DRAFT Explanatory Memorandum to Regulations for Wales which support the implementation of the Mental Capacity (Amendment) Act 2019

DRAFT REGULATIONS FOR WALES

The Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Wales) (Amendment) Regulations 2022

The Mental Capacity (Deprivation of Liberty: Training and Criteria for Approval as an Approved Mental Capacity Professional) (Wales) Regulations 2022

The Mental Capacity (Deprivation of Liberty: Monitoring and Reporting) (Wales) Regulations 2022

The Mental Capacity (Deprivation of Liberty: Eligibility to Carry Out Assessments, Make Determinations and Carry Out Pre-authorisation Reviews) (Wales) Regulations 2022

This Explanatory Memorandum has been prepared by the Health and Social Services Group within Welsh Government and is laid before the Senedd in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

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Minister's Declaration

In my view, this draft Explanatory Memorandum gives a fair and reasonable view of the expected impact of the following draft Regulations:

- The Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Wales) (Amendment) Regulations 2022

- The Mental Capacity (Deprivation of Liberty: Training and Criteria for Approval as an Approved Mental Capacity Professional) (Wales) Regulations 2022

- The Mental Capacity (Deprivation of Liberty: Monitoring and Reporting) (Wales) Regulations 2022

- The Mental Capacity (Deprivation of Liberty: Eligibility to Carry Out Assessments, Make Determinations and Carry Out Pre-Authorisation Reviews) (Wales) Regulations 2022

I am satisfied that the benefits justify the likely costs.

Eluned Morgan MS

Minister for Health and Social Services

[INSERT DATE]

PART 1

1. Description

DRAFT REGULATIONS:

- The Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Wales) (Amendment) Regulations 2022
- The Mental Capacity (Deprivation of Liberty: Training and Criteria for Approval as an Approved Mental Capacity Professional) (Wales) Regulations 2022
- The Mental Capacity (Deprivation of Liberty: Monitoring and Reporting) (Wales) Regulations 2022
- The Mental Capacity (Deprivation of Liberty: Eligibility to Carry Out Assessments, Make Determinations and Carry Out Pre-Authorisation Reviews) (Wales) Regulations 2022

1.1 These Regulations will support the implementation of the Mental Capacity (Amendment) Act 2019 in Wales and the Liberty Protection Safeguards (the LPS).

1.2 The Mental Capacity (Amendment) Act 2019 (the MC(A)A 2019) was introduced by the UK Government in July 2018 and received Royal Assent on 16 May 2019. The MC(A)A 2019 amends the Mental Capacity Act 2005 (MCA 2005) which contains the Deprivation of Liberty Safeguards (DoLS). DoLS is a set of checks which aim to ensure that any treatment or care that restricts a person's liberty is both appropriate and in their best interests. The MC(A)A 2019 replaces the DoLS with a new scheme called the Liberty Protection Safeguards (the LPS).

1.3 The purpose of the LPS is to protect the Article 5 Rights (under the European Convention on Human Rights) of people who lack mental capacity (for instance due to brain injury, a stroke, or dementia) to consent to their health and/or social care and treatment. Where care, support or treatment 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. The scope of the LPS is wider than DoLS, applying to 16 and 17 years olds and to a wider range of settings, and designed to deliver improved outcomes for people who are or who need to be deprived of their liberty.

1.4 Although the Mental Capacity Act 2005 is a subject matter which is reserved to the UK Parliament, the MC(A)A 2019 contains regulation making powers for the Welsh Ministers to implement the LPS in Wales.

1.5 These Regulations will therefore:

- Establish a system for monitoring and reporting on the operation of the LPS in Wales by conferring monitoring duties on Care Inspectorate Wales (CIW), Health Inspectorate Wales (HIW) and Estyn.

- Provide training and criteria for the approval of individuals to act as an Approved Mental Capacity Professional (AMCP). AMCPs assist in pre-authorisation reviews of the proposed arrangements for deprivation of liberty to determine whether the authorisation conditions are met in respect of the arrangements or whether it is reasonable for a body to conclude that the authorisation conditions are met.

- Make amendments to the existing Independent Mental Capacity Advocates (Wales) Regulations 2007 (S.I. 2007/852 (W. 77)) which ensure that persons appointed as Independent Mental Capacity Advocates (“IMCAs”) in the new LPS system will be subject to the same appointment requirements as IMCAs are currently in respect of DOLs, and that those so appointed will be authorised to carry out functions appropriate to the requirements imposed by the MC(A)A 2019.

- Set out the eligibility requirement for those persons who may to carry out assessments, make determinations and carry out pre-authorisation reviews for the purpose of establishing whether the authorisation conditions are met in relation to arrangements which amount to a deprivation of liberty.

2. Matters of special interest to the Legislation, Justice and Constitution Committee

2.1 Section 5 of the MC(A)A 2019 grants the Secretary of State a regulation making power to make provision that is consequential on any provision of the MC(A)A 2019. This includes the power to amend, repeal or revoke primary or secondary legislation. The regulation making power must be exercised by statutory instrument. The Regulations will be subject to the negative procedure, save where the Secretary of State proposes to make changes to primary legislation, in which case the affirmative procedure applies.

2.2 The UK Government as part of their consultation on the implementation of the LPS in England will include drafts of the following two statutory instruments:

- The Mental Capacity (Amendment) Act 2019 (Commencement, Transitional and Savings Provisions) Regulations ("the Commencement Regulations")

- Mental Capacity (Amendment) Act 2019 (Consequential Provisions) Regulations ("the Consequential Provisions Regulations")

2.3 The Commencement Regulations bring the provisions of the MC(A)A 2019 which are not already in force, into force on a specific date [TBC]. They also make transitional and savings provision in connection with standard authorisations and urgent authorisations under the current DoLS system set out in Schedule A1 of the 2005 Act, which are either in force or suspended immediately before [the given date] or which have been requested but not granted immediately before that day. This transition period of 12 months is necessary to ensure the smooth transition from the current DoLS to the LPS.

2.4 The replacement of the DoLS with the LPS will require consequential amendment to a number of secondary and primary legislation in England and Wales. In Wales, the following legislation will need to be amended to omit specific references to Schedule A1 and the DoLS and add in reference to Schedule AA1 and to the LPS:

- Social Services and Well-being (Wales) Act 2014 (annw. 4)
- The Independent Health Care (Wales) Regulations 2011 (S.I. 2011/734 (W.112))
- The Mental Health (Care Co-ordination and Care and Treatment Planning) (Wales) Regulations 2011 (S.I. 2011/2942 (W. 318))

- The Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017 (S.I. 2017/1264 (W. 295)).
- The Adult Placement Services (Service Providers and Responsible Individuals) (Wales) Regulations 2019 (S.I. 2019/163 (W. 40)).

2.5 In addition, the following statutory instruments will be revoked:

- The Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) (Wales) Regulations 2009 (S.I. 2009/266 (W. 29))
- The Mental Capacity (Deprivation of Liberty: Assessments, Standard Authorisations and Disputes about Residence) (Wales) Regulations 2009 (S.I. 2009/783 (W. 69))

2.6 The amendments required to the Welsh legislation will be made in the Consequential Provision Regulations by the UK Government at the same time as the consequential amendments to legislation in England. As the main provisions of the MC(A)A come into force [on DATE TBC] but certain authorisations can continue in force under the old system of DoLS by virtue of the Commencement Regulations, certain provisions in Consequential Regulations and the revocations noted above come into force on that later date.

2.7 The regulation making power to make consequential amendments related to the MC(A)A 2019 was not conferred on the Welsh Ministers. The Welsh Government has, however, liaised with the UK Government in identifying the necessary legislation affected by the implementation of the LPS.

3. Legislative background

3.1 The MC(A)A 2019 amends the Mental Capacity Act 2005 ("the 2005 Act") in relation to procedures in accordance with which a person may be deprived of their liberty where that person lacks capacity to consent. The MC(A)A 2019 amends the 2005 Act by removing Schedules A1 (Hospital and Care Home Residents: Deprivation of liberty) and 1A (Persons Ineligible to be Deprived of Liberty by this Act) and introduces a new process for authorising arrangements (Schedule AA1- Deprivation of Liberty: Authorisation of arrangements enabling care and treatment). Schedule AA1 gives the Welsh Ministers powers to make Regulations to support the implementation of the LPS in Wales.

3.2 The Mental Capacity (Deprivation of Liberty: Monitoring and Reporting) (Wales) Regulations 2022: Paragraph 44 of Schedule AA1 enables the Welsh Ministers in relation to the operation of Schedule AA1 in Wales to

make provision in Regulations for prescribed bodies to monitor and report on the operation of the LPS.

3.3 The Mental Capacity (Deprivation of Liberty: Training and Criteria for Approval as an Approved Mental Capacity Professional) (Wales) Regulations 2022: Paragraph 40 of Schedule AA1 enables the Welsh Ministers to make Regulations which prescribe the eligibility criteria which must be met for someone to be approved to act as an Approved Mental Capacity Professional (AMCP); prescribe what a local authority must or may take into account when deciding whether to approve a person as an AMCP; and provide for a prescribed body to approve training for persons who are or wish to become AMCPs.

3.4 The Mental Capacity (Deprivation of Liberty: Eligibility to Carry out Assessments, Make Determinations and Carry out Pre-Authorisation Reviews) (Wales) Regulations 2022: Paragraphs 21(3) and 22(1) of Schedule AA1 provides the Welsh Ministers with regulation making powers to set out eligibility requirement for those persons who may to carry out assessments, make determinations and carry out pre-authorisation reviews for the purpose of establishing whether the authorisation conditions are met in relation to arrangements which amount to a deprivation of liberty.

3.5 The Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Wales) (Amendment) Regulations 2022: In Wales, there are already Regulations in place in relation to the role and functions of the appointment of IMCAs (the Independent Mental Capacity Advocates) (Wales) Regulations 2007 (S.I. 2007/852 (W. 77)), made under powers found in section 35 of the 2005 Act. The MC(A)A 2019 amends the 2005 Act to provide for the IMCA role under the LPS.

3.6 The 2005 Act (as amended by the MC(A)A 2019) provides at section 65(2A) that Regulations made by the Welsh Ministers under Schedule AA1 are subject to annulment in pursuance of a resolution of the Senedd. These Regulations will therefore be made under the negative resolution procedure.

4. Purpose and intended effect of the legislation

Background:

4.1 The four sets of Regulations for Wales will provide the legal frameworks needed to support the implementation of the LPS in Wales.

4.2 The LPS system provides safeguards for people aged 16 and over who lack the mental capacity to consent to their care, support or treatment where 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.

4.3 Unlike the DoLS system, 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) and will also apply to anyone aged 16 and over.

4.4 The new LPS system (supported by the four sets of Regulations) will involve three new assessments (replacing the six assessments undertaken under DoLS). There will also be a new role of the AMCP to provide enhanced oversight for more complex cases, and there will be an expansion of the role of the IMCA. Local authorities or local health boards in Wales will authorise and oversee the safeguards in their role as Responsible Bodies (currently Supervisory Bodies). HIW, CIW and Estyn will be named as the bodies responsible for monitoring and reporting on the LPS. This includes monitoring and reporting across all settings – including people's own homes.

Purpose and intended effect of the Regulations:

4.5 The LPS will replace the existing DoLS. DoLS provide a legal process to review and, where appropriate, authorise arrangements for a person's care, support or treatment which may amount to a deprivation of liberty, for people aged 18 and over in a care home or hospital. It provides key safeguards to protect the person's human rights. In Wales, the DoLS system is currently monitored by HIW and CIW. All other cases are considered by the Court of Protection.

