

# Children's Rights Impact Assessment: Liberty Protection Safeguards

Describe and explain the impact of the proposal on children and young people

## Background:

The Mental Capacity Act 2005 governs decision-making on behalf of those persons who lack mental capacity.

A person lacks mental capacity if they are unable to make a decision for themselves because of an impairment of, or a disturbance in the functioning of their mind or brain. A person who lacks mental capacity may be unable to consent to their care, support or treatment under wider rights and entitlements to assess and meet and individual's needs (referred to as P) under the Social Services and Well-being (Wales) Act 2014 (SSWA), the Additional Learning Needs and Education Tribunal (Wales) Act 2018 (ALNETA) and the Mental Health (Wales) Measure 2010 (MHM). This legislation is collectively referred to as "the relevant legislation" for the purposes of this impact assessment.

Where arrangements under the relevant legislation amount to a deprivation of a person's liberty due to the degree of restrictions or confinement they involve, the appropriate lawful authority to begin or continue those arrangements must be sought. The process for obtaining lawful authority is currently contained under the Deprivation of Liberty Safeguards (DoLS). The Liberty Protection Safeguards (the LPS) are a new system introduced by the UK Mental Capacity (Amendment) Act 2019 that will replace DoLS.

The need for urgent reform of the current law and DoLS is widely recognised across the system in Wales and England, including from people with lived experience and carers. There is strong Ministerial commitment to implementing the new safeguards in Wales. There is a specific commitment to reform included in the Mental Health Delivery Plan for Wales 2019-2022.<sup>1</sup> Currently, Health Inspectorate Wales (HIW) and Care Inspectorate Wales (CIW) have a responsibility for reporting on DoLS on behalf of Welsh Ministers. Previous reports can be accessed here:

## [HIW & CIW Reports on DoLS](#)

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<sup>1</sup> [Welsh Government Mental Health Delivery Plan 2019 to 2022](#)

Although the Mental Capacity Act 2005 is a reserved subject matter, the Mental Capacity (Amendment) Act 2019 contains regulation-making powers for the Welsh Ministers to implement the LPS in Wales.

Welsh Government is consulting on draft Regulations for Wales. As part of the consultation, Welsh Government will publish Plain English / Welsh and Easy Read versions of the Regulations. These will also be made available on the Welsh Government consultation website.

### How will the proposal affect the lives of children, positively and negatively?

The DoLS/LPS are part of the Mental Capacity Act 2005 which is the legal framework in Wales and England about how decisions are made when a person lacks the mental capacity to make that decision for themselves, for instance due to a learning disability, stroke, brain injury, mental disorder, or dementia.

The purpose of the LPS are to protect the Article 5 Rights (under the European Convention on Human Rights) of people who lack mental capacity to consent to their health and/or social care and treatment. Where those arrangements amount to a deprivation of a person's liberty due to the degree of restrictions or confinement they involve, the appropriate lawful authority to begin or continue those arrangements must be sought.

While most of the Mental Capacity Act 2005 applied to people aged 16 and over, the DOLs only applied to adults aged 18 and over. The LPS system provides safeguards for people aged 16 and over who lack the mental capacity to consent to their care, support or treatment and those arrangements amount to a deprivation of their liberty i.e. they are not free to leave a place permanently and are under continuous supervision and control.

Additionally, unlike DoLS (which only applied to arrangements in care homes and hospitals and to people aged 18 and above), the LPS will apply in all settings (e.g. care homes, nursing homes, hospitals, supported living, people's own homes, day services, sheltered housing, shared lives and post-16 specialist education placements). Crucially – they will also apply to anyone aged 16 and over. At present, the deprivation of liberty for a young person aged 16 and 17 is authorised through an application to the Court of Protection. This places the onus upon NHS bodies and local authorities to initiate burdensome and costly court proceedings. The introduction of the LPS will mean that the same safeguards will apply to everyone over the age of 16, while the Court of Protection will continue to safeguard the interests of those children below the age of 16. This will enable the majority of deprivations of liberty to be authorised in a

more efficient and straightforward manner and ensure young people are provided with practical and effective Article 5 rights.

The new LPS system will involve three new assessments (replacing the six assessments undertaken under DoLS). There will also be an enhanced role of the Independent Mental Capacity Advocate (IMCA) to support the person and those acting on their behalf to ensure that their views, wishes and feelings inform their care, support or treatment arrangements – as well as a new role of the Approved Mental Capacity Professional (AMCP) to add additional scrutiny for more complex cases. Local authorities or local health boards in Wales will authorise and oversee the safeguards in their role as Responsible Bodies (currently known as Supervisory Bodies).

### *Well-Being of Future Generations (Wales) Act 2015*

The development of the draft Regulations to support the implementation of the LPS in Wales has been considered in line with the Well-Being of Future Generations (Wales) Act 2015, the Welsh Government's well-being objectives and the principles of sustainable development.

The 2015 Act requires us to think about the long-term impact of our decisions and to work collaboratively with colleagues and stakeholders to make connections between economic, social, environmental and cultural challenges and to find sustainable solutions for Wales.

The LPS aim to ensure that people are only deprived of their liberty if this is necessary and proportionate. The implementation of LPS will provide a more streamlined system that will enable authorisations to be processed more efficiently, which means vulnerable people will be able to access safeguards more quickly.

The LPS will support some of our most vulnerable groups in society – thereby making an important contribution to the wellbeing goal of a healthier Wales, where people's physical and mental well-being is maximised and in which choices and behaviours that benefit future health are understood. The LPS will also make an important contribution to the wellbeing goal of a more equal Wales – as the safeguards will support and enable people no matter what their background or circumstances.

Regarding the principles of sustainable development: As we consult on the draft regulations, there will be an ongoing focus on the long-term and preventative aims of the LPS – and ensuring these important safeguards are improving outcomes, and preventing issues from occurring or deteriorating (which we will consider as part of ongoing monitoring and reporting).

We are also continuing to working collaboratively with a range of stakeholders through our LPS National Implementation Steering Group for Wales and the specific workstreams / sub-groups we have established on monitoring and reporting; workforce and training; transition arrangements (as we move from DoLS to LPS);

and 16 and 17 year olds. These work streams include an ongoing focus on ensuring the person is at the centre of the new safeguards. We will also have ongoing engagement with those who have a lived experience of the current DoLS system, for example, through the Welsh Government's Dementia Oversight of Implementation and Impact Group (DOIIG), the Mental Health Forum Wales, and the through the engagement work planned with young people being led by Children in Wales.

