From:	Penny Southern, Interim Corporate Director of Adult Social Care and Health
To:	Graham Gibbens, Cabinet Member for Adult Social Care.
Decision Number:	18/00021
Subject:	**COMMISSIONING OF NEW SERVICES FOR DEPRIVATION OF LIBERTY SAFEGUARDS ASSESSMENTS (NON-PRIORITY)**
Classification:	Unrestricted
Past Pathway of Paper:	Adult Social Care and Health Directorate Management Team – 21 February 2018 Strategic Commissioning Board 26 March 2018 Commissioning Advisory Board 1 May 2018 Adult Social Care Cabinet Committee – 18 May 2018
Future Pathway of Paper:	Cabinet Member decision
Electoral Division:	All

Summary: This paper sets out the arrangements for commissioning new services for Deprivation of Liberty Safeguards assessments, to reduce the size of the backlog of non-priority assessments, subject to endorsement by the Adult Social Care Cabinet Committee and subsequent Executive Decision being taken by the Cabinet Member for Adult Social Care.

Recommendations: The Cabinet Member for Adult Social Care is asked to agree to:
a) **COMMISSION** new services for Deprivation of Liberty Safeguards assessments to reduce the size of the backlog of non-priority assessments; and
b) **DELEGATE** authority to the Interim Corporate Director of Adult Social Care and Health, or other nominated officer, to undertake the necessary actions to implement the decision.

1. Introduction

1.1 The Deprivation of Liberty Safeguards (DOLS) aim to protect people who lack mental capacity, but who need to be deprived of their liberty, so they can be given care and treatment in a hospital or care home. If a person's right to liberty needs to be infringed in either of these settings, authorisation must be obtained from the local authority. The number of DOLS applications received from care homes and hospitals however, has increased to such a volume that the Council does not have the resources available to process all the DOLS applications it receives each month. This leads to situations where people are being deprived

of liberty without the legal safeguards being formally assessed and authorised by the Council.

1.2 The Council currently manages this legal risk by using a nationally recognised tool to prioritise and respond in a timely manner to those requests which have the highest risk. The statutory timeframe for completing applications is 21 days for standard, and up to 14 days for urgent cases (i.e. in an emergency, or in situations where there is no time to go through the assessment process before a health or care provider needs to deprive a person of their liberty). The Council is now meeting the statutory time frame for priority cases. Any DOLS applications that are not assessed as being a high priority however, are currently added to a backlog of non-priority DOLS applications.

1.3 Following the Supreme Court judgement of March 2014, there has been a ten-fold national increase in DOLS applications. In Kent, the total number of DOLS applications has seen an increase from under 300 in 2013/14 to 2866 in 2014/15, 5113 in 2015-16 and 5069 in 2016-17. As of 1 February 2018, the Council has received a total of 4,402 applications since 1 April 2017.

1.4 An additional £1.54m in funding has been allocated to reduce the backlog of non-priority DOLS applications, and therefore ensure that care received in a hospital or care home in Kent, which deprives a person of their liberty, is both appropriate and in their best interests. This paper therefore provides details of the planned commissioning approach.

1.5 The Council's statutory obligations could however be changing within the next few years, due to plans to replace the DOLS with new legislation that may to reduce the volume of DOLS applications received. This paper therefore also considers the potential risk and benefit of continuing to manage the backlog of non-priority DOLS applications as it is.

2. Policy Framework

2.1 The Deprivation of Liberty Safeguards are the legal framework to ensure independent assessment of the best interests of individuals who lack the mental capacity to consent to care arrangements, which involve a restriction on their liberty. In such circumstances, the health or care provider must apply to the Council for authorisation, and the Council must check six assessment criteria:

- age assessment
- mental capacity assessment
- mental health assessment
- no refusal assessment
- eligibility assessment
- best interests assessment

2.2 In March 2014, the Supreme Court issued a judgment that clarified an "acid test" for what constitutes a deprivation of liberty (known as the 'Cheshire West judgement'). The acid test states that an individual who lacks the capacity to consent to the arrangements for their care and is subject to continuous

supervision and control and is not free to leave their care setting, is deprived of their liberty and should be the subject of a DOLS application (where they are in a care home or hospital setting). This decision has had the effect of increasing demand for DOLS very significantly, and has meant that the Council, along with all other local authorities nationally, has started to build up a backlog of unauthorised DOLS applications.

3. Commission of new services for Deprivation of Liberty Safeguards assessments (non-priority)

3.1 On 20 February 2018, Kent County Council agreed a budget for 2018/19 that identifies one-off funding of £1.54m for processing non-prioritised DOLS applications from care homes and hospitals for tackling a significant proportion of the DOLS backlog cases in 2018/19.

3.2 On 26 March 2018, Strategic Commissioning Board approved a recommendation to commission a service for the completion of non-priority DOLS Best Interests Assessments, while leveraging an existing contract for the completion of DOLS Mental Health Assessments (ref. SS15053).

3.3 Strategic Commissioning Board agreed that 12 months was insufficient time to run the required backlog project that could make a meaningful difference to the size of the backlog of non-priority DOLS applications. Given that the £1.54m funding for this project is agreed as a one-off only, it was agreed that 24 months would instead give KCC more time to exploit opportunities to drive cost efficiencies to continuously improve the number of DOLS assessments that could be processed per month, and ultimately decrease the total backlog of non-priority DOLS applications to below current estimates.

3.4 The proposed service model must not put the completion of priority DOLS assessments at risk. The proposed service models therefore ensure that resources are not diverted away from completing high priority DOLS assessments to complete non-priority assessments.

