

Decision Maker: Education Portfolio Holder

Date: For Pre-Decision Scrutiny by the Education Policy Development and Scrutiny Committee on 30th September 2014 and the Care Services Policy Development and Scrutiny Committee on 2nd October 2014

Decision Type: Non-Urgent Executive Non-Key

Title: DAY NURSERY PROVISION: PROPOSAL TO MARKET TEST

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Chief Officer: Terry Parkin Director: Education and Care Services

Ward: Penge and Cator; Orpington

1. Reason for report

- 1.1 The Education Policy & Development Scrutiny Committee considered a report in January 2014 (Report ED14009) in relation to nursery provision directly run by the Council, located within the Blenheim and Community Vision Children & Family Centres. The report outlined options for the future delivery of the service. It was agreed by the Portfolio Holder for Education that further work to establish the business case for the preferred option of market testing nursery provision should be conducted. This report provides further detail on the preferred option for the future delivery of nursery provision and seeks a decision as to whether to proceed with market testing the service.

2. **RECOMMENDATIONS**

2.1 **Subject to the views of Education Policy and Development Scrutiny Committee, the Education Portfolio Holder is asked to:**

- i. **Note the content of the report;**
- ii. **Approve the recommendation in paragraph 3.40 to proceed with the market testing of day nursery provision on a concession basis;**
- iii. **Note that a further report detailing the outcome of market testing and recommendations arising be reported to a future meeting of the Education Policy and Development Scrutiny Committee and Executive as appropriate for Portfolio Holder / Executive decision.**

Corporate Policy

1. Policy Status: Existing policy. Childcare Act 2006
 2. BBB Priority: Children and Young People. Excellent Council.
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Financial

1. Cost of proposal: Estimated cost To be Confirmed
 2. Ongoing costs: N/A. Ongoing staffing costs, and associated long-term expenditure such as pension liabilities, are likely to be reduced in the event of staff transferring to another organisation
 3. Budget head/performance centre:

Community Vision Nursery	121602
Blenheim Nursery	121601
 4. Total current budget for this head: £0 (controllable)/ £187k (total cost of service)
 5. Source of funding: Revenue Support Grant
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Staff

1. Number of staff (current and additional):

Blenheim	9.15 FTE
Community Vision	14.55 FTE
 2. If from existing staff resources, number of staff hours: n/a
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Legal

1. Legal Requirement: N/A
 2. Call-in: Call in is applicable
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Customer Impact

1. Estimated number of users/beneficiaries (current and projected):
Registered places available per day total 75 across both nurseries (42 at Community Vision and 33 at Blenheim).
Around 130 children currently attend, of whom around 50 are funded through social care purchased places.
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Ward Councillor Views

1. Have Ward Councillors been asked for comments? Yes.
2. Summary of Ward Councillors comments:

3. COMMENTARY

Background

- 3.1 A paper was considered (Report ED14009) by the Education Policy & Development Scrutiny Committee on 30 January 2014 on the options for future delivery of day nursery provision directly run by the Council, located within the Blenheim and Community Vision Children & Family Centres. It was agreed that the preferred option was the market testing of the day nursery provision, subject to a further report (this report) providing further detail on the business case for market testing.
- 3.2 Duties on the Local Authority in relation to nursery and early years provision are as follows:
- Duty to provide sufficient childcare for working parents (Childcare Act 2006);
 - Duty to secure prescribed early years provision free of charge (Childcare Act 2006, amended by Education Act 2011);
 - Duty to assess childcare provision (Childcare Act 2006);
 - General duties to improve the well-being of children under 5 and reduce inequalities (Childcare Act 2006), ensuring early years' services are accessible to all families.
- 3.3 Specifically, the Childcare Act 2006, Section 8 states that the local authority may not provide childcare unless satisfied 'that no other person is willing to provide childcare' or that 'in the circumstances it is considered appropriate for the local authority to provide childcare'. However, this clause does not apply for children in need who are covered by the Children Act 1989, Section 18, which states that 'the local authority shall provide day care for children in need...aged five and under...as is appropriate'. However, this does not mean that the local authority must directly provide such provision.
- 3.4 The two nurseries provide full day care for children aged 0-5 and are open for 51 weeks a year. They are located in Orpington (Blenheim) and Penge (Community Vision), with the majority of users residing in wards considered areas of deprivation on national measures. They are situated within the Blenheim and Community Vision Children and Family Centres – many of the families using the nurseries also access provision offered by the Centres. Places are funded through a combination of the Department of Education Free Early Education (FEE) grant which funds 15 hours per week during term time for all three and four year olds and eligible two year olds, together with income generation from fees charged to families for the balance of their childcare needs. From September 2014, the eligibility criteria for free early years education for two year olds will increase with 40% of the cohort estimated to be eligible, up from the current 20%.
- 3.5 In addition, the two nurseries provide an estimated equivalent of 20 full time (or 48 part time) places for children referred, and funded, by Children's Social Care. The Children's Social Care Team provide early intervention support to prevent family breakdown (and the risk of children entering care) by arranging and funding nursery places primarily through the Blenheim and Community Vision nurseries. Children's Social Care fund the additional cost of hours required above the 15 hours free entitlement and provision outside of term time.
- 3.6 The places provided by the nurseries for Children's Social Care referrals are, essentially, a block contract arrangement. Children's Social Care has an annual budget of £254k against which the nurseries recharge. The basis of the budget allocation is historical and, as a result, it has not been necessary to date to ensure correlation between the budget amount, the