## New Regulations for Wales:

To support the implementation of the LPS in Wales, there will be four areas of legal safeguards underpinned by Welsh Regulations. These will focus on:

- Enhancing the role of IMCAs.
- Creating a new role of AMCPs and arrangements for their approval by local authorities, training requirements and a prescribed body for approval of that training (in Wales – this will be Social Care Wales).
- Agreeing and setting out which professionals can undertake LPS related assessments, pre-authorisation reviews and make decisions.
- Prescribing public bodies (CIW / HIW / Estyn) to monitor and report on the LPS.

The Regulations are required to implement the LPS in Wales. Without these Regulations, the legal frameworks needed to support the implementation of the LPS in Wales will not be in place.

## Approved Mental Capacity Professionals (AMCP) Regulations – Background:

To support the implementation of the LPS in Wales, the draft AMCP Regulations will:

- Set out the criteria which must be met by a person to be eligible for approval by a local authority in Wales as an AMCP.
- Specify the matters that a local authority may take into account before approving a person as an AMCP.
- Provide for Social Care Wales to approve training for AMCPs in Wales.
- Provide for Welsh Ministers to approve courses which will enable people who are currently Best Interests Assessors under the existing DoLS scheme to become AMCPs under the LPS.
- Set out training requirements for the AMCPs.

- Include provision for the circumstances when a person's approval as an AMCP will be suspended and specify when approval will end.
- Enable a local authority to approve Best Interests Assessors as AMCPs, who successfully complete a conversion course, if the local authority is satisfied they meet other criteria set out in the Regulations.

### Independent Mental Capacity Advocate (IMCA) Regulations – Background:

The IMCA Regulations will support the planned implementation of the LPS by amending our existing IMCA Regulations (the Mental Capacity Act 2005 (Independent Mental Capacity Advocates (Wales) Regulations 2007) to reflect the changes taking place and which enhance the existing role and functions of IMCAs, under Schedule AA1 of the UK Mental Capacity Act 2005.

The purpose of an IMCA is to support P (the person) to participate in decisions; to ascertain P's views, wishes and feelings; to ascertain alternative courses of action including less restrictive options (in terms of the person's care, support or treatment); to report these to the Responsible Body; and to maintain contact with P.

Every person subject to the LPS will have ongoing representation and support from either an 'Appropriate Person' or an IMCA. It is the duty of the Responsible Body (health boards and local authorities in Wales) to ensure that there is an Appropriate Person or IMCA provided as soon as an application for an authorisation of a person's deprivation of liberty is made. IMCAs must be enabled to act independently of the person or body instructing them.

Under the LPS, the Responsible Body is required to take reasonable steps to appoint an IMCA if:

- the person has capacity to consent to the appointment and makes a request; or
- the person lacks capacity to consent, unless the Responsible Body is satisfied that being represented and supported by an IMCA would not be in the person's best interests.

The purpose of the IMCA is to represent and support people who lack the capacity to make important decisions about their care, support or treatment. The duty to take reasonable steps to appoint an IMCA, however, does not apply if there is an Appropriate Person to represent and support the person. In most cases, this will be a family member or friend of the person. IMCAs will work with and support people who lack the relevant capacity, and represent their views to those who are working out the best interests of the cared-for person. When there is no suitable individual to act as an Appropriate Person, in most cases an IMCA will help represent and support the

person. An IMCA must also be appointed to support the Appropriate Person to represent and support the person where they request one.

### Who Can Undertake Assessments, Determinations and Pre-Authorisation Reviews – Background:

The main purpose of these Regulations is to set out who is eligible to undertake certain assessments under the LPS and make the decisions about three authorisation conditions. These conditions are:

- The person lacks capacity to consent to the arrangements (care, support or treatment), known as “the mental capacity” assessment.
- The person has a mental disorder, known as “the medical/diagnostic” assessment.
- The arrangements are necessary to prevent harm to the cared-for person and proportionate in relation to the likelihood and seriousness of harm to the cared-for persons, known as the “necessary and proportionate” assessment.

These assessments are central to the LPS process. Before an LPS authorisation can be given, a pre-authorisation review must be carried out by someone independent from those providing the day-to-day care, support or treatment. This must review the assessments and determine whether the “authorisation conditions” are met (i.e. that the three assessments have reached the appropriate conclusion). Only once the pre-authorisation review has been concluded can the Responsible Body give an authorisation of the deprivation of liberty.

### Monitoring and Reporting Regulations – Background:

The Regulations on monitoring and reporting are required to support the implementation of the LPS in Wales. Without these Regulations, there will be no monitoring of the operation of the LPS, which would be to the detriment of some of the most vulnerable individuals in Wales. HIW, CIW and Estyn are the most appropriate bodies to monitor and report on the operation of the LPS in Wales. It is a matter of public record already that they will have a key role in the implementation and operation of the new system. The Regulations on monitoring and reporting will give HIW, CIW and Estyn the power to:

- A. Visit a setting where an authorised deprivation of liberty is being carried out.
- B. Meet with cared-for persons (either in the settings where the authorised deprivation is happening or elsewhere).
- C. Require records relating to the care and treatment / support / additional learning provision of that person, and to inspect those. Specifically, HIW / CIW / Estyn can

request these records from a setting where an authorisation is in place before, when or after they visit the setting.

D. Issue an annual report on the operation of the LPS. It is anticipated that this will involve the publication of a tri-partite report – developed by CIW, HIW and Estyn.

The intention is that the monitoring and reporting Regulations will broadly empower the prescribed bodies to carry out the functions above. As the new LPS system will also apply to people's own homes, monitoring and reporting on the LPS will also include these settings. The detail of how CIW / HIW / Estyn will include people's own homes as part of monitoring and reporting arrangements is being worked through, and further detail will be included as part of the UK Government Code of Practice for the LPS and the Monitoring and Reporting Strategy for Wales, which is currently being developed.