4.6 According to the UK Government Updated Impact Assessment on the Mental Capacity (Amendment) Act 2019, there are a number of key challenges with the DoLS system.[1] In particular, it is seen complex and overly bureaucratic. Furthermore, since DoLS was introduced, two court judgements – Cheshire West[2] and Re D[3] – gave a significantly wider definition of a deprivation of liberty than that which had been previously understood, resulting in the DoLS system being overwhelmed.[4]

4.7 As set out the UK Government Updated Impact Assessment on the MC(A)A 2019: "The current legal framework fails to protect the rights of people and establishes a compelling case for reform…more than 120,000 people are being left without the protections they need and over 50,000 have been waiting more than one year for an authorisation. These figures only include individuals who have applications for DoLS and there could be many more in non-DoLS settings. This creates a situation where people are being deprived of their liberty without any oversight and can mean that overly restrictive practices are used which may interfere with their Article 5 human rights…Furthermore, inefficiencies in the administration of the DoLS authorisation process create wastage. It is important to ensure that the system is operating as efficiently as possible, particularly given wider pressures on the health and care sector caused by an ageing population and other factors."[5]

4.8 The UK Government's policy objectives and the intended effects of the MC(A)A 2019 are identified in the UK Government Updated Impact Assessment as being:

- To create a new simplified legal framework which is accessible and clear to all affected parties.

- To deliver improved outcomes for persons deprived of their liberty and their families / unpaid carers.

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[1] Department of Health and Social Care Updated Impact Assessment on the Mental Capacity (Amendment) Act 2019.

[2] Cheshire West Supreme Court Judgement

[3] Re D Supreme Court Judgement

[4] For a further discussion of the challenges associated with the current DoLS system, see section 6.3 of this draft Regulatory Impact Assessment.

[5] Paragraphs 5.1 and 5.2: UK Government Updated Impact Assessment for the Mental Capacity (Amendment) Act 2019.

- To provide a simplified authorisation process capable of operating effectively in all settings.

- To 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 5 and 8 of the European Convention on Human Rights.

- To provide a comprehensive, proportionate and lawful mechanism by which deprivations of liberty for young people aged 16 and 17 can be authorised.[6]

4.9 According to the UK Government Updated MC(A)A 2019 Impact Assessment: "The intended effects are to ensure increased compliance with the law, improve care and treatment for people lacking capacity and to provide a system of authorisation and robust safeguards in a cost-effective manner."[7]

4.10 While the MC(A)A 2019 and the LPS are UK Government legislation and policy, Welsh Government agrees with the reforms they will introduce. The four sets of Regulations that Welsh Government are consulting on will support the implementation of the LPS in Wales.

Regulations on IMCAs:

4.11 The role of the IMCA is an important safeguard to ensure that a person's voice and interests (i.e. those of the individual receiving care, support or treatment) is at the heart of key decision-making under the 2005 Act.

4.12 In Wales – we have Regulations in place in relation to the appointment, role and functions of IMCAs, made under the 2005 Act (section 35) which reflect the role of the IMCAs under Schedule A1, and the DoLS system. The MC(A)A 2019 amends the 2005 Act to amend the functions of the IMCA role to reflect the replacement of DoLS with the LPS. Therefore, it follows that Regulations made under the MCA should also reflect the role and functions of IMCAs under the new LPS safeguards.

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[6] UK Government Updated Impact Assessment for the Mental Capacity (Amendment) Act 2019

[7] UK Government Updated Impact Assessment for the Mental Capacity (Amendment) Act 2019

4.13 The amendments to the 2005 Act made by the MC(A)A 2019 in relation to IMCAs are:

- Section 35 – The duty on the Welsh Ministers to make arrangements for IMCAs to be available is amended to include circumstances where an appointment is made under paragraph 42 (IMCA for the cared-for person) and paragraph 43 (IMCA for the Appropriate Person) of the LPS. Given that regulation-making powers for IMCAs are given under s.35, it follows that our Regulations should be updated to reflect the LPS.

- Section 36 – The regulation making power conferred on the Welsh Ministers relating to the functions of IMCAs is amended to included functions under the LPS, in particular where an IMCA is instructed to support an Appropriate Person.

- Section 38 and Section 39 – Provision of accommodation (by NHS body or local authority) are amended to state that an appointment of an IMCA under s.38 and s.39 does not apply if an IMCA is appointed under paragraph 42 of the LPS and that those arrangements include for the cared-for person to be accommodated in a hospital or a care home.

- Amendments are also made to section 42 (Codes of Practice) stating that guidance for persons acting as IMCA for the cared-for person and an Appropriate Person will be given in the LPS Code of Practice for England and Wales.

4.14 The IMCA Regulations for Wales are a set of amending Regulations that will deliver the changes set out above. Without the amending Regulations, our current Regulations on the role of IMCAs would not reflect the legislative changes being introduced as a result of the MC(A)A 2019.

4.15 Welsh Government will make available a version of the 2007 Regulations showing the proposed amendments these Regulations make so as to ensure they are easily identifiable.

Regulations on monitoring and reporting:

4.16 Currently, the Welsh Ministers have regulation making powers to prescribe the bodies to monitor and report on the operation of the DoLS. While, as with the operation of all other legislation, all public bodies and services are responsible for their part and governance of the LPS, in many situations a person who is subject to an authorised deprivation of liberty is in a highly vulnerable situation. It is therefore important that “the state” knows about, monitors and seeks assurance that the legal safeguards are being engaged appropriately. With this in mind, it is intended the inspectorates

and regulators in Wales have a role in the monitoring and reporting on the operation of the legal safeguards.

4.17 The proposed aims of the LPS monitoring and reporting system are:

- To ensure deprivations of liberty are being authorised and reviewed properly.
- To ensure authorisations are being carried out properly.
- To prevent abuse (aligning with the Optional Protocol to the Convention Against Torture – OPCAT), including unauthorised deprivation of liberty in certain cases.
- To oversee and identify national (Wales level) trends in the operation of the LPS.
- To promote high standards.

4.18 Monitoring will include the following settings: NHS hospitals, independent hospitals, care homes, domiciliary care services, Shared Lives accommodation, out-patient health care settings, specialist education placements, CHC (continuing healthcare) funded packages of care in community settings, and private dwellings (e.g. domiciliary care in people's own homes).

4.19 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 being consulted on 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.

E. Request certain data from the Responsible Body for the purpose of carrying out its functions.

4.20 This is a limited set of regulation powers. The intention is that the monitoring and reporting Regulations will broadly empower the prescribed bodies to carry out the functions set out above. The Regulations will not specify how or to what extent the prescribed bodies utilise the powers granted by the Regulations. This needs to be worked through in partnership (between HIW, CIW and Estyn) and as part of a Monitoring and Reporting Strategy for the LPS in Wales.

4.21 The monitoring bodies will be able to visit those settings where an authorised deprivation of liberty is being carried out, as part of existing monitoring and inspection regimes. Given the wide scope of the LPS – CIW, HIW and Estyn will also be responsible for monitoring and reporting on authorised deprivations of liberty which may be occurring in private dwellings / people's own homes. The Regulations on monitoring and reporting include the provision that monitoring bodies must seek consent in relation to visiting a person in relation to monitoring and reporting in a private dwelling / a person's own home. The detail on how this will work in practice will be set out in the Monitoring and Reporting Strategy for Wales, which is currently being developed.

4.22 As public bodies, HIW, CIW and Estyn will comply with Article 8 rights when exercising their functions. Recognising that the interface between safeguarding Article 5 (right to liberty and security) and respecting Article 8 (right to privacy in your own home) will require a balanced approach, further detail on the monitoring and reporting arrangements in relation to people's own homes will be set out in the Monitoring and Reporting Strategy for Wales.

4.23 Without these Regulations, there will be no monitoring of the operation of the LPS in Wales which would be to the detriment of some of the most vulnerable individuals in Wales.

Regulations on who can undertake assessments and determinations:

4.24 The main purpose of the Regulations on who can undertake assessments and determinations is to provide the eligibility criteria on who may undertake the assessments under the LPS and make the decisions about the authorisation conditions. The authorisation conditions are the three conditions based on corresponding assessments which must be undertaken and which must be met before the Responsible Body can

authorise arrangements which would give rise a deprivation of liberty. These conditions are:

- The person lacks capacity to consent to the arrangements (care, support or and treatment) ("the capacity assessment").

- The person has a mental disorder ("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 (the "necessary and proportionate" assessment).

4.25 The identity of who can carry out these assessments and determinations to establish if the authorisation conditions are met is set out in Regulations. Specifically, the Regulations for Wales we are consulting on:

- Prescribe the general eligibility requirements for a person to carry out a capacity assessment, a medical assessment or a necessary and proportionate assessment. They also prescribe the requirements that must be met for a person to be eligible to make a determination on such an assessment.

- Specify further eligibility conditions for a person to carry out a capacity assessment and also provide that a person is eligible to make a determination on a capacity assessment if they are eligible to carry out a capacity assessment.

- Specify further eligibility conditions for a person to carry out a medical assessment and provide that a person is eligible to make a determination on a medical assessment if they are eligible to carry out a medical assessment.

- Specify further eligibility conditions that must be met for a person to carry out a necessary and proportionate assessment.

- Provide that it is only the person who carried out the necessary and proportionate assessment who can make a determination on that assessment.

- Prescribe the circumstances in which a person will have a connection with a care home, the effect being that such a person cannot carry out a pre-authorisation review. A pre-authorisation review is a review that must be carried out to determine whether the authorisation conditions

are met in respect of proposed arrangements or whether it is reasonable for a body to conclude that the authorisation conditions are met.

4.26 Without these Regulations on who can undertake assessments and determinations, the legal frameworks needed to support the implementation of the LPS in Wales will not be in place.

Regulations on Approved Mental Capacity Professionals:

4.27 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 Interest Assessor (BIA) under the DoLS and is loosely modelled on the Approved Mental Health Professional role under the Mental Health Act 1983.

4.28 The AMCP will be responsible for considering cases where a person either resides in an independent hospital, where an objection to the arrangements has been raised or in other relevant cases (which will be set out in the LPS Code of Practice for England and Wales).

4.29 Paragraph 40 of Schedule AA1 to the MC(A)A 2019 confers regulation-making powers to the Welsh Ministers to:

- Prescribe the eligibility criteria which must be met for someone to be approved to act as an AMCP.
- Prescribe what a local authority must or may take into account when deciding whether to approve a person as an AMCP.
- Provide for a prescribed body to approve training for persons who are or wish to become AMCPs.

4.30 The Regulations 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 (stating that a person must be registered as one of a specific group of professions also mentioned in the Regulations).

4.31 They also specify the matters that a local authority may take into account before approving a person as an AMCP – and also set out training requirements (which relate to conversion, initial and further training). Costs associated with these different elements of the AMCP role and associated training are considered in this RIA.

4.32 Without these Regulations, the legal frameworks needed to support the implementation of the LPS in Wales in relation to the new role of the AMCP will not be in place.

5. Consultation

5.1 The Welsh Government is consulting (for a period of 16 weeks) on the draft LPS Regulations for Wales. The consultation will be drawn to the attention of a wide audience of key stakeholders – reflecting the range of settings where the new safeguards will apply. This is an on-line consultation – supported by on-line events and also one to one meetings with stakeholders.[8] Plain English / Welsh and Easy Read versions of the Regulations are also available and have been published as part of the consultation. Welsh Government is also working with Children in Wales and Practice Solutions to engage with those with lived experience of current arrangements for authorising a deprivation of liberty (DoLS / application to the Court of Protection), as well as views on the new safeguards.[9]

5.2 In addition to consulting on Regulations for Wales, Welsh Government is also consulting on a draft Regulatory Impact Assessment – which is set out in Part 2 of this document.

5.3 Welsh Government is also working closely with stakeholders to develop an LPS Workforce Plan and Training Framework for Wales, and a new National Minimum Data Set on the LPS. A summary of the aims of the Workforce Plan and Training Framework is set out in Annex 2 of this RIA. Annex 3 sets out suggested data items for the National Minimum Data Set, which will be agreed over the coming months, with support from Digital Health and Care Wales and an LPS Working Group.

