Majlish Homecare Services (MHS). This report sets out the recommended option for the future delivery of these services.

A previous report, considered by Cabinet on 1 December 2015, set out six options for securing the future delivery of services previously provided by MHS. Following consideration of this report Cabinet set aside four of those options presented and asked that further work on the risks and benefits of the remaining two options be undertaken and a recommended option reported back to Cabinet in January 2016.

The further work undertaken in respect of the benefits and risks attached to each of the two remaining options, as well as the firming up of the timing and nature of a wider re-commissioning exercise for domiciliary care services, has resulted in a different preferred option being recommended to Cabinet for approval than was recommended in December 2015.

The recommended option has been identified as offering the optimum combination of continuity for service users, clarity for workers in the service and assurance for the Council in respect of compliance with Competition Law and the achievement of Best Value. If approved, no additional procurement process will be required to be undertaken over and above that already planned in respect of domiciliary care services as a whole.

Recommendations:

The Mayor in Cabinet is recommended to:

1. Agree that the domiciliary care services previously provided by Majlish Homecare Services, and currently directly provided by the Council, be included in the scope of the domiciliary care services tender to be advertised in January 2016;

2. Authorise the Acting Director of Adults' Services following consultation with the Corporate Directory of Law, Probity and Governance and Monitoring Officer to enter into any necessary negotiations and other processes required by the Transfer of Undertakings (Protection of Employment) Regulations regarding the transfer of any persons deemed to be employees employed by the Council for the provision of the service as at the date of transfer, to those providers from whom services are subsequently commissioned.

3. Authorise the Acting Director of Adults' Services following consultation with the Corporate Director of Resources, Corporate Director of Law Probity and Governance and Monitoring Officer to enter into all necessary negotiations with a view to reach agreement with workers in the service in respect of any continuous period of employment proposed to be offered to them by the Council until such time as the tender process is complete and any employees are transferred to new employers.

4. Note the intention that the tender process referred to in recommendation 1 above is the means by which a range of contractual requirements will be introduced with the express aim of improving the terms and conditions of individuals who will be employed to deliver the service by the successful bidders in line with the Mayoral commitment to explore how to introduce the Ethical Care Charter into domiciliary care services in the borough.

1. REASONS FOR THE DECISIONS

1.1 To ensure that the domiciliary care services previously provided by MHS continue to be commissioned in a way that provides Best Value to the Council and is fully compliant with relevant EU Competition law.

2. ALTERNATIVE OPTIONS

2.1 The options appraisal undertaken to support identification of the Best Value option is attached to this report as Appendix 1. The two options considered are listed along with the relative strengths and weaknesses of each option. The analysis of strengths and weaknesses was based on a range of factors including impact on service users and staff, impact on the council and deliverability.

2.2 The Mayor in Cabinet considered, on 1 December 2015, a range of six options for the future delivery of the services previously provided by MHS. Following that consideration four options were set aside, leaving two in respect of which further detailed analysis was requested to be undertaken. The option recommended in this report is informed by that further detailed analysis.

2.3 The Mayor in Cabinet could, however, choose to seek additional analysis of any of the previously considered options and/or require further consideration of additional options proposed by the Mayor or Cabinet. While this option is open to the Mayor it is not recommended in the interests of providing clarity and certainty for service users and for workers in the service.

3. DETAILS OF REPORT

3.1 Majlish Homecare Services (MHS) were successful in winning a contract for inclusion on the Council's Domiciliary Care Preferred Provider Framework Agreement in 2012. MHS's existing contractual relationship with the Council meant that they transferred onto the new Framework with a significant volume of existing business, and accordingly were one of the largest providers of domiciliary care to the Council by volume and cost.

3.2 During 2013 increasingly significant concerns were raised, both through the Council's contract monitoring processes and via the regulatory activities of the Care Quality Commission, regarding the way in which MHS was being managed. These concerns were also informed and increased by whistleblowing activity from workers/employees within MHS. The extent of these concerns was such that the Council came to the view that there was a very significant risk to MHS's ability to continue to trade as a going concern without changes to the way in which MHS was managed and run.