With the view to ensuring there is consistency across the health boards and local authorities in Wales on how the LPS is being monitored, Welsh Government is working with partners to develop a National Minimum Data Set (NMDS) on the LPS for Wales. The NMDS is comprised of a set of key data items on the LPS – that we would expect the Responsible Bodies (health boards and local authorities) to collect. It includes data items on the protected characteristics of those individuals where there has been an application under the LPS to authorise the care, support or treatment arrangements that amount to a deprivation of liberty, where an individual lacks the mental capacity to agree to these arrangements.

The UK Government has led on the development of a NMDS for England. This NMDS data set has been considered by the Monitoring and Reporting Sub Group for the LPS in Wales – and has been amended to reflect the position for Wales. With the view to agreeing the NMDS for Wales, Welsh Government officials have submitted a data development proposal to the NHS Digital Health and Care Wales. The proposal has been considered by the Welsh Information Development Group of the Welsh Information Standards Board (WISB). Welsh Government and Digital Health and Care Wales are now working with the health boards and local authorities, with the view to agreeing each of the data items included in the NMDS and its future collection. A series of workshops have been held with stakeholders. Health boards and local authorities have also completed impact assessments on the future collection of the NMDS. A full data development proposal will now be submitted to WISB, with the view to agreeing a Data Standards Change Notice (DSCN).

### Plans for the Implementation of the LPS in Wales:

Plans for the implementation of the LPS in Wales are aligned with that of the UK Government, as the parent act for the draft Regulations – the Mental Capacity

(Amendment) Act 2019 – is UK Government led legislation. The UK Government are planning to consult on draft Regulations for England and a draft Code of Practice for England and Wales. Welsh Government is consulting on the draft Regulations for Wales at the same time.

How will the proposal affect different groups of children (e.g. those from ethnic minority communities, children who have experienced adverse childhood experiences (ACEs), children living in poverty, children with a disability, children living in Welsh speaking households and children in Welsh medium education etc.)

The new safeguards will protect the Article 5 Rights (under the European Convention on Human Rights) of young people aged 16 and 17 who lack mental capacity (to consent to their health and/or social care, support or treatment). This will include young people from ethnic minority communities, those with disabilities, those living in poverty, and those in Welsh speaking households. As part of the NMDS for the LPS currently being developed, we will collect data on protected characteristics with the view to monitoring the impacts of the LPS on different groups on an ongoing basis. We will also use the consultation period to gather further evidence of impacts on those with protected characteristics, children and young people with Adverse Childhood Experiences, young people living in Welsh speaking households, and those living in poverty. Welsh Government will also be engaging with stakeholders regarding a draft Workforce Plan and Training Framework – to ensure the LPS workforce for Wales is in place and has the necessary skills and competencies to provide support. The Workforce Plan and Training Framework includes a specific reference to cultural competency to ensure children and young people from ethnic minority communities are supported appropriately.

What evidence have you used to inform your assessment, including evidence from children or their representatives?

As part of overall governance arrangements for the implementation of the LPS in Wales (see next section of the CRIA), we have established a specific sub group on 16 / 17 year olds, which includes representatives from health boards, local authorities, Social Care Wales, the Children's Commissioner, and front line practitioners with experience of working with children who lack capacity – with the view to ensuring we are developing draft Regulations for Wales that take account of the needs of young people. Through the 16 /17 year old sub group, there has been a specific focus on looking at the LPS from the perspective of the young person, with the view to promoting children's rights as part of the LPS, and ensuring we develop information and supporting materials for young people that reflect their needs. Alongside the work



of the 16 / 17 year old sub group, Welsh Government is also working with Children in Wales to engage with young people as part of the consultation on the draft Regulations. The engagement sessions planned will help to ensure the Regulations for Wales and also the Code of Practice for the LPS (as we can feedback findings to the UK Government if there are specific points we would want to include as part of the Code of Practice) – are informed by the views of young people.

### Collaboration and Consultation with Stakeholders:

As highlighted in the previous section, Welsh Government has established specific governance arrangements to support the development and implementation. This includes the establishment of an LPS National Implementation Steering Group for Wales in March 2020. Members of the Steering Group include representatives from health boards, the NHS, Social Care Wales, HIW, CIW and Estyn – and where there is an emphasis on working collaboratively and working across the sub-groups to ensure a comprehensive and coherent approach.

The LPS National Implementation Steering Group reports to the recently established Together for Mental Health Ministerial Delivery and Oversight Board, which is chaired by Deputy Minister for Mental Health and Wellbeing.

We have also established specific work streams / sub-groups to support the development of the Regulations and to plan for implementation. These sub groups are focussed on monitoring and reporting; workforce and training; transition arrangements (as we move from DoLS to the LPS); and 16/17 year olds. These work streams include an ongoing focus on ensuring the person is at the centre of the new safeguards.

The work of the sub group on 16/17 Year Olds has helped to ensure that the needs of children and young people are reflected throughout the LPS including the draft Regulations, the draft Workforce Plan and Training Framework for the LPS, and the draft Monitoring and Reporting Strategy for the LPS in Wales. Welsh Government will be engaging with stakeholders regarding the draft Workforce Plan and Training Framework, and the draft Monitoring and Reporting Strategy alongside the consultation on the draft Regulations.

We will also have ongoing engagement with those who have a lived experience of the current DoLS system, for example, through the Welsh Government's Dementia Oversight of Implementation and Impact Group (DOIIG) and through the 3 Nations Group on Dementia (which is chaired by a member of the DOIIG), as well as with the Mental Health Forum (supported by Practice Solutions). Through the work being planned by Children in Wales for the consultation on the draft Regulations, we will also be engaging with young people.

In the lead up to consulting on the draft Regulations for Wales (and as part of a wider LPS Engagement Plan) Welsh Government officials have met with key stakeholders, including officials from the office of the Children’s Commissioner, the office of the Older People’s Commissioner, the WCVA, Care Forum Wales and safeguarding boards.

Welsh Government will be consulting on the draft Regulations for Wales for a period of 16 weeks. As part of this consultation, there will be a specific focus on the rights of children and young people. The draft CRIA will be published alongside the draft Regulatory Impact Assessment, and we will seek specific additional evidence on the anticipated impacts on children’s rights in order to test the assumptions co-produced through our cross sector sub-groups.

