

**Kent County Council
Equality Analysis/ Impact Assessment (EqIA)**

Directorate/ Service: Adult Social Care & Health, Disabled Children & Young People and Integrated Children Services

Name of decision, policy, procedure, project or service: Transition and Implementation of Liberty Protection Safeguards (replacing Deprivation of Liberty Safeguards)

Responsible Owner/ Senior Officer: Janice Duff (SRO), Maureen Stirrup (SOO)

Version: 1.0

V0.1	27/09/2019	Sholeh Soleimanifar	Initial draft
V0.2	23/12/2019	Akua Agyepong	Comments
V1.0	23/12/2019	Sholeh Soleimanifar	Final
V1.1	01/12/2021	Robert Underwood	Review of Final Draft

Author: Sholeh Soleimanifar

Pathway of Equality Analysis:

Adults PMO (Project Mandate) 23 July 2019

DMT (Adult Safeguarding) 13 August 2019

Adults PMO (Project Proposal) 04 September 2019

Summary and recommendations of equality analysis/impact assessment.

- **Context**

Deprivation of Liberty Safeguards (DOLS) is a statutory function of the local authority. The law governing the application of DOLS is the Mental Capacity Act 2005 which is based on Article 5 of the European Convention on Human Rights (ECHR). This legislation guarantees a person's right to personal liberty and requires safeguards to be provided to those deprived of their liberty.

The Mental Capacity (Amendment) Act received Royal Assent in May 2019. This legislation will introduce a new model for authorising deprivations of liberty in care replacing DOLS with the Liberty Protection Safeguards (LPS). The new law is expected to come into force in October 2020 running alongside the DOLS for the first year. The new legislation (LPS) was expected to be introduced from October 2020, then Spring 2021, and then late Summer 2021. We are still waiting on the code of practice to be released in December 2021 and the public consultation which will enable the implementation.

The complexity of the DOLS process and the impact of the Supreme Court ruling in 2014 on the number of applications received, has put a lot of strain on current resources, resulting on a backlog of applications pending assessment and outcome. This crisis is reflected locally, regionally and nationally.

Current DOLS legislation exclusively covers applications from registered care settings. Government has estimated there are around 53,000¹ cases nationally involving deprivations of liberty in these settings. There is no current estimate available

The Assessment Process

As soon as the local authority has confirmed that the request for a standard authorisation should be pursued, it must obtain the relevant assessments to ascertain whether the qualifying requirements of the DoLS are met.

The assessments are:

1. Age Assessment
2. Mental Capacity Assessment
3. Mental Health Assessment
4. No Refusals Assessment
5. Eligibility Assessment
6. Best Interests Assessment

Where all six requirements are met, the application is granted and this means that the individual can be legally deprived of their liberty by the hospital or care home. The authorisation can be granted for any length of time up to a year. If any of the six requirements are not met, an authorisation cannot be granted.

The introduction of LPS seeks to ensure increased compliance with the law, with robust safeguards in a cost-effective manner – in all settings.

Overwhelmingly those subject to DOLS are older people, many of whom have dementia. However, younger adults with learning disabilities, people with mental health problems and people with acquired brain injury may also be subject to DOLS. The age range under LPS is extended to include 16 and 17 year olds.

- **Aims and Objectives**

Article 5 of the European Convention on Human Rights (ECHR) guarantees the right to personal liberty and security and provides that no one should be deprived of their liberty in an arbitrary fashion. The Deprivation of Liberty Safeguards (DoLS), introduced into the Mental Capacity Act 2005 by the Mental Health Act 2007, provides a legal process in England and Wales for authorising deprivations of liberty in hospitals and care homes.

The Supreme Court judgment in 2014, (known as Cheshire West), significantly extended the scope for deprivation of liberty so that a person who lacks capacity to consent to their confinement will be deprived of liberty where they are under continuous supervision and control and are not free to leave, irrespective of whether or not they appear to object to their deprivation.

