

<b>Decision maker:</b>	<b>Cabinet member health and adult wellbeing</b>
<b>Decision date:</b>	<b>Wednesday, 3 February 2021</b>
<b>Title of report:</b>	<b>Recommissioning of Independent Advocacy Services</b>
<b>Report by:</b>	<b>Senior Commissioning Officer</b>

## **Classification**

Open

## **Decision type**

Key

This is a key decision because it is likely to result in the council incurring expenditure which is, or the making of savings which are, significant having regard to the council's budget for the service or function concerned. A threshold of £500,000 is regarded as significant.

This is a key decision because it is likely to be significant having regard to: the strategic nature of the decision; and / or whether the outcome will have an impact, for better or worse, on the amenity of the community or quality of service provided by the authority to a significant number of people living or working in the locality (two or more wards) affected.

Notice has been served in accordance with Part 3, Section 9 (Publicity in Connection with Key Decisions) of the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012.

## **Wards affected**

(All Wards);

## Purpose

To approve the recommissioning of Independent Advocacy Services for adults by means of an open tender process. The current contract to deliver independent advocacy expires on 31 July 2021.

## Recommendation(s)

That:

- (a) **the commissioning of an independent advocacy service for adults through an open procurement process be approved;**
- (b) **the director for adult and communities be authorised to take all operational decisions necessary to implement the service including award of contract for the independent advocacy service for a period of up to five years and with a maximum value of £1.1m.**

## Alternative options

1. Not to procure an independent advocacy service for adults. This is not recommended as this would mean the council will fail to meet statutory duties in respect of Mental Capacity Act 2005, Mental Health Act 1983 as amended, Health and Social Care Act 2012 and Care Act 2014. As the Care Act regulations stipulate, advocacy must be independent of the local authority, operated by an organisation with its own constitution, code of practice and complaints procedure. Therefore it is not appropriate to deliver this service in house and an external provider must be commissioned to deliver advocacy services.
2. To extend the contract or make a direct award to continue the service with the current provider during this time of uncertainty around legislative changes. This option is not recommended as the current governance does not extend to cover further extensions to the existing contract. There is also sufficient time to go out to full competitive tender, which the current provider may bid for, with a revised contract and specification reflecting the current and anticipated future requirements of an advocacy service, whilst ensuring a fair and competitive review of the current market and achieving the best value service offer.

## Key considerations

3. The council has a statutory duty to provide independent advocacy services. This decision outlines the recommendation for commissioning an external provider to deliver independent advocacy services for adults, discharging the council's statutory duties and ensuring the voices of vulnerable adults in Herefordshire are heard.
4. The legislation under which the has a statutory duty to provide independent advocacy is the Care Act 2014, Mental Health Act 1983 as amended, Mental Capacity Act 2005 and the Health and Social Care Act 2012. This requires the provision of;
  - Independent Mental Capacity Advocacy (IMCA)
  - Independent Mental Health Advocacy (IMHA)
  - Care Act Advocacy
  - NHS Complaints Advocacy