5.4 Welsh Government will use the consultation to gather further evidence of impacts – particularly in terms of anticipated costs on health boards, local authorities, service providers and the Third Sector.

5.5 In the lead up to the consultation, Welsh Government officials have been meeting with stakeholders to highlight the forthcoming consultation on the LPS Regulations for Wales. This has included meeting with representatives from Learning Disability Wales, Care Forum Wales, the Older People's Commissioner for Wales and the Children's Commissioner for Wales, the WCVA, members of the All Wales Parents and Carers Forum, and Age Alliance Wales – as well as ongoing engagement with the Dementia

[8] Welsh Government Consultation Page on LPS

[9] Welsh Government Consultation Page on LPS

Oversight of Implementation and Impact Group (DOIIG)[10] and the Mental Health Forum.[11]

5.6 Officials have also had engagement with stakeholders through the LPS Implementation Steering Group for Wales (which first met in March 2020), and also with four working groups established to support implementation in Wales. These four working groups focussed on: monitoring and reporting; workforce and training; 16 and 17 year olds; and the transition from DoLS to the LPS. In terms of overall governance for this programme of legislation in Wales, there is an LPS work stream that reports directly to the recently established Mental Health Oversight Board, which is chaired by Welsh Ministers.

[10] Dementia Oversight of Implementation and Impact Group

[11] Mental Health Forum Wales

PART 2 – REGULATORY IMPACT ASSESSMENT

RIA – LPS REGULATIONS FOR WALES

This is a combined draft Regulatory Impact Assessment (RIA) for the four sets of Regulations (the Regulations) being developed to support the implementation of the LPS in Wales. It sets out the impacts associated with the Regulations on the new role of Approved Mental Capacity Professionals (AMCPs); who can undertake assessments; monitoring and reporting; and the role of Independent Mental Capacity Advocates (IMCAs).

It draws on the UK Government analysis of the impacts of the LPS set out most recently in the Updated Impact Assessment for the Mental Capacity (Amendment) Act 2019 – published as part of the UK Government consultation on Regulations for England and the Code of Practice for England and Wales.[12] This impact assessment included costs for England and Wales. For the purposes of this draft Impact Assessment – we have assumed that costs for Wales would amount to 5.36% of the total England and Wales costs – using a population based approach.

This draft RIA has also been informed by a baseline evidence collection exercise undertaken with health boards and local authorities in Wales, regarding the current DoLS workforce and existing capacity, skills and competencies – including in relation to advocacy, undertaking assessments and determinations. Welsh Government wrote to 22 local authorities and 7 health boards in March 2021 to develop a greater understanding of the current workforce context in Wales, and current costs associated with training.[13] This exercise focussed on the roles where there is a clear link to roles under DoLS, to ensure that evidence provided was as accurate as possible. The exercise indicated that the costs identified in the UK Government Updated Impact Assessment for the MC(A)A 2019 were potentially an underestimate of the likely costs of the new system in Wales.

We recognise that the UK Government IA and the initial baseline exercise alone do not provide a sufficient estimate of the likely impacts of the LPS in Wales, and we intend to use the consultation period to gather further evidence from stakeholders.. As part of the consultation document – we

[12] UK Government Updated Impact Assessment for the Mental Capacity (Amendment) Act 2019.

[13] A summary of the information collected through this baseline exercise is included in Annex 1 of this Impact Assessment.

include a specific question on the draft RIA and ask stakeholders to submit further evidence to help inform the position for Wales.[14] In addition, further baseline data will be sought from local authorities and health boards on the new roles set out within the Regulations and the UK Government Code of Practice.

[14] Welsh Government Consultation Page on LPS

6. Options

Option 1 – DO NOTHING:

6.1 This is not a viable option. These Regulations are being introduced in order to implement UK Government legislation – the MC(A)A 2019. Without these Regulations, the legal frameworks needed to support the implementation of the LPS in Wales will not be in place.

6.2 As set out in the UK Government Updated Impact Assessment on the MC(A)A 2019 and the UK Government Updated Impact Assessment published as part of their consultation on the draft Regulations for England and the draft Code of Practice for England and Wales: "The current system cannot keep pace with the high demand for DoLS authorisations and not all deprivations of liberty in community settings are being authorised through the CoP, meaning there has been subsequent non-compliance with the law and potential breaches of human rights."[15]

6.3 The UK Government's Impact assessment for the MC(A)A 2019[16] and the UK Government Updated Impact Assessment published as part of their consultation on the draft Regulations for England and the draft MCA Code of Practice for England and Wales identifies the following key features of DoLS and associated problems:

- Limited in scope and not cost effective: The DoLS only apply to people over the age of 18 in care homes and hospitals. This means the authorisation of deprivations of liberty outside these settings, such as in supported living and private and domestic settings, must be dealt with by the Court of Protection. This is also the only route for authorisations for 16/17 year olds who are not covered by DoLS, although they are covered by other provisions within the MCA. This is a more expensive process for local authorities and NHS bodies (compared to authorisations under the DoLS) and can result in delay and increased stress for the person concerned, and their family or unpaid carers. The Law Commission concluded that cases are frequently not taken to Court when they should be, meaning people are not accessing vital safeguards and are deprived of their liberty unlawfully.

[15] Page 2 UK Government Updated Impact Assessment for the Mental Capacity (Amendment) Act 2019 published for the consultation.

[16] Paragraphs 4.2 to 4.8 UK Government Updated Impact Assessment for the Mental Capacity (Amendment) Act 2019

- Overly complex system: The legislation which set up the DoLS has been described as “tortuous and complex”. The current DoLS system requires six separate assessments to be carried out for each application and every application needs to be approved by a Best Interests Assessor (BIA). An authorisation of an application can last up to one year in a single location. A new and separate application also needs to be completed when care is received in a different location. This means people who receive respite care or have a planned hospital admission are likely to end up with multiple applications, which place an unnecessary burden on individuals and their families, as well as the DoLS system and budget. Mr Justice Charles, Vice President of the Court of Protection, described the experience of writing a judgment in a case involving the DoLS as feeling “as if you have been in a washing machine and spin dryer”.

- Ill-suited and outdated terminology: The terminology used in the DoLS – including terms such as “standard authorisations”– has been criticised as cumbersome and failing to reflect modern health and social care functions. The Law Commission found in their engagement that the label “Deprivation of Liberty Safeguards” is also seen as stigmatising and may make care providers reluctant to seek authorisations.

- Scale of the problem: The Government’s original impact assessment, completed in 2008, considered that very few people who lack capacity would need to be deprived of liberty, with expected cases beginning at 5,000 in the first year but dropping to 1,700 in the following years. Their worst-case scenario assumed that a total of only 21,000 people in England and Wales would be subject to the DoLS. In fact, the number of cases was initially higher than expected, with 7,157 in 2009/10. This number then rose to 11,887 in 2012/13. Since the Cheshire West judgment there has been a significant increase in DoLS applications. In 2019/20, there were 263,940 applications in England, which is over ten times the number of applications the DoLS system was expected to need to process in the worst-case scenario. Approximately two million people are thought to lack the capacity to make certain decisions for themselves, so the number of people subject to DoLS could grow even further. The DoLS were designed with a relatively small number of cases in mind and were not intended to deal efficiently with the present levels of demand. Lack of workforce capacity means there is a building but ever-changing ‘backlog’ of pending applications not completed within the year they are received by local authorities and health boards.

- Individuals left without safeguards: In England in 2019/20, the number of cases that were not completed as at year end was 124,195. Of these just under 40% (49,500) had a duration of over one year (according to Mental Capacity Act (2005) Deprivation of Liberty Safeguards, (England) 2019/20, Official Statistics). The volume of cases pending approval by local authorities means that individuals are often left without safeguards for an extended period of time. This means that individuals may be

receiving inappropriate care and that local authorities are not meeting their statutory duties.

- DoLS in Wales: According to the most recent Annual Monitoring Report on the Deprivation of Liberty Safeguards[17] a total of 6,486 new and further DoLS applications were received by health boards in 2019-20. This means the number of applications to health boards increased by 28%, from 5,070 in the previous year. This was a substantial increase in demand on health boards. In addition, at the end of the 2019-20 financial year, a total of 10,402 DoLS applications were received by local authorities across Wales. Data for 2019/20 show that across Wales, fewer than half of applications were completed within the statutory timeframes. In addition: health boards and local authorities continued to propose very different durations for their authorisations, with health boards proposing considerably shorter durations than local authorities. Over half of applications had not been assessed within 28 days, suggesting supervisory bodies were unable to assure themselves that people's human rights were not being breached by being deprived of their liberty unlawfully.

Option 2: Introduce new Regulations for Wales to support the implementation of the MC(A) Act 2019 and the Liberty Protection Safeguards

6.4 According to the UK Government's Impact Assessment on the MC(A) Bill published in 2019: "The Liberty Protection Safeguards aim to provide a system able to cope with the significant numbers of people deprived of liberty, in a manner that minimises costs. The new system will make significant savings for local authorities to reinvest into care and in the long term will reduce the funding pressure across the system. By reducing the bureaucracy associated with the DoLS system we also ensure that health and social care staff are not diverted away unnecessarily from delivering frontline care."[18]

6.5 The UK Government's revised Impact Assessment for the Mental Capacity (Amendment) Act 2019 (published in January 2021) and the UK Government Updated Impact Assessment published as part of the consultation on the draft Regulations for England – reiterates these anticipated impacts.

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[17] Deprivation of Liberty Safeguards Annual Monitoring Report for Health and Social Care 2019 to 2020

[18] Paragraph 9.5: Department of Health and Social Care Impact Assessment: Mental Capacity (Amendment) Bill

6.6 As highlighted in the Explanatory Memorandum to the Regulations, there are four sets of Regulations for Wales which support the implementation of the new safeguards. A summary of each of the Regulations for Wales is set out in the Explanatory Memorandum.

7. Costs and benefits

OPTION 1 – DO NOTHING – COSTS

TOTAL COSTS FOR DoLS CONTINUATION

7.1 The UK Government Updated Impact Assessment published to inform the consultation on the draft Regulations for England, and the draft Code of Practice for England and Wales, sets out the estimated cost of DoLS as it operates currently (i.e. using current authorisation volumes) in England and Wales. Best estimate costs associated with the current DoLS system included in the UK Government's Impact Assessment[19] are:

- Costs of authorising DoLS which fall on supervisory bodies: **£395.27million**
- Costs of authorisations for deprivations of liberty outside of DoLS settings: **£42.96million**
- Legal costs: This includes the cost to the courts, legal aid, Official Solicitor and people who lack the relevant mental capacity and their families or carers: **£79.10million**
- Costs to regulatory bodies: The Care Quality Commission, Care Inspectorate Wales and Healthcare Inspectorate Wales currently incur costs in monitoring and reporting on the DoLS: **£9.4million**.
- Ongoing training costs: **£0.45million**

7.2 Total per annum costs of the status quo are therefore estimated to be **£527.18million for England and Wales**.

7.3 Using a population based approach and the assumption that costs for Wales amount to 5.36% of total costs for England and Wales, the estimated costs for continuing DoLS in Wales would be **£28.26million per year**.

7.4 As stated above at paragraph 6.3, the current lack of workforce capacity means there is a building but ever-changing 'backlog' of pending applications not completed within the year they are received by local

[19] Paragraph 13.2: Updated UK Government Impact Assessment for the Mental Capacity (Amendment) Act 2019 published as part of the consultation on the draft Regulations for England.

authorities and health boards. In order to address this backlog an additional £3.3m was made available in 2021 to support local authorities and local health boards to manage cases. If no changes were made to the DoLS system, it is highly likely that similar backlog funding exercises would be required in future years.