volume of actual referrals made and the actual cost of the provision. The nurseries accommodate all referrals as flexibly as possible. A higher level of support is provided for Social Care referrals, including breakfast or lunches, hands on family support and involvement in Social Work case work meetings.

- 3.7 The nurseries currently provide an overall total of 75 full time places (baby places, two year olds places and three/four year old places). The capacity is based on staffing ratios (based on Ofsted guidelines) with the capacity affected by the relative volumes of the different age ranges that access the nurseries. Capacity could therefore be increased through staffing adjustments although this will still be limited by physical space at the nurseries. Under the previous guidelines for capacity, based on floor space, Blenheim had capacity for 33 and Community Vision had capacity for 55. Both nurseries are rated as Good by Ofsted with the Blenheim nursery graded as having outstanding elements.

Sufficiency

- 3.8 There are around 850 Ofsted Registered Childcare providers in Bromley, of which the two nurseries are the only settings directly run by LBB as full time day care nurseries (the Local Authority also provides nursery provision attached to the Bromley Adult Education College, but these are primarily for the use of students, acting more in a crèche capacity, and do not operate on a full time basis). The Private, Voluntary and Independent (PVI) childcare market in Bromley is of a good standard with 83% of PVI providers rated as outstanding or good at their most recent Ofsted inspection. Funding for Free Early Years Education for two year olds is only available to providers rated as Good or above.
- 3.9 The Bromley Childcare Sufficiency Assessment (2011) states that there is only one day nursery available in Orpington – the Blenheim Centre itself. Other childcare options are mainly through child minders and pre-schools – child minder options are likely to be limited as only child minders rated good or outstanding are eligible for FEE contributions for two year olds; and there are no places for babies or two years olds at pre-schools. There are no other day nurseries within a mile and the closest day nurseries rated as good are located some distance away. While the nearest day nurseries have (currently) available places to accommodate the occupancy at the Blenheim, access to those places is likely to be restricted due to travelling distance. The Blenheim nursery currently operates a waiting list indicating demand for this provision.
- 3.10 There were 8 day care nurseries, including Community Vision, identified within the Sufficiency Assessment available in Penge. However only five others are currently rated as Good by OfSTED and therefore eligible for free early years funding. The other five nurseries do not have sufficient capacity to accommodate the volumes currently accessing the Community Vision nursery (each nursery was contacted to confirm their current occupancy and capacity). There is demand for provision at Community Vision with a waiting list for places.

2013/14 Final Out-Turn Position

- 3.11 The previous report offered an estimated out turn for the two nurseries, forecasting that an overall surplus of £109,570 would be delivered against the budget for controllable costs. This reduced the overall cost of the provision from the budgeted figure of £155,700 (once apportioned non-controllable costs had been taken into account) to an actual cost of £46,130. It should be noted that the non-controllable costs are a generally fixed cost to the Council which would only see significant reductions in the longer term once reductions or alternative delivery models have been made in other council services.

