LPS Impact Assessment:
draft feedback February 2021

This document provides joint feedback from Care England, the National Care Forum and the Registered Nursing Home Association on the latest Impact Assessment of the Mental Capacity (Amendment) Act 2019, published on 28 January 2021.

We welcome the opportunity to discuss our feedback in more detail and we also have some 'asks' of DHSC in relation to our feedback:

- ✓ A response to our feedback
- ✓ Confirmation of the timescales for the updated, detailed impact assessment of the LPS overall

We are also making an offer to review the next iteration of the draft updated detailed impact assessment before it is finally published.

1. Summary

Implementation work on the Liberty Protection Safeguards (LPS) re-started in the autumn of 2020, aiming for a revised implementation date of April 2022. This new Impact Assessment of the Mental Capacity (Amendment) Act (IA), the third Impact Assessment, has been long awaited, in particular following the cogent and extensive feedback provided by care provider organisations to the department of health and social care (DHSC) following each of the previous versions.

The DHSC is keen to manage expectations in relation to this IA, with a clear recognition that this is an update IA of the Act and as such is an incomplete and non-final assessment of the impact of LPS overall. The Government says it will undertake more detailed impact assessment of LPS overall, including policy details to be specified in secondary legislation, after public consultation.

So, this is not the last impact assessment we will see, but the final one prior to public consultation. It is disappointing, however, that it has taken so little account of detailed feedback on earlier versions from the CPA and other care provider organisations, on such matters as the training needs of senior care home staff in preparation for the introduction of LPS, and the nature of their ongoing additional responsibilities.

It is also disappointing that the figures in the IA are hard to understand. There seems to be a mixture of updated figures with statistics and numbers that are up to five years out of date, for example, see analysis of care home registered manager training costs in 4.1 – 3 below.

This is particularly concerning given the assumptions that persist from earlier versions of the IA. For example, the current document ignores the fact that turnover among this group of care senior staff in 2019-20 was 25%, yet this IA, like earlier versions, contains no funding for new managers, much less the deputies and other senior staff who will be providing cover for inevitable absence of the registered

manager. In addition, the strains of Covid-19 on these groups of staff mean that they enter the new financial year already exhausted and stressed; further staff turnover is a very real possibility.

2. New burdens of LPS for care home managers still not acknowledged or provided for

2.1 New tasks for care home managers: DHSC continues to claim that there is no identifiable cost to care home providers of the new tasks, seemingly because there are no new tasks. However, the Mental Capacity (Amendment) Act 2019 makes it clear that **new tasks for care home managers** include:

- consultation for LPS purposes (which is undeniably different from normal advance care planning or MCA best interests' consultation).
- arranging and managing periodical and ad-hoc LPS assessments and reviews.
- assessing and determining which pre-existing professional assessments carried out, for example, for Care Act reasons, are fit for the specific purpose of an individual's LPS situation.
- liaising with local authorities and possible new assessors.
- assembling and composing the draft 'statement' on which responsible bodies will base their authorisation documents.

It is confusing that the IA continues to claim (18:52 - 18:55)

- that LPS create a specific role for care home managers in adult settings which formalises functions they already perform. These include preparing the statement provided to the responsible body and completing consultation and ongoing review.
- that 'the statement provided to the responsible body is broadly similar to the current DoLS application' (*which it factually is not, as an examination of the DoLS application form will show).* However, under LPS 'the statement will be accompanied by valid pre-existing assessments which care homes should keep as best practice. This will allow the statement to provide the basis of the draft authorisation record. If there are not valid assessments available, the care home manager might work with the responsible body to arrange them.' *This begs the question of how a care home manager, without training, can identify the features that will demonstrate that an existing (or new) assessment is lawful, valid and applicable.*
- while acknowledging that 'LPS introduces the power for care home managers to complete consultation about the person's arrangements and to review the person's condition and circumstances, where asked to by the local authority,' it asserts that 'care home managers are already performing these functions as part of delivering care more widely and we expect that the consultation and review for LPS will be conducted alongside this.'

2.2 The problem with the net zero cost assumption: The impact assessment's conclusion, repeating a series of assertions challenged already in two IAs, is, perhaps unsurprisingly, that

- Since care home managers currently perform all functions of their formalised LPS role under DoLS, we are unable to quantify any differences in administrative costs for them so have worked on the basis of zero net cost. In our programme of work to implement the Liberty Protection Safeguards, we will work with the care sector to minimise administrative burdens and to ensure preparedness for this change.

It is factually wrong to keep claiming, as, here (p.4), in the identical terms as the previous impact assessments, that the 'cost of arranging authorisations and reviews by care settings (is) assumed to be zero as the proposed functions for care homes build on the role the registered manager performs currently'.

Many of these new roles have currently been postponed (but remain in the Act). This may be a tacit concession that new burdens brought in by LPS for care homes are potentially huge, and that to adding new burdens to the noted fragility of the sector, where stresses are already magnified by Covid-19 and Brexit, will be unhelpful for the sustainability of the provider sector at this time.