OPTION 2 – Introduce the LPS in Wales – Supported by the Regulations on IMCAs / AMCPs / Monitoring and Reporting / Who can undertake assessments, determinations and pre-authorisation reviews

TOTAL COSTS FOR LPS IMPLMENTATION BASED ON THE UK GOVERNMENT IMPACT ASSESSMENT

7.5 The UK Government Impact Assessment published as part of the consultation on the draft Regulations for England sets out the low estimate, best estimate and high estimate costs for the implementation of the LPS in England and Wales.

7.6 Best estimate total per annum costs associated with implementing the new LPS in England and Wales are estimated to be **£318.5million**. This includes costs of authorisations, costs of admin and desk top reviews, total costs of advocacy, total cost of AMCP approval, total legal system costs, costs to the Responsible Body from CoP reviews, and ongoing regulation, monitoring and reporting. In addition, there are transitional costs of **£85.74million** (including training, recruitment and familiarisation costs. These best estimate costs are summarised in the table below.

TABLE 1: Summary of Total LPS Best Estimate Costs for England and Wales

Total Costs	**Best Estimate Costs for the LPS for England and Wales**	**Best estimate cost for Wales based on 5.36% calculation**
Transitional		
Training costs (including BIA conversion to AMCPs, training for IMCAs, key professionals (such as nurses and other professionals) and wider awareness raising – in line with the groups identified in the "training triangle" (Figure 1 of Annex 2)	£76.32m	£4.09m
Data implementation costs (e.g. to support the development of new data reporting systems)	£6.57m	£0.35m[20]
Other implementation costs (for regulators to prepare for their new roles)	£2.85m	£0.15m
Total transitional costs	**£85.74million**	**£4.6million transitional costs for Wales**
Ongoing		
Cost of admin (desktop reviews)	£46.74m	£2.51m
Cost of new assessments	£52.43m	£2.81m

[20] For Wales – this would include £10K for each local authority and health board to support reporting systems locally on the LPS (£290K), plus £32K for an SEO post for six months to support the development of the LPS National Minimum Data Set for Wales. See paragraph 7.65 of the RIA.

Total Costs	**Best Estimate Costs for the LPS for England and Wales**	**Best estimate cost for Wales based on 5.36% calculation**
Total cost of advocacy	£141.30m	£7.57m
Total cost of AMCP approval	£27.45m	£1.47m
Total legal system costs	£18.99m	£1.02m
Costs to supervisory body from CoP reviews	£17.1m	£0.92m
Regulation	£14.90m	£0.8m
Total ongoing costs (per annum) in England and Wales	**£318.5million**	**£17.07million ongoing costs for Wales**

7.7 As highlighted in the table above, using a population based approach and the assumption that costs for Wales amount to 5.36% of total costs for England and Wales, the estimated costs for implementing the LPS in Wales – based on the updated UK Government Impact Assessment for the MC(A)A 2019 (published for the consultation on the draft Regulations for England) – would be just over **£17million per year.** In addition, there are an estimated **£4.6million transitional costs** for Wales**.** These result in potential ongoing cost-savings of **£11.19million** per year in Wales (see paragraph 7.3 of this RIA), relative to the annual estimated costs for DoLS.

7.8 Findings from the baseline exercise carried out by Welsh Government have been highlighted in relation to the relevant Regulations below. As highlighted in the introduction to the draft RIA (page 20), we recognise that this alone does not provide a sufficient estimate of the likely impacts of the LPS in Wales, and we intend to use the consultation period to gather further evidence from stakeholders to inform the Impact Assessments to be laid in the Senedd. As part of the consultation document, we include a specific question on the draft RIA and ask stakeholders to submit further evidence to help inform the position for Wales.

7.9 The total costs incurred as a result of the implementation of the LPS include costs from legislative changes on an England and Wales level. In the sections below, we have set out an estimate of the costs resulting specifically from changes brought into effect by Regulations made in Wales.

ESTIMATED COSTS: IMCA REGULATIONS FOR WALES

7.10 The draft Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Wales) (Amendment) Regulations 2022 are amending Regulations to take account of the role of IMCAs within the new LPS system.

7.11 Every person subject to the new safeguards will have ongoing representation and support from either an 'Appropriate Person' or an IMCA, unless this is not in their best interests.

7.12 Local authorities will be responsible for ensuring there are enough advocates available, but they will be appointed by the Responsible Body. It is the duty of the Responsible Body (a health board or the local authority in Wales) to ensure that there is an Appropriate Person or IMCA provided as soon as an application is made.

Advocacy costs for health boards and local authorities

7.13 The UK Government updated Impact Assessment for the MC(A)A 2019 calculates total advocacy costs by summing the cost of direct IMCA support to persons subject to an LPS authorisation and the cost of IMCA support to Appropriate Persons.[21]

7.14 In relation to estimated costs for advocacy for England and Wales, the updated UK Government Impact Assessment states the following:

- Paragraph 23.65: For the purposes of this impact assessment, we have calculated this cost by summing the cost of direct IMCA support to persons subject to an LPS authorisation and the cost of IMCA support to Appropriate Persons. Our calculations consider the different advocacy needs of a person subject to an LPS authorisation and an Appropriate Person. Voiceability (an advocacy provider) estimates that 95% of first-time applicants require some form of representation and support. Applying this to the **number of (first time) applications (278,646)** gives an estimate of **264,714 applications per year** requiring some form of representation and support**.**
- Paragraph 23.66: We have calculated the **cost of direct IMCA support to persons subject to an LPS authorisation** by assuming that, of individuals requiring some form of representation and support, **25% have**

[21] Paragraph 22.65: UK Government Updated Impact Assessment for the Mental Capacity (Amendment) Act 2019 published as part of the consultation on the draft Regulations for England.

direct IMCA support (**66,178**) and that an IMCA provides **38 hours of direct support per client**. The cost of IMCA support is roughly **£37 per hour.** These figures are devised by Voiceability and are used as a best estimate. There is a great deal of variation in the number of hours per client; PohWER Advocacy have indicated that this can range between 9 and 81 hours in an individual case. Multiplying together gives a cost of **£91.94m.**

- Paragraph 23.67: **Cost of IMCA support for Appropriate Persons** is calculated by assuming that **75%** of people requiring some form of representation and support have an Appropriate Person, and **40%** of Appropriate Persons have an IMCA. Therefore, **79,414 Appropriate Persons require IMCA support.** An IMCA provides **17 hours of support** to an Appropriate Person at a cost of **£37 per hour**. Multiplying gives a cost of **£49.36m.**
- Paragraph 23.68: Adding gives a total annual cost of advocacy of **£141.30m**.

7.15 Applying a population based proportion, and assuming that costs for Wales amount to 5.36% of total costs for England and Wales, would mean that advocacy costs for Wales would be in the region of **£7.57million.**

IMCA training costs for health boards and local authorities

7.16 In addition to costs associated with providing advocacy support, there are also costs associated with providing training for IMCAs as part of the new LPS system.

7.17 The updated UK Government's Impact Assessment for the LPS includes estimates for IMCA training costs:

- Paragraph 23.44: training is needed for 11,451 new IMCAs. This figure is comprised of 7,451 IMCAs to provide direct support and 4,000 IMCAs to support Appropriate Persons. The calculations imply that each IMCA can support 36 direct support cases per annum (1,350 working hours per annum divided by 38 hours per case) or 79 Appropriate Person support cases per annum (1,350 working hours per annum divided by 17 hours per case).

- Paragraph 23.45: The training cost for each new IMCA is £1,933. This is based on City and Guild course prices and uplifted to 2020/21 prices. It is assumed that the training cost under the new scheme will be equivalent to the cost of training a person as a DoLS advocate.

- Paragraph 23.46: The total advocate training cost is calculated by multiplying the number of advocates needed (11,451) by the advocate training cost (£1,933), giving £22.1m.

7.18 Applying a population based proportion, and assuming that costs for Wales amount to 5.36% of total costs for England and Wales, would mean that total advocate training costs for Wales would be in the region of **£1.18million.**

Revised estimated advocacy and training costs – using baseline data on IMCAs for Wales

7.19 With the view to informing estimates of total advocacy costs for Wales, and training costs for IMCAs in Wales, Welsh Government wrote to all local authorities and health boards to collect baseline data on the number of IMCAs currently in place and anticipated training needs.

7.20 IMCA services are predominantly commissioned by health boards. Some health boards undertake collective commissioning. The total annual spending by health boards on IMCAs is approximately £773k p/a. This is then supplemented with additional commissioning by health boards and local authorities. Whilst some areas indicated they were able to meet current demand, other areas highlighted that this level of funding was either currently insufficient for their area, or there was a risk that changes to the safeguards would mean that current funding is insufficient.

7.21 Given the gap between current resourcing and potential need under the LPS, it is likely that initial recruitment and training costs will be greater for Wales than estimated in the UK estimate for England and Wales.

7.22 The HIW and CIW Deprivation of Liberty Safeguards Annual Monitoring Report for Health and Social Care 2019-20 set out that current use of IMCAs varied considerably between health boards, depending on the approaches used locally.[22]

7.23 Under DoLS: All applications require that the individual has a nominated representative. The majority of these are a family member or friend. However, when there is no one independent of services, such as a family member or friend, to represent the person, an IMCA or a paid representative is instructed. The IMCA or paid representative role is to support and represent the person in the decision-making process and make sure that the Mental Capacity Act 2005 is being followed.

7.24 There are three roles for IMCAs in cases of deprivation of liberty as set out in the different sections of the Mental Capacity Act:

[22] Deprivation of Liberty Safeguards Annual Monitoring Report for Health and Social Care 2019 to 2020

- IMCAs are appointed under Section 39A when the individual has no one to consult.
- IMCAs are appointed under Section 39C when the individual's representative is temporarily or suddenly no longer able to represent them.
- IMCAs are appointed under Section 39D to support the individual's representative, if that representative is unpaid (e.g. family member), and it is believed by the supervisory body is in need of support.

7.25 According to the CIW and HIW Deprivation of Liberty Safeguards Annual Monitoring Report Health and Social Care 2019-20: Of all health board authorised applications, 60 made use of an IMCA appointed under Section 39A, 155 an IMCA appointed under Section 39D and 8 made use of an IMCA appointed under Section 39C. This was considerably higher than the previous year, with over three times as many IMCA 39A appointments. Of all local authority authorised applications, 285 made use of an IMCA appointed under Section 39A, 112 appointed under Section 39D and none made use of an IMCA appointed under Section 39C.

7.26 In terms of IMCA services delivered in Welsh: The baseline data collected from health boards and local authorities in April 2021 demonstrates significant regional variance. Three local authorities reported between 5-35% of all IMCA services being requested in the medium of Welsh. The remaining local authorities and health boards indicated there are currently approximately 10-20 cases requiring IMCA services to be delivered in Welsh each year across these areas.

7.27 There will be a need to consider the demand for IMCAs in Wales in more detail during the formal consultation, with an assessment of likely demand for IMCAs based on projected case load for Wales.

ESTIMATED COSTS: APPROVED MENTAL CAPACITY PROFESSIONAL (AMCP) REGULATIONS FOR WALES

7.28 The draft Mental Capacity (Deprivation of Liberty: Training and Criteria for Approval as an Approved Mental Capacity Professional) (Wales) Regulations 2022 set out provisions regarding the role and appointment of AMCPs.

7.29 The role of the Approved Mental Capacity Professional (AMCP) is a new role – both within the LPS and the health and social care workforce. It replaces and develops the role of the Best Interest Assessor (BIA) under the DoLS.