Through the 16/17 Sub group on the LPS – we have also engaged with stakeholders regarding our initial analysis of the articles of the UNCRC and how they will be supported by the LPS. A session was held in January 2021, where the 16/17 Sub Group looked at the LPS from the perspective of the young person, and identified ways in which the safeguards will help to protect and promote the rights of children and young people. Annex 1 to this CRIA has been informed by the session held in January.

In line with article 17 of the UNCRC (every child has the right to reliable information from a variety of sources, and governments should encourage the media to provide information that children can understand) we plan to publish Plain English and Easy Read versions of the draft Regulations, a Plain English / Easy version of the Explanatory Memorandum and Regulatory Impact Assessment, and an Easy Read consultation response form. These will be available on the Welsh Government consultation website.<sup>2</sup>

## How have you consulted with children and young people?

There is ongoing engagement with the Youth Parliament on mental health related matters.

As part of the consultation on the draft LPS Regulations, there will be specific appropriate and sensitive engagement with young people – including those with lived experience of where their care, support or treatment has amounted to a deprivation of their liberty, and where this has been authorised under previous arrangements. Welsh Government is working with Children in Wales to engage with young people as part of the consultation on the draft Regulations. The engagement sessions planned will help

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<sup>2</sup> [Welsh Government Consultation on the LPS for Wales \(Welsh\)](#) [Welsh Government Consultation on the LPS for Wales \(English\)](#)

to ensure the Regulations for Wales and also the Code of Practice for the LPS (as we can feedback findings to the UK Government if there are specific points we would want to include as part of the Code of Practice) – are informed by the views of young people.

### Impacts on children's rights:

The Rights of the Children and Young Persons (Wales) Measure 2011 requires policy to have due regard to the rights contained within the United Nations Convention on the Rights of the Child (UNCRC). The inclusion of 16 and 17 year olds into the LPS provides a more proportional route to legal safeguards (as opposed to applications to the Court of Protection) achieving parity with the safeguards currently available to persons aged 18 and over. The development of the new Regulations for Wales and the implementation of the LPS in Wales will take account of the rights of the child under the UNCRC.

We anticipate that the implementation of the LPS in Wales will have a positive impact on Children and Young People through enhanced arrangements to secure their views, wishes and feelings and supporting them to participate in decisions about their care, support or treatment. Annex 1 sets out the individual articles of the UNCRC and considers how they will be supported by the LPS. This includes a specific focus on how the LPS increases children's access to their rights (and / or increases access to services and resources that give access to rights), and how they enable children and young people to participate and take advantage of their rights.

As part of Annex 1, we have also considered how the implementation of the LPS will impact on the rights of different groups of children (including children and young people from minority ethnic communities, those living in poverty, and children and young people with disabilities).

### Positive Impacts:

We anticipate that the LPS and the draft Regulations for Wales will support children's rights in a number of different ways. The LPS safeguards are there to:

- Create a new simplified legal framework which is accessible and clear to all affected parties with independent support and scrutiny of decision making.
- Deliver improved outcomes for persons deprived of their liberty and their families / unpaid carers by ensuring views, wishes and feelings are heard and the least restrictive options implemented.

- Provide a simplified authorisation process capable of operating effectively in all settings.
- Ensure that the Mental Capacity Act works as intended, by placing the person at the heart of decision-making and that it is compliant with Article 8 of the European Convention on Human Rights (right to respect for a person’s private and family life, the home and their correspondence, subject to certain restrictions that are “in accordance with law” and “necessary in a democratic society”).

#### IMCAs:

As soon as a referral is made to the Responsible Body, the Responsible Body must take reasonable steps to appoint an Independent Mental Capacity Advocate (IMCA), unless there is someone else (such as a family member or someone else close to the person) who could act as the Appropriate Person. The Appropriate Person and the IMCA’s role will be to represent and support the person through the process. When arrangements are proposed, the Responsible Body must take practicable steps, such as providing information, to ensure that the person, and the Appropriate Person understand the process. The role of the IMCA is an important safeguard in the LPS to ensure that the voice and interests of the individual are at the heart of decision-making about their care, support or treatment. In particular, an IMCA should ensure that the person’s wishes and feelings are represented throughout the LPS process, which is reflected in the draft Code of Practice for the LPS. An Appropriate Person will also be able to seek support from an IMCA.

#### AMCPs:

The AMCP is a new role within the LPS and the health and social care workforce. The AMCP replaces and develops the role of the Best Interests Assessor under the DoLS and is loosely modelled on the Approved Mental Health Professional role.

AMCPs will play a critical role in supporting the rights of those who lack mental capacity and ensuring that the Humans Rights of people in Wales are better protected. Their role will be fundamental to promoting the key principles of the Mental Capacity Act 2005, which are:

- A person must be assumed to have capacity unless it is established otherwise; a person is not to be treated as unable to make a decision, unless all practicable steps to help them do so have been taken without success.
- A person is not to be treated as unable to make a decision merely because an unwise decision is made.

- An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
- Before making any decision or undertaking any act, care must be taken to avoid restricting the person's rights and freedom of action.

Before a Responsible Body (a local authority or a health board in Wales) can decide whether to authorise arrangements amounting to a deprivation of liberty, a pre-authorisation review of the person's case must be carried out and the appropriate determination made. An AMCP will carry out the pre-authorisation review of the person's case if:

- it is reasonable to believe that the person does not wish to reside in the place proposed in the arrangements;
- it is reasonable to believe that the person does not wish to receive care, support or treatment at the place proposed in the arrangements;
- the proposed arrangements are for the person to receive care, support or treatment mainly in an independent hospital;
- the Responsible Body refers the case to an AMCP and the AMCP accepts the referral.

AMCPs are also required, if appropriate and practicable, to meet the person, and consult with those involved in their care, support or treatment, and those with an interest in the person's welfare, such as family members, or take any further action. In many cases, AMCPs will be expected to consider whether alternative arrangements can be put in place which minimises the restrictions placed on the person and/or prevents a deprivation of liberty. In their role – they will help to support children and young people to access their rights under the UNCRC.

#### Monitoring and Reporting:

The LPS will apply to all 16/17 year olds who lack mental capacity in all settings, including their own home. Monitoring and reporting will help to protect their rights by ensuring proposed deprivations of liberty are scrutinised, authorised and reviewed effectively; ensuring authorisations are being carried out properly; by preventing abuse (aligning with the Operational Protocol to the Convention Against Torture); identifying national and local trends in the operation of the LPS; and promoting high standards informed by data on protected characteristics.