3.3 The Council therefore sought to engage with the Board of Trustees of MHS, as well as with the existing senior managers in the organisation to effect change. Ultimately, however, this engagement did not produce a satisfactory outcome and the Council took the decision, toward the end of 2013, to terminate the contract with MHS with effect from 28 February 2014.

3.4 It is important to highlight that the concerns identified both by the Council and by the Care Quality Commission were primarily related to the way in which MHS was managed and run. The quality of care provided on a day to day basis by the care workers/employees was not, and had not been previously, of particular concern.

3.5 Once the decision to terminate the contract had been taken various options for maintaining service delivery from 1 March 2014 onwards were considered. The safest option identified at the time was to bring the service under the direct management of the council for a period of time in order to allow for a more considered exploration of the Best Value option for the service. In

pursuance of this, the Council employed the workforce from MHS who were directly involved in providing care. The administrative staff as well as first line supervisors, who were on existing contracts of employment, were offered the opportunity to transfer, under the terms of the Transfer of Undertakings (Protection of Employment) Regulations ("TUPE"), to the Council's employment on their existing terms and conditions with effect from 1 March 2014. The Council also took on those workers who were previously under contract with MHS but not employees at the date of transfer and therefore not subject to the TUPE requirements. This process involved a total of approximately 120 individuals the majority of whom worked part-time hours and had been engaged on zero-hours contracts. New management arrangements were put in place by the Council to ensure that the service would be effectively managed and run on a day to day basis.

3.6 The transfer to the Council took place on schedule, with the Council assuming direct responsibility for the provision of the service with effect from 1 March 2014. Since that date the focus has been on maintaining and improving the quality of care provided; ensuring that all staff are properly trained; ensuring that any existing terms and conditions of employment or contractual arrangements are appropriate and are equitably applied; and seeking to ensure that documentation relating to all workers/employees is up to date and complete. This documentation includes proof of right to work as well as up to date Disclosure and Barring Service checks.

3.7 The transfer in of the service was always intended to be a temporary measure until such time as the service had been stabilised and put back on a sound footing. Various options for the future delivery of the service have been analysed and six such options were set out in the options appraisal included in a report to Cabinet in December 2015. The preferred option identified in that previous report and recommended for approval by the Mayor in Cabinet, was that the volume of business currently provided by the service be re-commissioned via the existing Preferred Provider Framework Agreement. Under that option, it was proposed that employees transfer, on existing terms and conditions, to the receiving provider or providers.

3.8 In summary, the six options considered by the Mayor in Cabinet in December 2015 were:

A. Allocate to providers on the existing Preferred Provider Framework by the same method as would be used for new packages of care commissioned via the framework. This option will ensure that the activity is then incorporated into the planned re-tender of the Preferred Provider Framework;

B. Retain in-house until such time as the planned Preferred Provider Framework re-tender is completed (October 2016), and allocate to successful bidders as part of the contract mobilisation process;

C. Retain in-house for an initial period and initiate the process of setting up a new entity, using the Public Sector Mutual model. Once the new

entity is set up, the Council to retain a majority stake for an incubation period of between two and three years to allow the service to become commercially viable prior to being exposed to competition law requirements to competitively tender for business;

D. Tender for the necessary volume of activity as a single (reducing) block contract;

E. Tender for the necessary volume of activity via a new Preferred Provider Framework (separate to the currently planned process);

F. Retain in-house on the same basis as the previous Longer Term Homecare service i.e. reducing over time as packages cease.

3.9 Following consideration of the six options by the Mayor and his Cabinet, and taking into account exempt legal advice on the risks associated with a number of the options, the Mayor determined the following course of action:

1. To confirm the rejection of options C to F as set out in Paragraph 3.8 above.

2. To defer a decision on whether to agree either Option A or Option B, as set out in Paragraph 3.8 above, subject to further discussion and with the intention of co-ordinating a final decision with the proposal to retender all commissioned domiciliary care activity to be presented at the next Cabinet meeting.