5. In addition, there is also provision of generic advocacy. Whilst this is not a statutory requirement, the council has provided it through the advocacy commissioned provider. There is anecdotal evidence that the provision of this advocacy eases pressures elsewhere in the system, for example many of the referrals during the peak of the recent pandemic related to people with mental health issues as a consequence of concerns or changes arising from the pandemic.
6. Throughout a significant period of the current contract, the incumbent provider has been operating near to or beyond full capacity. This has been closely monitored through contract management and work carried out with the provider to ensure value for money is achieved. However, there remains an ongoing concern about the ability of a provider to meet demand under the current contract terms and the result that some people are waiting to access advocacy services. All referrals are currently triaged by the provider, assessing individual scenarios and vulnerabilities, to ensure that the most vulnerable are not left without an advocate.
7. There is a small, but competitive market of providers who are able to offer advocacy services. Therefore the recommended approach is to complete a competitive open tender exercise to procure a five year contract. The tender process will score the bidders responses on both value and quality of service offered.
8. There is a consistent level of demand, so that in an average quarter there would be around 450 vulnerable Herefordshire residents actively supported by advocacy services. Over 90 per cent of this demand is for statutory advocacy, with 70 percent for advocacy provided under the requirements of the Mental Capacity Act. Advocacy support required under the Mental Capacity Act, particularly paid Relevant Persons Representative role, will often remain active from the point of referral for the remainder of the person's life.
9. Councils have a statutory responsibility to ensure the availability of the following services for vulnerable adults where:
  - a) qualifying patients, who are detained or subject to a community treatment order, require support and assistance from an Independent Mental Health Advocate (IMHA) under the Mental Health Act 1983 as amended.
  - b) in certain circumstances relating to decisions about their health or care needs, people who lack capacity and have no one else to support them, require support from an Independent Mental Capacity Advocate (IMCA) under the Mental Capacity Act 2005.
  - c) a person who lacks capacity and is being deprived of their liberty, and where the best interests assessor is unable to recommend anyone, an advocate should be appointed as the relevant person's representative to support the person through the Deprivation of Liberty Safeguards (DoLS) process.
  - d) a person has substantial difficulty in being involved in the assessment of their needs or with care planning or reviews, safeguarding enquiry or safeguarding adult review, an independent advocate is required to support them under the Care Act 2014.
  - e) people who, for a wide range of reasons, find it difficult to navigate the health complaints system themselves an independent advocate is to be provided, by the NHS complaints advocacy service to help people to speak up, express their views and achieve personal outcomes. It is a requirement of the Health and Social Care Act 2012 that councils make provision for this service.
10. In addition to the statutory obligations it is proposed that, in the pursuit of good practice as promoted by the Care Act, the service continues to provide generic advocacy to support

adults who are not able to express their views and preferences by providing an independent view within decision making processes that promotes the rights and interests of that person.

11. In the 12 month period from 1 August 2019 to 31 July 2020 the service received 624 referrals. During the final four months of this contract period the number of referrals fell, particularly for IMCA, this was during the first peak of the COVID19 pandemic, but referrals numbers have since started to increase again. In the previous 12 month period, 704 referrals were received and overall, the trend in advocacy referrals is sustained and potentially increasing.

Type of advocacy	Number of referrals 1 August 2018 – 31 July 2019	Number of referrals 1 August 2019 – 31 July 2020
IMCA (including DoLS)	510	392
IMHA	65	58
Generic	67	64
Care Act	51	90
NHS complaints	11	16

12. The period of time that advocacy is provided to a person varies according to the type of advocacy and individual need. Referrals for advocacy relating to a person's deprivation of liberty under the Mental Capacity Act remain open for the duration of the DoLS authorisation. In practice this often means for the duration of that person's lifetime.
13. COVID19 has had a negative impact on the delivery of the advocacy service and the experience of those vulnerable adults who are in need of advocacy, particularly individuals who have a deprivation of liberty authorisation. There have been restrictions around face to face visits, with the use of technology to facilitate alternative contact requiring the assistance of a staff member or other person to facilitate online conversations. This results in the person being unable to have a private conversation with the advocate and may therefore not openly talk about their wishes and preferences. It also limits the advocate's ability to build confidence, trust and rapport with the person, as well as removing the opportunity to identify potential safeguarding or other concerns through observation of the setting. During the pandemic the flow of referrals for Independent Mental Capacity Advocacy, including DoLS, has slowed as the work required to undertake the authorisation now takes longer.
14. Any change in service provision will need to be communicated to key stakeholders who make referrals to the advocacy service. This will include information on the advocacy services provided and how to access advocacy services not provided under this contract, such as parental advocacy. The successful bidder will be responsible for ensuring that all who refer to or access their services are clear about the service offered and the mechanisms for contact.
15. The service will be commissioned by means of a full open tender process. This process will include the requirement that bidders indicate their ability and willingness to adapt their

service in line with forthcoming legislative change. The planned procurement timetable is outlined below;

Publication of tender documents	15/02/2021
Closing date for submission of clarification questions	19/03/2021
<b>Closing date for submission of tender</b>	<b>29/03/2021 (noon)</b>
Completion of tender evaluation	W/C 12/04/2021
Amplification and clarification meeting(s) (if required exact date to be confirmed)	W/C 19/04/2021
Preferred bidder announced	23/04/2021
10 day standstill ends	04/05/2021
Award of contract	05/05/2021
Mobilisation phase	Approximately three months
Contract start date	01/08/2021

16. There are expected changes to the Mental Capacity Act and Mental Health Act during this contract period. Implementation of these changes are anticipated to have an impact on advocacy services, requiring potential additional resource and amendments to the service delivery. The council will keep abreast of upcoming changes in legislation and plan for the impact of these when the detail of these changes become available. If this is anticipated to have an impact on the contractual arrangements of the advocacy service further governance will be sought to make the appropriate variations to the contract.