3.5 The Council cannot outsource the authorisation element of a DOLS outcome. The success of this project is therefore dependent on increased in-house capacity for authorising DOLS outcomes. Failure to dedicate more resource to authorise non-priority DOLS outcomes could lead to a new bottleneck situation, where Authorisers do not have capacity to authorise an increased number of DOLS outcomes coming through for authorisation. Work has therefore already started to expand the pool of in-house Authorisers from eight to eighteen, and introduce a new rota that distributes the workload out more effectively

4. Procurement next steps

4.1 As the required service can be categorised under Schedule 3 of the Public Contracts Regulations 2015 and the value of the required service exceeds the higher threshold of €750,000 (£615,278 sterling equivalent), the Council is obligated to advertise the opportunity on the Official Journal of the European Union ('OJEU'). The Council has the flexibility to use any process or procedure

it chooses to run this procurement, as long as the process complies with the Public Contracts Regulations 2015. There is no requirement to use the standard EU procurement procedures (open, restricted etc.) that are available for other types of services; the Council can use these procedures if helpful, or tailor those procedures according to its own needs, or can design its own procedure.

4.2 To minimise procurement timescales, it is therefore proposed that a single-stage **'light touch' procurement process** be used with reduced timescales. The Council has already provided the market with early notification that it is considering going out to tender for this service soon and has already received 19 expressions of interest.

4.3 Set out below is the proposed procurement timetable.

Event	Anticipated Date
Deadline for Requirement Clarifications:	Friday 4 May 2018
Deadline for Tender Responses:	Thursday 10 May 2018
Evaluation of Tenders, and Tender Clarifications:	Friday 11 – Friday 18 May 2018
Pre-Award Meeting with Preferred Supplier:	Wednesday 23 May 2018
Approval of Award Recommendation	Tuesday 29 May 2018
Contract Award Decision:	Tuesday 29 May 2018
Standstill:	10 Calendar Days
Contract Award:	Monday 11 June 2018
Implementation:	c. 4 Weeks
Contract Commencement:	Monday 9 July 2018

5. Equality Impact Assessment

5.1 An Equalities Impact Assessment has been completed and is attached as Appendix 1 to this report.

6. Financial Implications

6.1 The proposed backlog project will run for two years, and the timescales for this project will run over three financial years (i.e. from July 2018 until July 2020). The Council will need to ensure that the £1.54m funding is therefore managed effectively over these three financial years.

7. Legal Implications

7.1 The main legal risk of continuing to have a backlog of DOLS applications, where people are being deprived of their liberty with no legal safeguard/authorisation and where the state is directly responsible for those arrangements, is that someone could bring a claim under the Human Rights Act 1998 on the basis that their Article 5 ECHR right to liberty, and possibly their right to a private family life under Article 8, has been breached. This means a claim could be brought against the Council and the Court could make a declaration that the Council has unlawfully deprived someone of their liberty, and, where necessary

to give just satisfaction, damages could be awarded. Depending on whether the breach is a procedural breach (where the Council's failure to secure authority for a deprivation of liberty or provide a review of detention would have made no difference to the person's living or care arrangements) or substantive (the person would not have been detained if the Council had acted lawfully, which has more serious consequences for the person) will depend on what damages are considered.

7.2 The risk of exposure to legal repercussions for failing to meet statutory obligations under the DOLS (i.e. claim under the Human Rights Act 1998) is reduced significantly by the Council undertaking the proposed backlog project. Otherwise, regular data cleansing and sifting through the backlog to identify 'medium risk' cases, and dealing with these as appropriate may reduce the legal risk (to a lesser extent).

7.3 The procurement process will comply with the Council's policy on Spending the Council's Money, along with the Public Contracts Regulations (PCR) 2015.

7.4 The Council shall undertake due diligence as part of procurement process to safeguard against compliance risk, by ensuring all potential suppliers meet mandatory (and discretionary) selection criteria.

7.5 Data protection clauses will be included in the terms of the contract(s) awarded for the required service to protect personal data in accordance with the General Data Protection Regulation.

8. Conclusion

8.1 The risk of continuing not to authorise non-priority DOLS applications is twofold, affecting both the Council, in terms of potential consequences of failure to deliver a statutory service, and to the vulnerable adults themselves, in terms of failure to provide legal safeguards for them.

8.2 While Central Government is committed to making changes to "increasingly unsustainable" DOLS system, no timetable for this has been given and it is unlikely that the changes could be implemented any earlier than 2020 and potentially may be later. Meanwhile, the extent to which legislative changes will have a significant downward impact on volume of DOLS applications remains difficult to determine.

8.3 Commissioning a service for the completion of non-priority DOLS Best Interests Assessments, while leveraging an existing contract for the completion of DOLS Mental Health Assessments, has been determined as the best option for managing legal risks, as well as safeguarding vulnerable people who are being deprived of their liberty. Officers will provide Members with regular progress reporting as project gets underway.

9. Recommendations

9.1 Recommendation: The Cabinet Member for Adult Social Care is asked to agree to:
a) **COMMISSION** new services for Deprivation of Liberty Safeguards assessments to reduce the size of the backlog of non-priority assessments; and
b) **DELEGATE** authority to the Interim Corporate Director of Adult Social Care and Health, or other nominated officer, to undertake the necessary actions to implement the decision.

10. Background documents

Deprivation of liberty safeguards: Supreme Court judgments
https://www.gov.uk/government/publications/deprivation-of-liberty-safeguards-supreme-court-judgments

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