3.10 The further work undertaken in the period between Cabinet on 1 December 2015 and this subsequent paper being drafted has included a detailed review of the balance of risks and benefits associated with the two remaining options. This review of the risks has incorporated extensive legal advice on a range of contractual and procurement related issues as well as further consideration of employment matters in respect of the existing workforce.

3.11 This detailed review has also taken into account the planned timetable (subject to approval to commence the tender process) for re-tendering the wider domiciliary care services commissioned by the Council. This timetable was not as fully developed at the time of the original option appraisal and has been added to the overall analysis as a material factor.

3.12 The result of this detailed review is the revised options analysis appended to this report as Appendix 1. The effect of this revised option appraisal is that officers now recommend Option B as the preferred option. This is a change from the previously recommended option, which was option A.

3.13 Senior Managers have undertaken two consultation meetings with workers in the service, on the 11th and 19th of November 2015 in order to seek their views on the different options. Across the two sessions approximately 70 of the workforce of 120 attended, and a Trade Union representative was also present in each session. It is clear from the outcome of these sessions that

there are significant divisions within the staff group about the preferred way forward and arguably the most consistent message to come from the sessions is that what matters most is security of employment. While all of the options under original consideration mean that employees would transfer to new employers with terms and conditions protected by the TUPE regulations, the views expressed with regard to security of employment have been given weight in the review of the two remaining options.

3.14 As part of the process of preparing to retender the wider domiciliary care services during 2016, the Council intends to introduce compliance with the Ethical Care Charter as a contractual requirement in respect of all commissioned domiciliary care services in the borough. The introduction of the Charter will help to drive improved quality of service to vulnerable residents and also introduces important improvements to the security of employment and conditions for the whole domiciliary care workforce.

3.15 The total current volume of activity provided by the service is 129,311 hours per annum, delivered to 143 individual service users, and the forecast cost of providing the service in 2015/16 is £1.73m[1]. If the recommendations set out in this report are approved then this volume of activity will be included in the overall volume of domiciliary care activity to be tendered during 2016.

3.16 If the recommended option is agreed, officers will engage with the workforce and their representatives to negotiate and agree a contractual basis for the remaining period of direct employment by the Council. This negotiation will need to be concluded by the end of March 2016 in order to ensure that full and accurate TUPE information can be made available to bidders as part of the tender documentation.

3.17 The base costs of continuing to directly provide the service until October 2016 are accounted for in the Council's existing Medium Term Financial Plan. Should the negotiation regarding contractual terms referred to in paragraph 3.13 above result in additional costs to the Council that are greater than officers have delegated authority to approve a separate authority to approve the additional resources required will be sought from the Mayor in Cabinet.

3.18 MHS did also provide services on behalf of NHS Tower Hamlets CCG and a small number of other London Boroughs on a spot purchased basis and these services have continued to be provided since the council assumed direct control of the service. Those purchasing authorities will therefore need to make alternative arrangements to have these services provided if the recommended option is pursued. Officers will work closely with those purchasing authorities to ensure that is achieved in the least disruptive manner possible for service users.

[1] Based on a unit cost of £14.64 ph

4. COMMENTS OF THE CHIEF FINANCE OFFICER

4.1 The predicted cost of providing the service previously managed by MHS is £1.73m for this financial year. The unit cost of providing the current service is £14.64 per hour which is outside the average rate charged by our external providers of between £13.92 and £14.50 per hour. The rate has increased recently as the unit cost in April 2015 for MHS was £13.94 per hour. By redistributing the clients to the existing preferred provider framework the Council will avoid the risk of subsidising a potentially costly in-house service

4.2 There are ongoing financial implications for the council which may arise post transfer regardless of the option pursued. This is in respect to costs which relate to staff having opted-in to the Local Government Pension Scheme (LGPS) and the need for staff to be offered an equivalent scheme once transferred to the independent sector, there may be an expectation that the Council would cover this cost. The likely financial impact is dependent on the number of staff who are opted-in to the scheme prior to transfer and the turnover rate that applies directly to those staff for the duration of the contract.

