

Report to, Alan Sinclair, Director of Adults and Health

September 2022

Deprivation of Liberty Safeguards (DoLS) Direct Award

Report by Loretta Rogers, Assistant Director, Operations

Electoral division(s): All

Summary

The Council holds a contract with a provider to deliver Deprivation of Liberty Safeguards (DoLS) assessments. This is a statutory service that protects people's human rights if they are deemed to be 'deprived of liberty' in a hospital or care home. It is a legal duty placed on local authorities irrespective of how the person's care and support is funded and applies inside and outside of the county area to people who meet the ordinary residence requirements.

The current contract with the provider ended on 31st August 2022 and the extension provision allowed for in this contract has already been utilised. This report is seeking approval to direct award the contract to the current provider for a period of 19 months until 31st March 2024. This time will allow for new legislation in relation to DoLS to come into effect and for WSCC to decide future commissioning options and also allow for any potential procurement process following the implementation of the new legislation.

Recommendations

The Director of Adults and Health is asked to approve a contract by way of direct award for Deprivation of Liberty Safeguards (DoLS) for a period of 19 months effective from 1st September 2022 to 31st March 2024, via a single tender waiver at a cost of circa. £1.267m.

Proposal

1 Background and context

- 1.1 Deprivation of Liberty Safeguards ('DoLS') is the legal framework that protects people's human rights if they are deemed to be 'deprived of liberty' in a hospital or care home. It is a legal duty placed on local authorities irrespective of how the person's care and support is funded and applies inside and outside of the county area to people who meet the ordinary residence requirements.

- 1.2 Each DoLS authorisation requires assessments from two independent assessors: a specially trained Doctor, and a Best Interests Assessor (a social worker or other registered professional who has carried out required specialist training). Once completed, the assessments are rigorously scrutinised by WSCC senior staff and the person's deprivation of liberty is then formally authorised for the maximum period of 1 year. Further assessments are required for each repeated authorisation period.
- 1.3 DoLS was implemented in 2009, and initially generated relatively low numbers of referrals that were manageable within the statutory timescales and requirements of the scheme. In 2015 the UK Supreme Court issued a ruling that substantially increased the scope of the DoLS framework. From this point onwards DoLS referral rates sharply increased. Screening prioritisation levels were introduced by the Association of Directors of Adults Social Services (ADASS) to support councils to manage the new influx of DoLS work, however WSCC among many councils in England and Wales began to develop rising waiting lists.
- 1.4 In 2019 Government agreed a new legal framework to replace DoLS: the Liberty Protection Safeguards ('LPS'). LPS was due to be implemented in October 2020 but later postponed until April 2022 due to the Covid-19 pandemic. Implementation has been postponed for a second time with an agreed timescale still being awaited. A 17-week consultation period closed in July 2022 with an announcement on the updated implementation schedule anticipated in winter 2022.
- 1.5 To manage high levels of referrals for DoLS assessments, WSCC use a range of in-house and externally commissioned DoLS assessors. From Autumn 2019 a significant tranche of WSCC's DoLS work has been carried out by a national provider: Action First Assessments Ltd, via a framework agreement created by Nottinghamshire County Council. The Council entered into a call off contract with the initial period coming to an end 31/03/21. The call off contract under the framework agreement was then extended for a further period until 31/08/22. The Nottinghamshire CC framework agreement has now ended and therefore WSCC is seeking to directly award the contract from 01/09/2022 to Action First Assessments Ltd for a period of 19 months to 31/03/2024 to align with the new legal framework being implemented.
- 1.6 WSCC DoLS use a best value approach to fully utilise local and in-house options first, with the remainder of work being allocated to Action First on a flexible basis. This has enabled WSCC to be able to allocate in bulk to a single provider enabling efficiencies in the admin and finance processes.
- 1.7 WSCC DoLS is a high-volume service, dealing with up to 100 incoming referrals per week and managing waiting lists that can rise sharply. At the time of writing WSCC's DoLS waiting list is approx. 750 referrals with the most overdue dating back 8 months. Working effectively with Action First throughout the period 2019 – present has enabled WSCC to clear historical backlogs dating back to 2015 which were over 1,800 at the start of the project.
- 1.8 Future contracting decisions are being made in the context of the Liberty Protection Safeguards rollout in the coming years.
- 1.9 Continuing with the current provider will ensure continuity of service while waiting for new legislation to be implemented.

