

**Decision Maker:** EXECUTIVE

**For Pre-Decision Scrutiny by the Care Services Policy Development and Scrutiny Committee on Tuesday 28 June 2016**

**Date:** Wednesday 13 July 2016

**Decision Type:** Non-Urgent Executive Key

**Title:** DEPRIVATION OF LIBERTY SAFEGUARDS - PROPOSAL FOR FUTURE SERVICE DELIVERY

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**Chief Officer:** Lorna Blackwood, Assistant Director Commissioning, Education, Care and Health Services

**Ward:** Borough-wide

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1. Reason for report

- 1.1 This report updates Members on service activity following the 2014 Supreme Court judgement relating to Deprivation of Liberty Safeguards and to the deprivation of liberty of individuals.
- 1.2 The report also outlines the current procurement arrangements under a service agreement to spot purchase these assessments and considers other options for this procurement. The report recommends the setting up of a framework for procurement of specialist assessments.
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2. **RECOMMENDATIONS**

- 2.1 Care Services PDS Committee is asked to note and comment on the contents of this report prior to the Council's Executive being requested to:
- i) Agree that the future model for the service should be Option 2 i.e. to employ external Best Interest Assessors and Section 12 doctors via 'Lots' on a Framework established for 4 years; and to
  - ii) Delegate authority to the Assistant Director (Adult Social Care) in consultation with the Portfolio Holder for Care Services to make any subsequent appointments of suitably qualified providers to the framework if there are insufficient providers on the framework following the annual review.

### Corporate Policy

1. Policy Status:: Existing Policy
  2. BBB Priority: Supporting Independence. Safer Bromley
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### Financial

1. Cost of proposal: Estimated Cost £604k
  2. Ongoing costs: Recurring Cost: £.
  3. Budget head/performance centre: Mental Capacity Act 2005
  4. Total current budget for this head: £651k
  5. Source of funding: Core Funding
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### Staff

1. Number of staff (current and additional): N/A Staff currently engaged on temporary basis.
  2. If from existing staff resources, number of staff hours:
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### Legal

1. Legal Requirement: Statutory Requirement; Mental Capacity Act 2005
  2. Call-in: Applicable
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### Customer Impact

1. Estimated number of users/beneficiaries (current and projected): 1000-1500 People
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### Ward Councillor Views

1. Have Ward Councillors been asked for comments? N/A
2. Summary of Ward Councillors comments:

### 3. COMMENTARY

#### Background

- 3.1 As Members will recall the Deprivation of Liberty Safeguards (DoLS), introduced as an amendment to the Mental Capacity Act in April 2009, aimed to prevent decision making which deprived people of their liberty unless properly authorised. The safeguards cover people, regardless of the funding source, in registered care/nursing homes and in hospitals, who have a mental disorder, and who lack the capacity to consent to the care provided, where that care may include the need to deprive people of their liberty. It does not apply to people detained under the Mental Health Act 1983.
- 3.2 Hospitals and care homes are the 'managing authorities', and under the Act are responsible for identifying when a deprivation of liberty is occurring within their own service provision and for making referrals to the designated 'supervisory body'. The supervisory body is the Local Authority for both health and social care provision.
- 3.3 On 19 March 2014, the Supreme Court handed down its judgments in the case of "P v Cheshire West and Chester Council and another" and "P and Q v Surrey County Council". The full judgments can be found on the Supreme Court's website at the following link: [http://supremecourt.uk/decided-cases/docs/UKSC\\_2012\\_0068\\_Judgment.pdf](http://supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf)
- 3.4 The judgment is significant in determining whether arrangements made for the care and/or treatment of an individual lacking capacity to consent to those arrangements amount to a deprivation of liberty. The Court emphasised that even though an individual may never have tried to leave, the fact that there are measures in place to prevent them from leaving amount to a deprivation. A deprivation of liberty for such a person must be authorised in accordance with one of the following legal regimes: a deprivation of liberty authorisation or Court of Protection order under the Deprivation of Liberty Safeguards in the Mental Capacity Act 2005, or (if applicable) under the Mental Health Act 1983.
- 3.5 The other consequence of the Supreme Court judgements is that a deprivation of liberty can take place because of a care regime in supported living accommodation, day care or the individual's own home and although currently the Mental Capacity Act does not cover a Deprivation of Liberty Safeguard process being followed in these cases, they should be referred to the Court of Protection. The judgement also lowered the age of consideration for a deprivation of liberty to 16 years. This is in terms of an individual's capacity and takes no account of whether there is parental consent for any care regime.
- 3.6 On receiving the request for a DoLS from the managing authority; a doctor, who is qualified under Section 12 of the Mental Health Act 2007, (S12 approved doctor is a term used by the Mental Health Act to describe a medical professional who has been trained and 'approved' by a social services or health authority to carry out particular duties under the Mental Health Act) and a Best Interest Assessor (BIA) are identified (usually a qualified social worker who has received accredited training) to complete the following assessments:
- Establishing the individual is over 18 years
  - Individual lacks capacity to consent to being in the care home or hospital in order to receive the care or treatment that is necessary to prevent harm to them,
  - Individual has a mental disorder
  - Whether this is the least restrictive placement and whether it is in the individual's best interest to be deprived of their liberty