#### Who can undertake assessments, determinations and pre-authorisation reviews:

The LPS will provide strengthened authorisation and review that is compliant with Article 5 of the European Convention on Human Rights (ECHR). Undertaking assessments will determine whether three authorisation conditions are met – thereby protecting the rights of those who lack mental capacity to agree to the proposed care,

support or treatment arrangements. The assessments that will be undertaken are a medical assessment, a mental capacity assessment to determine if the person lacks capacity, and an assessment to determine if the care, support or treatment arrangements are necessary and proportionate.

### Negative Impacts:

The restriction of anyone's liberty, particularly those who lack capacity, are actions of last resort. Although the LPS will overall support the rights of children and young people in Wales, the independent support and scrutiny of the decisions required seek to provide balance and a focus on best interests and improving outcomes which in turn result in the least restrictive option. In particular, there has to be balance between Article 5 of the ECHR (everyone has the right to liberty and security of person) and Article 8 (which protects a person's right to respect for their private and family life). The CRIA will be kept under review and we will use the consultation on the draft Regulations to gather further evidence of potential negative impacts and unintended consequences from stakeholders.

### UNCRC articles that are most relevant to the LPS:

DoLS authorisations only authorise the actual deprivation of liberty, whereas the LPS authorisations authorise the arrangements for care that give rise to the deprivation of liberty. This is an important distinction, since the new process focuses more on the support and care of the child. There are links to Article 6 (ensuring children develop to their full potential), Article 18 (support services for children), Article 23 (dignity for disabled children) and Article 27 (adequate standard of living).

The UNCRC Articles and children's rights most relevant to the LPS include the following:

#### **Article 3: The best interests of the child must be a top priority in all decisions and actions that affect children.**

- Best interest decisions are at the heart of the LPS informed by person centred-planning wherever statutory duties arise. There will be a specific focus on establishing and reinforcing the young person's views, wishes and feelings as part of the LPS assessment, authorisation and review processes, alongside an ongoing consideration of what are the least restrictive options for care, support or treatment.

**Article 19: Governments must do all they can to ensure that children are protected from all forms of violence, abuse, neglect and bad treatment by their parents or anyone else who looks after them.**

- Article 19 is also fundamental to the implementation of the LPS. The safeguards are all about ensuring that before a person is deprived of their liberty all alternative options are explored and scrutinised before it can be authorised and is then subject to review at agreed intervals to ensure those decisions remain robust and the care, support or treatment arrangements are necessary and appropriate.
- Through the assessment, authorisation and review processes, there will be a continued focus on safeguarding and ensuring that the individual is protected from violence, abuse, neglect and bad treatment.

**Article 20: If a child cannot be looked after by their immediate family, the government must give them special protection and assistance. This includes making sure the child is provided with alternative care that is continuous and respects the child's culture, language and religion.**

- The safeguards provided by the LPS are there to support those who lack mental capacity and whose care, support or treatment amount to a deprivation of liberty. For those young people subject to the LPS, whether living with their family or not, the safeguards are in place to ensure that their rights are protected and that their care, support or treatment is necessary and proportionate, the least restrictive possible and in their best interests.

**Article 23: A child with a disability has the right to live a full and decent life with dignity and, as far as possible, independence and to play an active part in the community. Governments must do all they can to support disabled children and their families.**

- Article 23 is also at the heart of the Liberty Protection Safeguards. The safeguards are there to protect the rights and interests of those young people by ensuring their views and wishes inform the development of their care, support or treatment and that they, and their Appropriate Person, can access support to ensure they are heard.
- For those young people with disabilities, the safeguards will help to support their right to live a full and decent life with dignity and (as far as possible) independence. In any decision or act that affects them, the principles of the Mental Capacity Act mean that these should be in their best interests and also the least restrictive option.

Annex 1 to this CRIA provides further information on the individual articles of the UNCRC and how they will be supported by the LPS in Wales.

### Measuring Impact:

To support the implementation of the safeguards in Wales, Welsh Government will be working in partnership with Health Inspectorate Wales, Care Inspectorate Wales and Estyn to develop a Monitoring and Reporting Strategy for Wales. This will include a specific focus on measuring the impact of the LPS and the extent to which the safeguards are delivering improved outcomes. As highlighted in earlier this CRIA, a National Minimum Data Set will be developed for the LPS in Wales (which aligns with the approach being taken in England).

### Advice to Ministers:

We have considered the UNCRC when developing the draft Regulations to support the implementation of the LPS in Wales. Ministerial advice has included reference to a CRIA being undertaken. As Welsh Government consults on the draft Regulations for Wales, we will continue to embed the principles of the UNCRC across policy and the Code of Practice for the LPS – and will continue to look for opportunities to further promote children's rights.

The Minister for Health and Social Services, the Deputy Minister for Mental Health and Wellbeing and the Minister for Education and Welsh Language have been advised that this work is consistent with the requirements of the UNCRC, particularly the articles outlined above.

The Welsh Government will continue to engage with the Children's Commissioner for Wales and other stakeholders and service providers when we consult on the draft Regulations, when they are laid before the Senedd, ahead of implementation.

This CRIA has been drafted alongside the development and drafting of the Regulations to support the implementation of the LPS in Wales. It includes a specific consideration of the individual articles of the UNCRC. Welsh Government will publish the draft CRIA when it publishes the draft Regulations and Regulatory Impact Assessment for consultation. As part of the consultation, we will ask stakeholders to consider the draft CRIA, with the view to building the evidence around the impacts of the new Regulations on children's rights. Following the period of public consultation on the draft Regulations, the CRIA will be revised. An updated version of the CRIA will then be published when we lay the Regulations before the Senedd.

The CRIA includes evidence that supports the intended aims and objectives of the LPS. It provides a high level summary of how we intend to analyse and measure



impact and how it supports and promote children’s rights. The CRIA also sets out how we intend to consult on the draft Regulations for Wales – and how we intend to review the CRIA following the period of planned public consultation.

