

Getting it right

Regulations and plans for Wales for the Liberty Protection Safeguards

Introduction

Welsh Government needs your help and advice.

The Mental Capacity Act 2005 now has a new section called Schedule AA1.

Schedule AA1 lays out the rules for something new – the Liberty Protection Safeguards. The Liberty Protection Safeguards (called the LPS) will be replacing the Deprivation of Liberty Safeguards (called DoLS).

Both the Liberty Protection Safeguards and the Deprivation of Liberty Safeguards are about protecting people's rights and freedom if:

- they cannot make all of their own decisions and
- the only way to keep them or others safe is to restrict their freedom.

Until the Liberty Protection Safeguards are introduced, people will still be protected by the Deprivation of Liberty Safeguards.

There are two big differences between the Liberty Protection Safeguards and the Deprivation of Liberty Safeguards:

- Deprivation of Liberty Safeguards are only for adults. The Liberty Protection Safeguards will be for young people aged 16 and 17 too.
- Deprivation of Liberty Safeguards are only for people in hospitals and registered care settings (e.g. care homes). The Liberty Protection Safeguards will apply in many more places, including people's own homes.

The change from the Deprivation of Liberty Safeguards to the Liberty Protection Safeguards applies to England and Wales. However, Wales will have its own Regulations about how to put the change into practice.

This Welsh Government consultation is about how to put the Liberty Protection Safeguards into practice in Wales.

As part of this, Welsh Government has written four sets of Regulations. They cover:

- Who can do assessments and agree plans for keeping someone safe - **Regulations about who can do assessments, determinations and pre-authorisation checks**
- Training and approval for Approved Mental Capacity Professionals - **Regulations about Approved Mental Capacity Professionals**
- Independent Mental Capacity Advocates - **Regulations about Independent Mental Capacity Advocates**
- Monitoring and reporting on how the Liberty Protection Safeguards are being used - **Regulations about monitoring and reporting on the use of the Liberty Protection Safeguards.**

Welsh Government is also writing two plans:

- A workforce and training plan
- A plan for monitoring and reporting and the information that needs to be collected nationally about the Liberty Protection Safeguards.

Welsh Government are asking members of the public and staff who work in health and social care to look at these. They want to know if you think the rules and plans they have written will work, and if you can see them causing any problems.

Please fill in the consultation response form and send it to:

MentalHealthandVulnerableGroups@gov.wales

Mental Health and Vulnerable Groups Team
Welsh Government
4th Floor Cathays Park
Cardiff
CF10 3NQ

The rest of this document has an everyday version of the four Regulations. The Regulations mention schedule AA1 a lot, so the everyday version tells you what schedule AA1 says.

You may want to have a copy of the Regulations and schedule AA1 to find the formal words that are used.

At the end of this document there is a list of words or phrases that have a particular meaning.

Regulations about who can do assessments, determinations and pre-authorisation reviews

These Regulations cover three sorts of assessments:

- Checking if someone can make all of their own decisions
- Checking if someone has a mental health problem, autism, dementia or learning disability
- Checking if plans to restrict someone's freedom are necessary and allow the person to keep as much of their freedom as possible.

These Regulations explain who can do these assessments, make decisions and carry out checks.

Regulations 1 and 2 Title, when these Regulations come into force and what special words mean

Regulation 3 General eligibility

Before someone can do any of these assessments, the health board or local authority must check that the person:

- Has insurance
- Has the right skills and knowledge to do the assessment, including the ability to keep good records, write clear reports, communicate well and act independently
- Has an enhanced criminal record certificate
- Is not related to the person
- Has no financial relationship with any service connected with the person's care or treatment.

Regulations 4 and 5 Who can assess or check an assessment about someone's capacity to make their own decisions?

The person must be registered in the UK as one of these:

- Medical practitioner (Doctor)
- Nurse
- Occupational therapist
- Social worker
- Practitioner psychologist
- Speech and language therapist.

The health board or local authority must check that the person is registered as one of these professions and has not been suspended.

Regulations 6 and 7 Who can assess or check an assessment to decide if someone has a mental health problem, autism, dementia or a learning disability?