3.12 The final out-turn for 2013/14 has reduced from the forecast position, as follows:

Table 1: Final Trading Account Position 2013/14 Across Both Nurseries

	2013/14 Budget	2013/14 Outturn	Variation
	£	£	£
Direct Costs			
Employees	538,450	459,820	-78,630
Running expenses	117,030	110,634	-6,396
	655,480	570,454	-85,026
Income			
FEE & Private	-407,410	-416,904	-9,494
Recharge Social Care Purchasing Budget			
Children's Social Care	-248,070	-217,609	30,461
	-655,480	-634,513	20,967
Total Controllable	0	-64,059	-64,059
Non-controllable	580	24,439	23,859
Recharges	155,700	146,752	-8,948
Total Cost of Service	156,280	107,132	-49,148

3.13 Most of the operating surplus is linked to underspend against budgeted employee and running costs. It is not expected that these costs will rise if maintaining current level of delivery and therefore it is a reasonable indication of profitability. However, overall profitability is reduced when taking non-controllable costs into account.

Options Considered - Recap

3.14 Three options were considered in the previous report:

- Option 1: Do Nothing
- Option 2: Closure of Nursery Provision
- Option 3: Market Testing of Nursery Provision

3.15 Option 1: Do Nothing was recognised as a potentially viable option for the future delivery of nursery provision. The confirmed out-turn for 2013/14 improves upon the budgeted position. However, it was not the preferred option for the following reasons:

- The out-turn data, while positive, is based on one year of data only. Should income decrease or costs increase, to an extent that an operating surplus is not achieved, the Council would need to subsidise the delivery of day care provision from within its own budgets. The Council is also subject to other costs relating to staffing, such as pensions and related on-costs. Although the current trading data is positive, it cannot be said with certainty that the position is sustainable in the long term.
- The Council is not necessarily the best provider of such provision. The responsiveness of the provision, to increased demand for example, and its ability to maximise income may be limited by Council in relation to staffing and budget controls.

- The overriding factor is that the policy is clear. The Council is not expected to provide such provision unless it is satisfied that no other person or body is willing to do so. There is no evidence that another body would not be willing to provide such provision and therefore the Local Authority is obliged to test the market to establish whether there are other willing providers.

3.16 However, the out-turn position provides a robust baseline against which, in the event of market testing, alternative delivery models can be assessed; and it provides a valid future delivery option if proposals arising from market testing do not demonstrate best value.

3.17 Option 2: Close of Nursery Provision was rejected as an option because of the negative financial and sufficiency implications.

3.18 Option 3: Market Testing of Nursery Provision was the preferred option as it will establish whether alternative organisations are willing to provide the provision and whether they can demonstrate best value.

Soft Market Testing

3.19 A range of early years providers were invited to participate in soft market testing, via informal discussion with the Head of Schools & Early Years Commissioning, supported by the ECHS Commissioning Team. The purpose of soft market testing was to seek feedback from a variety of early years providers as to their potential interest in a market testing opportunity for the nursery provision, their experience of different market testing approaches and different models of contracting.

3.20 Meetings with four early years providers took place, comprising of one national private nursery chain, one local private nursery provider and two national voluntary sector nursery providers.

3.21 The majority of feedback was common across all providers:

- All providers stated that they would be interested in tendering for the provision in the event of market testing, based on the overview of information supplied. All providers gave the caveat that this would be subject to due diligence based on a detailed tender process;
- All providers indicated that the key considerations in their due diligence would be TUPE and pension arrangements together with assessment of profitability of the provision;
- All providers stated that they would be seeking maximum flexibility in the operation of the provision, marketing, branding and managing the provision as per their corporate procedures;
- All providers would be willing to accommodate a block contract for Social Care referrals;
- All providers stated that they would be willing to work flexibly with the Council, where possible, in order to meet local needs and address the sufficiency agenda in the borough.