### Costs and Budgets:

There are costs associated with the implementation of the LPS in Wales, which relate to workforce and training; undertaking assessments, determinations and pre-authorisation reviews; the support provided by IMCAs; the role of the AMCP; the transition from DoLS to the LPS; and monitoring and reporting. A full analysis of the estimated costs for the implementation of the LPS in Wales are included in the draft Regulatory Impact Assessment for the draft Regulations. These are predominantly based on the Impact Assessment published by the UK Government for the Mental Capacity (Amendment) Act 2019<sup>3</sup> and a UK Government Updated Impact Assessment. Welsh Government has undertaken baseline work to further inform cost estimates for Wales and we will use the consultation period to gather further evidence on the anticipated impacts – including financial impacts on health boards, local authorities, Welsh Government, businesses in Wales and the Third Sector.

### Ongoing Monitoring and Review:

The CRIA will be reviewed by officials on an ongoing basis. The next review will take place as we consult on the draft LPS Regulations for Wales.

**Mental Health and Vulnerable Groups Team**

**Welsh Government**

**March 2022**

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<sup>3</sup> [UK Government Impact Assessment of the Mental Capacity \(Amendment\) Act 2019](#)

## Annex 1: Children's Rights and the Liberty Protection Safeguards

**Article 2 (non-discrimination):** The Convention applies to every child without discrimination, whatever their ethnicity, sex, religion, language, abilities or any other status, whatever they think or say, whatever their family background.

The LPS will apply to all 16/17 year olds who lack mental capacity in all settings, including in people's own homes.

As part of monitoring and reporting on the LPS (one of the safeguards) we will collect data on protected characteristics.

**Article 3 (best interests of the child):** The best interests of the child must be a top priority in all decisions and actions that affect children.

Best interest decisions are at the heart of the LPS informed by person centred-planning wherever statutory duties arise. There will be a specific focus on establishing and reinforcing the young person's views, wishes and feelings as part of the LPS assessment, authorisation and review processes, alongside an ongoing consideration of what are the least restrictive options for care support or treatment.

**Article 4 (implementation of the Convention):** Governments must do all they can to make sure every child can enjoy their rights by creating systems and passing laws that promote and protect children's rights.

The implementation of the LPS will contribute to promoting and protecting children's rights in Wales. The LPS will apply to young people aged 16 / 17. If their care, support or treatment amounts to a deprivation of liberty, then this deprivation of liberty will need to be authorised.

The new draft Regulations will support the implementation of the LPS and ensure young people are protected by the safeguards that the new scheme will put in place.

The inclusion of 16 and 17 year olds into the LPS provides a more proportional route to legal safeguards (as opposed to applications to the Court of Protection – as is currently the case), achieving parity with the safeguards currently available to persons aged 18 and over.

Through the implementation of the safeguards, the principles of the Mental Capacity Act will be embedded within care, support or treatment planning for 16 / 17 year olds. The principles of the MCA are:

1. A presumption of capacity. Everyone has assumed to have capacity until proven otherwise. A lack of capacity should not be assumed based on, for example, a person's age or behaviour. Just because a person lacked capacity in relation to a previous decision (e.g. in relation to managing finances) it does not mean that they lack capacity to decide where they want to live.

2. Support to make a decision. All steps must be taken to help the person make a decision themselves, before treating them as being unable to make a decision.
3. Ability to make unwise decisions. Assessing capacity needs to focus on how the person makes the decision, not the actual decision the person makes.
4. Best interests: if a decision is made (or an act undertaken) on behalf of the person who lacks capacity, then this must be done in their best interests.
5. Least restrictive: If a decision is made (or an act undertaken) this must be the least restrictive option in relation to the person's rights and freedoms.

One of the key features of the LPS system is that where it's known in advance that the person's care, support or treatment will take place across multiple settings, an authorisation can apply in more than one setting. For young people, this may mean that an authorisation can cover a number of different settings – including home, a day or residential school or college, any pre or post school activities, a children's home, a fostering placement, a short break or other respite provision, and a planned hospital stay.

**Article 5 (parental guidance and a child's evolving capacities): Governments must respect the rights and responsibilities of parents and carers to provide guidance and direction to their child as they grow up, so that they fully enjoy their rights. This must be done in a way that recognises the child's increasing capacity to make their own choices.**

Within the LPS, the young person who lacks mental capacity is expected to have an Appropriate Person (who is not involved in the care, support or treatment of the individual) who will support and represent the person. This could be the member of a person's family or unpaid carer. If the individual does not have an Appropriate Person, the Responsible Body (with the health board or the local authority) will allocate an Independent Mental Capacity Advocate to support them. The Appropriate Person can also request support from an IMCA.

The draft Code of Practice underpinning the LPS recognises the potential for a number of advocates to be supporting the person (P). For the purposes of the LPS, the Responsible Body in discussion with P (and if necessary, the Appropriate Person, others appointed by P to advocate on their behalf, and any other relevant parties) will identify who is the most suitable to secure P's views wishes and feelings.

**Article 6 (life, survival and development): Every child has the right to life. Governments must do all they can to ensure that children survive and develop to their full potential**

The LPS is about supporting people to achieve better outcomes by making sure that any deprivation of liberty and the principles of the Mental Capacity Act are being considered as part of care, support or treatment planning from the outset; that the

deprivation of liberty has been assessed and authorised; and that decisions associated with care, support or treatment are in the best interests of the young person and are necessary and proportionate / least restrictive.

DoLS authorisations only authorise the actual deprivation of liberty, whereas the LPS authorisations authorise the arrangements for care that give rise to the deprivation of liberty. This is an important distinction, since the new process focuses more on the support and care of the child. There are links to Article 6 (ensuring children develop to their full potential), Article 8 (dignity for disabled children), Article 18 (support services for children) and Article 27 (adequate standard of living).