7.30 The new Schedule AA1 to the 2005 Act (as inserted by the MC(A)A 2019) contains the new administrative scheme for the authorisation of arrangements which amount to a deprivation of liberty. Before the arrangements can be authorised, a pre-authorisation review must be carried out to determine whether the authorisation conditions are met in respect of the arrangements or whether it is reasonable for a body to conclude that the authorisation conditions are met. In certain circumstances, this pre-authorisation review must be carried out by an AMCP. AMCPs are only required to approve authorisation in specific cases where the relevant skills are most needed. By focussing skills, the system will be more efficient.

7.31 Following assessments and consultation, a pre-authorisation review is completed by the Responsible Body. In cases where a person resides in an independent hospital, has raised an objection to the arrangements, or has particularly complex circumstances, the pre-authorisation review will be completed by an AMCP. This will mean that objections to the proposed arrangements can be considered by someone not involved directly in the person's care, support or treatment.

7.32 According to the UK Government Updated Impact Assessment on the MC(A)A 2019: "…the Responsible Body will arrange an independent pre-authorisation review for every referral. As reported by the Law Commission, most authorisations should be straightforward, so we do not expect this to be burdensome on local authorities, NHS Trusts and CCGs (in England), or local health boards (in Wales). In a small number of other cases (for example, if the person does not wish to reside in the place where the arrangements are carried out), an AMCP will be brought in to ensure that the assessments have been done to the highest standard. This means that resources are used efficiently, and skills are focused where they are most needed. In many cases under the current system, the arrangements proposed for the person are reasonable and no changes are needed, but the BIA is required to approve every application. By redefining the role of BIAs into AMCPs we are able to make the system much more efficient by focusing skills in the right places."[23]

Cost of approval of cases by AMCPs

7.33 In the UK Government Updated Impact Assessment of the MC(A)A 2019, the sum ongoing cost of approval by AMCPs is comprised of AMCP costs for all cases requiring their approval, the cost of repeat assessments, and the cost of refresher courses (18 hours of further training) for AMCPs.

7.34 Paragraph 23.75 of the UK Government Updated Impact Assessment

[23] Paragraph 9.10: UK Government Updated Impact Assessment for the Mental Capacity (Amendment) Act 2019 published as part of the consultation on the draft Regulations for England.

states: **AMCP cost for all cases requiring their approval** is calculated by multiplying the number of cases requiring an AMCP (between 11% and 41% of the 278,646 applications per annum, with a central estimate of 26%, giving 72,500 cases) by the AMCP cost per approval (£131 more than the £227 standard cost of administration and pre-authorisation review, giving £358)), taken from the Law Commission. This gives a cost of £25.91m.

7.35 Applying a population based proportion, and assuming that costs for Wales amount to 5.36% of total costs for England and Wales, this would be an **estimated £1.39million for Wales**.

7.36 Paragraph 23.76 of the UK Government Updated Impact Assessment states: If the AMCP is not satisfied with existing assessments, they can choose to do their own. **Cost of repeat assessments** is calculated by using the Law Commission assumptions and multiplying the number of cases subject to AMCP approval above, the cost per repeat assessment (£53) and an assumption on the repeat assessment rate (5%). This gives a cost of £0.19m.

7.37 Applying a population based proportion, and assuming that costs for Wales amount to 5.36% of total costs for England and Wales, this would be an estimated **£10K for Wales**.

Training costs for AMCP: Conversion training / new training / refresher (further) training

7.38 A range of staff across the health and care sectors, including children's services and local authorities, will require training on the new LPS system, and this includes training for AMCPs.

7.39 The UK Government Updated Impact Assessment states the following for the costs of AMCP conversion:

- **Paragraph 23.49:** The cost of conversion is the cost of converting BIAs to AMCPs. BIAs already perform a similar role to AMCPs, so the cost of conversion is lower than training a new AMCP. Furthermore, since DHSC is supporting the cost of the development of the training materials, the cost of each course will include only the time taken to undertake this training which we expect will be between 8-16 hours. We will take the centre of this range, 12 hours. Using the £30 per hour unit cost of an AMCP trainee's time, this gives a total time cost of £360.

- **Paragraph 23.50:** The Law Commission estimated that 90% of AMCPs would be existing BIAs. We have therefore multiplied the number of AMCPs converted from BIAs (90%, giving 1,043), by the unit cost of a BIA to AMCP conversion course (£360), and added the one-time course materials price. This gives a cost of £0.38m.

7.40 Applying a population based proportion, and assuming that costs for Wales amount to 5.36% of total costs for England and Wales, would mean that total conversion training costs for Wales would be in the region of **£20K. This would be a one off implementation cost, as the conversion course will only be available to support the implementation period.**

7.41 The UK Government Updated Impact Assessment states the following in relation to training for new AMCPs who are not currently undertaking BIA functions.

- **Paragraph 23.48:** The training cost for each new AMCP comprises a course fee and the cost of time. The unit cost of an AMCP trainee's time is estimated to be £30[24] per hour - we have used the social worker hourly cost for estimation purposes since social workers are the largest group that perform the BIA role under DoLS. The course will be worth 60 credits and will be longer than the 30 credit, 48 hour course BIAs currently undertake. On the basis that the course is worth twice the credits, we assume it will be twice as long, i.e. 96 hours, giving a total time cost of £2,883. We also assume it will cost twice as much as the £1,581 estimated by the Law Commission, giving £3,162. **The total cost of AMCP upfront training** is calculated by multiplying the number of AMCPs who need training (116) by the combined unit cost of the AMCP upfront training course (£6,045), giving a cost of £0.7m.

7.42 Applying a population based proportion, and assuming that costs for Wales amount to 5.36% of total costs for England and Wales, would mean that total initial training courses costs for Wales would be in the region of **£38K. However, these costs will vary based on the details of new AMCP training for AMCPs operating in Wales, and estimates will be revised following consultation.**

7.43 It is also anticipated that AMCPs will be required to undertake 18 hours of **further training** per year (referred to as refresher training in the UK Government Impact Assessment).

7.44 Within the UK Government Updated Impact Assessment, the cost of refresher training is assumed to be £1,159 per AMCP per year, accounting for course and time costs. This includes the Law Commission's estimate of a conversion course multiplied by 18/8 to reflect a longer expected course length of 18 hours (versus 8 hours in previous version of the IA), and uplifted to 2020/21 prices (£23). The unit cost of an AMCP time is

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assumed to be similar to that of existing Best Interests Assessors (who can be a social worker, nurse, occupational therapist or registered psychologist by law) and is estimated to be £30 per hour (uplifted to 2020/21 prices) - we have used the social worker hourly cost as a proxy for estimation purposes as it falls in the middle. This gives a time cost per course of £541. Multiplying the number of AMCPs (1,159) by the total cost of per refresher training (£1,159), gives a cost per annum of £1.34m.

7.45 Applying a population based proportion, and assuming that costs for Wales amount to 5.36% of total costs for England and Wales, would mean that total further training courses costs for Wales would be in the region of **£0.072million.**

7.46 A summary of the estimated training costs for Wales – based on the UK Government Updated Impact Assessment for the Mental Capacity (Amendment) Act 2019 is set out in the table below.

TABLE 2: Summary of costs for AMCPs in Wales – based on the updated UK Government Impact Assessment for the MC(A)A 2019

Costs – AMCP Role:	**Best Estimate – Using updated UK Government Impact Assessment: estimated costs for Wales**
Transition costs	
Training	
Conversion Training for BIAs	**£20K**
New (Initial) Training for AMCPs	**£38K**
Ongoing Annual Costs	
Training	
Refresher Training (18 hours per year of further training per AMCP)	**£72K**
AMCP approval of cases costs	
AMCP costs for all cases requiring their approval	**£1.39m**
Repeat assessments	**£10K**
TOTAL ANNUAL COSTS:	**£1.47million**

Revised estimated advocacy and training costs – using baseline data on Best Interest Assessors / AMCPs for Wales

7.47 With the view to informing estimates of AMCP costs for Wales relating to AMCPs and approval, as well as workforce development, training and recruitment, Welsh Government wrote to all local authorities and health boards to collect baseline data. A summary of key findings is set out in Annex 1.

Workforce

7.48 The UK Government Updated Impact Assessment estimates that 26% of LPS cases will require an AMCP. Baseline data for Wales suggests that Responsible Bodies anticipate a greater proportion of cases requiring an AMCP. There is a need to further develop this data, but estimates for the number of cases which would be classed as complex / objecting ranged from 27% to 65% for some localities.[25] This would result in a higher number of AMCPs being required.

7.49 This is reflected in the estimates provided by Responsible Bodies as to the number of individuals that would require conversion training. Through the baseline data collection, all areas reported not currently having enough BIAs to handle current DoLS case load. The LPS Workforce Plan will provide planning tools to Responsible Bodies to allow them to make more accurate estimates of required workforce capacity. However, initial estimates indicated that most regions anticipated most of the current BIA workforce would require conversion training to the AMCP role.

7.50 The figures provided as part of the baseline exercise indicate there are approximately 192 staff currently undertaking Best Interest Assessments in Wales, with local authorities and local health boards estimating they would look to convert around 140 BIAs. Although this is an initial estimate and further workforce planning will be required, this would suggest a greater initial spend on conversion training than currently provided for within the 5% allocation.

Training

7.51 Feedback from stakeholders has demonstrated support for training for new AMCPs following a similar approach to AMHP training. The cost in Wales to deliver AMHP training is currently approximately £5,350. This is

[25] This is based on the baseline evidence collection exercise in Wales where LAs and LHBs were asked to estimate the proportion of current DoLS cases which would be considered complex or objecting.

an increase on the England and Wales estimate of £3,693. Whilst final costs of courses are still to be established, it is likely that the cost of training in Wales may be greater than the cost of training in England.

7.52 Greater detail is also required on the anticipated number of individuals that will require training to develop 1WTE AMCP. UK Government have estimated that due to the AMCP role regularly forming one part of an individual's wider role, four AMCPs will need to be trained in order to provide 1 WTE. The baseline data exercise has demonstrated a very mixed approach to the blend of full time and part time AMCPs, and further work is needed to inform the likely transitional training costs.

7.53 Alongside the draft Regulations for Wales, Welsh Government is also engaging with stakeholders on the development of a Workforce Plan and Training Framework. A summary of the aims of the Workforce Plan and Training Framework is set out in Annex 2.

ESTIMATED COSTS: MONITORING AND REPORTING REGULATIONS FOR WALES

7.54 The LPS will provide an authorisation process and review scheme that is Article 5 compliant. It also gives effect to rights under Article 8 of the ECHR, a right to respect for a person's private and family life, and other relevant international human rights law, such as the United Nations Convention on the Rights of People with Disabilities. This will be complimented by a comprehensive monitoring system, which will ensure that no one is unfairly treated while deprived of their liberty, in line with the requirements of the Optional Protocol to the Convention of against Torture.

7.55 The draft Mental Capacity (Deprivation of Liberty: Monitoring and Reporting) (Wales) Regulations 2022 define a "monitoring body" as being either Care Inspectorate Wales (CIW), Health Inspectorate Wales (HIW) or Estyn in Wales. The monitoring bodies must monitor and report on the Liberty Protection Safeguards in relation to Wales. The relevant monitoring body in the case of a person in a social care setting will most likely be CIW and in a health care setting it will most likely be HIW. If the person is aged 16 or 17 or in receipt of educational provision under the Additional Learning Needs and Education Act 2018, the relevant monitoring body will most likely be Chief Inspector of Education and Training in Wales (Estyn).

7.56 HIW, CIW and Estyn may work together to meet their duties to monitor the operation of the Liberty Protection Safeguards.

7.57 The Regulations will confer certain powers on the monitoring body in connection with their monitoring and reporting duties. These powers will enable the monitoring body to visit any place where an authorised arrangement is being carried out; meet with a cared-for person; require the

production of, and inspect, records relating to the care or treatment of a cared-for person; and also meet with a person engaged in caring for a cared-for person or a person interested in a cared-for person's welfare. In respect of the power to visit a person's own home, the Regulations we are consulting on make it clear that relevant monitoring bodies will be reliant on consent in order to visit. The detail on how this will work in practice will be included in a Monitoring and Reporting Strategy for Wales, currently being developed.