The person must be registered in the UK as one of these:

- Medical practitioner (Doctor)
- Practitioner psychologist.

The health board or local authority must check that the person is registered as one of these professions and has not been suspended.

Regulations 8 and 9 Who can assess or check an assessment that the planned restrictions to freedom are needed and leave the person as much freedom as possible?

The person must be registered in the UK as one of these:

- Medical practitioner (Doctor)
- Nurse
- Occupational therapist
- Social worker
- Practitioner psychologist
- Speech and language therapist.

The health board or local authority must check that the person:

- Is registered as one of these professions and has not been suspended.

- Can weigh up complex evidence and different opinions.

Regulation 10 Who cannot do a pre-authorisation check?

Pre-authorisation checks cannot be carried out by anyone who is connected to a care home.

Regulations about Approved Mental Capacity Professionals

Before a health board or local authority can authorise someone's freedom being restricted, they must check that it is the right thing to do.

Sometimes this check must be carried out by an Approved Mental Capacity Professional.

Each local authority must make arrangements for approving Approved Mental Capacity Professionals and make sure there are enough for its local authority area and local health boards.

Regulations 1 and 2 Title, when these Regulations come into force and what special words mean

Regulation 3 Who can apply to be approved?

A person can only apply to be approved if they are on a UK register as a:

- Nurse
- Social worker
- Practitioner psychologist
- Speech and language therapist
- Occupational therapist.

Regulation 4 Approving someone as an Approved Mental Capacity Professional

A local authority must check that the person:

- Has the right skills and knowledge
- Has done the initial training or, if they are already a best interests assessor, has done a conversion course
- Has not been suspended from their professional register
- Has at least 2 years of post-registration experience
- Has insurance or similar indemnity
- Has an enhanced criminal records certificate.

Regulation 5 Keeping an approval

An Approved Mental Capacity Professional must have their approval checked every 12 months.

To continue their approval they must show the local authority that:

- They have done at least 18 hours of further training
- They have done their work well.

If someone did their initial training or conversion course in the year before they got approved, they do not need to do 18 hours of further training during their first year of approval.

Regulation 6 Telling the local authority about changes

If an Approved Mental Capacity Professional stops being registered as a nurse, social worker, psychologist, speech and

language therapist or occupational therapist, they must tell the local authority straight away.

If an Approved Mental Capacity Professional gets suspended from their professional register, they must tell the local authority straight away.

They must not do any more work as an Approved Mental Capacity Professional.

Regulation 7 What to do if someone is suspended from their professional register

For as long as someone is suspended from their professional register, the local authority must suspend their approval as an Approved Mental Capacity Professional.

Before they can start work as an Approved Mental Capacity Professional again, the local authority must be sure the person is competent to do the job.

Regulation 8 What to do if someone has not done the 18 hours further training

The person cannot continue to work as an Approved Mental Capacity Professional until they have shown the local authority that approved them that they have done the 18 hours of further training.

If someone gives the local authority a good reason why they have not done the further training, the local authority can agree to give them more time to complete the training. However, the person must not work as an Approved Mental Capacity Professional until they have completed the 18 hours of further training.

Regulation 9 Ending someone's approval

The local authority must end someone's approval if:

- The person stops being registered as a nurse, social worker, psychologist, speech and language therapist or occupational therapist
- There is a problem with their insurance or criminal record certificate
- The person does not do their 18 hours a year of further training (unless they had a good reason and the local authority has accepted that reason)
- They do not think the person has the right skills and knowledge
- The person asks them to end their approval.

The local authority must tell the person that their approval has been ended and explain why.

Regulation 10 Approving training and courses

Initial training for the Approved Mental Capacity Professional must be a higher education course. It must be approved by Social Care Wales.

The conversion course for best interests assessors must be approved by Social Care Wales or the Welsh Ministers.

Further training must be approved by Social Care Wales or a local authority.

