

2022 No. (W.)

MENTAL CAPACITY, WALES

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

EXPLANATORY NOTE

(This note is not part of the Regulations)

The Mental Capacity (Amendment) Act 2019 (c. 18) (“the 2019 Act”) amended the Mental Capacity Act 2005 (c. 9) (“the 2005 Act”) to provide for a new process for authorising arrangements to enable the care or treatment of persons who lack capacity to consent to the arrangements, which give rise to a deprivation of their liberty (“the arrangements”). In particular, the 2019 Act inserts a new Schedule AA1 into the 2005 Act, which contains the new administrative scheme for the authorisation of those arrangements (“Liberty Protection Safeguards”). The Liberty Protection Safeguards will replace the deprivation of liberty safeguards scheme set out in Schedule A1 to the 2005 Act.

These Regulations make provision for the monitoring of and the reporting on the operation of Schedule AA1 in relation to Wales.

Regulation 2 provides definitions for the purposes of the Regulations and defines a “monitoring body” as either Care Inspectorate Wales (“CIW”), Healthcare Inspectorate Wales (“HIW”) or Her Majesty’s Chief Inspectorate for Education and Training in Wales, commonly referred to as “Estyn”. The monitoring body, in cases where arrangements authorised under Schedule AA1 are carried out in a social care setting, will typically be CIW. In cases where arrangements authorised under Schedule AA1 are carried out in a health care setting, the monitoring body will typically be HIW. In cases where arrangements authorised under Schedule AA1 include education provision as part of those arrangements the monitoring body will typically be Estyn.

Regulation 3 provides that a monitoring body must monitor and report on the Liberty Protection Safeguards in relation to Wales.

Regulation 4 provides that a monitoring body may produce a joint report with another monitoring body on the operation of the Liberty Protection Safeguards.

Regulation 5 provides that a monitoring body may request assistance from another monitoring body in connection with its duties to monitor and report on the Liberty Protection Safeguards under regulation 3.

Regulation 6 specifies the powers of the monitoring body in connection with its monitoring and reporting duties under regulation 3. The powers specified in regulation 6 include a power to visit any place where an authorised arrangement is being carried out, meet with the cared-for person and inspect certain records relating to the care and treatment of the cared-for person. In exercising these powers the monitoring body has a duty to have regard to any Code of Practice issued under section 42 of the 2005 Act.

Regulation 7 makes provision for the conduct of meetings by the monitoring body.

Regulation 8 provides that a Welsh responsible body must notify a monitoring body if it begins the process for authorising arrangements under the Liberty Protection Safeguards and if it authorises, renews or varies an authorised arrangement and that an authorised arrangement has ended. A responsible body must also provide to a monitoring body such information as the monitoring body may reasonably request for the purpose of carrying out its functions.

Further information on the operation of these Regulations and on the monitoring and reporting of the Liberty Protection Safeguards is set out in the Monitoring and Reporting Strategy for Wales.

The Welsh Ministers' Code of Practice on the carrying out of Regulatory Impact Assessments was considered in relation to these Regulations. As a result, a regulatory impact assessment has been prepared as to the likely costs and benefits of complying with these Regulations. A copy of the Monitoring and Reporting Strategy for Wales and the Regulatory Impact Assessment can be obtained from the Mental Health, Substance Misuse and Vulnerable Groups Division, Welsh Government, Cathays Park, Cardiff CF10 3NQ.

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<i>Made</i>	***
<i>Laid before Senedd Cymru</i>	***
<i>Coming into force</i>	***

The Welsh Ministers make the following Regulations in exercise of the powers conferred by paragraph 44(1) and (2) of Schedule AA1 to the Mental Capacity Act 2005(1).

Title, commencement and application

1.—(1) The title of these Regulations is the Mental Capacity (Deprivation of Liberty: Monitoring and Reporting) (Wales) Regulations 2022.

(2) These Regulations come into force on *** 2022.

(3) These Regulations apply in relation to Wales.

Interpretation

2. In these Regulations—

“the 2005 Act” (“*Deddf 2005*”) means the Mental Capacity Act 2005;

“arrangements” (“*trefniadau*”), “authorisation” (“*awdurdodiad*”), “authorisation record” (“*cofnod awdurdodiad*”), “cared-for person” (“*person y gofelir amdano*”) and “responsible body” (“*corff cyfrifol*”) have the meanings given in paragraph 3 of Schedule AA1;

(1) 2005 c. 9. Schedule AA1 was inserted by section 1(4) of the Mental Capacity (Amendment) Act 2019 (c. 18). See definition of “appropriate authority” in paragraph 44(3)(b) of that Schedule.

“CIW” (“AGC”) means Care Inspectorate for Wales(1);

“Estyn” (“*Estyn*”) means Her Majesty's Inspectorate for Education and Training in Wales;

“HIW” (“AGIC”) means Healthcare Inspectorate for Wales(2);

“monitoring body” (“*corff monitro*”) means—

- (a) CIW,
- (b) HIW, or
- (c) Estyn;

“relevant person” (“*person perthnasol*”) means a person engaged in caring for a cared-for person or a person interested in a cared-for person's welfare;

“Schedule AA1” (“*Atodlen AA1*”) means Schedule AA1 to the 2005 Act.

