

NDA Submission to the Department of Health to inform its consultation on the development of Protection of Liberty Safeguards legislation

**May 2025**

# Introduction

The National Disability Authority (NDA) is the independent statutory body with a duty to provide information and advice to the Government on policy and practice relevant to the lives of persons with disabilities, and to promote the adoption and application of a Universal Design approach across all sectors. We thank the Department of Health for the opportunity to contribute to its consultation on the development of Protection of Liberty Safeguards legislation.

The NDA broadly welcomes the wide-ranging changes made by the Department to its initial protection of liberty safeguards proposals outlined in the draft General Scheme of a Bill subject to public consultation in 2018 and 2019. The Department’s revised approach, detailed in its Discussion Paper, includes a welcome move away from an overly courts-based system and greater alignment with the General Principles of the Assisted Decision-Making (Capacity) Act 2015 (as amended) (ADMCA), including recognition of the presumption of decision-making capacity and the requirement that a care arrangement is the least restrictive option.

The NDA is represented on the Department of Health’s Expert Advisory Group on Protection of Liberty Safeguards, through which we continue to offer ongoing advice and guidance in relation to the development of the proposed legislation. We have therefore limited our input in relation to this consultation to some overarching considerations.

# Overarching considerations

## Prioritisation of the development of this legislation

The NDA is currently undertaking research examining the process and the experiences of those leaving wardship. Since the commencement of the ADMCA in April 2023, the High Court no longer has a statutory basis to make a new detention order in respect of a person under wardship. In the absence of Protection of Liberty Safeguards legislation, which would provide an alternative statutory framework, the High Court has been exercising its inherent jurisdiction to make new orders for the detention of persons who lack capacity but do not have a mental disorder as defined by section 3 of the Mental Health Act 2001. Such persons include people in wardship and others who are not in wardship but lack decision-making capacity.

Research underway by the NDA on the discharge of Wards of Court has revealed that the increase in applications under the High Court’s inherent jurisdiction connected to detention is absorbing a large amount of court time and resources. Concerns have also been raised about the appropriateness of reliance on the use of inherent jurisdiction, with the Law Reform Commission commenting that, unlike inherent jurisdiction, a statutory framework allows for clear thresholds and safeguards, ensuring that the rights of those who may be subject to an order are appropriately, and consistently, weighed and considered.[[1]](#footnote-1)

The NDA is aware that, despite recent progress and momentum, work to develop Protection of Liberty Safeguards legislation has been ongoing for over ten years. In the absence of such legislation, applications under the inherent jurisdiction of the High Court will continue. Accordingly, the NDA underscores the importance of progressing this legislation as a matter of priority.

## Engagement with disabled people and their families

The NDA acknowledges the preliminary stakeholder engagement undertaken by the Department to date and welcomes the ongoing targeted stakeholder consultation. However, given that many of those who will avail of protection of liberty safeguards will be disabled people, the NDA advises the importance of ongoing engagement with people with disabilities and their representative organisations in the development of these legislative proposals.

Article 4(3) of the UN Convention on the Rights of Persons with Disabilities (UNCRPD) requires all government departments and statutory agencies to ensure the effective participation of persons with disabilities in the creation and implementation of policies and legislation that impact their lives.[[2]](#footnote-2) The NDA therefore encourages the Department to consider establishing a mechanism for ongoing engagement and consultation with disabled people and Disabled Persons’ Organisations in relation to this draft legislation, for example through the establishment of a disability advisory group.

The NDA also advises that families and carers should be actively consulted and engaged with as part of the development of this draft legislation. As noted in the Discussion Paper, families and caregivers will have an important role in any future statutory framework, including engagement on possible alternatives to deprivation of liberty. As such, their views and perspectives should be actively sought and considered, though these are secondary to the will and preferences of the person.

## Advance Place of Care Decisions

The NDA supports the proposal to introduce Advance Place of Care Decisions which would provide a record of a person’s wishes regarding ‘place of care’ decisions and to appoint a representative to make decisions on their behalf (either as part of Advance Healthcare Directives or a separate but similar instrument). While the Discussion Paper notes that these would be non-legally binding, the NDA advises that they would provide an important expression of the person’s will and preference with regard to their place of care.

## Review of existing care arrangements

The consultation document acknowledges that on enactment of Protection of Liberty Safeguards legislation there may be a cohort of people that would be considered to be deprived of their liberty under the new legislation, but whose current care arrangement is not underpinned by a formal legal framework. To address this issue, it is proposed that, at the time of enactment, facilities will be given a set amount of time to review all existing care arrangements in the facility to identify possible cases of deprivation of liberty and to make applications to the authorising body for any identified cases of deprivation of liberty.

