Briefing note to Advisory Board members on proposed re-structure of the Preschool from an unincorporated charity to a Charitable Incorporated Organisation (CIO)

This note summarises, in advance of the meeting of the Advisory Board on 12.02.2024, the proposed re-structure of the Preschool to form a CIO and dissolve the unincorporated charity. Further information on the nature of a CIO, its structure, and an outline model constitution from the Charity Commission, are also attached for members to consider.

Background

The Preschool is a registered charity, but it is currently unincorporated. This means that although it is registered with the Charity Commission and subject to charity law, it has no legal "personality". When the Preschool enters into any contracts, currently the trustees of the Preschool are ultimately accountable for its performance of any of those contracts, and are potentially personally liable for any of the Preschool's debts.

The main advantage of an unincorporated association is that it is easy to set up and flexible. Whereas a company, for example, is bound by and regulated by the Companies Acts, an unincorporated association is regulated only by its own constitution and, of course, charity law if the association is a charity. This has suited the Preschool in the past, as it was running a smaller-scale service with fewer staff, fewer financial commitments and lower turnover.

Having no separate legal personality also causes problems when an association wishes to hold property or pursue legal action, as the arrangement must be entered into by an individual or individuals. For example, if the association has a lease of property, the lease will usually be in the name of individual members. Every time one of these people cease to be connected with the charity, or die, it is necessary to transfer the property or lease to a new trustee. This can involve expense and difficulty.

An unincorporated association is not a recommended structure for charities that hold property, employ staff or enter into contracts.

Proposal

In view of the increase in Preschool childcare provision, staff numbers and the imminent purchase of the freehold Preschool building, for the reasons above, it is proposed to form a CIO and when all assets have been transferred to the CIO, to dissolve the old charity.

The initial CIO formation can be started now, and although the processing time will depend to some degree on the turnaround time by the Charity Commission, there is a working assumption of c. 40 working days, or up to 8 weeks. A rough outline of the process, to tie in with the purchase of the building, would be as follows:

- Registration of CIO with Charity Commission
- Open CIO account and transfer deposit funds for building purchase
- Notify HSBC so that mortgage offer can be transferred to CIO
- Purchase the Preschool building in the name of the CIO
- Register CIO for Ofsted approval as a 'new' provider
- Arrange for the rest of the Preschool assets and liabilities to all be transferred over to the CIO, including staff contracts, funding agreements etc.

- Dissolve the old charity

In carrying out these steps, we will need to ensure:

- The charity resolutions, minutes etc. for these decisions are all correctly recorded and filed with the Charity Commission;

- Staff are consulted appropriately in relation to the transfer for their employment contracts to the CIO, for TUPE purposes (*Wirehouse are able to assist with this);*

- We notify and obtain any necessary consent from funders / lenders to transfer money to the CIO (*HSBC are happy with this, Council needs to be updated);*

- We record the transfer of all contracts and other assets etc to the CIO in an agreement *(query whether there may need to be a short-term lease agreement between the CIO and the unincorporated charity, until Ofsted registration is transferred over);* and

- Accounts are updated and properly transferred over when the time comes *(may be possible to file one set of accounts with the Charity Commission for both the CIO and unincorporated charity, as 'linked', but need further advice on this).*

It is important to get these steps right for the future structure and governance of the Preschool. The Advisory Board can assist with this, but the time commitment will be significant and it is submitted that specialist advice should be sought from a lawyer specialising in corporate law and charities.

Two quotes have been obtained from Trowers & Hamlins LLP and Tozers LLP as follows:

Aspect of work	**Comments**	**T&H. Tozers Quote**	**Tozers Quote**
Checking any trust deed that the existing trustees have in place to determine whether it includes any relevant provisions	The deed may restrict transfers, require Commission consent, or have wind-up provisions that need to be factored in	£550	£300 (if needed)
Registering the CIO	Including drafting the constitution, preparing the Charity Commission application and managing charity registration process	£2,450	£2,000
Drafting and agreeing business transfer agreement	Would record that the transfer was happening, transfer non-land assets, record the TUPE position, data issues, goodwill, any IP etc	£3,250	£1,050
Resolutions and minutes for Trustees and CIO	To resolve to transfer and receive transfers of the assets and liabilities	£775	£300

General calls, correspondence and advice on process		Up to £1,250 (capped)	Not factored in - but £300 quoted for assistance with dissolution of old charity if needed.
Potential total		£8,275 plus VAT	£3,950 plus VAT

Alternatives

1. To do nothing - i.e. keep the current charitable structure as it is. This would avoid the additional workload and costs outlined above, but would leave the Preschool in the unsatisfactory position of having no legal personality of its own, with its trustees remaining personally liable for its debts. There may also be additional work generated in connection with the land purchase, as individual trustees would have to be nominated to legally hold the land for the charity, which may require further lender approval and checks.

2. To defer any re-structure of the Preschool now, and proceed with purchasing the building in the name of the current, unincorporated charity. This would mean buying the land, and taking out a mortgage, in the names of two individual holding trustees. It would also mean keeping the Council funding agreement in the name of the old charity and individual trustees remaining personally liable for the time.

The CIO could still be formed and assets transferred over, but this would then involve a transfer of land from the individual trustees back to the CIO.

Issues for the Board:

1. Whether the Preschool should form a CIO and begin to transfer over the mortgage and funds needed to purchase the building?

2. If the answer to (1) is yes:

    a) Whether the CIO constitution should adopt the foundation or association model? (draft to be circulated for approval following legal advice)

    b) Which members of the Board are prepared to be CIO trustees and/or remain as trustees for the unincorporated charity until Ofsted registration is transferred and it can be dissolved?

3. Approval of a quote for lawyers to assist with this process

Alternatively:

4. Nomination of two 'holding trustees' to hold the land on behalf of the Preschool.