## Community impact

17. In addition to meeting statutory obligations the provision of an independent advocacy service enables vulnerable residents of Herefordshire to participate in decisions that impact on their life. For example, this may be a decision about where they live, what medical treatment that they do or do not receive, how their needs are met, benefits or other financial matters or making a complaint about a health or social care service.
18. The county plan outlines three key themes of Sustainability, Connectivity and Wellbeing. The provision of an advocacy service will better enable vulnerable people to be connected and involved in decisions that impact on their wellbeing, contributing to the ambition to protect and improve the lives of vulnerable people. The plan highlights that people with disabilities “*want to be counted in the community and we want to be listened to*”, the advocacy service will help to make sure those voices are heard.
19. Case studies provided as part of the current service contract monitoring have demonstrated the benefits to people whose voice would not have been heard and their wishes not listened to without the services provided by an advocate.

20. The independent advocacy service does not have any direct impact on the lives of Looked After Children or Care Leavers, but may indirectly impact on them should they require support to enable them to express their views and wishes, and/or ensure their rights are upheld.

## **Environmental Impact**

21. Herefordshire Council provides and purchases a wide range of services for the people of Herefordshire. Together with partner organisations in the private, public and voluntary sectors we share a strong commitment to improving our environmental sustainability, achieving carbon neutrality and to protect and enhance Herefordshire's outstanding natural environment.
22. The environmental impact of this proposal has been considered through the service specification and includes appropriate requirements on the contractor/delivery partner to minimise waste, reduce energy and carbon emissions and to consider opportunities to enhance biodiversity. This will be managed and reported through the ongoing contract management.

## **Equality duty**

23. Under section 149 of the Equality Act 2010, the 'general duty' on public authorities is set out as follows:

A public authority must, in the exercise of its functions, have due regard to the need to -

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
  - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
  - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
24. The public sector equality duty (specific duty) requires us to consider how we can positively contribute to the advancement of equality and good relations, and demonstrate that we are paying 'due regard' in our decision making in the design of policies and in the delivery of services. Our providers will be made aware of their contractual requirements in regards to equality legislation.
  25. The Equality Impact Assessment does not identify any negative implications for those with a protected characteristic. Over half of those accessing advocacy services are aged 65 or over. Whilst this is disproportionate to the overall population of Herefordshire, the nature of the service means that older people are more likely to require an advocate, particularly in respect of decisions about their care and support needs and in being deprived of their liberty. Slightly more females than males access the service, but this gender divide is representative of the Herefordshire population aged 65+.

26. Continuing to provide an advocacy service will ensure that those with a disability, health inequality or an older person are provided with a quality service to ensure that their rights are upheld and their thoughts and wishes are heard. Without an advocacy service those with these protected characteristics may not have their voices listened to, may not be involved in decisions that directly impact on their life and may be subjected to unlawful treatment, such as being unlawfully deprivation of their liberty.

## Resource implications

27. A potential increase to current spending is projected due to the ongoing concerns in respect of the demands on capacity of the incumbent provider. Current spend is £193.2k per annum. Tenders will be sought within a range of £195k - £215k per annum, for a contract period of five years. Tenders will be assessed using a financial and quality scoring process to ensure best value for money.
28. From April 2021 – March 2022 it is anticipated that an additional £20k may be required to prepare advocates for the proposed implementation of the Liberty Protection Safeguards from 1 April 2022. Any further variations to the contract specification and/or value as a result of changes in legislation will be subject to further governance.
29. The total budget for this service over the contract period will be up to £1.1m. This is funded through base budget and an annual allocation of funding from the Department of Health. Should the DoH funding cease or reduce this would have an impact on the base budget.
30. The contract year runs from 1 August to 31 July. The figures in the tables below relate to a service commencing on 1 August 2021 and terminating on 31 July 2026.
- 31.