Costs to monitoring and reporting bodies

7.58 In Wales, there will be ongoing costs for Welsh Government related to annual reporting, as well as case tracking and ongoing performance review and monitoring meetings. It is anticipated that the monitoring bodies (HIW / CIW / Estyn) will work together to publish an **annual report** on the operation and outcome of the LPS (using the LPS National Minimum Data Set). There will also be costs associated with the design, translation and publication of the annual report (which will also include an accessible version).

7.59 The UK Government Updated Impact Assessment for the MC(A)A 2019 states the following in relation to monitoring and reporting costs:

- Paragraph 19.11: Based on data provided by CQC, current CQC costs under the existing DoLS system are around £9.4m per year.

- Paragraph 23.92: The cost of CQC regulation for the LPS has been estimated at **£13.5m** per annum once DoLS is no longer in operation. These figures are based on initial analysis done by the CQC team.

- Paragraph 23.93: Initial analysis by Ofsted suggests a cost of around **£600,000** per annum.

- Paragraph 23.94: We [UK Government] do not have estimations of specific costs for the Welsh monitoring bodies, so have added an additional 5.7% to cover these costs. **This gives a total combined regulation cost of £14.90m per annum.**

7.60 Applying a population based proportion, and assuming that costs for Wales amount to 5.36% of total costs for England and Wales, would mean that total monitoring and reporting costs for the LPS in Wales for HIW and CIW would be in the region of **£0.72million per annum** – and for Estyn, they would be in the region of **£32K per annum.**

7.61 As we engage with stakeholders on the development of the LPS Monitoring and Reporting Strategy for Wales, we will give further consideration to anticipated costs for monitoring and reporting – for both Welsh Government and Responsible Bodies.

Costs to Welsh Government – Development of a National Minimum Data Set (NMDS) on the LPS

7.62 Welsh Government has been working with stakeholders to develop a National Minimum Data Set (NMDS) for the LPS in Wales. The UK Government has led on the development of a NMDS for England. This NMDS 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.

7.63 With the view to agreeing the data set 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). The NHS Digital Health and Care Wales has been leading discussions with the health boards and local authorities – with the view to getting agreement to each of the data items included in the NMDS and its future collection. A series of workshops have been held with key stakeholders, and health boards and local authorities have completed Impact Assessments on the proposed NMDS. A full data proposal will be submitted to WISB when the NMDS is finalised. The data will then be collected by the Responsible Bodies (health boards and local authorities).

7.64 Estimated costs for the development of the NMDS and working with DHCW for Welsh Government are: 1 full time SEO post for 6 months at a cost of £32,150.[26]

7.65 The updated UK Government Impact Assessment for the MC(A)A 2019 states the following in relation to the development of the data set and supporting data systems:

- Paragraphs 23.52 and 23.53: It is important that there is a reliable and detailed data set regarding the LPS to enable appropriate monitoring of the effectiveness of the system, and to spot any trends that may need to be addressed. The monitoring bodies (CQC and Ofsted in England) also have a vital role in ensuring that the system is being delivered fairly and the rights of people impacted by it are protected. Responsible Bodies will be required to notify the monitoring bodies of every authorisation, in line with a national minimum data set, to allow the bodies to plan inspections and report appropriately on the data. In order for this to work, data systems at a national and local level need to be in place. The national level data system will collect data from Responsible Bodies and feed it

[26] This is based on Welsh Government Annual Average Gross Pay Costs for 2020-21. These costs are captured in Table 1.

into the monitoring bodies. The details of the development of this system is estimated to cost **£1.5million**.

- Paragraph 23.54: At a local level, local authorities will already have systems in place from their role under DoLS. These systems will need updating to align with the LPS process and to work with the national system. However, NHS bodies (Clinical Commissioning Groups and NHS Trusts in England, Health Boards and NHS Trusts in Wales) have a new role that they did not have under DoLS. They do not currently have systems in place and will therefore need to develop entirely new systems. DHSC currently has limited information about these potential costs so, for the purposes of this Impact Assessment, we estimate that each Responsible Body will need to spend on average around £10k on data implementation, across LAs and NHS bodies. This means that data systems for Responsible Bodies would cost around £5.1m.

7.66 Health boards and local authorities in Wales have started to identify the potential costs associated with making changes to local systems to enable the future collection of the NMDS. However, the recent Impact Assessments completed by health boards and local authorities on the LPS NMDS (as part of the WISB process for agreeing the NMDS) have highlighted that it is difficult to estimate costs at this point. Further discussions are currently taken place regarding the changes needed to local data systems to enable ongoing future monitoring and reporting on the LPS NMDS, and estimates of costs will be informed by these conversations. There may also be training costs associated with the development of new data collection systems. There will also be costs associated with making changes to national systems (such as WCCIS / Once for Wales) to reflect and embed the new LPS NMDS.

7.67 Applying a population based proportion, and assuming that costs for Wales amount to 5.36% of total costs for England and Wales, would mean that data implementation costs for Wales would be in the region of **£0.35m**. It is expected that WG would provide £10K to each Responsible Body to ensure local systems are updated to align with the LPS process, amounting to £290K of this total (22 local authorities and 7 health boards).

Ongoing costs to health boards and local authorities – monitoring and reporting on the LPS

7.68 Annual costs of monitoring and reporting on the LPS for health boards and local authorities in Wales are not yet known. Ongoing local monitoring and reporting and costs will be explored further through the consultation.

ESTIMATED COSTS: WHO CAN UNDERTAKE ASSESSMENTS AND DETERMINATIONS REGULATIONS FOR WALES

7.69 The draft Mental Capacity (Deprivation of Liberty: Eligibility to Carry out Assessments, Make Determinations and Carry out Pre-Authorisation Reviews) (Wales) Regulations 2022 set out the eligibility requirements for a person to carry out the following assessments:

- an assessment as to whether a person lacks capacity to consent to the arrangements ("a capacity assessment");
- an assessment as to whether a person has a mental disorder ("a medical assessment"); and
- an assessment that the arrangements are necessary to prevent harm to the person and are proportionate in relation to the likelihood and seriousness of harm to the person ("a necessary and proportionate assessment").

7.70 Once all three assessments are complete, a person who is not involved in the day-to-day care of, or in providing any treatment to, the person, and who does not have a prescribed connection with a care home, must carry out a pre-authorisation review. A pre-authorisation review is a review that must be carried out to determine whether the authorisation conditions are met in respect of proposed arrangements or whether it is reasonable for a body to conclude that the authorisation conditions are met in order to authorise the deprivation of liberty as lawful.

7.71 In cases where a person resides in an independent hospital, has raised an objection to the arrangements, or has particularly complex circumstances, the pre-authorisation review will be completed by an Approved Mental Capacity Professional (AMCP). This will mean that objections to the proposed arrangements can be considered by someone not involved directly in the person's care, support or treatment.

7.72 The Regulations on who can undertake assessments and determinations also prescribe the circumstances in which a person will have a connection to a care home for the purpose of a pre-authorisation review. A person who has a prescribed connection to a care home cannot undertake a pre-authorisation review. A connection to a care home includes where they work at that care home (or a company connected with that care home), are a member of the governing body of that care home, or have a financial interest in that care home.

Undertaking assessments

7.73 The cost of the new LPS assessments is expected to be met by the Responsible Body.

7.74 The UK Government Updated Impact Assessment for the MC(A)A 2019 states that costs associated with the new assessments under the LPS are estimated to be **£52.46million**.

7.75 Specifically, updated the UK Government Impact Assessment states the following:

Medical and capacity assessments

- Paragraph 23.58: In many cases, capacity and medical assessments will already be available for the purposes of a Liberty Protection Safeguards authorisation. For example, if someone has a diagnosis of dementia that is still valid, this can be used for the purposes of an assessment for mental disorder. Similarly, if a capacity assessment is carried out for another purpose, such as hospital discharge, and it is still valid, this capacity assessment might be used.
- Paragraph 23.59: The Law Commission estimated that a medical assessment will already have been completed in 85% of cases. This means a new medical assessment will be required in 15% of cases. Using this as a basis and uplifting slightly to consider applications concerning 16/17-year olds which are likely to be first time authorisations, we estimate that new medical assessments will need to be completed in 20% of cases. The medical assessment under the LPS system will not need to cover the level of detail of those completed in the current DoLS by Section 12 doctors. It is therefore difficult to establish the cost of a medical assessment, so we have used £121 per medical assessment as a best estimate, inflated from the 2011/12 Law Commission cost of £102.
- Paragraph 23.60: There is limited information available to establish how many capacity assessments will be required. However, stakeholders have indicated that a new capacity assessment will be needed more often than a new medical assessment. Using this as a basis and allowing for 16/17-year olds as above, a new capacity assessment will be needed in 40% of cases at a cost of £170 per capacity assessment (inflated from the Law Commission estimate).

Necessary and proportionate assessments

- Paragraph 23.61: New necessary and proportionate assessments will be needed in every new case. However, for those who have a care plan under the Care Act 2014, Continuing Healthcare arrangements, or other statutory health or care planning, the necessary and proportionate

assessment can be completed alongside the care planning for this. Approximately 50% of those subject to the LPS will have such a plan. For these people we estimate that the cost of completing the necessary and proportionate assessment alongside this care planning will be 20% of the standard cost of completing a new standalone necessary and proportionate assessment. The cost for these individuals is therefore equal to 139,300 assessments (50% of all expected applications under the LPS) at a cost of £32 per assessment (20% of the full standalone 'necessary and proportionate' assessment cost of £160 each).

- Paragraph 23.62: The remaining 50% (139,300) will not have such a care plan and they will all require standalone 'necessary and proportionate' assessments, at a cost of £160 each.

7.76 Applying a population based proportion, and assuming that costs for Wales amount to 5.36% of total costs for England and Wales, would mean that total costs associated with undertaking the LPS assessments in Wales are estimated to be **£2.81million**.

Training costs for competency groups B, C and D (see figure 1 in Annex 2)

7.77 Work undertaken by the LPS Workforce and Training Sub Group for Wales has highlighted a significant range of roles that will require training to support work under the LPS. This includes training for a wide range of roles who will be able to undertake assessments, including social workers and nursing staff.

7.78 The updated UK Government Impact Assessment for the MC(A)A 2019 now includes those costs and states the following in relation to training for staff across the health and care sectors:

> Paragraph 23.4: A range of staff across the health and care sectors, including children's services and local authorities, will require training on the new LPS system.
>
> Paragraph 23.5 The previous iteration of the Impact Assessment focused solely on the key roles requiring significant levels of training – doctors, social workers, AMCPs and advocates. We have expanded our analysis to include other core healthcare staff (such as nurses) and other staffing groups who may support or look after young people aged 16 & 17 (e.g. special education staff). This is by no means an exhaustive list, and we expect that some staff in NHS Trusts and Responsible Bodies, for example, will have to undertake training in order to carry out their responsibilities as part of the LPS process.

However, it is difficult to identify these individuals and to quantify the impact.

7.79 The UK Government Updated Impact Assessment now includes estimates for training of Doctors, Nurses, Social Workers, care home managers and Special School Staff. The Impact Assessment estimates that training costs for these groups to be £53.1million for England and Wales. Estimates for Wales have been calculated based on the 5.36% figure, and are estimated to be £2.8million. These costs are included within the estimate of transitional training costs. They will be updated in line with more accurate estimates of staff numbers in Wales following further engagement with local health boards and local authorities on the development of local workforce plans.