Duty of a monitoring body to monitor and report

3.—(1) A monitoring body must monitor the operation of Schedule AA1 in relation to Wales.

(2) A monitoring body must provide a report in writing to the Welsh Ministers on the operation of Schedule AA1, insofar as the monitoring body has a duty to monitor its operation under paragraph (1), at such intervals as the Welsh Ministers may from time to time request.

Joint reports

4. The Welsh Ministers may request a monitoring body to produce a joint report with one or more of the other monitoring bodies in pursuance of its duty under regulation 3(2).

Assistance with monitoring and reporting

5.—(1) A monitoring body may request assistance from another monitoring body, including in relation to the matters specified in regulation 4, 7 or 8, for the purposes of carrying out its duty under regulation 3 if they think that such assistance—

- (a) will have a positive effect on the manner in which the monitoring body carries out its duty, or
- (b) will assist the monitoring body in achieving its duty.

(1) CIW is an operationally distinct division of the Department of Health and Social Services within the Welsh Government acting on behalf of the Welsh Ministers.

(2) HIW is an operationally distinct division of the Department of Health and Social Services within the Welsh Government acting on behalf of the Welsh Ministers.

(2) A monitoring body must comply with a request made by another monitoring body under paragraph (1) unless it—

- (a) is prevented from assisting in the manner requested by any enactment or other rule of law,
- (b) thinks that such assistance would otherwise be incompatible with its own duty under regulation 3, or
- (c) thinks that such assistance would have an adverse effect on its own duty under regulation 3.

Monitoring and reporting: monitoring body powers

6.—(1) A monitoring body may, for the purposes of carrying out its duties under regulations 3 and 4—

- (a) subject to paragraph (2), visit any place where an authorised arrangement is being carried out;
- (b) subject to paragraph (3), meet with a cared-for person who is subject to an authorisation;
- (c) require access to, and inspect, records relating to the care or treatment of a cared-for person who is subject to an authorisation;
- (d) meet with a relevant person.

(2) Where an authorised arrangement is being carried out in a private dwelling or in a part of a premises used as a private dwelling, a monitoring body must seek permission prior to visiting.

(3) A monitoring body may meet with a cared-for person who is subject to an authorisation only if—

- (a) that person has capacity to consent to meeting with the monitoring body and does so consent;
- (b) where that person does not have capacity to consent to meeting with the monitoring body, the requirements of paragraph (4) are satisfied.

(4) The requirements to be satisfied for the purposes of paragraph (3)(b) are that—

- (a) either a donee of a lasting power of attorney granted by the cared-for person, or a deputy appointed for the cared-for person by the court, makes a valid decision that such a meeting is in the cared-for person's best interests, or
- (b) where there is no donee of a lasting power of attorney or deputy appointed by the court, a person engaged in caring for the cared-for person or interested in the cared-for person's welfare decides that such a meeting is in the cared-for person's best interests.

(5) For the purpose of paragraph (4)(a), a decision of a donee of a lasting power of attorney or of a deputy appointed by the court is valid if it is made—

- (a) within the scope of the donee's or deputy's authority, and
- (b) in accordance with Part 1 of the 2005 Act.

(6) A decision made by a person under paragraph (4)(b) must be made in accordance with Part 1 of the 2005 Act.

Conduct of meetings

7.—(1) A meeting with a cared-for person pursuant to regulation 6(1)(b) may be—

- (a) held at the place where the authorisation is being carried out or at any other place;
- (b) a meeting in person or, if appropriate, a meeting that is conducted using audio or video conferencing facilities.

(2) Where regulation 6(3)(a) applies and the cared-for person requests that the meeting be held in private, the monitoring body must conduct that meeting in private with the cared-for person.

Notification

8.—(1) A responsible body must notify a monitoring body on a regular basis of the following—

- (a) that the responsible body is carrying out its functions under Schedule AA1 with a view to determining whether to authorise arrangements in respect of a person and the date on which it started that process;
- (b) that the responsible body, after carrying out its functions under Schedule AA1, has determined not to authorise arrangements in respect of that person and the date of that determination;
- (c) that the responsible body has authorised arrangements under paragraph 18 or 19 of Schedule AA1 and the—
 - (i) date on which the responsible body gave the authorisation,
 - (ii) date from which the authorisation has effect, and
 - (iii) details of the arrangements as recorded in the authorisation record;
- (d) that the responsible body has renewed an authorisation under paragraph 32 of Schedule AA1 and the—
 - (i) date on which it renewed the authorisation, and

- (ii) the renewal period;
- (e) that the responsible body has varied an authorisation under paragraph 37 of Schedule AA1 and the—
 - (i) date on which it varied that authorisation, and
 - (ii) details of the variation to the arrangement;
- (f) that an authorisation has ceased to have effect under paragraph 29 of Schedule AA1 and the date on which it ceased to have effect.

(2) A responsible body must provide to a monitoring body such information as the monitoring body may reasonably request for the purpose of carrying out its functions.

(3) In this regulation, “renewal period” has the meaning given by paragraph 32(1) of Schedule AA1.

Name

Title of Minister, one of the Welsh Ministers

Date