3.22 The major difference in feedback was between the private and voluntary sectors on the nature of the potential contract arrangement. The interest for the voluntary sector providers would be in a contract for services arrangement, effectively managing the provision on behalf of the Council on a fixed term contract arrangement, with a preference that the property would continue to be maintained by the Council with provider occupancy on a peppercorn rent arrangement. Private sector providers were not interested in a contract for services arrangement, although they did not rule it out altogether. Their strongly stated preference was

for a concession arrangement or outright purchase of the provision, supported by a lease arrangement with the Council for the use of the property.

3.23 This in turn affected the providers view of the length of arrangement they would enter into. In the context of a contract for services, voluntary sector providers were looking at a three to five year arrangement as a minimum. In the context of a concession and property lease arrangement, private providers would be seeking a minimum period of 10 to 15 years in order for it be considered viable to invest time and resource in developing the business.

Social Care Block Funding

3.24 As indicated in paragraph 3.6, the block funding budget of £254k per annum for social care referrals has been set on a historical basis only with no correlation to the actual volume and cost of referrals made. It was unclear therefore whether the budget was funding places at a disproportionately higher rate to other referrals, effectively subsidising the nursery provision, or whether the budget was funding places at a disproportionately lower rate to other referrals, effectively being subsidised by the income generation of the nursery provision.

3.25 Through analysis of the available information, the total number of hours funded through Social Care Funding was estimated (hours delivered over and above the FEE funded 15 hours per week). The total funding for social care places was divided by the estimated number of hours to derive an average cost per hour. This was then compared to the equivalent calculation for hours funded through FEE or on a charged basis. Table 2 provides an overview.

Table 2: Cost per Hour of Nursery Provision

	Hours	
	Income / FEE	Social Care
Babies	21714	6274
2 Yr Olds	20158	14155
3 & 4 Yr Olds	19441	28935
FEE 2 Yr Olds	14861	0
FEE 3 & 4 Yr Olds	33739	0
Total	109913	49364
Income	£507,372.00	£248,070.00
Average Cost Per Hour	£4.62	£5.03

3.26 Although the estimated average cost per hour for social care funded places is higher than the average for other places, the service has confirmed that it would expect to be funded at a higher rate due to the higher level of support provided, such as breakfast and lunches, hands on family support and involvement and attendance in social work case reviews.

3.27 Therefore it is considered that social care funded places are charged at an appropriate comparable rate and the analysis provides a baseline for the commissioning of a continued block contract arrangement in the event of market testing of the provision. In negotiating any future block contract arrangement, further discussions and analysis of referrals will be made in conjunction with Social Care in order to ensure an appropriate volume is established, minimising the risk of funding unoccupied places.

3.28 The analysis of social care placements from April 2013-March 2014 indicates that only 40% of referrals were directly referred by Social Care, with the other 60% being referrals from other agencies, such as health visitors and Bromley Children Project. Any future block contract arrangement will ensure that referral and eligibility processes are firmly established and documented as part of the arrangement.

Recommended Option: Market Testing of Nursery Provision on a Concession Basis

3.29 The local market of private, voluntary and independent providers of day care is well developed and of a good standard. Given that the day nursery provision at Blenheim and Community Vision is well established and indications are that it is operating above full cost recovery, it is feasible that alternative providers will be willing and capable to take over the operation and management of this provision. The soft market testing also indicates that there is potential interest from the market. This could be established by inviting providers to submit bids for the delivery of the provision through a tendering process. This would meet the requirements of the legislation in relation to childcare by ensuring that the Local Authority is not the provider of childcare if it is established that there are other willing parties to meet the service need.

3.30 The proposed outcome of a tendering process would be to enter into a concession agreement for the delivery of services, supported by a lease agreement for the use of the premises. Concession agreements mean that:

- The contractor must bear the cost of service provision;
- The contractor must receive fees paid by third parties for using the service; and
- The contractor must bear a level of market risk for use of the service.

3.31 The characteristics of a concession agreement apply to the day nursery provision. As a concession agreement it would be subject to a 'lighter' procurement process. A concession agreement would typically be a long-term contract arrangement and therefore it is recommended that any such arrangement should be entered into for a minimum of ten years, with an extension option of five years. A lease agreement should be for the same period of time, with appropriate break clauses.