2.3 Significant new roles and responsibilities for care home managers remain: it is clear from the following highlighted quotations from the IA itself (in italics) , that significant new roles and responsibilities will, albeit at a time yet to be announced, fall to care home managers:

- 9.3: When it is identified that a person might need an LPS authorisation, a Responsible Body or, where appropriate, *a care home manager, will arrange the assessments needed, or use existing valid assessments where available, and complete the relevant consultation.*
- 9.5 Care *home managers may also* ***have a different role in the new system*** *(emphasis added) as they might, in some cases, complete a number of functions, including preparing the statement provided to the Responsible Body, and completing a consultation and ongoing review. They might have to submit the evidence* to a local authority, CCG or Local Health Board (depending on the Responsible Body) to have the arrangements authorised.
- 9.6 In some cases, there will already be valid assessments in place which have been completed… as part of a person's care planning. In other cases, a *new assessment will need to be arranged and the care home manager might work with the Responsible Body to do this.*
- 9.7 The Responsible Body, *or care home manager where appropriate, must organise a necessary and proportionate assessment* for the person to ensure that depriving the person of their liberty is needed to keep them safe from harm, and is a reasonable response to the probability of them suffering harm, taking into consideration other less restrictive options. *This must be a new assessment*, although, where possible, this should be done alongside existing care planning to reduce duplication.

3. Implementation preparation: confusion and inconsistency about what care home managers need: 'familiarisation', 'training', or 'training/familiarisation'.

3.1 Issues with calculating training/ familiarisation costs for care home managers: This IA lists (15.2) among transitional costs, **'Training/familiarisation costs for care home managers: £2.28m'**. The way this is arrived at, and the assumptions underpinning it, merit further analysis. Section 18.46 refers explicitly to the need to 'train' care home managers for their 'specific role', by acknowledging a 'specific training need.' It goes on, puzzlingly, to repeat the statement from earlier IAs both that the role only formalises current functions – emphatically not the case, as explained at length in feedback to previous IAs as well as here – and a reassuring statement of government's commitment to supporting the care sector in preparing for LPS.

3.2 A single day's familiarisation is not enough: In light of the 'specific training need' above, it is disappointing in section 18.50 to find the assessment that a single day's familiarisation remains DHSC's best estimate of how long it will take care home managers to 'take on board the new policy'. There is nothing here about the preparation for new roles discussed elsewhere in the IA.

We do note, though, that this is a doubling of the earlier, much criticised, half day 'familiarisation' previously thought to be sufficient for this cohort of managerial/senior adult social care staff.

4. The calculation assumptions behind the assessed costs of care home manager training (also referred to as 'familiarisation' or even 'training / familiarisation') are simplistic and misguided.

4.1 Assumptions that fail to recognise the reality of full workforce training costs: The best estimate total sum of £2.28m is reached using some shaky assumptions. As feedback to the 2019 IA explained,

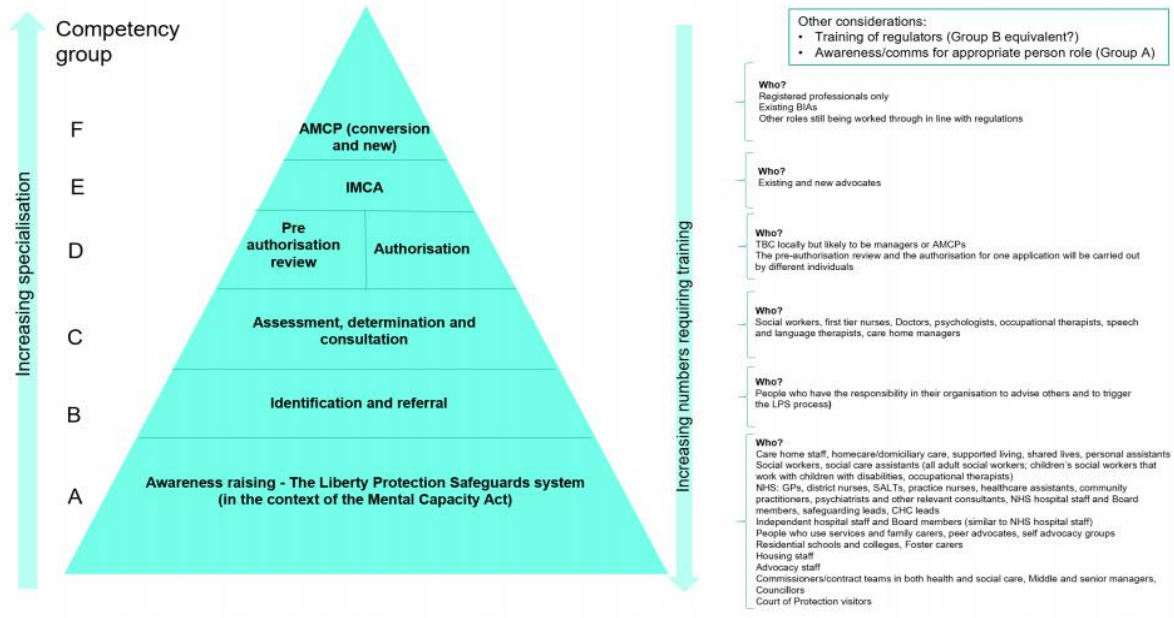
the methodology, which is also used in the latest version, allows nothing for backfill, training of senior staff members to cover unavailability of the manager, or the significant churn of staff at this level in adult social care settings. The turnover of registered care home managers in 2019-20 according to the Skills for Care Workforce Intelligence Survey was 25%. This figure may well grow in the aftermath of the strains this group of staff have suffered during Covid-19.

