

Report to: EXECUTIVE CABINET

Date: 24 January 2023

Executive Member: Councillor John Taylor – Executive Member for Adult Social Care Homelessness & Inclusivity

Reporting Officer: Stephanie Butterworth - Director of Adult Services

Subject: **CONTRACT FOR THE PROVISION OF DEPRIVATION OF LIBERTY SAFEGUARDS ASSESSMENTS IN RESPECT OF DELIVERING THE COUNCIL'S RESPONSIBILITIES UNDER THE MENTAL CAPACITY ACT 2005.**

Report Summary: The Council has a duty to act as a supervisory body for the Deprivation of Liberty Safeguards (DoLS) which imposes upon it a more general duty to act as a Human Rights Champion for those adults who might lack capacity to agree to actions taken by others. The role of the Human Rights Champion entails the active promotion of the human rights of citizens – for example, in avoiding breaches of their human rights wherever possible, and facilitating their ability to contest actions of the local authority in court. The Deprivation of Liberty Safeguards are an amendment to the Mental Capacity Act 2005 and apply in England and Wales only. The Mental Capacity Act allows some restraint and restrictions to be used – but only if they are in a person's best interests and necessary and proportionate.

This report seeks to gain permission to procure a new Flexible Purchasing System (FPS) of DoLS Assessments carried out by Best Interest Assessors and Section 12 Doctors. These include: Best Interest Assessments, Mental Health Assessments, Mental Capacity Assessments and CoPDoLS renewals. A call off contract will be issued to providers delivering for Tameside.

The FPS will include:

- Lot 1 - Best Interest Assessors to select for both with and without a Mental Capacity Assessment, and select Council areas where the provider is able to deliver assessments;
- Lot 2 - Mental Health Assessors to selected for both with and without a Mental Capacity Assessment, and Council areas where the provider is able deliver assessments;
- Lot 3 – Court of Protection DoLS renewals.

On 27 October 2021 approval was given by Strategic Commissioning Board, to tender for a framework of DoLS Assessors to commence no later than 31 March 2023. The delays in the implementation of Liberty Protection Safeguards (LPS) have unfortunately impacted on the procurement timescales and delayed the Councils ability to meet the tender requirements approved at Strategic Commissioning Board on 27 October 2021.

Given the notification on 1 April 2023 confirming the indefinite delay of the implementation of LPS it is now necessary to complete a further review of current provision to ensure that statutory responsibilities of the Council are met.

Therefore permission is sought to continue with the current

procurement arrangements to 30 September 2024, which will allow a full review and tender process to take place with a view to entering into a new five year contract commencing on 1 October 2024 to 30 September 2029.

Recommendations:

That Executive Cabinet approve:

- Continuation of the current procurement arrangements until 30 September 2024.
- To procure a new FPS containing 3 lots via STAR Procurement, to deliver Best Interest Assessments, Mental Health Assessments, and Mental Capacity Assessments, and CoPDoLS renewals to commence 1 October 2024 to 31 September 2029 for a period of 5 years.
- That on each occasion the FPS is opened, any recommendations for contract award would be authorised and signed off by the Executive Member for Adult Social Care Homelessness & Inclusivity and the Director of Adult Services.

Corporate Plan:

The procurement of the FPS contract to deliver DoLS Assessments for ordinary residents or patients in Tameside will allow the Council to show it is taking positive and clear actions within a number of themes of the Corporate Plan:

- Nurturing communities – increase access, choice and control in emotional and mental self-care and wellbeing
- Independence and activity in older age, and dignity and choice at end of life – increase the number of people helped to live at home

Policy Implications:

The proposal aligns with the Living Well, Working Well and Ageing Well programmes for action

Financial Implications:

(Authorised by the statutory Section 151 Officer & Chief Finance Officer)

The service has a budget of £0.353m in 2023/24 for expenditure relating to Deprivation of Liberty Safeguards (DoLS) Assessments and is financed by Council general fund. The forecast spend for 2023/24 is £0.323m and is included in the Period 8 monitoring.