Since the judgment the DoLS system has struggled to cope with the increased number of cases:

¹ <https://publications.parliament.uk/pa/bills/lbill/2017-2019/0117/mental-capacity-IA.pdf>

- 2013/14 (prior to Cheshire West) total number of DoLS application in England was 13,715.
- 2017-18 (post Cheshire West) total number of DoLS applications in England increased to 227,400.²

These figures do not capture people who are deprived of liberty in settings not covered by the DoLS, (e.g. supported living, shared lives and private and domestic settings) where the only available mechanism to provide Article 5 safeguards is via authorisation by the Court of Protection. This number was estimated by the Law Commission's Impact Assessment at around 53,000³.

The backlog of applications that have not been approved means many numbers of individuals are left without safeguards for an extended period. To manage these historic applications, Kent secured a one-off funding in 2018 to process and complete as many applications as possible in a two-year period. A new project was set up in the DOLS unit, using a commissioned provider to undertake the assessments. In the first year of the project, all pending applications from April 2014 to March 2017 (~ 1500 applications) were processed and authorised. It is estimated a similar number will be completed by end of the project in July 2020.

- **Summary of equality impact**

This project will manage the transition from DOLS to LPS, with full implementation currently documented at April 2022.

Under the current DoLS system many people are not receiving Article 5 safeguards for significant periods of time, or in some cases at all, as a result of the backlog of cases awaiting authorisation. It is expected that LPS will be more streamlined than the existing DOLS system because of the fewer assessments and increased period by which authorisations can be renewed.

LPS will also be a more equitable system, as it will be applicable for any setting, rather than just registered care settings.

Finally the extension of the age group to include 16 & 17 years olds, means that the rights of young people transitioning to adulthood will be better safeguarded and any deprivations of liberty, where they are unable to consent to their care or treatment, is considered in the same way as those 18 and above.

The Code of Practice was expected to be published in Spring 2020, delayed to late summer 2020 and currently does not have a release date, which will set out how the new system will operate in practice.

Adverse Equality Impact Rating

Low

² NHS Digital, Mental Capacity Act 2005 Deprivation of Liberty Safeguards 2017-2018 report

³ <https://publications.parliament.uk/pa/bills/lbill/2017-2019/0117/mental-capacity-IA.pdf>

Attestation

I have read and paid due regard to the Equality Analysis/Impact Assessment concerning **the transition and implementation of Liberty Protection Safeguards** . I agree with risk rating and the actions to mitigate any adverse impact(s) that has /have been identified.

Head of Service Signed:	Name: Maureen Stirrup
Job Title: Head of DOLS	Date:
DMT Member Signed:	Name: Akua Agyepong
Job Title: Assistant Director (countywide services)	Date:

Part 1 Screening

Could this policy, procedure, project or service, or any proposed changes to it, affect any Protected Group (listed below) less favourably (negatively) than others in Kent?

Could this policy, procedure, project or service promote equal opportunities for this group?

Please provide a brief commentary on your findings. Fuller analysis should be undertaken in Part 2.				
Protected Group	High negative impact EqlA	Medium negative impact Screen	Low negative impact Evidence	High/Medium/Low Positive Impact Evidence
Age	No	No	No	<p>Impact is expected to be positive on this protected characteristic, as majority of those subject to deprivation of liberty are older adults (85+), many of whom have dementia.</p> <p>Younger people (aged 18-64) are generally supported more in the community to a greater extent than for those aged 65 and over. They will be impacted as the safeguards will now apply to this cohort of persons in domestic community settings.</p> <p>Similarly, there are benefits for 16&17 year olds being included in safeguards through LPS</p>

Disability	No	No	No	Impact is expected to be positive on this protected characteristic, as all those subject to deprivation must be assessed to lack capacity to consent.
Sex	No	No	No	The majority of DOLS applications both nationally and in Kent are for females (approx. 60%). This means that the impact is expected to be particularly positive for females.
Gender identity/ Transgender	No	No	No	Whilst gender identity/transgender information is routinely collated as part of DOLS applications, most 'decline to respond' It is unlikely to have an impact either way
Race	No	No	No	The proportion of applicants for DoLS from BAME backgrounds is lower than that compared to those who are in receipt of social care. Part of the reason is that majority of