2. Proposal details

- 2.1 The Director of Adults and Health will be asked to approve a direct award to the current provider for a period of 19 months until 31st March 2024.
- 2.2 To deliver business as usual DoLS workload and manage waiting lists ahead of the legal changes. This will ensure continuity of service and reduce legal and reputational risk to WSCC.
- 2.3 A minor change in rates has been identified by Action First: this will raise the cost of one of the professional assessments from £300 to £310. The total cost for both assessments will therefore be £560 (thus far £550).
- 2.4 The performance of the service has been monitored through quality assurance activity and quarterly contract review meetings. The provider submits and continues to meet their quarterly contract Key Performance Indicators (KPI's).
- 2.5 It is anticipated that the new legislation will be announced in winter 2022. The current timeline is as follows; however, this is dependent on the announcement and implementation of the new legislation:

Task	Timescale
Research and market discussions	January – March 2023
Design based on new legislation	March – June 2023
Re – Commissioning, options appraisal	June 2023 – January 2024
Contract award	January 2024
Service Commencement	1 st April 2024

3. Other options considered (and reasons for not proposing)

- 3.1 To do nothing: Discontinuing the services is not considered a viable option given the statutory requirement WSCC has to deliver these services. There would be significant risks to WSCC as follows:
- Sharply escalating waiting lists
 - WSCCs DoLS services KPIs not met
 - Inability to complete urgent out of area work
 - Significant delays carrying out work locally and in WSCC owned in-house residential services
 - Risk of complaints, Ombudsman decisions, reputational harm to WSCC
 - risk of legal action due to human rights breaches for unauthorised deprivation of liberty as well as possible civil claims

This option is therefore not recommended.

- 3.2 Immediate Re-procurement: This option is not proposed as the new DoLS legislation will mean a number of significant changes to the services. It is anticipated that there will be an update with this legislation in this winter

2022. Reprourement now would mean that WSCC would then potentially not be in line with the new legislation when it comes into effect.

- 3.3 WSCC's in-house BIA team is fully staffed with no budget to expand further. WSCC BIA rota is operational after a hiatus over the pandemic period and has been recently expanded. WSCC DoLS continues to explore all locally available options including expanding a pool of self-employed BIAs, maximising use of the WSCC casual bank and working closely with trained DOLS doctors in the local area. However, these can deliver only a small proportion of the required work and are not able to manage out of area work without increased travel costs.
- 3.4 In July 2022 Sussex Partnership Foundation Trust ceased a DoLS administrative support service funded by the three local councils. This service had previously coordinated DoLS Doctor allocations and supported the supply, training and governance of DOLS Drs locally. This places further pressure on WSCC DOLS to meet its statutory requirements to access sufficient doctors as well as exacerbating administrative burden on the team.
- 3.5 Prior to commencing work with Action First via the framework agreement, WSCC worked with an alternative provider during July 2019. Unfortunately, this was not a successful endeavour and work eventually needed to be returned to WSCC resulting in delays and legal risk. Alternative providers were researched at that point, and it was found that Action First Ltd was more cost effective than the other options. Given the limited timescale until DoLS legislation is replaced and the risks that would arise from a gap in service it is agreed that a competitive tender process is not proportionate at this point.
- 3.6 Ahead of the rollout of the new legislation, WSCC aims to manage and reduce DoLS waiting lists and incoming referrals as effectively as possible. This is both so as to continue to manage and mitigate existing risks and to have as successful as possible a transition to the new legal scheme. A tendering process and the need to develop new working processes and pathways with (an)other provider(s) would be greatly challenging for WSCC DoLS and is likely to create delays and backlogs that would otherwise be avoided.
- 3.7 This direct award proposal offers stability and continued delivery of services as no change of provider is planned whilst a review is undertaken to establish the most effective future commissioning proposal.

4. Consultation, engagement and advice

- 4.1 Consultation has taken place with the current provider, and they have confirmed that they agree with a direct award of the existing contract for the time period proposed.
- 4.2 The proposal is supported by the Council's Mental Health Service Operational Management who have oversight of the Deprivation of Liberty Safeguards team.
- 4.3 A project group will be set up to evaluate options for these services once the announcement of the new legislation has taken place. This will inform the procurement process for the continued commissioning of these services.

- 4.4 A contract has been drafted by the council's legal services with input from the Head of Service for Mental Health.

5. Finance

- 5.1 The proposed decision results in a continuation of an existing contractual arrangement for a period of 19 months. Consequently, the recommendation does not create any additional financial implications and so the cost of the provision of the services will remain in line with the assumptions on which the budget is based, as shown in the table below.