Regulations about Independent Mental Capacity Advocates

Independent Mental Capacity Advocates are not employed by the health board or local authority. They have no links to the care provider or the person or their family. The new Independent Mental Capacity Advocate role for the Liberty Protection Safeguards is similar to the role of the Independent Mental Capacity Advocate with the Deprivation of Liberty Safeguards. The current role of the Independent Mental Capacity Advocate under the Deprivation of Liberty Safeguards is set out in Regulations made in 2007. These Regulations explain what will change under the new Liberty Protection Safeguards.

Regulation 1 Title and when these Regulations come into force

Regulation 2 Changes to the 2007 Regulations

Change to Regulation 5 of the 2007 Regulations - appointing Independent Mental Capacity Advocates

Independent Mental Capacity Advocates can be appointed to represent and support a person. Some people already have someone they know who supports them – and under the Liberty Protection Safeguards, this person is known as the ‘Appropriate Person’. Under the Liberty Protection Safeguards an Independent

Mental Capacity Advocate can be appointed to support the Appropriate Person too.

The Mental Capacity Act 2005 sets out:

If the Liberty Protection Safeguards are being considered, the health board or local authority must do everything they can to appoint an Independent Mental Capacity Advocate to represent and support the person.

If the person has capacity to decide they want an Independent Mental Capacity Advocate, then they need to ask.

If the person does not have capacity, then a best interests decision must be made about appointing an Independent Mental Capacity Advocate.

If the person has an Appropriate Person, that person can represent and support them instead of an Independent Mental Capacity Advocate. However, the health board or local authority must take reasonable steps to offer and appoint an Independent Mental Capacity Advocate to support the Appropriate Person.

Changes to Regulation 6 of the 2007 Regulations – what Independent Mental Capacity Advocates do

The Independent Mental Capacity Advocate role is changing. Under the Deprivation of Liberty Safeguards their role was to gather information and write a report for the person making the decision. Under the Liberty Protection Safeguards, their role will be to represent and support the person. This means the Independent Mental Capacity Advocate role is to:

- help the person take part in the decision
- find out what the person's wishes and feelings are about the plans being made
- find out what alternatives there are, especially ones that mean more freedom
- write a report if appropriate, including any suggested actions
- keep in touch with the person.

The Independent Mental Capacity Advocate can support an Appropriate Person to do all of these things for the person.

The Independent Mental Capacity Advocate can also support the Appropriate Person to:

- make a case to inform the pre-authorisation information
- ask for a review of the decision

- make a case that will help the person keep their human rights in the plans made
- apply to the Court of Protection.

Changes to Regulation 7 of the 2007 Regulations - challenging decisions

The role of the Independent Mental Capacity Advocate to challenge a decision is being made clearer. They can:

- make a case to inform the pre-authorisation information
- ask for a review of the decision
- make a case that will help the person keep their human rights in the plans made
- apply to the Court of Protection.

The Welsh Government does not plan to change the role of Independent Mental Capacity Advocates in reviewing accommodation (Regulation 8) and adult protection (Regulation 9).

Regulations about monitoring and reporting on the use of the Liberty Protection Safeguards

Regulation 1 Title and when these Regulations come into force

Regulation 2 Monitoring bodies

There are three monitoring bodies who monitor the use of the Liberty Protection Safeguards:

- For social care services, Care Inspectorate Wales
- For health care services, Healthcare Inspectorate Wales
- For education services, Estyn.

Regulation 3 Reporting to Welsh Ministers

The monitoring bodies must write reports to the Welsh Ministers about how the Liberty Protection Safeguards are being used.

Regulation 4 Working together

The Welsh Ministers can ask monitoring bodies to work and write reports together.

Regulation 5 Helping another Monitoring Body

A monitoring body can ask the other monitoring bodies for help with monitoring the Liberty Protection Safeguards and to do what it says in these Regulations.

If they are asked, a monitoring body must help unless:

- There is another law that says they must not do what they are being asked
- They think helping does not match with doing what these Regulations say they must do
- They think helping means they will not do a good job themselves.

