

## **Liberty Protection Safeguards**

# **Monitoring and Reporting Strategy for Wales**

Consultation Draft

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## Introduction

The Liberty Protection Safeguards (LPS) are a new system introduced by the UK Mental Capacity (Amendment) Act 2019 replacing the Deprivation of Liberty Safeguards (DoLS). They are necessary procedures in law to safeguard people's Article 5 (right to liberty) Human Rights. Where care, support and 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.

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

The policy objectives and the intended effects of the Mental Capacity (Amendment) Act 2019 are:

- 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.
- 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 (right to liberty) and 8 (respect for family life) 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.

On behalf of Welsh Ministers, Healthcare Inspectorate Wales (HIW) and Care Inspectorate Wales (CIW) have monitored and reported on the system for authorising arrangements that amount to a deprivation of liberty, under DoLS. This related to arrangements in care homes and hospitals and to people aged 18 and above.

The LPS extends to all settings including care homes, nursing homes, hospitals, supported living, people's own homes, day services, sheltered housing, shared lives and post-16 specialist education placements. It also extends to include 16 and 17 year olds. This means Estyn are also named as a monitoring body for the purpose of monitoring the LPS in Wales. This reflects the inspectorates' wider strategic roles in monitoring and reporting on leadership and practice across the social care, health and education sectors in Wales.

## Aims of the Monitoring and Reporting Strategy

In Wales, the functions of monitoring the operation of the LPS fall to the monitoring bodies. They are performed by Health Inspectorate Wales [HIW] and Care Inspectorate Wales [CIW] and in respect of education settings, the function is also performed by Estyn.

The LPS are designed to ensure people are only deprived of their liberty if this is necessary and proportionate and provided with safeguards to protect their rights. In order to provide reassurance the LPS are being operated correctly, it is important for there to be an effective mechanism for monitoring the use of the safeguards.

Our work to monitor and report on the operation of the LPS will be guided by the following principles. We will;

- 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.
- Ensure that our monitoring and reporting draws on first-hand evidence and gains the perspectives of key stakeholders in the LPS process.
- Apply the principle of equality for Welsh and English to all our monitoring and reporting work.
- Ensure our work promotes high quality healthcare, social care and education which protect and promote people's health, safety and well-being;
- Collaborate, co-operate and communicate openly about major concerns, issues or opportunities.
- Make the best use of our collective resources through appropriate coordination, shared learning and information sharing.
- Adhere to statutory requirements and best practice. Comply with applicable laws and standards including data protection and freedom of information legislation.

The aims of the LPS monitoring and reporting system are to ensure;

- People's human rights are not being breached by them being deprived of their liberty unlawfully.
- To provide reassurance that the LPS are operating effectively.
- To prevent abuse (aligning with the Operational 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 improvement through identifying recommendations and sharing effective practice.

To promote high standards and to support these overall aims, the strategy details:

- Our approach to monitoring
- Our approach to reporting

- What happens when we have concerns about practice?

CIW, HIW and Estyn [see Annex 1] acknowledge their respective statutory and non-statutory responsibilities and functions, and will take account of these when working together. The same applies when working with Care Quality Commission [CQC] and the Office for Standards in Education, Children's Service and Skills [OFSTED] as the monitoring bodies in England.

The legal frameworks governing UK cross-border placements can be complicated and may vary between jurisdictions. When the use of the LPS is being considered, it is important, as in all cross-border cases, to ensure a person-centred approach is taken throughout and that authorities work together [see Annex 2].

## **Our approach to monitoring**

Our focus will be on ensuring:

- Responsible Bodies are upholding people's rights by implementing the LPS effectively, proportionately and efficiently.
- People are not being deprived of their liberty without authorisation.
- Any authorised deprivation is carried out proportionately and in line with authorisation.
- Authorisations are requested where appropriate.
- People's rights are protected and care, support and treatment arrangements amounting to a deprivation of liberty are appropriately assessed, authorised and reviewed.
- The person and certain others have been consulted as far as is practicable and appropriate about the person's wishes and feelings about the arrangement for their care.
- An "Appropriate Person" is identified and appointed to represent and support the cared for person. When there is no one suitable, an Independent Mental Capacity Advocate (IMCA) has been instructed. (Under the LPS, the Appropriate Person is also able to be supported by an IMCAS.)
- People are treated with dignity and respect and are being given the care they need that is in their best interest and in line with their own wishes and offers the least restrictive approach.
- Responsible Bodies and care providers consistently consider whether alternative arrangements could be implemented to prevent a deprivation of liberty.
- Authorisations are being carried out properly and working to a wrong no door approach with any disputes to determine relevant Responsible Body resolved swiftly
- Information is shared where relevant about any transition between care arrangements.