ADDITIONAL COSTS:

Transition

7.80 Consideration is being given to the transition from DoLS to the LPS. Health boards and local authorities receive £320K per year from Welsh Government to carry out DoLS assessments. In 2020/21, an additional £1.5million was allocated to health boards and local authorities in Wales by Welsh Government to support DoLS – the majority of which was for undertaking DoLS assessments and reducing the current "backlog" of cases where individuals were waiting for a DoLS authorisation.

7.81 A further £4.5million was made available in 2021/22 (£3.3million for addressing the backlog and £1.2million to support training on the MCA in preparation for the implementation of the LPS). It is anticipated that additional funding for the DoLS backlog will also be required for 2022/23.

7.82 Feedback from stakeholders has highlighted particular challenges that may be faced during the transitional year. A key assumption in the impact assessment is that new medical assessments will be needed in 20% of cases, and new capacity assessments will be needed in 40% of cases. This will reduce the cost of undertaking medical and capacity assessments. However, there is a risk that this intended saving will not be achieved in year one, as the quality of care, support or treatment plans will need to improve to facilitate this. There are therefore likely to be additional transitional costs in relation to undertaking assessments.

7.83 Additional intelligence from stakeholders has raised the need to provide assurance of the quality of these assessments during the transitional year, to minimise the number of assessments that are determined to need repeating.

7.84 In line with Mwy na geiriau / More than just words: A Strategic Framework for Promoting the Welsh Language in Health, Social Services and Social Care (Mwy na geiriau / More than just words), the 'active offer' principle will apply to work undertaken as part of the LPS. Where applicable, services such as assessments and advocacy support will be offered in Welsh. Workforce planning will look to ensure there are no barriers to receiving services in Welsh, and that these services are offered proactively. No additional costs have been allocated to support this workforce planning, as it is assumed that capacity to deliver services in the Welsh language is embedded within services.

Once for Wales Supporting Materials

7.85 Consideration is also being given to the development of "once for Wales" supporting materials for Responsible Bodies in Wales, as well as supporting information for key stakeholders, members of the public, local authorities and health boards. Costs associated with the development of these materials are not yet known. Information will be included in the final version of the Impact Assessment.

Implementation of the Workforce Plan and Training Framework in Wales

7.86 This RIA has estimated the key training and workforce costs associated with the role of the AMCP and the IMCA, as well as wider training needs for staff in other roles, using estimates from the UK Government Impact Assessment and adjusting for Wales. The Impact Assessment will be revised to include more accurate estimate of these costs for Wales, based on the views of health boards and local authorities, following consideration of the draft Code of Practice and the draft Workforce Plan and Training Framework. Welsh Government will be engaging with stakeholders alongside the consultation on the draft Regulations, regarding the new Workforce Plan and Training Framework.

Summary

7.87 Option 2 has been chosen by the Welsh Government. Introducing the Regulations for Wales will support the implementation of the LPS and the reforms needed to improve the current system for authorising arrangements that amount to a deprivation of liberty, where the person lacks the mental capacity to agree to these arrangements.

7.88 Table 1 provides a summary of the key costs associated with the implementation of the LPS – including an analysis of transition costs plus ongoing implementation costs, based on the UK Government Impact Assessment for the LPS.

7.89 According to the updated UK Government's Impact Assessment for the MC(A)A 2019, there are potential cost-savings of **£11.19million** per year in Wales (see paragraph 7.3 of this RIA), relative to the annual estimated costs for DoLS.

8. Consultation

8.1 The Welsh Government is currently consulting on the Regulations for Wales. This is an online consultation where we are asking stakeholders to submit written responses. We will also be holding a number engagement sessions with stakeholders. Welsh Government will analyse the consultation responses and the information from the engagement sessions and use this to inform the RIA, the Regulations for Wales, as well as other LPS work streams.

8.2 Alongside the formal 16 week consultation on the draft Regulations and Impact Assessments, Welsh Government will also undertake focussed engagement on the LPS Workforce Plan and Training Framework. These are documents aimed at professionals within Responsible Bodies which will provide planning advice to support the development of local plans for the implementation of the LPS. Focussed engagement will therefore be undertaken with stakeholders within Responsible Bodies and other key organisations to develop the workforce planning documents, and enable Responsible Bodies to begin to develop and implement their own workforce plans as early as possible. Following this engagement, updated versions of the Workforce Plan and Training Framework will be published.

8.3 In addition, HIW, CIW and Estyn will be engaging with stakeholders to develop an LPS Monitoring and Reporting Strategy. Following this engagement and the consultation on the draft LPS Regulations, a Monitoring and Report Strategy for Wales will be published.

9. Competition Assessment

9.1 We do anticipate any specific effects, either positive or negative, on small firms or on competition. However, we will use the consultation period to gather evidence on this specific issue, in consultation with key stakeholders from the health, social care and education sector.

10. Post implementation review

10.1 Included in the new LPS is ongoing monitoring and reporting. As highlighted, HIW, CIW and Estyn are developing an LPS Monitoring and Reporting Strategy for Wales. There will be (tri-partite) annual reporting on the LPS by HIW, CIW and Estyn.

10.2 Welsh Government will continue to review the outcomes of the legislation, as part of the Mental Health Strategy for Wales and supporting Delivery Plans.

11. Summary of Additional impact Assessments

Equalities Impact Assessment

11.1 Welsh Government does not think that the Regulations will have any adverse equality impact on any social group as defined by their race, age, religion or belief, sex, sexual orientation, disability, or gender reassignment.

11.2 As set out in the UK Government Equality Analysis of the Liberty Protection Safeguards Mental Capacity (Amendment) Bill, it is anticipated that the new system will have beneficial impacts, particularly for older people and people with disabilities aged 16 and above. These benefits will include greater advocacy rights for these groups, better protection of their human rights, and greater empowerment for these groups relating to issues of treatment and care. The implementation of the LPS also moves England and Wales closer towards compliance with the requirements of the United Nations Convention on the Rights of Persons with Disabilities.[27]

11.3 We have published an Equalities Impact Assessment as part of the consultation on the Regulations for Wales. We will use the consultation period to request additional evidence of the impacts on those with protected characteristics.

[27] Department of Health and Social Care Equality Analysis: Liberty Protection Safeguards Mental Capacity (Amendment) Bill

Children's Rights Impact Assessment

11.4 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 and 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. 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.

11.5 We have published a draft Children's Rights Impact Assessment as part of the consultation on the Regulations for Wales. We anticipate that the implementation of the LPS in Wales will have a positive impact on the rights of 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.

11.6 We will use the consultation period to request additional evidence of the impacts of the LPS on children and young people and their rights.

Privacy and Data Impact Assessment

11.7 Welsh Government will not be processing personal data. However, Responsible Bodies will be processing personal information as part of their compliance with delivering the Mental Capacity (Amendment) Act 2019.

11.8 There will be an ongoing consideration of the data and privacy impacts of the LPS and the Regulations for Wales, particularly as we develop the LPS National Minimum Data Set. Welsh Government will be consulting with the Information Commissioner's Office.

Justice Impact assessment

11.9 The Welsh Government's assessment of the impacts of this legislation on the justice system is that it has no or negligible potential impact. This is

because the Regulations for Wales supporting the implementation of the LPS do not create any new offences (criminal or civil).

Rural Impact Assessment

11.10 People living in rural areas will be subject to the same LPS process and safeguards as those living in non-rural settings. There will be no specific impacts for people living in rural areas as the new safeguards will apply in all settings. Responsible Bodies will need to consider all applications for an authorisation of care, support or treatment arrangements that amount to a deprivation of liberty – regardless of where someone is living.

11.11 We will continue to review and reflect on the impacts of the safeguards on rural communities, as we consider, engage and consult with stakeholders on the Regulations for Wales.

Welsh Language Impact Assessment

11.12 Overall – it is anticipated that the implementation of the LPS and the Regulations for Wales will have a positive impact on Welsh speakers.

11.13 In line with Mwy na geiriau / More than just words: A Strategic Framework for Promoting the Welsh Language in Health, Social Services and Social Care – the 'active offer' principle will apply to work undertaken as part of the LPS. Where applicable, services such as assessments and advocacy support will be offered in Welsh. Workforce planning will look to ensure there are no barriers to receiving services in Welsh, and that these services are offered proactively.

11.14 We will continue to review and reflect on the impacts of the safeguards on the Welsh Language as we consider, engage and consult with stakeholders on the Regulations for Wales. As part of the consultation, we have also published a draft Welsh Language Impact Assessment.

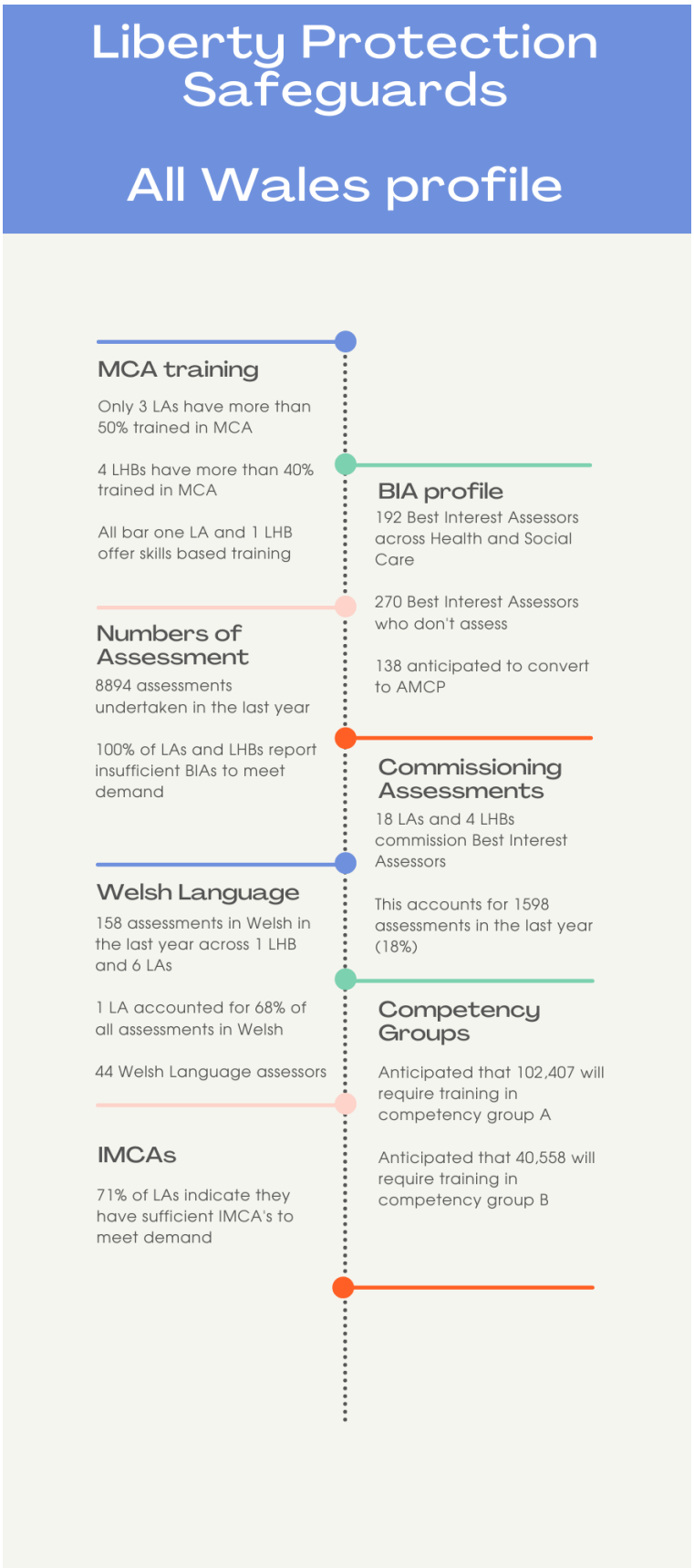
Socio-economic duty

11.15 We know that socio-economic disadvantage can be disproportionate in certain communities of interest – including those with protected characteristics. We have specifically considered how the Regulations will

impact on those with protected characteristics in the Equalities Impact Assessment, published as part of the consultation.

