

From Clair Bell, Cabinet Member for Adult Social Care and Public Health
Richard Smith, Corporate Director Adult Social Care and Health

To: Adult Social Care Cabinet Committee – 18 January 2022

Subject: **Deprivation of Liberty Safeguards Mental Health Assessments Contract Extension and Transition to Liberty Protection Safeguards**

Decision Number: 20/00003

Classification: Unrestricted

Past Pathway of report: Adult Social Care Governance Board – 22 December 2021

Future Pathway of report: Cabinet Member Decision

Electoral Division: All

Summary: Deprivation of Liberty Safeguards assessments require a mental health assessment to be completed by a qualified mental health assessor. Kent County Council commissions South-East Memory Assessment Services to undertake these assessments. Liberty Protection Safeguards was planned to replace Deprivation of Liberty Safeguards legislation from April 2021. The pandemic has delayed the implementation of Liberty Protection Safeguards further. During the pandemic the current contract with South East Memory Assessment Services was extended to 31 April 2022, due to uncertainty regarding the go-live of Liberty Protection Safeguards.

The implementation date for Liberty Protection Safeguards is still the 1 April 2022, but this is unachievable as the code of practice consultation was due to start in Spring 2021 and it will take a year for the implementation. As a result, the current arrangements with South East Memory Assessment Services need to be extended by a further year to the 31 March 2023. It is expected that Liberty Protection Safeguards code of practice will be made public in the next six months, providing the detail that is required, which will also enable a new contract to be let to cover any requirements post 31 March 2023. The extensions to the current contract (first during the pandemic, and second proposed extension to 31 March 2022), place the total spend on the contract over £1,000,000 therefore requiring a key decision.

Recommendation(s): The Adult Social Care Cabinet Committee is asked to **CONSIDER** and **ENDORSE** or make **RECOMMENDATIONS** to the Cabinet Member for Adult Social Care and Public Health on the proposed decision (attached as Appendix A) to:

a) **EXTEND** the current contract with South East Memory Assessment Services for 12 months from 1 April 2022 to 31 March 2023, by means of a Written Justification for Exemption from the Normal Contract Procedure; and

b) **DELEGATE** authority to the Corporate Director Adult Social Care and Health to take relevant actions, including but not limited to finalising the terms of and entering into required contracts or other legal agreements, as necessary to implement the decision; and

c) **CONSIDER** and **NOTE** the planned implementation of Liberty Protection Safeguards as a replacement to Deprivation of Liberty Safeguards.

1. Introduction

- 1.1 The Mental Capacity Act (MCA) 2019 introduced Liberty Protection Safeguards (LPS) as a replacement to Deprivation of Liberty Safeguards (DoLS) and was originally to come into force from 1 October 2020.
- 1.2 Liberty Protection Safeguards have been designed by UK Government to be a much more streamlined, efficient system which balances protection of people's rights with manageability of the system overall. LPS is expected to reduce the huge demand on the current DoLS system nationally, which for many years has been regarded as "*an administrative and bureaucratic nightmare*" (*Law Commission Report, 2017*)
- 1.3 A central premise of LPS is the person-centred, strengths-based approach to consider all options before taking the option that results in deprivation of liberty.
- 1.4 However, during the pandemic Central Government announced that it would not be possible to meet the October deadline and decided that full implementation of Liberty Protection Safeguards would be April 2022.
- 1.5 The implementation date of April 2022 hasn't changed but it takes a year to consult and implement, so there is an expectation of a further year's delay to April 2023.

2. Current Position

- 2.1 DoLS assessments were introduced in 2009 to prevent breaches of article 5 human rights ("Right to liberty and security of person"), provide a procedure in law for those deprived in accommodation to access care and treatment, and to provide legal protection to determine the lawfulness of the deprivation.
- 2.2 Under the current arrangements a DoLS requires a mental health assessment, carried out by a mental health assessor. The MCA DoLS Regulations 2008 stipulate this must be a medical doctor experienced in mental health and are section 12 approved, therefore approved clinicians under the Mental Health Act 1983. Furthermore, the local authority is responsible for ensuring that sufficient mental health assessors are available.
- 2.3 Capacity with a previous mental health assessment provider was limited – this was identified by a project group set up to clear a significant number of pending (backlog) cases. That project group worked with Commissioning to source alternative provision for DoLS mental health assessors, following due process

which led to South East Memory Assessment Services (SEMAS) being awarded the contract in April 2016, and the contract was expanded due to a key decision in May 2018 to purchase extra support to clear backlog, this was called project DoLS.