Regulation 6 What a Monitoring Body can do

A monitoring body can:

- Go into any place where the Liberty Protection Safeguards are being used to restrict a person's freedom. If it is someone's home, then the monitoring body must ask for permission first
- Meet with the person if they consent
- If the person cannot consent, then it needs to be decided what is best for the person. This is called 'a best interests decision'. The Mental Capacity Act 2005 says how this must be done

- See and check any records about the person's care or treatment, even if the service provider does not want them to
- Meet with anyone caring-for, or who cares about, the person who is having some freedom taken away.

Regulation 7 Meeting people

Meeting the person can happen where that person is staying, or somewhere else. It can be in person, or if appropriate, over a phone or video call.

If the person can give consent and wants a private meeting, the monitoring body must meet them in private.

Regulation 8 What service providers must tell monitoring bodies

The service provider must tell a monitoring body, if the service provider wants to make, carry on or change what's written down in the Liberty Protection Safeguards and care plan about what, how and why some of the freedom will be taken away from a person who cannot make their own decisions.

The service provider must contact the monitoring body to tell them:

- The date that they are starting the Liberty Protection Safeguards

- The date that they decide not to authorise what's written down in the Liberty Protection Safeguards and care plan about what, how and why some of the freedom will be taken away from the person
- The date that they decide to authorise what's written down in the Liberty Protection Safeguards and care plan about what, how and why some of the freedom will be taken away from the person.
- The date they carry on what's written down in the Liberty Protection Safeguards and care plan about what, how and why some of the freedom will be taken away from the cared-for person, and how long this will last
- The date they made changes to what's written down in the Liberty Protection Safeguards and care plan about what, how and why some of the freedom will be taken away from the cared-for person, and the details of this new Liberty Protection Safeguards and care plan
- The date they stop the Liberty Protection Safeguards and care plan about what, how and why some of the freedom will be taken away from the cared-for person.

Words and phrases with special meanings

<p>Appropriate Person</p>	<p>This is the person who is chosen to help and speak for someone who lacks capacity.</p> <p>The Appropriate Person can be an unpaid carer, relative, friend, a person with power of attorney, or a court deputy.</p>
<p>Approved Mental Capacity Professional</p>	<p>A person chosen by the Responsible Body to give extra help with the LPS process. They will decide if the rules have been followed when someone loses some of their rights and freedoms.</p> <p>Under the Liberty Protection Safeguards checks must be done before plans that may deprive a person of their liberty</p>

	<p>can be authorised. Sometimes (for example – if the person lives in an independent hospital or who does not agree with the plans being put in place) this check will be carried out by an Approved Mental Capacity Professional.</p>
<p>Assessments (see also Determinations)</p>	<p>Assessments means checks. Determinations means decisions.</p> <p>There are 3 assessments in the LPS process and a determination is made for each one.</p> <p>Assessments are checks by professionals that are needed to indicate if someone may need their freedom restricted as part of their care, support or treatment.</p>
<p>Authorisation</p>	<p>Where the Responsible Body agrees that someone can</p>

	have their freedom restricted as part of their care, support or treatment.
Best interests assessor	Under the current Deprivation of Liberty Safeguards, the person who writes a report to tell the Supervisory Body if someone needs a Deprivation of Liberty Safeguards Authorisation.
Capacity	Capacity or Mental Capacity is the ability to make certain decisions for yourself.
Determinations (see Assessments)	Assessments means checks. Determinations means decisions. A determination is a decision by a professional about an assessment.
Deprivation of Liberty	Stopping or limiting someone from doing things and restricting their freedom.
Independent Mental Capacity Advocate	A person who helps the person or the Appropriate Person. They

	<p>support them to be involved, can speak for them and help them challenge decisions.</p>
Monitoring Body	<p>The organisations that check and write reports on how the LPS process is working.</p> <p>In Wales, Healthcare Inspectorate Wales, Care Inspectorate Wales or Estyn.</p>
Pre-authorisation checks	<p>Checks that must be done to confirm / agree if plans that deprive a person of their liberty can be authorised.</p>
Regulations	<p>A law.</p>
Responsible Body	<p>The organisation in the LPS process that decides about arrangements for someone who lacks capacity.</p> <p>This is either a health board or local authority in Wales that authorises if someone's freedom can be restricted as</p>

	part of their care, support or treatment.
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