Revenue or Capital cost of project (indicate R or C)	2020/21	2021/22	2022/23	Future Years	Total
	£000	£000	£000	£000	£000
Provision of advocacy services (R)	£0	£164	£215	£717	£1,096
<b>TOTAL</b>	<b>£0</b>	<b>£164</b>	<b>£215</b>	<b>£717</b>	<b>£1,096</b>

Funding streams (indicate whether base budget / external / grant / capital borrowing)	2020/21	2021/22	2022/23	Future Years	Total
	£000	£000	£000	£000	£000
Current base budget (for period 1.8.21 – 31.7.26)	£0	£94	£141	£471	£706
Current health grant (for period 1.8.21 – 31.7.26)	£0	£35	£52	£173	£260
<b>TOTAL</b>	<b>£0</b>	<b>£129</b>	<b>£193</b>	<b>£644</b>	<b>£966</b>

Revenue budget implications	2020/21	2021/22	2022/23	Future Years	Total
	£000	£000	£000	£000	£000
Current budget (for period 1.8.21 – 31.7.26)	£0	£129	£193	£644	£966
Budget required (for period 1.8.21 – 31.7.26)	£0	£164	£215	£717	£1096
<b>TOTAL additional funding required</b>	<b>£0</b>	<b>£35</b>	<b>£22</b>	<b>£73</b>	<b>£130</b>

## Legal implications

32. The Council's legal obligation for this service is dealt with elsewhere within this report. The discretionary element of the services can be provided by the Council under the general power of competence in the Localism Act 2011.
33. As the UK will have left the EU by the date of this decision the post Brexit procurement rules will apply. The Public Contrast Regulations 2015 have been amended by the Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 to give them a UK focus but most of the pre-Brexit regime continues. The estimated value of the procurement is above the threshold for the provision of social and other specified services under Schedule 3 of the 2015 Regulations and so the procurement is only subject to the light touch regime.

## Risk management

34. The risks to the council if the recommendations are agreed or declined, and how these would be managed, are set out in the table below.
- 35.

Risk / opportunity	Mitigation
<p>Legal and reputational.</p> <p>If the recommendation to commission an independent advocacy service for adults through an open procurement process not be accepted the council would be in breach of statutory obligations to ensure that this service is available and independent to the council. Should a direct award be made to the incumbent or any other provider without a competitive tender process being followed the council will be in breach of contract</p>	<p>A competitive tender process will be undertaken to seek a suitable provider to deliver this service and discharge the council's statutory duties to provide independent advocacy.</p>



procedure rules and face potential challenge.

Financial.

Funding allocation is made on an annual basis by the Department of Health. If the annual figure is withdrawn or reduced this will leave a deficit that will have to be met through an increased spend in base budget.

The funding has been provided consistently for many years, with no precedent for reductions or sudden changes. As soon as funding allocation is made to the council, if there is a reduction a review of the service provision will be undertaken and any appropriate variations to the contract made to lessen the impact on the base budget.

Financial

Costs of adjusting the contract to meet the requirements of the changes in Mental Capacity Act (Liberty Protection Safeguards implementation) and Mental Health Act (following government review in 2018) legislation may exceed the budget provision.

Further review of the contract requirements will be completed once all relevant information is available, including revised government Impact Assessment. Further governance will be sought prior to making any changes to the contract.

Reputational

The provision of an advocacy service gives vulnerable adults in Herefordshire the opportunity to have their thoughts and wishes heard and enables them to exercise choice in decisions, as well as ensure that their rights are upheld.

There is a small specialist market who are able to provide advocacy services. The competitive tender process will enable these specialist providers to bid to provide this service in Herefordshire. The tender process will require bidders to demonstrate their capacity to deliver a quality service under the current legislative requirements and their ability to adapt in response to forthcoming legislative changes.

36. If the recommendations are approved the risks will be managed at a service or directorate level and will be entered onto the Adult and Communities risk register.

## Consultees

37. Advocacy user feedback is provided through the service provider and included in the contract monitoring process.
38. Consultation with the political groups has been undertaken and no comments were received.

## **Appendices**

Equality Impact Assessment

## **Background papers**

None

## **Glossary of terms, abbreviations and acronyms used in this report.**

IMCA – Independent Mental Capacity Advocate

IMHA – Independent Mental Health Advocate

DoLS – Deprivation of Liberty Safeguards

DoH – Department of Health

LPS – Liberty Protection Safeguards