3.32 A tendering process to enter into a contract for services to deliver the provision is not recommended as this would mean that the Local Authority remains as the direct provider of the provision, albeit through a third party, based on a contract price (with additional third party overheads) for the delivery of the service. Such an arrangement would defeat the main purpose of exploring alternative models of delivery, which is to address the relevant legislation which states that a local authority may not deliver childcare unless it is satisfied that no other provider is willing to do so. A contract for services arrangement does not meet this aim. A concession arrangement may mean, based on the feedback from the soft market testing, that voluntary sector providers may be less interested in pursuing this opportunity. However, there is nothing to prevent voluntary sector organisations, or any other type of organisation, in competing for a concession contract if they so wished.

3.33 In entering into a concession agreement, the Local Authority will be inviting providers to submit a price for awarding the concession to the third party. In addition, arrangements for the lease of the premises would need to be finalised including agreed rental charges. At present utilities at the premises are shared between the nurseries and the Children and Family Centres inside which they sit. A decision about the equitable division of these costs and setting rent charges for the nurseries will need to be established as part of the market testing process. The estimated

total rental value for the two nurseries is £40k pa (Community Vision £22,500, Blenheim £17,800).

- 3.34 In transferring the operation of the service via a concession agreement, TUPE may apply to staff currently employed by the Local Authority in the delivery of this service. In the event of the transfer of staff, the Local Authority may also transfer the associated liabilities and risks, such as pension liabilities, subject to negotiation.
- 3.35 The Children's Social Care team recommend that arrangements for a block contract, or appropriate equivalent arrangement, to accommodate Social Care referrals is included within any option for the future delivery of the day care provision at the two nurseries, funded from the Children's Social Care Purchasing Budget. The price for a block contract arrangement can be included within the concession price for the delivery of the nursery provision. As indicated in 3.15, detailed modelling on the level of service, the cost of the provision and the volume (to minimise vacancies) will be undertaken as part of the market testing process.
- 3.36 The current data on the trading account for the nursery provision shows that it is operating at an estimated surplus of £87k for 2014/15. The financial risk to the Local Authority is whether the income generated from a concession agreement will be sufficient to match the current surplus currently made by income generation from the nurseries.
- 3.37 The potential net price of the concession agreement will include the price received for the operation of the concession (i.e. based on the ability to generate income), the price paid for the delivery of a block arrangement for Social Care referrals and the rental charge. This is illustrated in Table 3 below based on like for like assumptions against the current trading account data.
- 3.38 The current nursery rates charged compare favourably with other local provision, and charges are reviewed annually in April. There is potential to increase charges to make the provision more profitable, this would need to be considered in line with the local market and the balance to be achieved regarding offering affordable places to local families.
- 3.39 There may also be scope for the nurseries to offer additional places for 2 year olds eligible for FEE if minimal capital investment was made to reconfigure the layout of each nursery. Capital funds are available for the increase of places, and this will be a consideration regardless of the outcome of market testing.
- 3.40 This option is recommended to the Portfolio Holder for Education as it meets the requirement of the Local Authority to satisfy itself as to whether there are alternative providers of this provision. Market testing will demonstrate the ability and interest of the marketplace to deliver nursery provision at these locations and whether it demonstrates best value compared to the current position.

4. POLICY IMPLICATIONS

- 4.1 The proposed plan reflects the Building a Better Bromley 2020 vision, and both the local and national policy direction for Education Services.

5. FINANCIAL IMPLICATIONS

- 5.1 The nurseries moved on to a Trading Account from 2013/14. The costs of running the nurseries have been separated out from those of running the Children and Family Centres. Since April, occupancy has increased, and income has increased accordingly. The trading account budgets and final outturn for 2013/14 are shown in Table 1 above.

- 5.2 The budgets were not set up as full cost recovery trading accounts, so the recharges (overheads) are not covered by the income. The final outturn figures reflect that before recharges the nurseries generated a total surplus of £64k, and a deficit of £107k once overheads are taken into account.
- 5.3 At present utilities are shared between the nurseries and the Children and Family Centres inside which they sit. A decision about the equitable division of these costs and setting rent charges for the nurseries will be taken as part of the market testing process. The estimated total rental value for the two nurseries is £40k pa (Community Vision £22,500, Blenheim £17,800).
- 5.4 Table 3 below compares the 2014/15 budget to an equivalent concession arrangement per 3.36 above.