- That the individual is not liable for detention or treatment under the Mental Health Act.
- Whether there is an advance decision or any other legal notice in place

3.7 The Best Interest Assessor must also identify someone to represent the person for the length of time the DoLS is in place; this is usually a member of their family. On completion of these assessments and the relevant paperwork, the DoLS is authorised. This has to be reviewed a minimum of annually although in some cases it will be more regularly than that, which requires the above process to be repeated. This process is outlined in the legislation and in the statutory code of practice on deprivation of liberty.

3.8 In Bromley since the beginning of April 2015 to March 2016, 1,280 Deprivation of Liberty safeguard applications have been received by the Council with outcomes as detailed below.

	April 2014 -April 2015	April 2015 – April 2016
Number of referrals	388	1,280
Number Granted	351	991
Number not granted	31	73
Number withdrawn	6	8

(NB Not all referrals result in an assessment)

### Current Service

3.9 The current volume of work has been delivered by a small central team of a senior practitioner, five best interest assessors (with the occasional use of additional in house assessors based in Care Services), a co-ordinator and other staff time in processing the authorisations and in managing the service. The central team currently consists of locum staff engaged on a temporary basis. S12 doctors are engaged externally. The main burden of the safeguards is with the administration of the system required by the Department of Health which ensures that the legal requirements are met. The current budget for the service for 2016/17 is set out below.

	£'000
Officers' Pay	308
Temporary/Agency Staff	16
Training Expenses	14
Books, Newspapers & Periodicals, Printing, Stationery	1
Other Hired & Contracted Services	208
Additional drawdown from contingency	66
Conference Expenses	1
Room Bookings	2
Advocacy	5
Independent Mental Capacity Advocacy (IMCA)	30
<b>Total</b>	<b>651</b>

- 3.10 The budget contains an assumption that £66k can be drawn down from contingency to meet the additional costs of the BIA's and S12 in 2016/17. There is a total of £184k currently in contingency for DOLs.

### **Best Interest Assessors (BIAs)**

- 3.11 Of the 1280 applications for Deprivation of Liberty Safeguards (DoLS) between April 2015 to March 2016 890 assessments were carried out. Where the demand for BIAs is not able to be met in house, independent assessors have been used for people placed outside of London and the Home Counties as well as to supplement resources locally. Assessors outside of Bromley have been identified based on the recommendation of host local authorities who have used them to carry out assessments in their local area. Independent Best Interest Assessors have the flexibility to undertake assessments to timescale dependent on the type of authorisation request that is being assessed. External Best Interest Assessors (BIA) have a service agreement in place which details the expectation of the Council and includes checks on their individual registration, insurance, social work and Best Interest Assessor training and certification of fitness to practice in the UK. The individual is engaged on a spot basis depending on geographical location and availability.
- 3.12 The current cost of assessments carried out by external BIAs varies between £250 and £532 depending on the area and the travel distance. All BIA's in the area concerned are asked to quote for which assessments they can carry out prior to commencing the work and the cheapest quote is taken. BIAs are asked to quote for each assessment prior to commencing the work. Nationally BIA payments are in the range of £250 - £500 with local assessments from £250 - £300. Currently there is no nationally agreed rate; the Association of Directors of Adult Social Services (ADASS) is currently considering this as an option.

### **Section 12 assessments**

- 3.13 S12 doctors are engaged under a service agreement which details the expectation of the Council and includes checks on their individual registration, insurance, DoLS training and certification of fitness to practice in the UK. The individual is engaged depending on geographical location of the person to be assessed and availability. S12 Doctors for people out of borough are engaged based on the recommendation of host local authorities that have used them to carry out assessments in their own local area. Of the 1280 applications for Deprivation of Liberty Safeguards (DoLS) between April 2015 to March 2016; 1244 were assessed by S12 doctors. All Doctors are asked to quote for which assessments they can carry out prior to commencing the work and the cheapest quote is taken. Nationally S12 Doctors payments range £150 - £250 with local assessments in the Greater London area of £150 - £200 although again establishing a locally agreed rate is being considered by ADASS.
- 3.14 In 2014/15 the costs of assessments the by S12 doctors and Independent BIA's was £87k. In 2015/16 the total budget of £201k allocated for meeting these costs this was fully spent.