The Directorate are requesting approval for the continuation of the current process for the procurement of DoLS assessments until 30 September 2024.

The service will work with STAR Procurement to procure a new Flexible Purchasing System (FPS) commencing on 1 October 2024 to 30 September 2029 (five years). As part of the procurement process the service will ensure that the proposed expenditure relating to any new FPS will be within the current allocated budget.

Although the contract is proposed for a period of five years, appropriate break clauses will be included within any future contract arrangements to ensure that the commissioned service can be altered, should it be required, to mitigate any adverse financial impact on the Council.

Any uplift in commissioned contract values due to inflation, demand or service configuration will need to be taken into account within the service specification to ensure that it is affordable within the

available annual budget allocation for the contract duration.

It is essential that value for money is evaluated as part of the direct award process and that this is clearly evidenced and retained for section 151 officer assurance.

In addition, an Executive Decision will be required prior to award of the resultant contract. This is in accordance with the value thresholds within the Council's Financial Regulations approved at full Council on 5 October 2021 – section 4 Procurement Decisions – Award Of New Contracts within the section headed 'Financial Delegations' refers.

The Council's Financial Regulations are available for reference via the following link. [Financial Regulations \(moderngov.co.uk\)](https://www.moderngov.co.uk)

Legal Implications:
(Authorised by the
Borough Solicitor)

The report correctly identifies the statutory obligations of the Council to provide Deprivation of Liberty Safeguarding Assessments pursuant to duties contained within the Mental Capacity Act 2005. The report sets out the reasons for the delay in the procurement process and provides assurance that a lawful procurement process will be undertaken through the CHEST with appropriate advice provided by STAR.

Risk Management:

The service is required by the Council in order to meet their statutory responsibilities under the Mental Capacity Act 2005. Risks will be identified and managed by appropriate officers.

- (1) The Council could choose to do nothing. This is not a viable option as the current spot purchasing mechanism is not a formal procurement route.
- (2) The Council could choose to procure the works in such a way that would hand all the works contained within the tender to one contractor. This would not provide value for money. It would be a single point of failure. It would not allow the Council to work with existing providers that provide the service at good value with excellent quality.
- (3) The Council could choose to procure the works using a Flexible Purchasing System (FPS). Existing providers do not engage with the procurement process. The Council in partnership with STAR Procurement will offer a market engagement session to support with registration on the CHEST (the North West procurement portal) and the procurement process.

Access to Information:

The background papers relating to this report can be inspected by contacting Victoria Heyes, Commissioning and Contracts Officer and Lucinda Bogahalanda, Team Manager – MCA Lead.