4.2 Salary costs used are very out of date: The costings laid out in Annex 2 are allegedly based on 2018/19 costs (which were themselves corrected in the most recent earlier IA by Care England, see IA costings changes, on p.8) as a result of their earlier inaccuracy. It seems on the face of it a missed opportunity to not have updated the figures within the annexes of this IA but the failure to do so means that the total listed for care home manager training as 'at today's prices' is actually using extremely out of date salary costs.

The effect of the pandemic on the costs of maintaining safety and autonomy weigh very heavily on providers of adult social care; it remains to be seen what the effects of such a traumatic time will have on staff retention levels. Combined with the effects of Brexit on established staff members from EU countries, there may be a far greater demand for training and the support promised by government.

As described here (section 18.47 - 18.51), the method is to add together the number of care homes in England (15,692) and Wales (1085); then find a weighted average care home manager annual salary (£31,303); and divide that by the number of days worked (estimated at 230) to get a daily rate of £136. A simple multiplication, rounded up, then reaches the notional £2.28m to cover the single day allowed to 'take (LPS) on board.' This figure is listed in the summary as being 'at today's prices' but is clearly achieved by using the earlier figures: indeed, probably by using five-year-old figures, since a footnote on p.40 lists the source as Skills for Care in 2016. Unsurprisingly, currently vacancies are advertised as between approximately £34,000 for care homes without nursing and £40,000 for nursing homes.

4.3 The training needed for care home managers: DHSC is currently involved in designing a framework for LPS training, based on the learning triangle below:



It is notable that, within this framework, care home managers and senior staff certainly come within **level B of the training triangle**, since they have a responsibility to refer into the LPS system; they also explicitly have the duty to carry out and report on consultation as described in level C. They will in future (when their full responsibilities outlined in the Mental Capacity Amendment Act 2019 come

into effect) also need to understand and use in practice some of the assessment skills of level D, to apply specific tests to available assessments to determine if they are applicable and reliable. To meet their responsibilities, they will need the same levels of training as many other professionals involved in the LPS process as shown in the diagram.

4.4 Accounting for ongoing training is missing: There is nothing identified in the IA to allow for ongoing training for senior care staff: the reference to 'ongoing training costs estimated to be £0.9m per year' is general but, given the persistence of the opinion that care home managers simply do not have any training needs, the fear arises that they are excluded from this. Further explanation is needed.

4.5 Better recognition of the care provider perspective: This IA repeats (section 15.9) the previous assertion that 'engagement with care providers showed a general view that the current assessment process duplicates a lot of work.' This was challenged robustly in feedback to earlier versions: engagement with care providers before the first IA was recognised as having been extremely scrappy, and, in addition, it has been pointed out that the Mental Capacity Amendment Act 2019 creates a major gain for local authorities, by passing on the care home managers the significant cost and time implications of managing the assessment and authorisation processes.

5. Misleading, poor quality, outdated materials cited despite damning feedback to earlier IAs – see Annex 1: recommended training materials

'This includes the cost of the existing DoLS awareness training course (£23) which runs for two hours (many of these social workers will be familiar with the current DoLS system) and we have used this as a proxy.'

We have concerns about the course referred to, produced by a company called High Speed Training. We fail to understand why one company is given this implicit approval from government, by inclusion here. Feedback in 2019 to the most recent IA pointed out that its cost is in fact not the £23 stated, but £30 + VAT; this error remains uncorrected. This IA suggests, by its context, that this is a course appropriate for social workers, although all the examples make it clear that front-line care workers are the perceived audience. More importantly, as noted in our feedback to the previous IA, as well as being poorly designed (consisting of large blocks of text appearing on the screen and read aloud) it remains littered with errors.

It is extraordinary that material cited approvingly by government still claims that hospital DoLS authorisations are granted by PCTs (which ceased to exist in April 2013). Further serious errors include telling users that DoLS apply in all care settings (whereas they only apply to registered care homes and hospitals); describing a person in a coma as certainly needing a DoLS authorisation in contradiction to case law; partial, inaccurate, and misleading explanations of how to assess capacity; an inaccurate explanation of urgent authorisations and complete omission of the Court of Protection role in resolving disputes or hearing challenges.

10 February 2021