4.3 The cost to the Council per annum if 100% of workers were to opt-in to the LGPS is estimated to be £200k per annum, this amount reduces by £50k per 25% of staff who choose to opt-out of the scheme. As stated in paragraph 4.2, these values would be applicable only to those staff who transferred. If the relevant staff left the new supplier during the contract period their additional costs would no longer be payable.

5. LEGAL COMMENTS

5.1 Detailed legal advice on the risks relating to each of the options was provided in **restricted** Appendix 2 to the previous Cabinet Report. That advice covered legal and risk issues relating to all the available options including the preferred options. It remains valid though not necessary to be reproduced into this report.

5.2 The Council has a duty to ensure that all its services provide for Best Value in accordance with Section 3 of the Local Government Act 1999. In order to comply with this duty it is accepted practice that local authorities should tender services and award a contract based on the bid that provides the most economically advantageous tender judged on a blend of quality and price.

5.3 The Council had previously tendered for these services when Majlish won a bid and it was at that point the frameworks for the placement of further new packages of care were formed. However, Majlish's service provision failed but the Council still owes a legal duty to the service users to provide these services under the Care Act 2014. The Council fulfilled its duties in this regard by transferring Majlish employees to the Council (and retaining existing workers) and providing the services in-house which in turn did not present any procurement law issues.

5.4 Tendering for the Majlish services together with the domiciliary care framework on the whole would appear to be lawful in all respects provided that the Public Contracts Regulations 2015 are followed when the tendering takes place.

5.5 It should be noted that throughout the transition the Council should also comply with its consultative duties with the Service Users in line with the Care Act 2014.

5.6 It is highly likely that the Transfer of Undertakings (Protection of Employment) Regulations will apply to any onward transfer of the Majlish service in respect of any staff who are deemed to be employees at the date of transfer. Where they do apply the Council should be aware of the duty to provide employee information to incoming providers and inform and consult with the outgoing employees in respect of any measures envisaged by the new provider(s) and should take part in the process as well as making the framework providers and other bidders involved in the intended tendering process aware of the potential staff transfer. The work that is currently being done in respect of regularising terms and conditions for the workforce will undoubtedly increase the number of employees in the service who will be covered by the TUPE provisions.

5.7 Under section 149 of the Equality Act 2010, the Council must when carrying out its functions, including making any alterations to the services, have due regard to the need to eliminate unlawful conduct under the Equality Act 2010, the need to advance equality of opportunity and the need to foster good relations between persons who share a protected characteristic and those who do not.

6. ONE TOWER HAMLETS CONSIDERATIONS

6.1 The receiving provider or providers will be subject to the contractual terms and conditions against which the services are tendered. These terms and conditions cover a range of factors including compliance with the Public Sector Equality Duty as well as a range of protections for employees.

6.2 The significant majority of the individuals to whom domiciliary care is provided by the service are from the Bangladeshi community. Ensuring that receiving providers are capable of providing a service that is culturally appropriate and that the first language preferences of individuals can be respected will be a critical component of the mobilisation plan.

7. BEST VALUE (BV) IMPLICATIONS

7.1 The options analysis that informs the recommendation to Cabinet was undertaken in order to identify the Best Value option for the future delivery of the service. Best Value has been determined by considering the following factors in the options appraisal:

- Speed of delivery (achievability);
- Resources required to deliver (achievability and impact);
- Impact on service users and carers (impact);
- Impact on front line employees of the service (impact);
- Impact on wider domiciliary care market locally (impact);
- Impact on LBTH, including reputational (impact);
- Cost (achievability and impact)
- Legal considerations about competition, contractual and employment matters.

8. SUSTAINABLE ACTION FOR A GREENER ENVIRONMENT

8.1 There are no sustainability implications arising from the subject of this report.

9. RISK MANAGEMENT IMPLICATIONS

9.1 A detailed mobilisation plan will be developed prior to the new domiciliary care contracts being awarded. This mobilisation plan will address all of the risks associated with the transfer of services from existing providers to new providers and will incorporate lessons learned from previous equivalent exercises.