**Article 7 (birth registration, name, nationality, care): Every child has the right to be registered at birth, to have a name and nationality, and, as far as possible, to know and be cared for by their parents.**

**Article 8 (identity): States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.**

**Article 9 (separation from parents): Children must not be separated from their parents against their will unless it is in their best interests (for example, if a parent is hurting or neglecting a child). Children whose parents have separated have the right to stay in contact with both parents, unless this could cause them harm.**

Under the LPS, arrangements may be authorised which include separation from parents against the child's will, but only where it is in the child's best interests, so the LPS is relevant to Article 9 in this respect. These arrangements will be subject to three assessments which includes an assessment of whether the arrangements are "necessary and proportionate". Before authorisation of an arrangement, there will also be a pre-authorisation review, and in circumstances where the child may be objecting to the arrangements or where it is reasonable to suspect the child would object to the arrangements, a pre-authorisation review will be conducted by an Approved Mental Capacity Professional (an AMCP). An AMCP, as part of the pre-authorisation review will meet with the person and consult relevant others, if practical and appropriate to do so.

**Article 10 (family reunification): Governments must respond quickly and sympathetically if a child or their parents apply to live together in the same country. If a child's parents live apart in different countries, the child has the right to visit and keep in contact with both of them.**

**Article 11 (abduction and non-return of children): Governments must do everything they can to stop children being taken out of their own country illegally by their parents or other relatives, or being prevented from returning home.**

**Article 12 (respect for the views of the child): Every child has the right to express their views, feelings and wishes in all matters affecting them, and to have their views considered and taken seriously. This right applies at all times, for example during immigration proceedings, housing decisions or the child's day-to-day home life.**

Article 12 is fundamental to the LPS. The LPS safeguards are all about protecting the rights of those young people who lack mental capacity. In the assessments that must take place to inform whether the care, support or treatment amounting to a deprivation is authorised, the wishes and feelings of the young person will be critical.

People working with young people who lack capacity to make certain decisions should consider all possible communication methods in order to determine that young person's wishes and feelings.

ALSO: There is the new role of the AMCP within the LPS. This is an extra safeguard in the event that a person might not wish to receive care/reside at a particular place. AMCPs must meet with the person and consult relevant others, if practical and appropriate to do, as part of the pre-authorisation review of arrangements amounting to a deprivation of liberty. Also important in terms of Article 12 (respect for the views of the child).

**Article 13 (freedom of expression): Every child must be free to express their thoughts and opinions and to access all kinds of information, as long as it is within the law.**

Also really important within the context of the LPS – as the views and wishes and feelings of the young person are critical, along with ensuring that the person has access to the information they need. Through the safeguards, young people will be given the opportunity to express their thoughts and opinions and to access different kinds of information.

As part of the implementation of the LPS in Wales, consideration is being given to the supporting materials that will need to be developed for young people, their families and the Appropriate Person, with the view to sharing information on the LPS process, and how the safeguards are looking to protect their human rights. Information on the LPS will need to be suitable for all audiences including young people, and will also need to be available in different languages for young people from minority ethnic communities.

**Article 14 (freedom of thought, belief and religion): Every child has the right to think and believe what they choose and also to practise their religion, as long as they are not stopping other people from enjoying their rights. Governments must respect the rights and responsibilities of parents to guide their child as they grow up.**

One of the principles of the Mental Capacity Act is ability to make unwise decisions. The focus needs to be on how they are making the decision, not the actual decision itself.

The principles of the independent advocate role are also important here: conduit of views rather than shaping views.

**Article 15 (freedom of association): Every child has the right to meet with other children and to join groups and organisations, as long as this does not stop other people from enjoying their rights.**

**Article 16 (right to privacy): Every child has the right to privacy. The law should protect the child's private, family and home life, including protecting children from unlawful attacks that harm their reputation.**

This aligns with Article 8 of the European Convention on Human Rights, and the right to respect for a person's private and family life, the home and their correspondence, subject to certain restrictions that are "in accordance with law" and "necessary in a democratic society".

As part of the LPS, there are safeguards in place which protect the child's right to privacy (e.g. input from the child themselves / the AMCP process).

Other principles of the LPS are also relevant here, including dignity.

**Article 17 (access to information from the media): Every child has the right to reliable information from a variety of sources, and governments should encourage the media to provide information that children can understand. Governments must help protect children from materials that could harm them.**

A Communications and Engagement Strategy is being developed for the implementation of the LPS to ensure people have access to the information and materials they need. As part of this strategy, there will be a specific focus on children and young people.

As part of the consultation on the draft Regulations for Wales, it will be important to ensure there are Plain English and Easy Read versions of the documents.

**Article 18 (parental responsibilities and state assistance): Both parents share responsibility for bringing up their child and should always consider what is best for the child.**

**Governments must support parents by creating support services for children and giving parents the help they need to raise their children.**

Under the Mental Capacity Act and through care, support or treatment planning under the LPS, if a decision or an act is being made for the young person, then this decision and act needs to be in their best interests and also the least restrictive option, in terms of their rights and freedoms.

The wishes and feelings of the young person, together with the views of anyone with an interest in their care and welfare, must be carefully considered as part of any decision.

**Article 19 (protection from violence, abuse and neglect): Governments must do all they can to ensure that children are protected from all forms of violence, abuse, neglect and bad treatment by their parents or anyone else who looks after them.**

Article 19 is also fundamental to the implementation of the LPS. The safeguards are all about ensuring that before a person is deprived of their liberty, all alternative options are explored and scrutinised before it can be authorised – and is then subject to review at agreed intervals to ensure those decisions remain robust and the care, support or treatment arrangements are necessary and appropriate.

Through the assessment, authorisation and review processes, there will be a continued focus on safeguarding and ensuring that the individual is protected from violence, abuse, neglect and bad treatment.

**Article 20 (children unable to live with their family): If a child cannot be looked after by their immediate family, the government must give them special protection and assistance. This includes making sure the child is provided with alternative care that is continuous and respects the child's culture, language and religion.**

The safeguards provided by the LPS are there to support those who lack mental capacity and whose care, support or treatment amount to a deprivation of liberty. For those young people subject to the LPS, whether living with their family or not, the safeguards are in place to ensure that their rights are protected and that their care, support or treatment is necessary and proportionate, the least restrictive possible and in their best interests. A Workforce Plan and Training Framework is being developed to ensure the LPS workforce for Wales is in place and has the necessary skills and competencies to provide support. The Workforce Plan and Training Framework includes a specific reference to cultural competency to ensure children and young people from ethnic minority communities are supported appropriately.