				BAME prefer to receive care and support in their own home. In this respect the new legislation is likely to have a positive impact.
Religion and Belief	No	No	No	Most people do not respond positively to questions regarding religion and belief. The impact of LPS is likely to be positive on this group, reflective of the BAME communities, who prefer receiving care in the community.
Sexual Orientation	No	No	No	<p>Whilst sexual orientation is routinely collated as part of DOLS applications, positive identification is received on 50% of applications, who identify as Heterosexual, with the remainder either 'decline to respond' or 'Not captured'.</p> <p>It is unlikely to have an impact either way</p>

Pregnancy and Maternity	No	No	No	Pregnancy and maternity unlikely to be impacted.
Marriage and Civil Partnerships	N/A	N/A	N/A	N/A
Carer's Responsibilities	No	No	No	It is likely the impact of LPS will be positive on Carers. Currently those deprived of their liberty in the community need to go through the Court of Protection, which is lengthy and complex. LPS will make it much simpler.

Part 2

Equality Analysis /Impact Assessment

Protected groups

(Who will be directly or indirectly negatively affected by the changes?)

Analysis by protected characteristic

Age

Older people are more likely to be deprived of their liberty under the DoLS and so will feel the greatest positive impact of the changes. This is due to the higher number of older adults being in care homes compared to younger adults, compounded with the fact that age-related conditions such as dementia affect mental capacity.

Younger people (aged 18-64) are generally supported more in the community to a greater extent than for those aged 65 and over. They will be impacted as the safeguards will now apply to this cohort of persons in domestic community settings. This will be beneficial as it is a more streamlined process than having to apply to the Court of Protection.

Arrangements for 16 and 17-year olds are currently authorised through parental consent, or through the Court of Protection. Currently going through the Court of Protection is burdensome and could be distressing for a young person: this would be alleviated by having easier access to safeguards.

Disability

People with a disability, as defined in the Equality Act 2010, will be disproportionately affected by LPS (which specifically applies to people with mental disorder who lack mental capacity to consent to arrangements enabling care or treatment that give rise to a deprivation of liberty) in comparison to those without disability.

LPS is expected to have a more proportionate approach, with longer authorisations than the current system (up to 3 years after 2 initial 12 month authorisations) as well as the option to trigger a review, with the effect of reducing the burden of potentially invasive assessments upon people with long term and stable conditions and their families.

The extension of the model to deprivation of liberty in community settings removes an inequality between people with disabilities being cared for at home, versus those who are being cared for in care homes or hospitals.

Sex

The NHS Digital Report 2017/18 shows that 60% of applications for DoLS are made in relation to women⁴, across both England and Wales. This is

⁴ <https://digital.nhs.uk/data-and-information/publications/statistical/mental-capacity-act-2005-deprivation-of-liberty-safeguards-assessments/annual-report-2017-18-england>

replicated in Kent. This may be because women have a longer life expectancy so are therefore more likely to lose capacity because of age related conditions. This means that women will be impacted more and benefit more from the increased access to safeguards provided by the Liberty Protection Safeguards.

Race

The proportion of applicants for DoLS from BAME backgrounds is lower than that compared to the proportion in social care, and of the overall 18+ population. Department of Health & Social Care conducted engagement workshops with a range of stakeholders including those from BAME backgrounds. Participants from BAME communities indicated that people from their communities have a preference to receive care in their own home.⁵

Under the current system, deprivations of liberty that occur in domestic and community settings must be authorised by the Court of Protection. These will be covered by the Liberty Protection Safeguards, meaning individuals can be assessed and authorised without going to court. This will cost less than the current process of applying to the Court of Protection, takes less time and is more straightforward which is beneficial to the individual and their family. The easier access to the LPS should advance equality of opportunity, making the authorisations representative of the overall population, and improve the experience for those of BAME backgrounds. This is a positive impact as more of this group may now benefit from the additional safeguards which they may have not previously accessed.

It is also worth observing that people from BAME groups have much higher rates of detention under the Mental Health Act than White people nationally, as reported by the CQC in their 2018 report⁶.