Table 3: Final implications of a concession arrangement

	2014/15 Budget £	Equivalent Concession Position £	Notes
Direct Costs			
Employees	563,870	0	The provider will bear employee costs
Running expenses	136,430	0	The provider will bear running costs, and will be recharged for premises costs
	700,300	0	
Income			
FEE & Private	-446,250	0	The provider would receive the income
Rental income	0	-40,000	Estimated rental income from the provider
Concession Fee	0	tbc	
Recharge Social Care Purchasing Budget			
Children's Social Care	-254,050	0	The provider will receive the income directly through a block contract
	-700,300	-40,000	
Total Controllable	0	-40,000	

- 5.5 This shows that there would be a £40k saving plus any concession fee income if the service was delivered by an external provider, assuming the full rental value can be realised and social care costs remain unchanged.
- 5.6 However, current estimates project that a surplus of £87k will be delivered in 2014/15, which is currently helping to mitigate the total ECHS department overspend. Taking this into account, there would be a potential loss of £47k of the surplus income currently being generated. This would be expected to reduce dependent upon the price agreed for the delivery of the concession based upon its potential to increase income above current levels. The confirmed surplus in 2013/14 of £64k and the projected surplus in 2014/15 of £87k provides a reasonably robust range to be considered when receiving proposals for rental and concession fees.
- 5.7 The recharge from Children's Social Care totalling £254k provides for 48 part-time nursery places per year. If the service was provided externally then the budget would be available to purchase these places in the wider external market. It is expected that Social Care would continue to purchase places in advance at the two nurseries for the most vulnerable children, with the option to spot purchase additional places according to demand, either at the two nurseries or elsewhere. This increased flexibility may result in savings for Social Care, depending on the pricing of places. At the same time, spot purchasing places with other providers may prove more expensive. Further modelling needs to take place to establish the appropriate price and arrangements for a block contract as part of a concession agreement.

5.8 There are restrictions on the use of the Children and Family sites in which both nurseries are based, as they were built using funding from the Department for Education's Sure Start programme. Use of these sites for anything other than the provision of services for children aged 0-5 and their parents and carers could result in a potential liability to repay some or all of the Sure Start grant used to build the centres (approximately £910k for Blenheim and £1,075k for Community Vision).

6. LEGAL IMPLICATIONS

6.1 The provision of nurseries are currently Part B Services for the purpose of Schedule 1 to the Public Contract Regulations 2006 (as amended). The 2014 EU Procurement Directives were approved by the European Parliament on 15 January 2014 and by the EU Council on 11 February 2014. These Directives were published in the Official Journal of the EU on 28 March 2014 and came into force on 17 April 2014. EU member states have 2 years to implement them in national legislation.

6.2 One of main reforms in the new Directives is the removal of the distinction between Part A ("priority") and Part B ("non-priority") Services. This means that the services currently listed in the Part B Services category will be subject to the full procurement regime under the new Directives. There will, however, remain a list of social, health, cultural and assimilated services which will be subject to a lighter touch regime under what has been described as a new simplified procedure. This new simplified regime will have a higher threshold of €750,000 and the only obligations, apart from general EU principles, which apply are the rules in relation to non-discriminatory, transparency and publicity.

6.3 The Council are also required to comply with its own Financial Regulations and Contract Procedure Rules

7. PERSONNEL IMPLICATIONS

7.1 If Members agree the recommendation to market test, staff and their representatives will be engaged and consulted as early as practical at each stage of the process going forward, subject of course to any commercially sensitive information. The potential implications of this proposal were communicated to staff via an early warning letter on October 15th 2013. There will also be engagement with service users and representatives who might be affected by the proposals.

7.2 Any subsequent tendering process will consider whether or not the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 would apply and the consequential legal and financial implications arising from this. Any staffing implications, arising from the recommendations in this report will need to be carefully planned for and managed in accordance with Council policies and procedures and with due regard for the existing framework of employment law.

Non-Applicable Sections:	[List non-applicable sections here]
Background Documents: (Access via Contact Officer)	Day Nursery Provision (ED14009), 30th January 2014