- People receive timely information about the authorisation including their right to challenge the authorisation at the Court of Protection.
- Staff have appropriate training and understanding to carry out their roles, and a culturally competent workforce is in place.
- Compliance with legal framework and CIW/HIW/Estyn's monitoring requirements.

The Regulations for Wales that support the monitoring and reporting on the LPS allow the monitoring bodies to request data from Responsible Bodies for the purpose of carrying out our functions.

Monitoring will happen at a Responsible Body, provider and national level and will help us to understand how LPS is working in Wales. This will include (but is not limited to):

- how LPS is being embedded within care, support and treatment planning;
- the number of applications for an authorisation made;
- the number of people where a deprivation of liberty has been authorised;
- the number of applications that aren't authorised and reasons;
- whether decisions are being made within appropriate timeframes and in line with the Code of Practice;
- whether people are accessing the support they are entitled to (for example, from an Appropriate Person or an IMCA);
- where we identify people are being deprived of their liberty without authorisation.

As monitoring bodies we have the following powers that we may exercise in respect of LPS authorisations to allow us to carry out our monitoring responsibilities:

- Visit settings where an authorised deprivation of liberty is being carried out.
- In order to visit private dwellings or parts of premises used as private dwellings, as monitoring bodies we will seek permission to visit. Such permission may also be from someone other than the person the LPS authorisation applies to – depending on the living arrangements, such as the owners, occupiers or managers of the place.
- Meet with the person the LPS authorisation applies to. The person will need to have capacity to consent to a meeting with the monitoring body. Where the person does not have the capacity to consent to the meeting either a donee of a lasting power of attorney granted by the person or a deputy appointed by the court will need to make a decision that the meeting is in the person's best interest. Where there is no donee of a lasting power of attorney or deputy appointed by the court a person engaged in caring for the person or interested in the person's welfare will need to decide that such a meeting is in the person's best interests.
- Require access to and inspect records relating to the care, support and treatment of the person before, during or after we visit the setting. Monitoring bodies may request records from the Responsible Body that authorised the deprivation or the setting where the authorisation is occurring.

- Meet any person engaged in caring for a person the LPS authorisation applies to, or a person interested in their welfare for example family, unpaid carers or friends.
- In order to carry out our duties, as monitoring bodies we may exercise some of our powers, if appropriate, on a case sampling basis.

We will gather evidence to support the monitoring and reporting work through a range of methods which will include:

- Monitoring of key data – Responsible Bodies will be required to regularly notify the monitoring bodies of LPS applications, authorisations, renewals, and of authorisations that come to an end. Data will be collected quarterly through the National Minimum Data Set coproduced by Welsh Government. This ensures consistency on how the LPS is being monitored across Health Boards and Local Authorities in Wales. The data will provide intelligence to inform ongoing inspection activity as well as the annual monitoring and reporting of the LPS.
- Information gathered from any reports prepared by Responsible Bodies on the implementation of LPS at a local or regional level.
- Information captured during ongoing engagement with senior leaders in local authorities and health boards on local processes and practices and the strengths and the challenges in how they manage, monitor and report on LPS.
- Information from providers of care and treatment / support and education.
- Monitoring of the LPS as part of routine inspections of local authorities/health boards and providers in settings where individuals receive care, support, treatment and education. Guidance on the approach to inspection will be published by the relevant monitoring body.

We will also consider whether periodic thematic inspections or focussed monitoring and reporting approaches may be helpful.

## **Our approach to reporting**

As the monitoring bodies for Wales – HIW, CIW and Estyn will collaborate to produce a joint annual report on the operation of the LPS in Wales. The report will be made to the Welsh Ministers.

The annual report will draw on evidence from inspection activity and the national minimum data collection. The reporting period will be based on the financial year and we will aim to publish the report within 6 months of the end of the financial year.

As well as providing a summary of the current state of the LPS, the report will also be used to highlight areas of good practice as well as areas of concerns. This will include information on situations monitoring bodies have come across during inspection activity where they believe people may be deprived of their liberty without authorisation and Responsible Bodies have been informed.

Specific mention will also be made to any cross-border issues.

In addition to the annual LPS monitoring reports, all monitoring bodies also produce reports as an outcome of routine inspections. These inspection reports may also include detail about LPS authorisations and where these reports concern services with a cross-border interest, the reports will be proactively shared with relevant named organisations.