11.16 The safeguards will apply to all people who lack mental capacity, no matter what their background or circumstances.

Annex 1: Summary of Baseline Data Collection Exercise



Annex 2: Liberty Protection Safeguards: Workforce Plan and Training Framework Summary

The LPS will bring changes to organisations in Wales that will require them to map what workforce they will need in the future. To aid understanding of what changes the LPS will bring, health boards and local authorities will need to consider the LPS Code of Practice and other supporting documentation.

The LPS will bring about changes, with the creation of new roles and responsibilities for organisations and individuals, alongside process changes, thereby creating workforce and training gaps that will need to be addressed.

The national LPS Workforce Plan is designed to support local, regional and national employers in planning their staffing requirements in readiness for the implementation of the LPS. The document aims to provide support to a range of employers including NHS, independent hospitals, social care, advocacy and education services.

The Workforce Plan provides the following:

- A template to plan the workforce required to understand the current capacity levels to meet responsibilities under the current DoLS arrangements. An initial baseline data exercise has been undertaken to support this.
- Information to support understanding the potential demand for LPS authorisations to inform future workforce needs.
- Information to support mapping the potential future workforce available and identifying workforce gaps against future needs.
- An outline of the types of training required in line with the relevant category of staff.
- Templates to help prepare a learning and development plan to meet these workforce development needs:
    a. Leading up to the implementation date
    b. For the transitional year
    c. For future maintenance of the LPS workforce

Understanding potential demand for LPS authorisation to inform future workforce needs

In order to understand the potential demand for LPS authorisations, data analysis will be required. This will include analysis of current numbers of DoLS cases, Court of Protection (CoP) cases, and numbers of 16 and 17 year olds who may require the authorisation of a deprivation of liberty.

It will also be essential to understand how many are supported by Continuing Healthcare funding – as under the LPS, health boards will become the Responsible Body overseeing authorisations for these individuals.

For independent hospital cases, it will be important to develop an understanding of the numbers of people who use independent hospital services each year, including building-based hospice services.

Mapping potential future workforce available and identifying workforce gaps against future needs

Under the new scheme, it is intended that health, social care and education staff will still be required to recognise a deprivation of liberty and the need for authorisation, but that a wider range of registered health and social care professionals will all be able to undertake the required assessments and determinations as part of mainstream health and care needs assessment and care and support planning. It is crucial that the principles that underpin the MCA 2005 and the LPS are applied throughout the care and support planning process in order to ensure effective care and support planning. The introduction of the LPS reinforces the need for MCA 2005 informed care and support planning as it will be necessary for those professionals who are undertaking the assessments, determinations and pre-authorisation reviews to have access to all of the information necessary in order for them to make informed decisions.

A baseline data exercise has been undertaken to better understand current capacity under DoLS (see Annex 1 of this draft RIA). Responsible Bodies will need to assess the future workforce needs based on demand for LPS authorisations and map this against current capacity to build an understanding of workforce development needs. This workforce development could be undertaken by training, recruitment, or sharing resources across local areas.

The different roles required by the LPS will require differing levels of competency in terms of knowledge and application of the new procedures. Figure 1 below shows the competency groups required to deliver the LPS.

Figure 1:

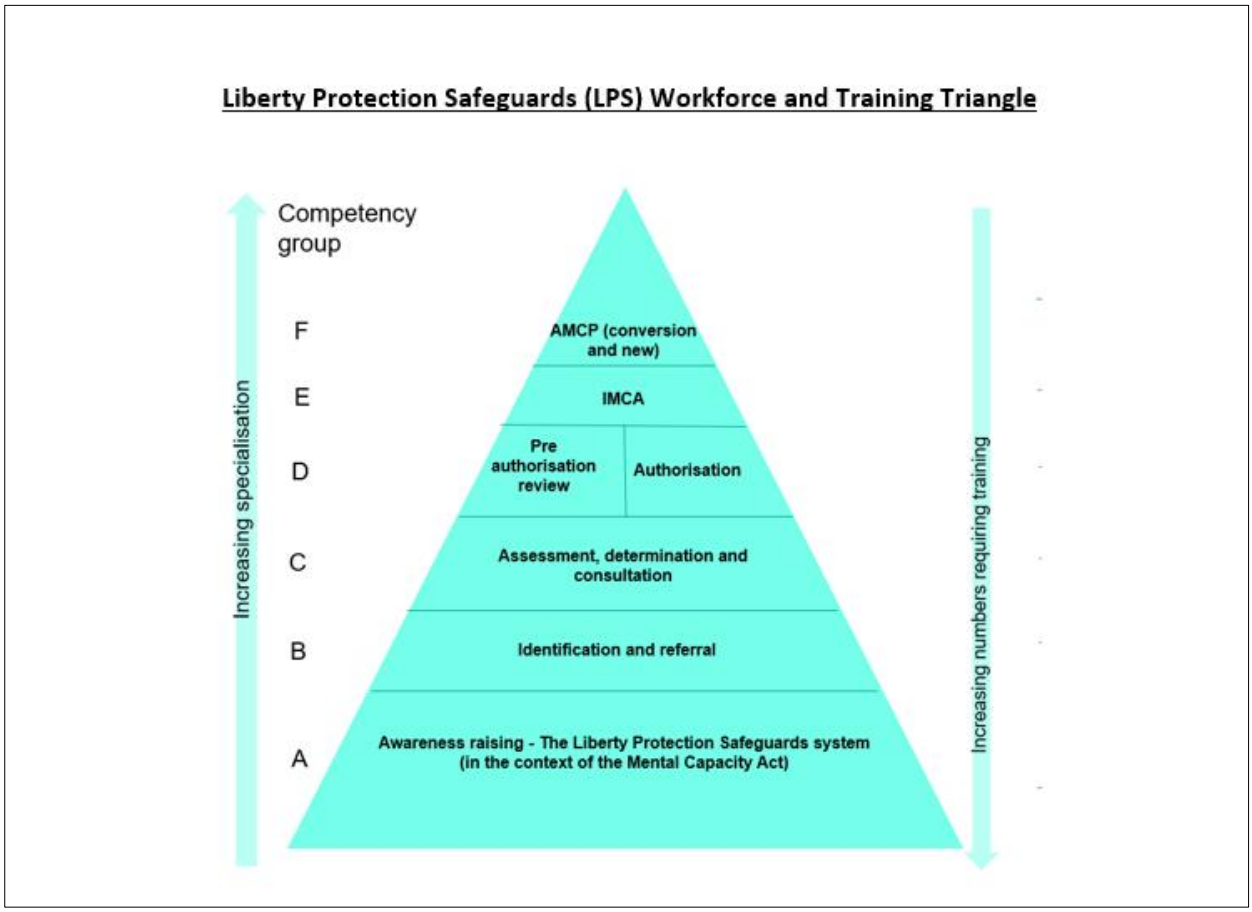

Liberty Protection Safeguards (LPS) Workforce and Training Triangle
Competency group
F
E
D
C
B
A
AMCP (conversion and new)
IMCA
Pre authorisation review
Authorisation
Assessment, determination and consultation
Identification and referral
Awareness raising - The Liberty Protection Safeguards system (in the context of the Mental Capacity Act)
Increasing specialisation
Increasing numbers requiring training

Figure 2 below provides a summary of roles that will be included in each competency group.

Figure 2:

Competency Group	Description	Who
Competency Group A	Awareness raising	All stakeholders in health, care, education and other services, who may come across a person who might lack the capacity to consent to arrangements that may give rise to a deprivation of their liberty.
Competency Group B	Identification and referral	Supervisors and managers of staff and volunteers in Competency Group A
Competency Group C	Assessment, determination and consultation	All roles that under the regulations might undertake assessments, determinations and consultation
Competency Group D	Pre-authorisation Review and Authorisation	Managers in responsible bodies
Competency Group E	Independent Mental Capacity Advocate (IMCA)	Existing and new advocates
Competency Group F	Approved Mental Capacity Professional (AMCP)	People who meet the requirements set out in regulations, have undertaken full AMCP training or BIA to AMCP conversion training and have been approved by the relevant local authority in line with the relevant regulations.

Learning, Development and Training Planning

Understanding the learning and development needs within an organisation

Each organisation will have a range of roles that will need learning and development to support transition to the new system. Two sets of learning outcomes have been developed (that mirror the approach taken in England) to assist in the development of the relevant learning and development programmes for each of the competency groups.

- **National Training Framework Learning Outcomes – Transition from DoLS to the LPS** – which describes the learning outcomes in readiness for the transition between DoLS and the LPS and is aimed at those already involved in the DoLS process with a prior knowledge and understanding of the MCA 2005.

- **Liberty Protection Safeguards (the LPS) Draft Training Framework** – which describes the learning outcomes to support the operation of the LPS.

These training frameworks are designed to identify the learning outcomes required within each competency group.

Future actions

Alongside the consultation on draft Regulations for Wales, Welsh Government will be engaging with key stakeholders on the content of the Workforce Plan and Training Framework. This engagement will inform future iterations of these documents, and will enable workforce planning to commence ahead of implementation.

Annex 3: LPS National Minimum Data Set for Wales

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 developing a National Minimum Data Set (NMDS) on the LPS for Wales.

The NMDS is comprised 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 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. The NMDS data set for England has been considered by the LPS Data Group and the Monitoring and Report Sub Group for the LPS in Wales – and is being amended to reflect the position for Wales.

With the view to agreeing the data set 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). The NHS Digital Health and Care Wales has been leading discussions with the health boards and local authorities – with the view to getting agreement to each of the data items included in the NMDS and its future collection. A series of workshops have been held with key stakeholders. A data proposal will be submitted to the Welsh Information Standards Board. The data will then be collected by the Responsible Bodies (health boards and local authorities).

Under the LPS, Welsh Government are proposing that the Responsible Body will be responsible for notifying HIW, CIW and Estyn of all LPS applications (across all settings), as well as authorisations, reviews, variations, and when an authorisation comes to an end. The NMDS will need to include these data items.

CIW, HIW and Estyn will be responsible for reporting annually on the LPS, like they do now for the DoLS.

Monitoring and reporting at both a local, regional and national level will help us to understand how the LPS is working in Wales.

There are approximately 30 LPS data items being considered for the LPS NMDS for Wales. These are set out below.

Suggested data items for the LPS national minimum data set:

1. Liberty Protection Safeguards Episode Reference ID

2. Is it an initial or renewal authorisation?
3. If a renewal, the number of times renewed
4. NHS Number (for health boards) / Person Reference (for local authorities)
5. Name of health board or local authority (Responsible Body)
6. Total number of separate locations / settings included in the authorised arrangements
7. The location identification reference number
8. Unique property reference Number
9. Date of Birth
10. Gender
11. Ethnicity
12. Preferred Language
13. Did you receive a service in your preferred language?
14. Disability
15. Sexual Orientation
16. Start date for when the LPS process began
17. If the application was started under Deprivation of Liberty Safeguards or involved the Court of Protection, what date did the application start?
18. Is there an Appropriate Person representing and supporting the person?
19. Was an Independent Mental Capacity Advocate appointed?
20. Reason for an Independent Mental Capacity Advocate appointed or not appointed
21. Was a Pre-Authorisation Review completed by an Approved Mental Capacity Professional?
22. If it was, what was the reason?
23. Authorisation Decision / Date signed
24. Authorisation status
25. If not authorised – what is the reason for this?
26. Start date of Authorisation Period
27. Planned end date
28. Actual end date

29. Reason for actual end of authorisation
30. Where relevant, is there a S21ZA application to the Court of Protection?
31. Was the authorisation record given or sent to the person within 72 hours of the decision being made. If not, what was the reason for the delay?