- 2.4 Since that time, the provider (SEMAS) has been able to provide the number of assessments the Kent DoLS team have requested to the standard required and within the appropriate timeframes.
- 2.5 Re-interpretations and amendments to DoLS policy have over the last decade dramatically increased the volume of applications entering the process, and the system is widely considered unsustainable in the long-term. As a result, Liberty Protection Safeguards were designed to replace DoLS. The basic premise of ensuring any deprivations placed upon a person are minimal and proportionate remains at the forefront of the legislation.
- 2.6 There are several key changes that the LPS will introduce such as
 - LPS will apply to 16 and 17 year olds, lowering the age eligibility requirement from 18 currently under DoLS
 - NHS Trusts and Clinical Commissioning Groups (CCG) will process any applications from health settings (e.g. hospitals), rather than the Local Authority
 - LPS will apply to all settings, including within the community, rather than being limited to mainly care homes and hospitals
 - A LPS application can be “transported” between locations, removing the need to complete a new assessment
 - LPS applications can be renewed for up to three years
 - ‘Best Interest Assessors’ are being replaced with ‘Approved Mental Capacity Professionals’
 - Mental health assessments are not explicitly required to complete an LPS application
- 2.7 It is expected based on current LPS guidance that new mental health assessments will not be required for people who are subject to an LPS assessment. Instead, where available, past documentation/diagnoses may be relied on in place of a new mental health assessment when completing an LPS assessment. Therefore under LPS the number of mental health assessments we our required to commission is expected to be far lower.
- 2.8 The coronavirus pandemic resulted in the Government taking the decision to delay the implementation of LPS.
- 2.9 During this period and with uncertainty around the implementation date for LPS, the contract with SEMAS was extended to 31 March 2022. UK Government will not achieve the revised go-live date for LPS of the 1 April 2022 and are expected to extend this date by a year to allow for a consultation. A project team is in place to manage this transition and implementation.

2.10 Therefore, the proposal is to extend the current SEMAS contract from 1 April 2022 to 31 March 2023 by means of a Written Justification for Exemption from the Normal Contract Procedure, in line with the change in legislation and new statutory framework (i.e. LPS)

3. Financial Implications

3.1 The value of the twelve months contract extension will be approximately £430,000 (dependant on demand).

3.2 Total spend on purchasing Metal Capacity Assessments (non-Project DOLs) through the contract will be over £1,000,000 by the end of March 2023, thereby requiring a key decision.

4. Legal implications

4.1 The extension to the SEMAS contract is procured under Procurement Policy Note (PPN 01/20) which was released in March 2020 setting out information and associated guidance on the public procurement regulations and responding to the current coronavirus, COVID-19, outbreak.

4.2 Invicta Law have reviewed the situation with the current SEMAS contract and have advised that extending the contract again raises KCC's risk exposure to challenge from other parts of the market.

4.3 It is understood that in Kent the SEMAS contract is not contested as much as others as there is no one who can provide this service.

4.4 We would agree that we need to engage the market early 2022 to re-purchase the services ready for the end of contract so a further extension is not required.

5. Equalities implications

5.1 An Equalities Impact Assessment (EqIA) covering DoLS is part of current service documentation.

5.2 An Equalities Impact Assessment (EqIA) covering LPS has been completed (attached as Appendix 1) based on current guidance, and shall be updated upon publication of LPS Codes of Practice

6. Data Protection Implications

6.1 General Data Protection Regulations are part of current service documentation.

6.2 A Data Protection Impact Assessment (DPIA) covering LPS has been completed, attached as Appendix 2, based on current guidance, and shall be updated upon publication of LPS Codes of Practice

7. Other corporate implications

7.1 Liberty Protection Safeguards will apply to 16 and 17 year olds as well as adults, therefore Children's Services will be impacted by the change in legislation. The project team is liaising with colleagues in Children's Services to ensure they are aware of the future impacts.

8. Conclusions

8.1 The delay to the implementation of LPS as a result of the pandemic resulted in an unavoidable extension to the SEMAS contract to ensure KCC continued to meet its DoLS obligations.

8.2 Now with an anticipated implementation date for LPS of April 2023, the SEMAS contract will need further extension to coincide with the implementation of the new legislation.

8.3 A new contract will be let to replace this extended contract for the time required and to include any LPS contractual requirements if the code of practice is released.

8.4 The adoption of Liberty Protection Safeguards as a replacement to DoLS is mandatory, but is expected to benefit all parties once fully bedded in, including both people subject to an application, and KCC in terms demand on resource.

8.5 A new contract is to be let from 1 April 2023 which will include any requirements post this date, or if the implementation date is delayed again the council will have a new contract to replace the current one.

9. Recommendations

9.1 Recommendation: The Adult Social Care Cabinet Committee is asked to **CONSIDER** and **ENDORSE** or make **RECOMMENDATIONS** to the Cabinet Member for Adult Social Care and Public Health on the proposed decision (attached as Appendix A) to:

a) **EXTEND** the current contract with South East Memory Assessment Services for 12 months from 1 April 2022 to 31 March 2023, by means of a Written Justification for Exemption from the Normal Contract Procedure; and

b) **DELEGATE** authority to the Corporate Director Adult Social Care and Health to take relevant actions, including but not limited to finalising the terms of and entering into required contracts or other legal agreements, as necessary to implement the decision; and

c) **CONSIDER** and **NOTE** the planned implementation of Liberty Protection Safeguards as a replacement to Deprivation of Liberty Safeguards.

10. Background Documents

None

11. Lead Officer

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