## **4 Options for the service in the future**

- 4.1 Whilst the current service is operating well and is compliant with financial and HMRC regulations the market provision for DOLS is changing and the number of assessments required is clearer so this is an optimum time to consider other models of provision. The costs of the options are detailed below. All options assume 890 BIA assessments and 1,244 S12 assessments per annum:-

#### 4.2 **OPTION ONE: Maintain the current service arrangements**

4.2.1 The current service manages the service demand with the core team processing referrals, carrying out approximately 75% of BIA assessments but providing flexibility to meet any fluctuation in service demand by the use of independent BIAs. The current configuration of the team may require adjustment in the future as the administrative burden is considerable but the systems are being further developed and refined.

4.2.2 In practice additional and out of borough capacity is procured through spot purchasing arrangements although the process does ensure that prices are compared between individual BIAs and S 12 doctors. As the market has developed there is an opportunity to set up a framework arrangement to ensure robust procurement of this service.

4.2.3 The total cost of Option One would be £651k p.a. assuming the current activity level, broken down as follows:

<b>COSTS OF OPTION ONE</b>	<b>£'000</b>	<b>£'000</b>
BIA ASSESSOR STAFF	216	
AGENCY STAFF	16	
OTHER STAFF (NON ASSESSORS) IN DOLS	81	
OTHER RUNNING COSTS, TRAINING, ETC	18	
ADVOCACY CONTRACT AND IMCA CONTRACT	35	
BUDGET FOR EXTERNAL S12/BIA'S	208	
CURRENT DOLS BUDGET		575
ADDITIONAL BUDGET NEEDED TO BE DRAWN DOWN FROM CONTINGENCY TO COVER ADDITIONAL ASSESSMENT COSTS	66	
STAFFING FOR INVOICE INPUT/ADMIN	10	
		76
TOTAL BUDGET REQUIRED		<b>651</b>

#### 4.3 **OPTION TWO: Maintain a core administrative function of three staff and set up a framework to call off BIA and S12 Doctor services**

4.3.1 By retaining the current administrative function but using a framework to deliver the functions of the BIA and S12 Doctor, Bromley would contract out all assessments to BIA's and S12 Doctor using a fixed rate (an average cost of £271 per BIA assessment and £190 per S12); the cost of service delivery would be £604k p.a. assuming the current level of activity. The current system of checks/vetting on eligibility to work, DBS, professional qualifications, insurance, evidence of DOLS training, S12 registration etc would form part of the evaluation of service providers to be included in the framework, which would be split into 2 'Lots', one for each service.

4.3.2 The cost of Option Two assuming current level of activity is detailed below:

<b>OPTION TWO</b>		<b>£000s</b>
FIXED RATE FOR ALL BIA (890)		241
FIXED RATE FOR ALL S12 ASSESSMENTS (1,244)		236
<b>COSTS THAT WOULD NEED TO BE RETAINED</b>		
OTHER STAFF (NON ASSESSORS) IN DOLS		81
OTHER RUNNING COSTS, TRAINING, ETC		0
ADVOCACY CONTRACT AND IMCA CONTRACT		35
INVOICE INPUT/ADMIN STAFF		10
		<b>604</b>

#### 4.4 **OPTION THREE: Tender the whole service**

- 4.4.1 With the expansion of Deprivation of Liberty new providers have emerged in the market which arrange both BIAs and S12 doctors and quality control the assessments. A number of Councils nationally have tendered for these services and information from them indicates that the average cost of this is between £500- £600 per referral.
- 4.4.2 The Council would still be required to receive the referrals and to process them once signed. The total cost would be £769k p.a. assuming the current level of activity is detailed below. This in essence would be a “managed service”

<b>OPTION THREE</b>		<b>£000s</b>
FIXED FEE FOR WHOLE SERVICE OF £550 PER ASSESSMENT (1,244)		684
<b>COSTS THAT WOULD NEED TO BE RETAINED</b>		
COORDINATOR ROLE		39
ADVOCACY CONTRACT AND IMCA CONTRACT		35
INVOICE INPUT/ADMIN STAFF		10
		<b>769</b>

Please note the costs given in Option 3 do not include the cost of monitoring this contract.

## 5 **FINANCIAL IMPLICATIONS**

- 5.1 Option one (cost £651k) assumes an almost ‘as is’ position. There is unlikely to be any efficiencies gained from this option as the amount of external assessments will remain static so no economies of scale can be achieved.
- 5.2 Option two (cost £604k) assumes all of the assessments are carried out externally. A more economic price can be achieved per assessment due to the quantum of size. Some current costs will need to be retained in order to maintain the service, but efficiencies are still made with this option.
- 5.3 Option three (cost £769k) is not economic. Although there is a market for dealing with all of the DOLS assessments, etc as a package, it is more expensive and some costs will still need to be retained to coordinate the service in house.

