

The Welsh Government has announced four priorities area for the remainder of the Senedd term, including 'lechyd da' – Good health with the First Minister keen to cut NHS Wales waiting times across all services, to improve access to social care and services for women's health.

In this year's Welsh NHS Confederation Annual Conference briefing, we provide a snapshot of 10 legal topics facing the NHS in Wales now and in the near future. Our team of expert lawyers regularly advises public bodies and health authorities upon matters of critical importance to the NHS in Wales & England. With a deep understanding of health and social care, as well as public policy, our experts can provide strategic guidance to address legal challenges, to ensure compliance with the law and to assist with the navigation of complex issues affecting patient care and operational effectiveness.

So, if you require advice relating to any of the topic raised in this briefing, contact us

1. THE HEALTH AND SOCIAL CARE (WALES) BILL

On 20 May 2024, the Health and Social Care (Wales) Bill ("the Bill") was introduced to the Senedd, with the stated aim of :-

- eliminating profit from the care of looked after children,
- to enable the introduction of direct payments for Continuing NHS Healthcare
- making other amendments to the Social Services and Well-being (Wales) Act 2014 and the Regulation and Inspection of Social Care (Wales) Act 2016, to ensure that both these Acts operate fully and effectively.

In October 2024, the Senedd Health and Social Care Committee released their Stage 1 Report upon the Bill which outlines stakeholder views, as well as 26 different recommendations for the Welsh Ministers to consider. This report can be found [here](#).

We have prepared a series of briefings on the Health and Social Care (Wales) Bill, which can be found [here](#).

2. DEPRIVATION OF LIBERTY - REFORM?

The Labour Party's 2024 UK Election manifesto committed to modernising the Mental Health Act 1983 ("MHA"). This was followed up in the King's Speech 2024, which highlighted that the MHA "is woefully out of date", the concerns about increased rates of detention under the MHA, its application to autistic people, people with a learning disability and the significant racial disparities that have arisen in its use.

The aim for this new Mental Health Bill which will apply in England & Wales, according to [the briefing notes issued](#) with the King's Speech is to make further amendments to the MHA "to give people detained greater choice and autonomy, enhanced rights and support, and ensure everyone is treated with dignity and respect throughout treatment". This would be achieved through steps such as:

- increasing the risk threshold for detention
- limiting the application of the MHA to people with a learning disability and/or autistic people
- adding statutory weight to the voice of patients
- strengthening and improving the statutory roles
- removing police stations and prisons as places of safety under the MHA

These MHA reforms will take a number of years to implement and be introduced in phases, due to the need to recruit and train more clinical and judicial staff. The intention is to introduce new powers only when there are sufficient staff in place to ensure safety. The UK Government has since indicated that it will slow the implementation of reform to the MHA in response to the CQC rapid review into the mental health care that Valdo Calocane received in the year's before he killed three people in Nottingham. Wes Streeting has stated that he wants to get the *"balance right between recognising there are people whose liberties are being deprived today who could live safely in the community, but also recognising for others there needs to be much better and closer supervision so that people like Calocane are not able to be on the street causing risk or fatalities to others"*. It has since been confirmed that a public inquiry will take place. The final form of the inquiry is yet to be determined, but the families are urging for it to be a statutory, judge-led inquiry.

In the meantime, in Wales, last month saw the publication of the Welsh Government's [Draft mental health and wellbeing strategy consultation: summary of response](#) which will inform changes and amendments to the final Mental Health and Wellbeing Strategy and its supporting delivery plan which will be published together. Further targeted engagement with stakeholders will be undertaken the meantime too.

Finally, despite the call for reform over 10 years ago and legislation initially passed within the Mental Capacity Amendment Act 2019 to introduce a new more streamlined system – the Liberty Protection Safeguards (LPS) – to replace the Deprivation of Liberty Safeguards (DOLS) process, there are no signs that LPS will be implemented in the foreseeable future. Over the border, the latest CQC State of Care report published in October found that Councils lacked sufficient assessors to deal with the volume of cases they received from care homes and hospitals, and also identified a "wide variation" in how authorities managed applications and in backlog levels.