## **What happens when we have concerns?**

We will respond appropriately to concerns arising in settings where an LPS authorisation is in place. A concern may be raised before, during or after a visit. If at any point the concern meets the criteria for a safeguarding enquiry under the Children Act 1989 or the Social Services and Well-being (Wales) Act 2014, the monitoring body will report it as a safeguarding concern to the relevant local authority in line with existing safeguarding statutory frameworks.

When a monitoring body identifies a person during an inspection where we believe deprivation of liberty may be occurring without authorisation, the provider and relevant Responsible Body will be informed.

When a monitoring body identifies any concerning trends in the data regarding the way a Responsible Body is discharging its functions under the LPS the concerns will be shared with the Responsible Body in the first instance. For example, we may identify a very low number of LPS authorisations by a Responsible Body.

Where the Responsible Body does not respond to these concerns or does not respond adequately, we may require access to records which the Responsible Body holds, and/or may use the data to inform further inspection activity.



If the monitoring body continues to have concerns, they may refer their concerns to the relevant Welsh Minister who will consider whether any existing powers should be initiated in response.

Where shortcomings in practice are identified in a provider, inspectors will also consider whether any follow up inspection or monitoring is required in line with the relevant published inspection guidance and approaches.

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## **Annex 1: Specific Roles and Responsibilities**

### **Care Inspectorate Wales (CIW)**

CIW is the independent inspectorate and regulator of social care and childcare in Wales. CIW carries out its functions on behalf of Welsh Ministers to provide assurance on the quality and safety of services. CIW register, inspect and take action to improve the quality and safety of services for the well-being of the people of Wales. CIW reviews the performance of local authorities in Wales the delivery of social services functions. CIW's main functions and responsibilities are drawn from the following legislation:

- Social Services and Well-being (Wales) Act 2014
- Regulation and Inspection of Social Care (Wales) Act 2016
- The Children's Act 1989 (as amended)
- Adoption and Children Act 2002
- Children and Families (Wales) Measure 2010

CIW aims to:

- Provide independent assurance about the quality and availability of social care in Wales;
- Safeguard adults and children, making sure their rights are protected;
- Improve care by encouraging and promoting improvements in the safety and quality of social care services and;
- Inform policy, standards and provide independent professional advice to people developing policy, the public and social care sector.

CIW core values are to ensure people are at the heart of everything we do and we aspire to be:

- Caring: we are compassionate and approachable
- Fair: we are consistent , impartial and inclusive
- Integrity: we are honest and trustworthy
- Professional: we are skilled , knowledgeable and innovative
- Respect: we listen, engage and value people

### **Estyn**

Estyn is the Office of Her Majesty's Inspectorate for Education and Training in Wales. As a Crown body, Estyn is independent of the Welsh Government. Estyn's principal aim is to raise the standards and quality education and training in Wales. Estyn inspects a range of sectors including local government education services, independent and maintained special schools, pupil referral units and independent

specialist colleges. Estyn's main functions and responsibilities are drawn from the following legislation:

- Education Act 2005 (non-maintained nursery settings, maintained schools and PRUs)
- Education Act 2002 (independent schools)
- Learning and Skills Act 2000 (post-16 providers)
- Education Act 1997 (local authorities)
- Education Act 1994 (teacher training)

Estyn aims to:

- Provide accountability to service users on the quality and standards of education and training in Wales;
- Inform the development of national policy by the Welsh Government;
- Build capacity for improvement of the education and training system in Wales.

Estyn's values are that we:

- Place learners at the heart of our work
- Listen, learn and work with others
- Act openly, fairly and with integrity
- Show effective leadership and teamwork
- Promote health, wellbeing and equality in all we do
- Value and respect people and their work
- Encourage responsibility, initiative and innovation

### **Healthcare Inspectorate Wales**

HIW is the independent inspectorate and regulator of healthcare in Wales. HIW carries out its functions on behalf of Welsh Ministers and, although part of the Welsh Government, protocols have been established to safeguard its operational autonomy. HIW's main functions and responsibilities are drawn from the following legislation:

- Health and Social Care (Community Health and Standards) Act 2003;
- Care Standards Act 2000 (and associated regulations);
- Mental Health Act 1983 and 2007, Mental Health (Wales) Measure 2010;
- Independent Health Care (Wales) Regulations 2011;
- Controlled Drugs (Supervision of Management and Use) (Wales) Regulations 2008; and
- Ionising Radiation (Medical Exposure) Regulations 2017 and Amendment Regulations 2018.