10. CRIME AND DISORDER REDUCTION IMPLICATIONS

10.1 There are no crime and disorder implications arising directly from the subject of this report.

11. SAFEGUARDING IMPLICATIONS

11.1 The service provides care to vulnerable individuals who have been identified as being eligible for provision of services in accordance with the council's duties under the Care Act 2014. A critical component of the process put in place to effect the contract mobilisation will, therefore, relate to ensuring that those individuals are fully safeguarded during the transfer process itself and subsequently once care is being delivered by the receiving provider or providers.

Linked Reports, Appendices and Background Documents

Linked Report

- Report presented to Cabinet in December 2015: Future commissioning arrangements for domiciliary care services previously commissioned from Majlish Homecare Services

Appendices

- Appendix 1: Option Appraisal

Background Documents – Local Authorities (Executive Arrangements)(Access to Information)(England) Regulations 2012

- NONE

Officer contact details for documents:
N/A

Appendix 1

Future commissioning arrangements for Domiciliary Care services previously provided by Majlish Homecare Services: Option Appraisal

Prepared: **09 December 2015**

Version: **06**

1. The two potential options for regularising the commissioning arrangements for the domiciliary care activity previously provided by Majlish Homecare Services are outlined below.

2. The options are presented in ranked order. This ranked order has been determined by considering the following criteria:
   - Speed of delivery (achievability);
   - Resources required to deliver (achievability and impact);
   - Impact on service users and carers (impact);
   - Impact on front line employees of the service (impact);
   - Impact on wider domiciliary care market locally (impact);
   - Impact on LBTH, including reputational (impact);
   - Cost (achievability and impact);
   - Legal considerations about competition, contractual and employment matters.

3. For each of the options a strengths and weaknesses appraisal, based on the above criteria, has been undertaken in order to evidence and substantiate the ranked order in which they are presented.

4. Earlier iterations of the option appraisal identified and appraised six options. Those six options were described as follows:
   a) Allocate to providers on the existing Preferred Provider Framework by the same method as would be used for new packages of care commissioned via the framework. This option will ensure that the activity is then incorporated into the planned re-tender of the Preferred Provider Framework;
   b) Retain in-house until such time as the planned Preferred Provider Framework re-tender is completed (October 2016), and allocate to successful bidders as part of the contract mobilisation process;
   c) Tender for the necessary volume of activity as a single (reducing) block contract;
   d) Retain in-house for an initial period and initiate the process of setting up a new entity, using the Public Sector Mutual model. Once the new entity is set up, the Council to retain a majority stake for an incubation period of between two and three years to allow

the service to become commercially viable prior to being exposed to competition law requirements to competitively tender for business;

e) Tender for the necessary volume of activity via a new Preferred Provider Framework (separate to the wider re-commissioning exercise that is being planned currently);

f) Retain in-house on the same basis as the Longer Term Homecare service was i.e. reducing over time as packages cease.

5. This range of options was considered by the Mayor in Cabinet on 1 December 2015. Following this consideration it was resolved that options C, D, E and F be set aside, and that further appraisal of options A and B be undertaken in the context of additional restricted Legal advice, new information about the likely timing of the planned retender of all commissioned domiciliary care services and feedback from the workforce at the two consultation meetings held.

6. The option appraisal set out below is the product of that additional analysis, and now identifies option B as the preferred option.

7. Option appraisal

Option and brief description	Appraisal of strengths and weaknesses
B Retain in-house until such time as the planned re-tender of the Preferred Provider Framework tender is completed (October 2016), and allocate to successful bidders as part of the contract mobilisation process.	**Strengths** • Would utilise the planned tender process so less likely to create wider market turbulence than option A below; • The high likelihood that this wider tender process will now start in January 2016 and be concluded as rapidly as possible reduces any potential impacts of the service being retained in house for a longer period; • Mobilisation issues would be contained within the wider mobilisation process for the new contracts, rather than the Council having to manage two separate mobilisation processes, thus saving significant effort; • Service users and the workforce would therefore only be subject to one transfer of provider / employer rather than two as would potentially be the case with option A below;