- 5.4 Option two is the preferred option and would enable efficiencies to be made on the current arrangements by setting up a framework to call off BIA and S12 Doctors with options for annual review and adjustments depending on the requirements of the DOLS service

## **6 LEGAL IMPLICATIONS**

- 6.1 This report seeks the approval of the Executive to commence a procurement process to establish a framework agreement for the provision of assessors to prevent a person's unlawful deprivation of liberty in hospitals and care homes. The framework agreement will be for a contract period of 4 years and the estimated total value of the contract is £2.4m, not £604k which is just the annual value.
- 6.2 The obligation to carry out assessments and to employ suitable assessors to prevent unlawful deprivation of liberty is a statutory requirement pursuant to section 4 and paragraphs 129, 180 and 182 of schedule 1A of the Mental Capacity Act 2005 (as amended to incorporate the Deprivation of Liberty Safeguards 2009).
- 6.3 The Public Contracts Regulations 2015 apply to this contract and the Council will need to comply with these Regulations. As the service is within the 'light touch' regime the Council must advertise the contract in the Official Journal of the European Union and may determine the procedures to be applied in awarding contracts provided that the principles of transparency and equal treatment are complied with.
- 6.4 The Council will also need to comply with the Best Value Duty set out in the Local Government Act 1999 section 3.
- 6.5 Pursuant to the Contract Procedure Rules the decision maker for this report is the Executive.
- 6.6 The Legal Department will need to be consulted regarding the contract terms and conditions and the appointment of assessors who are not a party to the original framework agreement. Consideration should be given to using a Dynamic Purchasing System.

## **7. PROCUREMENT IMPLICATIONS**

- 7.1 Health, social and related services are covered by Schedule 3 of the Public Contracts Regulations 2015, and thus any tender would be subject to the application of the "Light Touch" regime (LTR) under those regulations. Authorities have the flexibility to use any process or procedure they choose to run the procurement, as long as it respects the following obligations:
- i) The tender must be advertised in OJEU.
  - ii) A Contract Award Notice must be published in OJEU at the end of the procurement.
  - iii) The procurement must comply with Treaty principles of transparency and equal treatment.
  - iv) The procurement must conform with the information provided in the OJEU advert regarding: any conditions for participation; time limits for contacting/responding to the authority; and the award procedure to be applied.
  - v) Time limits imposed, such as for responding to adverts and tenders, must be reasonable and proportionate. There are no stipulated minimum time periods in the LTR rules, so contracting authorities should use their discretion and judgement on a case by case basis.
- 7.2 In conducting an 'Open' procurement process in accordance with the Council's Contract Procedure Rules and the indicative timetable in the table below, these obligations will be met.



## Indicative Timetable

Procurement Strategy agreed	28 <sup>th</sup> June 2016
Tender document preparation	To 15 <sup>th</sup> July 2016
Tender period	18 <sup>th</sup> July to 16 <sup>th</sup> August 2016
Tender evaluation	16 <sup>th</sup> August to 2 <sup>nd</sup> September 2016
Framework agreed and awarded	12 <sup>th</sup> October 2016
Implementation	1 <sup>st</sup> November 2016

- 7.3 It is proposed that the framework would be for a period of 4 years, with a built-in annual review to ensure that sufficient numbers of BIA and Section 12 Doctors are maintained.
- 7.4 It is further proposed that authority is delegated to the Assistant Director (Adult Social Care) in consultation with the Portfolio Holder for Care Services to make any subsequent appointments of suitably qualified providers to the framework if there are insufficient providers on the framework following the annual review. Consideration will be given to whether a Dynamic Purchasing System (similar to a framework but more flexible) would be appropriate.

## 8. PERSONNEL IMPLICATIONS

- 8.1 There is a current workforce of 8.5 staff (8 FTEs) who currently undertake the work in-house, who have been consulted with on the proposals outlined in this report. The team members are either seconded from other teams or agency workers. In the event that the Committee decides to proceed with either Option 2 or 3 then the seconded staff would return to their substantive roles.

<b>Non-Applicable Sections:</b>	Policy Implications Personnel implications
Background Documents: (Access via Contact Officer)	<a href="http://cds.bromley.gov.uk/documents/g4918/Public%20reports%20pack%20Tuesday%2010-Jun-2014%2019.00%20Executive.pdf?T=10">http://cds.bromley.gov.uk/documents/g4918/Public%20reports%20pack%20Tuesday%2010-Jun-2014%2019.00%20Executive.pdf?T=10</a>