It also said that a lack of knowledge of the DOLS, and the wider Mental Capacity Act 2005 (MCA), among provider staff was leading to unnecessary applications and overly restrictive practice, with many people were being deprived of their liberty unlawfully, without the safeguards required by the European Convention on Human Rights that are supposed to be provided by DOLS due to backlogs. We anticipate that a similar situation applies in Wales.

We will keep the NHS in Wales posted on how the reform to the law and policy in this area develops.

3. THE PROCUREMENT (WALES) REGULATIONS 2024

On 3 July 2024, the Senedd Cymru approved the Procurement (Wales) Regulations 2024 ("the Regulations"). The Welsh Ministers brought forward the Regulations using powers conferred on them by the Procurement Act 2023 ("the Act").

The Regulations will only apply to devolved Welsh authorities and contracting authorities that are to be treated as a devolved Welsh authority, under the Act.

The Regulations include additional provisions concerning transparency, which establish supplementary requirements regarding the publication of or the information included in, amongst other things, procurement notices (predominantly requirements relating to transparency notices), supplier information, contracting authority information and tender documentation.

In addition to this, the Regulations also contain details relating to light touch contracts, the definitions of 'Central Government Authority' and 'Works', below threshold procurements and the rules on using the central digital platform and the Welsh digital platform for the publishing of procurement notices.

It has been stated that the objectives of the Regulations are to:

- Create a simpler and more flexible commercial system that better meets Wales needs, while remaining compliant with international obligations.
- Open up Welsh public procurement to new entrants such as small businesses and social enterprises so that they can bid for more public contracts.
- Embed transparency throughout the commercial lifecycle so that the spending of Welsh taxpayers' money can be properly scrutinised.

The Welsh Government state that the Regulations will initiate a new way forward for Wales that will enable the Welsh public sector to leverage the power of procurement to support the more equal, sustainable and prosperous Wales we all want to see in the future. The Regulations are due to come into force at the same time as the Act, which is now 24 February 2025.

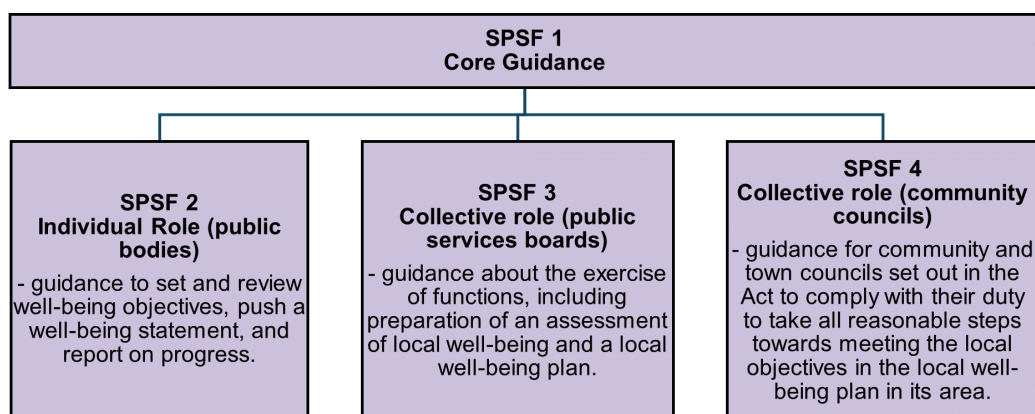
4. UPDATED STATUTORY GUIDANCE FOR THE WELL-BEING OF FUTURE GENERATIONS

The Shared Purpose: Shared Future Core Guidance ("SPSF 1") (the "Core Guidance") was updated in July 2024 applies to listed public bodies, including Health Boards and NHS Trusts in Wales on implementing the Well-being of Future Generations (Wales) Act 2015 ("the WFG Act"). NHS Wales must take this Core Guidance into account when fulfilling its legal duties under the Act.

The Core Guidance contains key definitions and sets out how to:

- carry out sustainable development;
- understand the well-being goals; and
- apply the sustainable development principle.

It sets out an explanation of the individual and collective duties, how the listed public bodies fit into the architecture of the Act, and where the key changes in organisations are expected to be seen:



You can read the full Core Guidance [here](#), and all other statutory guidance on the Act [here](#). For more detailed discussions on the implementation, you can explore resources provided by the [Future Generations Commissioner for Wales](#).