The NDA underscores the importance of such reviews being carried out in a timely manner, while recognising that such work will incur significant expenditure and resources by facilities, providers and the authorising body (a proposed new Protection of Liberty Office situated within the Mental Health Commission). We also advise the importance of communicating with affected individuals and their families from an early stage to allay any concerns they may have, with our ongoing research on wardship revealing concerns and fears amongst family members about the implications of the ending of the wardship system. Similar issues may arise in this respect for people whose care arrangements are being reviewed and where a possible deprivation of liberty is identified.

Supports to assist with transitional arrangements should be factored into the Regulatory Impact Assessment and costings which will accompany the draft legislation.

## Independent advocacy

The consultation document notes that when it is determined that a proposed care arrangement may involve a deprivation of liberty and an authorisation will be required, the responsible person should ensure the person has someone from their network of support to assist them during the process, such as an independent advocate (where no relative or friend is available or there are concerns around their suitability).

The NDA underscores the importance of access to an independent advocate as early as possible in the authorisation process. Access to independent advocacy support can be essential in ensuring that decisions concerning a possible deprivation of liberty take sufficient account of the will and preference of the person.

The NDA acknowledges the ongoing work of the National Advocacy Service, however its resources are limited and it would likely encounter significant challenges providing independent advocacy services to the number of people potentially affected by the legislation without significant additional investment. The Citizens Information Act 2007 affords legislative powers to an independent advocacy service, but it has not been commenced. The additional resourcing implications for independent advocacy services should be factored into the Regulatory Impact Assessment.

## Meaningful alternatives to detention

The Guidance Document notes that a lawful deprivation of liberty may include a situation whereby a person lacking decision-making capacity is ready to be discharged from hospital, and is requesting to leave, but the hospital is not in a position to discharge them due to a lack of suitable home care package, home modification or residential care place. In effect, this means that the new statutory framework may permit the detention of a person lacking decision-making capacity because of a lack of availability of necessary services, including home care or community-based services. This is a cause for concern and underscores the importance of meaningful alternatives to detention, other lesser intrusive care options and the resourcing of relevant health and social care services. The NDA advises that such considerations should be considered in the Regulatory Impact Assessment.

## Optional Protocol to the Convention against Torture

The new Programme for Government commits to enact the Inspection of Places of Detention Bill, enabling ratification of the UN Optional Protocol to UN Convention on Torture (OPCAT). OPCAT is an international human rights treaty designed to prevent torture and ill-treatment in all places of detention. It requires Governments to establish or designate a body – or a group of bodies – to monitor the treatment of and conditions of people deprived of their liberty (known as ‘National Preventative Mechanisms’ or ‘NPMs’).

The Inspection of Places of Detention Bill proposes to expand the role and remit of the Office of Inspector of Prisons, transforming it into the Inspectorate of Places of Detention and designating it as the NPM for the justice sector. The Bill also provides that the Minister for Justice will designate NPMs for other sectors, such as health or social care (the expectation being that HIQA and the Mental Health Commission will also be designated as NPMs). The Bill further proposes to designate IHREC as an overarching ‘NPM coordinator’ that effectively coordinates the activities of the individual NPMs and liaises with international bodies in relation to visits to Irish places of detention.

The Department’s Discussion Paper notes that regulators, including HIQA and the Mental Health Commission, will have a role in inspecting compliance with requirements under the Protection of Liberty Safeguards legislation, specifically requirements in relation to policies and procedures, as well as the maintenance of documentation and records. The NDA advises that the Department engages with the Department of Justice to ensure alignment between both pieces of legislation and ensure regulators such as HIQA and the Mental Health Commission are afforded the necessary powers to monitor places of detention and meet the requirements of OPCAT.

# Conclusion

The NDA welcomes the opportunity to contribute to this consultation and is available to engage further with the Department on any of the issues raised in this submission. We also look forward to continued engagement on these proposals through our representation on the Department of Health’s Expert Advisory Group on Protection of Liberty Safeguards.

1. Law Reform Commission (2024) A regulatory framework for adult safeguarding: Volume 1. [↑](#footnote-ref-1)
2. The NDA has developed guidance, entitled [Participation Matters](https://nda.ie/publications/participation-matters-guidelines-on-implementing-the-obligation-to-meaningfully-engage-with-disabled-people-in-public-decision-making), for public officials on implementing the obligation to meaningfully engage with disabled people in public decision making, which may also be of assistance to the Department in this regard. [↑](#footnote-ref-2)