**Article 21 (adoption): Governments must oversee the process of adoption to make sure it is safe, lawful and that it prioritises children's best interests. Children should only be adopted outside of their country if they cannot be placed with a family in their own country.**

**Article 22 (refugee children): If a child is seeking refuge or has refugee status, governments must provide them with appropriate protection and assistance to help them enjoy all the rights in the Convention. Governments must help refugee children who are separated from their parents to be reunited with them.**

Children and young people with refugee status could potentially be subject to the LPS. It will be important to consider any additional arrangements that could be needed to support this group of children and young people.

**Article 23 (children with a disability): A child with a disability has the right to live a full and decent life with dignity and, as far as possible, independence and to play an active part in the community. Governments must do all they can to support disabled children and their families.**

Article 23 is also at the heart of the LPS. The safeguards are there to protect the rights and interests of those young people by ensuring their views and wishes inform the development of their care, support or treatment are at the heart of the arrangements and that they, and their Appropriate Person can access support to ensure they are heard .

For those young people with disabilities, the safeguards will help to support their right to live a full and decent life with dignity and (as far as possible) independence. In any decision or act that affects them, the principles of the Mental Capacity Act mean that these should be in their best interests and also the least restrictive option.

**Article 24 (health and health services): Every child has the right to the best possible health. Governments must provide good quality health care, clean water, nutritious food, and a clean environment and education on health and well-being so that children can stay healthy. Richer countries must help poorer countries achieve this.**

The safeguards align with Article 24, as they will be there to support people who lack mental capacity. The principles of the Mental Capacity Act are focussed on ensuring that care and treatment is in the best interests of the individual, reflects their wishes and feelings, and is necessary and proportionate. This directly links to good health as the arrangements authorised by the LPS will support the child / young person to receive the level of care needed.

**Article 25 (review of treatment in care): If a child has been placed away from home for the purpose of care or protection (for example, with a foster family or**



in hospital), they have the right to a regular review of their treatment, the way they are cared for and their wider circumstances.

There will be regular reviews of the authorisation of the deprivation of liberty under the LPS.

**Article 26 (social security):** Every child has the right to benefit from social security. Governments must provide social security, including financial support and other benefits, to families in need of assistance.

**Article 27 (adequate standard of living):** Every child has the right to a standard of living that is good enough to meet their physical and social needs and support their development. Governments must help families who cannot afford to provide this.

The LPS may authorise the place where the child stays and arrangements for care, and so the safeguards can help to ensure the standard of living for the child / young person is adequate (e.g. by ensuring the level of care and support is in the child's best interests). The LPS may also support children to remain in the place best suited to their needs without an application to the Court of Protection.

**Article 28 (right to education):** Every child has the right to an education. Primary education must be free and different forms of secondary education must be available to every child. Discipline in schools must respect children's dignity and their rights. Richer countries must help poorer countries achieve this

**Article 29 (goals of education):** Education must develop every child's personality, talents and abilities to the full. It must encourage the child's respect for human rights, as well as respect for their parents, their own and other cultures, and the environment.

**Article 30 (children from minority indigenous groups):** Every child has the right to learn and use the language, customs and religion of their family, whether or not these are shared by the majority of the people in the country where they live

This will also be considered as the LPS is implemented.

Consideration is being given Welsh Language Standards and ensuring people are able to access support and advice in the language of their choice.

**Article 31 (leisure, play and culture):** Every child has the right to relax, play and take part in a wide range of cultural and artistic activities.

**Article 32 (child labour): Governments must protect children from economic exploitation and work that is dangerous or might harm their health, development or education. Governments must set a minimum age for children to work and ensure that work conditions are safe and appropriate.**

**Article 33 (drug abuse): Governments must protect children from the illegal use of drugs and from being involved in the production or distribution of drugs.**

**Article 34 (sexual exploitation): Governments must protect children from all forms of sexual abuse and exploitation.**

The LPS will help to support Article 34 by ensuring a focus on safeguarding and protecting the rights of young people.

The operation of the LPS will also be monitored and reported on by Care Inspectorate Wales, Health Inspectorate Wales and Estyn.

**Article 35 (abduction, sale and trafficking): Governments must protect children from being abducted, sold or moved illegally to a different place in or outside their country for the purpose of exploitation.**

The operation of the LPS will also be monitored and reported on by Care Inspectorate Wales, Health Inspectorate Wales and Estyn.

**Article 36 (other forms of exploitation): Governments must protect children from all other forms of exploitation, for example the exploitation of children for political activities, by the media or for medical research.**

Safeguards are designed to protect from exploitation generally.

The operation of LPS will also be monitored and reported on by Care Inspectorate Wales, Health Inspectorate Wales and Estyn.

**Article 37 (inhumane treatment and detention): Children must not be tortured, sentenced to the death penalty or suffer other cruel or degrading treatment or punishment. Children should be arrested, detained or imprisoned only as a last resort and for the shortest time possible.**

**They must be treated with respect and care, and be able to keep in contact with their family.**

**Children must not be put in prison with adults.**

The LPS will support Article 37 as the safeguards are about ensuring that the care, support or treatment plans that amount to a deprivation of liberty are authorised and are in the best interests of the individual and least restrictive.

**Article 38 (war and armed conflicts): Governments must not allow children under the age of 15 to take part in war or join the armed forces. Governments must do everything they can to protect and care for children affected by war and armed conflicts.**

**Article 39 (recovery from trauma and reintegration): Children who have experienced neglect, abuse, exploitation, torture or who are victims of war must receive special support to help them recover their health, dignity, self-respect and social life.**

Article 39 may also be potentially relevant – as the LPS may help to support children who have experienced trauma by enabling them to be cared for, supported, and in the best place for their needs.

**Article 40 (juvenile justice): A child accused or guilty of breaking the law must be treated with dignity and respect. They have the right to legal assistance and a fair trial that takes account of their age. Governments must set a minimum age for children to be tried in a criminal court and manage a justice system that enables children who have been in conflict with the law to reintegrate into society.**

**Article 41 (respect for higher national standards): If a country has laws and standards that go further than the present Convention, then the country must keep these laws.**

The Liberty Protection Safeguards are compatible with ECHR (specifically Article 5 & 8) as a higher standard.

**Article 42 (knowledge of rights): Governments must actively work to make sure children and adults know about the Convention.**

We will be developing national materials on the LPS to share with stakeholders, and these will include a focus on how the LPS supports the UNCRC.