Religion or belief

We do not hold sufficient data on religion or belief so are unable to analyse whether the current system applies to anyone disproportionately based on this characteristic, and accordingly whether they would experience an adverse impact. All people will be subject to the same process for Liberty Protection Safeguards, regardless of religion or belief.

Other protected Characteristics:

All people subject to the Liberty Protection Safeguards will be subject to the same process for assessment and authorisation of a deprivation of liberty regardless of gender reassignment, their sexual orientation or the characteristic of pregnancy and maternity. We do not have sufficient data to make a robust analysis of the potential impact to people who share them. However, we do not expect these groups will be differentially or adversely effected by the implementation of the LPS.

⁵

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/765385/equality-impact-assessment.pdf

⁶ The rise in the use of the MHA to detain people in England.

Impacts on Carers

According to Carers UK, 58% of unpaid carers are women,⁷ so, they will disproportionately benefit from the benefits of Liberty Protection Safeguards.

Under the Mental Capacity Act people who lack capacity to consent and receive care or treatment in domestic settings (outside of the current DoLS system) must have any deprivation of liberty authorised by the Court of Protection. This is a long process which requires the person, a family member or other carer or the CCG/local authority to go to court (potentially at financial cost to themselves) and leaves them with a level of uncertainty as it can be months before some cases are heard. LPS reduces the need to escalate a deprivation of liberty to the Court of Protection, whilst ensuring that the cared-for person receives an appropriate level of safeguards.

Information and Data used to carry out your assessment

Data sources have been indicated as footnotes throughout the document.

Who have you involved consulted and engaged?

Not Applicable - The Mental Capacity Amendment Act is a new legislation and a statutory function. Department of Health conducted consultations and engagement events for the passing of the Bill. Further consultations expected for the corresponding Code of Practice.

Analysis

Overall the impact on all protected characteristics is expected to be positive.

Adverse Impact,

No adverse impact identified in relation to protected characteristics.

Positive Impact:

The overall impact of LPS is expected to be positive on protected characteristics. At present, many people who ought to be assessed under the present framework are simply not receiving these assessments. The current DoLS system is only applicable in registered care settings for adults 18+. The demand on the service after the supreme court ruling almost brought the system to a halt, resulting in a backlog of non-priority applications. This has meant that many people have been left without a legal framework to safeguard their deprivation of liberty.

LPS will enable deprivations of liberty to be authorised in any setting, particularly important for those in the community who have had to use the Court of protection.

In addition, by increasing the eligible age group to include 16 & 17 year olds, means that young people assessed to lack capacity to consent to their care and treatment will now have a route to have their applications assessed and authorised in the same way as adults.

⁷ <https://www.carersuk.org/news-and-campaigns/press-releases/facts-and-figures>

Finally, LPS is expected to have a significant positive effect on human rights, and compliance with Article 5 of the European Convention on Humans Rights.

JUDGEMENT

Set out below the implications you have found from your assessment for the relevant protected group(s). If any negative impacts can be justified please clearly explain why. Identify the option to address the impact. There are four possible options:

- **No major change** - no potential for discrimination and all opportunities to promote equality have been taken

Internal Action Required NO

There is potential for adverse impact on particular groups and we have found scope to improve the proposal...

(Complete the Action Plan- please include dates for monitoring and review)

Equality Impact Analysis/Assessment Action Plan

Protected Characteristic	Issues identified	Action to be taken	Expected outcomes	Owner	Timescale	Cost implications
All protected characteristics	Standardised collection and recording of protected characteristics as part of the performance monitoring framework	Consider data collation when developing LPS forms Consider data collection as part of the 'systems' development to record protected characteristics	More robust information regarding protected characteristics to inform areas that are under represented, the reason for such instances and to develop action plans to address gaps	Project manager during the lifetime of the project	Jan – Oct 2020	None expected

Have the actions been included in your business/ service plan? N/A

Please forward a final signed electronic copy and Word version to the Equality Team by emailing diversityinfo@kent.gov.uk

If the activity will be subject to a Cabinet decision, the EqlA must be submitted to committee services along with the relevant Cabinet report. Your EqlA should also be published .

The original signed hard copy and electronic copy should be kept with your team for audit purposes.