	• If the Council determines that it wishes to implement all, or part of the Ethical Care Charter through the re-commissioning process this will ensure that the workforce transfer directly to Charter compliant providers. This reduces the risk of provider resistance to the transfer and improves security of employment and conditions for the workforce; • On a similar theme, as the intention to include this service in the tender will be included in the tender advert, and as detailed TUPE information will need to be provided to bidders, this again will reduce the risk of resistance to workforce transfer as bidders will be able to price for any liabilities that are considered to be additional to those that may accrue in relation to transfer of employees from other providers; • The additional time available would allow the Council and workforce representatives to negotiate an agreed position on current terms and conditions and ancillary matters. This in turn will give greater stability and security to the workforce in the short term; • Provides for an increased likelihood that the Council will be able to ensure that the workforce has a higher level of employment security than currently and that this security can be maintained post transfer. Security of employment was the most clearly expressed area of agreement across the workforce at recent consultation meetings. • There is a very low risk of challenge from the market with regards to the means by which the service is returned to the independent sector as this will be achieved via a fully compliant tender process.

	Weaknesses • An extended period of uncertainty for service users, families and the workforce (insofar as there will be uncertainty about which provider will provide a service / be the new employer beyond the end of October 2016); • Increased risk to the Council of a challenge relating to the differing terms and conditions of the workforce (including zero hours contracts) as compared with LBTH employees in what may be deemed to be equivalent roles; • May mean existing staff group is more widely dispersed across multiple providers; • Depending on the outcome of negotiations in respect of employment contracts a cost pressure may be generated that would be of a materially greater quantum than would be the case if the service was transferred back to the independent sector by the quicker route that option A allows. The quantum of this impact is not possible to determine precisely in advance of any agreement on contracts of employment, but will only exist for the period during which the workforce remains directly employed by the Council.
A Allocate to providers on the existing Preferred Provider Framework by the same method as would be used for new packages of care commissioned via the framework. This option will ensure that the activity is then incorporated into the planned re-tender of the Preferred Provider Framework	**Strengths** • Significantly quicker than other procurement based options; • Consistent with the way that care commissioned from other failing providers has been reallocated in the past; • Likely to deliver savings in the short term as unit costs of top ranked provider are lower. This benefit would only exist from point of transfer until October 2016 however;

The 16 providers on the current framework are ranked, and the 'rules' which govern the operation of the Framework mean that unless an individual expresses a preference for a particular provider on the list then new packages must be offered to the top ranked provider in the first instance. If the top ranked provider is not able to take on the package it is then offered to the second ranked and so on until allocated.	• Minimises LBTH exposure to single status issues and associated risks relating to the workforce of the service; • Likely (subject to TUPE consultations) that the existing workforce would transfer to one, or a small number of, providers.
	Weaknesses • The Framework was not explicitly set up to manage large scale transfers such as this, so there is a risk of challenge from the market, the impact of which is judged to be significant. The hours commissioned from MHS were, however, all included in the original volumes advertised when the Framework was tendered, or have been commissioned via the Framework since it was established, so there is a defence to any such challenge; • Following further detailed legal analysis and advice, the risk to the Council of pursuing this option is deemed to be very significant in terms of the likelihood of such an approach being found to be non-compliant with EU Competition Law; • Timing is now a significant issue, given that the existing Framework will be subject to a competitive procurement process over the next 10 months. This creates the possibility that individual service users will experience two transfers to new providers in a short space of time; • Following on from the above bullet point, the workforce would face the possibility of two TUPE transfers in a short space of time; • Very limited time would be available to conclude negotiations with workforce representatives regarding employment contracts, making the transfer process

	riskier and almost certainly leaving the workforce feeling unfairly treated by the Council; • There is a high risk of reputational damage to the Council arising from likely dissatisfaction from both service users and the workforce. Any legal challenge to the transfer process would also risk reputational damage irrespective of whether any such challenge was successfully defended.