HIW aims to:

- Provide assurance: Provide an independent view on the quality of care.
- Promote improvement: Encourage improvement through reporting and sharing of good practice

- Influence policy and standards: Use what we find to influence policy, standards and practice

HIW's core role is to review and inspect NHS and independent healthcare organisations in Wales to check that patients, the public, and others are receiving safe and effective care which meets recognised standards. Health services are reviewed against a range of published standards, policies, guidance and regulations. As part of this work HIW will seek to identify and support improvements in services and the actions required to achieve this. If necessary, HIW will undertake special reviews and investigations where there appears to be systematic failures in delivering healthcare services to ensure that rapid improvement and learning takes place.

HIW is also responsible for the registration and regulation of independent healthcare providers under the Care Standards Act 2000. The regulation of such establishments is governed by the Independent Health Care (Wales) Regulations 2011.

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## Annex 2: Cross-Border Issues – Joint Working with Ofsted and Care Quality Commission

CIW/ Estyn and HIW will work in partnership with the Care Quality Commission (CQC) and Ofsted to support the monitoring and reporting of the Liberty Protection Safeguards. This will include the exchange of information and data, joint referral of concerns and the sharing of best practice.

There will be cases where a deprivation of liberty is authorised by an English Responsible Body for the care and treatment of a person who is living in Wales, and vice versa. For example

A local authority in England may have assessed a person under the Care Act 2014 and decided that their care and support needs can only be met through accommodation of a certain type (such as a care home) and is proposing to provide that accommodation in Wales and in circumstances that amount to a deprivation of liberty. In such a case the local authority **in England will be the Responsible Body** and the monitoring body will be CQC or Ofsted.

Where the person that has been assessed by a Welsh local authority as having needs that can only be met under the Social Services and Well-being (Wales) Act 2014 within care home accommodation in England, **then the Welsh local authority is the Responsible Body** and the monitoring body will be CIW.

The Welsh and English Governments have agreed a number of principles that should be applied to all cross-border placements. For Wales, this is set out in the [Part 11 Code of Practice \(Miscellaneous and General\)](#).

## **Annex 3 - Glossary**

### **Appropriate Person**

The Appropriate Person provides representation and support for the person during the LPS process and during authorisation. The Appropriate Person is normally carried out by someone who is close to the person and can be a relative, friend or a person with power of attorney or a court deputy.

### **Care Inspectorate Wales (CIW)**

CIW is the independent inspectorate and regulator of social care and childcare in Wales. CIW carries out its functions on behalf of Welsh Ministers to provide assurance on the quality and safety of services. CIW register, inspect and take action to improve the quality and safety of services for the well-being of the people of Wales. CIW reviews the performance of local authorities in Wales the delivery of social services functions.

### **Care Quality Commission (CQC)**

CQC is the independent regulator of health and social care in England

### **Estyn**

Estyn is the Office of Her Majesty's Inspectorate for Education and Training in Wales. Estyn inspects a range of sectors including local government education services, independent and maintained special schools, pupil referral units and independent specialist colleges.

### **Healthcare Inspectorate Wales (HIW)**

HIW is the independent inspectorate and regulator of healthcare in Wales. HIW carries out its functions on behalf of Welsh Ministers. HIW inspect, review and investigate NHS Services and independent healthcare services throughout Wales.

### **Independent Mental Capacity Advocate (IMCA)**

IMCA are trained advocates who provide support and representation for a person who lacks capacity to make specific decisions, where the person has no-one else to support them. An IMCA can also support the Appropriate Person.

### **Monitoring Bodies**

In Wales, the monitoring bodies responsible for monitoring and reporting on LPS are the Health Inspectorate Wales (HIW) and Care Inspectorate Wales (CIW). In respect of education settings, the function is also performed by Estyn.

### **National Minimum Data Set (NMDS)**

The NMDS is comprised of a set of key data items on LPS that the Responsible Bodies are expected to collect. It includes data items on the protected characteristics of those individuals where there has been an application to authorise

the care and treatment arrangements that amount to a deprivation of liberty, where an individual lacks the mental capacity to agree to these arrangements.

**Office for Standards in Education, Children’s Service and Skills (Ofsted)**

Ofsted inspect services providing education and skills and inspect and regulate services that care for children and young people in England.

**Responsible Body**

Responsible Bodies are the organisations that oversee the LPS process. In Wales the Local Health Board will be the Responsible Body if the arrangements are mainly taking place in hospital, mainly carried out through NHS continuing health care or in an independent hospital in Wales. The local authority will be the Responsible Body in all other circumstances. The Responsible Body will usually be the local authority meeting the person’s care and support needs, or if no local authority is meeting the person’s needs the authority in which the arrangements are mainly being carried out.

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