Telephone: 0161 342 2215



e-mail: victoria.heyes@tameside.gov.uk



Telephone: 0161 342 4309



e-mail: lucinda.bogahalanda@tameside.gov.uk

1. BACKGROUND

- 1.1 On 27 October 2021 approval was given by the Strategic Commissioning Board, to tender for a framework of DoLS Assessors to commence no later than 31 March 2023.
- 1.2 A Deprivation of Liberty Safeguards (DoLS) Service is required to meet statutory guidelines by assessing whether a person's care or treatment amounts to a Deprivation of Liberty and is in that person's Best Interest. At present the DoLS assessments are performed by a number of qualified Assessors through a spot purchasing mechanism operated by the Council, as well as in house by members of trained staff. However, the spot purchasing mechanism is not a formal procurement route.
- 1.3 In July 2018, the Government published a Mental Capacity (Amendment) Bill which was to see DoLS replaced by the Liberty Protection Safeguards (LPS). This passed into law in May 2019. Under LPS, there was to be a streamlined process to authorise deprivations of liberty. This legislative change was due to be implemented in October 2020. However, after many delays on 1 April 2023 the Department of Health issued an update that it was delaying the implementation of LPS beyond the life of this Parliament.
- 1.4 In order to ascertain the capacity of the market, particularly with the uncertainty of future legislation, a Soft Market Test was launched in March 2021. The Soft Market Test was undertaken to identify the capacity of providers to complete a procurement exercise to enter into a formal framework agreement under the current legislative arrangements and then complete a further procurement exercise once changes to legislation were known. Twelve organisations responded to the Soft Market Test and these were a mix of current and new suppliers. However only three of these were current providers, and all three were Best Interest Assessors and none were Mental Health Assessors (Doctors).
- 1.5 At the time a risk analysis was undertaken with STAR Procurement which identified there were 34 suppliers on the approved provider list for the period 1 April 2019 to 31 March 2020. It was agreed that if all 12 applicants met the required standard, of which nine were new, this would still be well below the number required to deliver the volume of work at that time. Many Local Authorities had long waiting lists and Tameside had a high standard of providers and no waiting lists. Therefore with DoLS assessments being time critical, not meeting need by having a long waiting list could result in legal challenges and this was not an option.
- 1.6 At the time of the risk analysis other considerations to a delay in procurement were:
 - Providers are individual local specialist practitioners who would be required to participate in repeat procurement, in close succession, once the full extent of the new legislation requirements was known.
 - The details of their role and the specification and terms and conditions required were to change substantially under the new legislation, therefore time was needed to allow for the development of these documents to meet the Councils obligations in delivering these services going forward.
 - The risk of challenge was low as providers could request to be added to the list as long as they met the required standards and regular correspondence was shared with the list and the providers were given the option to choose volume of work.
- 1.7 Taking the above into consideration, commissioners have continued to work with STAR Procurement and the advice has been to monitor the situation. Other Local Authorities are in a similar position, and further advice was to undertake one procurement exercise when there was clarity on the changes to legislation. This was to ensure any procurement exercise would meet the Council's obligations and ensure the sector has the right information and training available to meet any requirements.
- 1.8 On 27 October 2021 approval was given by the Strategic Commissioning Board, to tender for a framework of DoLS Assessors to commence no later than 31 March 2023. However,

the delays in the implementation of LPS, as detailed in 1.3 above, impacted on the procurement taking place and delayed the Councils ability to meet the tender requirements approved at Strategic Commissioning Board on 27 October 2021.

1.8 Given the notification on 1 April 2023 confirming the indefinite delay of the implementation of LPS it is now necessary to complete a further review of current provision to ensure that statutory responsibilities of the Council are met.

1.9 Therefore permission is sought to continue with the current procurement arrangements until 30 September 2024, which will allow a full review and tender process to take place with a view to entering into a new five year contract commencing on 1 October 2024 to 30 September 2029.

2. CORE LEGISLATION

2.1 Mental Capacity Act 2005

The Deprivation of Liberty Safeguards is an amendment to the Mental Capacity Act 2005. They apply in England and Wales only. The Mental Capacity Act allows some restraint and restrictions to be used, but only if they are in a person's best interests and necessary and proportionate. Extra safeguards are needed if the restrictions and restraint used deprive a person of their liberty. These are called the DoLS. The DoLS can only be used if the person will be deprived of their liberty in a care home or hospital. In other settings the Court of Protection can authorise a deprivation of liberty. Care homes or hospitals must ask a Local Authority if they can deprive a person of their liberty. This is called requesting a standard authorisation.

2.2 Human Rights Act

Article 5 of the Human Rights Act states that 'everyone has the right to liberty and security of person. No one shall be deprived of his or her liberty [unless] in accordance with a procedure prescribed in law'. The DoLS is the procedure prescribed in law when it is necessary to deprive of their liberty a resident or patient who lacks capacity to consent to their care and treatment in order to keep them safe from harm.

2.3 Supreme Court Judgement

In March 2014 the judgement made reference to the "Acid Test" to determine whether a person was being deprived of their liberty. This consisted of two questions:

- Is the person free to leave?
- Is the person subject to continuous supervision and control?