	Current Year 2022/23 £m	Year 2 2023/24 £m
Revenue budget	0.467	0.800
Cost of proposal	0.467	0.800
Remaining budget	0	0

- 5.2 The effect of the proposal:

(a) **How the cost represents good value**

- 5.3 Being able to allocate work and deal with finance tasks using one single provider reduces administrative burden on WSCC. There is a streamlined and effective single route of communication with the provider with whom WSCC DOLS have good working relationships
- 5.4 Out of area work is carried out with zero additional cost whereas WSCC would otherwise need to individually source assessors throughout England and Wales and would need to pay substantial mileage/ travel costs.
- 5.5 The original contract was awarded as a call off contract from the Nottinghamshire Framework Agreement and therefore had a competitive element. The pricing has not increased during the current contract period however a minor change in rates has been identified by Action First: this will raise the cost of one of the professional assessments from £300 to £310. The total cost for both assessments will therefore be £560 (thus far £550) to reflect cost of living increases. This still represents value for money for the Council.

(b) **Future savings/efficiencies being delivered**

- 5.6 A successful rollout of the new LPS framework is going to be very challenging if high backlogs are in place at the point of implementation.
- 5.7 There is an increased risk of legal challenge including possible civil claims for unauthorized Deprivation of Liberty.
- 5.8 Efficiencies will be maintained by continuing to use the existing administrative pathways and processes developed in the period of working with the current provider.

Human Resources, IT and Assets Impact

5.9 None as will be continuing with current approach.

6. Risk implications and mitigations

Risk	Mitigating Action (in place or planned)
Contract award challenged	<p>There is insufficient time currently to deliver a compliant competitive tendering exercise for a new contract. The Council will undertake an options appraisal to inform future commissioning arrangements for these services once the new DoLS legislation has been announced.</p> <p>Furthermore, this contract was originally compliantly tendered under the Nottinghamshire Framework Agreement.</p>
Provider Performance	Appropriate performance management and governance arrangements are specified in the contract.
Provider Failure	Quarterly meetings are held with the provider and financial data is shared and reviewed. Meetings will continue during the direct award period.
Public Contract Regulations 2015	There is a risk that the Council could be challenged for failure to comply with the Public Contracts Regulations 2015 for the direct award of a contract outside of its allowed for extension provisions. This risk is mitigated as the Council has planned to undertake a review, albeit delayed due to the covid-19 pandemic as the new legislation has also been delayed.

7. Policy alignment and compliance

- 7.1 This proposal supports the aim as stated in the Council Plan for 2021-25 to make sure that more people access the Deprivation of Liberty Safeguards.
- 7.2 There is no provision within the current contract for a further extension. Consideration has been given to Regulation 72 of the Public Contracts Regulations 2015. Regulation 72 clarifies what is considered to be a "substantial modification" to a contract and sets out six scenarios where a public contract can legally be modified without the need for a new procurement. On consideration of these scenarios, the conclusion is that an extension is not within any of the permissible contract variations. Therefore, there is the risk of legal challenge from another provider in the market as the Council would be directly awarding a contract to a provider without following a competitive procurement procedure. As the Council will be direct awarding the contract to the incumbent provider and awaiting updated legislation before re procuring the services, there is felt to be a low risk of challenge.

- 7.3 **The Equality Act (2010)** containing the Public Sector Equality Duty, places a legal duty on public bodies to promote equality of opportunities for all. Deprivation of Liberty Safeguards ('DoLS') is the legal framework that protects people's human rights if they are deemed to be 'deprived of liberty' in a hospital or care home. It is a legal duty placed on local authorities irrespective of how the person's care and support is funded and applies inside and outside of the county area to people who meet the ordinary residence requirements.
- 7.4 This proposal is in line with the **West Sussex Our Council Plan priorities**; 'Independence for later life', 'A prosperous place', and 'A strong, safe and sustainable place'. The services deliver in the communities of West Sussex and support the objectives of the **Council's Plan** by:
- Protecting people's liberty and the Council's duty to keep vulnerable people safe.
 - contributing to a sustainable and prosperous economy by creating jobs for West Sussex people.
- 7.5 **Crime and Disorder** – There are no implications.
- 7.6 **Climate change** – We will work with the provider to help mitigate the effects of climate change and assist in meeting the Council's target of reducing carbon emissions to net zero by 2030.
- 7.7 **Public health** – The Council is the Public Health Authority for the county – a service led by the Director of Public Health. The Council has a duty to ensure that it takes decisions or plans, its policies and business activity in a way which enhances the general health and wellbeing of the communities served by the Council. This decision brings health and social care and housing together to deliver the best possible health outcomes for West Sussex residents by ensuring people's liberty is protected.
- 7.8 In terms of **Social Value**, we will work with the provider to continue to develop social value within the services. The provider currently employs an expanding workforce of local people and there are regular opportunities for refresher training.

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Appendices – None

Background Papers - None