2.4 Liberty Protection Safeguards

As stated in section 1.2 of the report, in July 2018, the Government published a Mental Capacity (Amendment) Bill which was to see DoLS replaced by the Liberty Protection Safeguards (LPS). This passed into law in May 2019. Under LPS, there was to be a streamlined process to authorise deprivations of liberty. This legislative change was due to be implemented in October 2020. However, after many delays on 1 April 2023 the Department of Health issued an update that it was delaying the implementation of LPS beyond the life of this Parliament.

3. THE STATUTORY ROLE OF THE LOCAL AUTHORITY

3.1 The DoLS code of practice is invaluable for understanding the roles and responsibilities created by these Safeguards. The role of the Local Authority to act as a supervisory body for DoLS imposes upon it a more general duty to act as a Human Rights Champion for those adults who might lack capacity to agree to actions taken by others.

3.2 The role of Human Rights Champion entails the active promotion of the human rights of citizens – for example, in avoiding breaches of their human rights wherever possible, and

facilitating their ability to contest actions of the Local Authority in court. When a Local Authority is carrying out its supervisory functions, it is essential that its processes and practices promote human rights, are open, transparent and helpful to the person at the centre of DoLS and their relatives or friends. The 'positive obligation of the state' means that all interventions must be accompanied by scrutiny within this essential framework.

4. PROCUREMENT APPROACH

4.1 The Flexible Purchasing System (FPS) is a mechanism that allows the DoLS Team to have a number of approved Best Interest Assessors and Section 12 Doctors that are available to pick up assessments on a spot purchase basis. The proposed FPS will cover the following:

- Lot 1 - Best Interest Assessors to complete Form 3, Form 3A or Form 3B select for both with and without a Mental Capacity Assessment, and select Council areas where the provider is able to deliver assessments;
- Lot 2 – Section 12 Doctors to complete Form 4 for both with and without a Mental Capacity Assessment, and Council areas where the provider is able deliver assessments;
- Lot 3 – Court of Protection DoLS, renewals.

4.2 An open tendering exercise will commence at the beginning of February 2024 in accordance with Tameside Metropolitan Borough Council Procurement Standing Orders and in conjunction with public procurement requirements via The CHEST with advice from STAR Procurement.

5. CONTRACT MAKEUP

5.1 The Council in its role as lead commissioner is looking to establish a five year FPS, commencing on 1 October 2024 and expiring on 31 September 2029 with no scope to extend. The service will be for a period of 5 years with a termination period of 6 months. If changes are required e.g. the implementation of LPS the Council will work with providers to develop the service around any future requirements.

5.2 The Council will add STAR partner authorities, and any other local authorities, wishing to be added. Providers will be required to tick the area they wish to supply services to. Other authorities will be able to use a call off contract to use providers as required.

5.3 The FPS will be 'opened' annually for a standard period and via the CHEST to allow other providers to apply to join. Should, for any reason there be a requirement, the FPS can be opened more frequently.

5.4 On each occasion the FPS is opened, any recommendations for contract award would be authorised and signed off by the Executive Member for Adult Social Care Homelessness & Inclusivity and the Director of Adult Services.

6. VALUE OF CONTRACTS

6.1 The anticipated total value of the DoLS Assessments in Tameside for 2023/24 is £0.334m combined. This is based on spend in 2022/23. The breakdown of the different elements will be as follows:

- Lot 1 - Best Interest Assessors £0.246m
- Lot 2 - Section 12 Doctor Assessors £0.085m. It is intended the budget can be flexed across both elements based on need.

- Lot 3 - The CoPDOLS assessments is a service that may be developed with a provider, during this contract.

6.2 A benchmarking exercise has taken place with a number of other GM and North West Councils and the following prices detailed in section 6.3 of the report have been agreed with those LA's which wish to be named on the FPS with Tameside as the Lead Authority.

6.3 The assessments will be procured on a spot purchase basis from the FPS and to ensure that Councils are working in partnership and not competing for the same resources, the following prices have been suggested. Following discussion with Finance colleagues, these prices will be finalised with all LA's wishing to join the FPS prior to the tender being published.

Lot 1

- Best Interest Assessor completes a Form 3 - Best Interest Assessment with or without Mental Capacity Assessment - £280.00 (currently £275 plus mileage)
- Best Interest Assessor completes part Form 3 or full Form 3A [if RP has capacity/not deprived of liberty] – With or without a Mental Capacity Assessment - £180.00 (currently ad-hoc)
- Best Interest Assessor completes a Form 3B [For stable care arrangements subject to 12 monthly renewals] - With or without a Mental Capacity Assessment - £180.00 (currently £175 plus mileage)

Lot 2

- Section 12 Doctor - Mental Health Assessor completes Form 4 - Mental Health Assessment, Eligibility Assessment, with or without Mental Capacity Assessment - £180.00 (currently £173 plus mileage)

Lot 3

- CoPDOLS – These prices will be determined as part of the procurement process and in order to ensure best value for money and as necessary, the development of the offer, discussions and approval will be sought from the DoLS Team Manager.

It should be noted that mileage is excluded from the above suggested costs, however in the event of an out of area assessment this will be agreed with the DoLS Team Manager utilising other GM and North West LA's approved providers in the first instance.

7. ALTERNATIVE OPTIONS

7.1 The Council has two alternative options to procuring a new FPS at this time regarding the delivery of DoLS Assessments.

- Option 1 - The Council could choose to do nothing;
- Option 2 - The Council could choose to procure the works in such a way that would hand all the works contained within the tender to one contractor.

8. RISKS

8.1 Option 1 - This is not a viable option as the current spot purchasing mechanism is not a formal procurement route.

8.2 Option 2 - This would not provide value for money. It would be a single point of failure. It would not allow the Council to work with existing providers that provide the service currently at good value with excellent quality.

9. PREFERRED OPTION OF PROCUREMENT

- 9.1 The preferred procurement option is for a FPS split into type of assessor. Prior to procurement Best Interest Assessors and Section 12 Doctors will be encouraged to bid for inclusion on the FPS.
- 9.2 Lot 1 and Lot 2 – Best Interest Assessors/Mental Health Assessors - The work will be offered on a rota basis with the option to accept or decline the work offered based on agreed process, with a maximum of 5 assessments per week to one provider. Should the provider decline, the offer will be made to the next DoLS Assessor on the list. The work will be on a fixed price scheme with prices benchmarked and agreed across Greater Manchester.
- 9.3 Lot 3 – Court of Protection DoLS Renewals - Those interested in the work will provide price per assessment for completing renewal assessments, the provider with the lowest price being successful. The Council will work with the independent CoPDOLS Assessor to develop this offer.
- 9.4 This preferred procurement option gives the Council more flexibility and control in the provision of the DoLS and CoPDOLS assessments, whilst retaining DoLS Assessors and Section 12 Doctors that currently provide the service at good value with excellent quality.

10. MARKET ENGAGEMENT

- 10.1 The Council wishes to promote and increase opportunities for providers within Tameside to help maintain employment, support social capital and give providers a sense of helping their local community.
- 10.2 In order to ensure the FPS is available to as many local providers as possible the Council is planning to hold a market engagement event to offer local providers the opportunity to meet commissioners and ask questions about the FPS and the procurement process. The previous Soft Market Test highlighted that many of the DoLS providers will not be registered on the CHEST. It is therefore our intention to support these providers to register on the CHEST portal prior to this event in preparation for the procurement process. STAR Procurement will be involved in providing this support.

11. EXTENSION OF EXISTING ARRANGEMENT

- 11.1 It is proposed the Council use the current procurement mechanism until the new FPS commences on 1 October 2024. This will provide enough time to hold the market engagement event, prepare the procurement process, carry out the evaluation process and complete governance for the award process.

12. CONCLUSION

- 12.1 As stated above, it is essential that the Council is able to meet its statutory requirements therefore permission to extend the existing arrangements to 30 September 2024 to allow time for the review, the market engagement and to complete the necessary procurement requirements to enter into a five year FPS from 1 October 2024 is requested.

13. RECOMMENDATIONS

- 13.1 That the recommendations at the front of this report be approved.