For more information about the Well-being of Future Generations (Wales) Act 2015, the Core Guidance or other statutory guidance and how we can support you, see [here](#)

5. DUTY TO TAKE REASONABLE STEPS TO PREVENT SEXUAL HARASSMENT

From 26 October 2024, employers are under a new duty to take reasonable steps to prevent sexual harassment of workers in the course of their employment. This new duty is contained in the Worker Protection (Amendment of Equality Act 2010) Act 2023.

Crucially, it is a preventative duty which means that employers should anticipate scenarios when their workers may be subject to sexual harassment in the course of their employment and take action to prevent it. If sexual harassment has taken place, employers should take action to stop it happening again.

Employers, including the NHS, will need to demonstrate the specific measures that they have put in place to comply with this new duty.

It is important to note that this new duty is limited to preventing sexual harassment and it does not apply to harassment based on other protected characteristics included in the Equality Act 2010.

If a worker brings a successful claim for sexual harassment and compensation has been awarded, the Employment Tribunal must consider if and to what extent the employer has complied with the new preventative duty. If it finds that the new duty has been breached, it may order a compensation uplift of up to 25%. Enforcement action can also be taken by the Equality and Human Rights Commission.

6. EMPLOYMENT RIGHTS BILL

On 10 October 2024 the UK Government published its Employment Rights Bill ("the Bill"), fulfilling its promise to publish such a bill inside their first 100 days in government. Most of the Bill applies to Wales.

The UK Government state that the Bill, which brings forward 28 individual employment reforms, will bring an end to unfair employment practices and help deliver economic growth by replacing out of date employment laws and by helping to boost pay and productivity.

The UK Government contend that the changes set out in the Bill are the biggest upgrade to workers rights in a generation, and a significant step towards delivering this government's plan to make work pay.

Specifically, the stated aim is that the Bill will:

- Give protection against unfair dismissal from day one, while allowing employers to operate probation periods

- Establish parental and bereavement leave from day one
- End exploitative zero-hour contracts
- End unscrupulous practices of fire and rehire and fire and replace
- Make flexible working the norm where practical
- Deliver stronger dismissal protections for pregnant women and new mothers
- Establish a new Fair Work Agency with new powers to enforce holiday pay
- Strengthen statutory sick pay

Alongside the Bill, the UK Government have published a 'Next Steps' document, which outlines the government's vision, long-term plans and sets out their ambitions for the plan to grow the economy, raise living standards across the country and create opportunities for all. Although this Bill is not expected to pass until June or July 2025, the above changes are likely to have a significant impact on upon employers, including the NHS in Wales, as they represent a significant change from current employment legislation and the related employment practices.

7. THE REGULATION OF PHYSICIAN ASSOCIATES AND ANAESTHESIA ASSOCIATES

Following the commencement of the Associates and Physician Associates Order 2024, the General Medical Council ("GMC") will become the statutory regulator of Physician Associates ("PAs") and Anaesthesia Associates ("AAs") in December 2024.

The GMC consider that such a step will help assure patients, colleagues and employers that PAs and AAs have the requisite knowledge and skill to work safely within the UK, while ensuring that they can also be held to account if serious concerns are raised.

The GMC have stated that organisations who employ PAs and AAs (which includes the NHS) should ensure that their internal governance arrangements take into account the fact that these professionals are trained and will be registered on the basis that they will always work under supervision. That being said, the GMC has also recognised that when it comes to supervision, there isn't a one-size-fits-all approach. In light of this, it is suggested that PAs, AAs and their named supervisors should agree a level of supervision appropriate to each individual's skill level, experience, role and the nature of the task.

PAs and AAs will have until December 2026 to register with the GMC. After this date, it will be an offence to use the requisite titles in the UK without holding a GMC registration. As a significant number of PAs and AAs are employed by the NHS, it is important that Health Boards ensure that processes are put in place to enable PAs and AAs are able to comply with their obligations under the new regulatory regime. Health Boards should also insist upon, and ensure that, all of its PAs and AAs are registered with the GMC by December 2026.

This change is widely seen as the first step towards a regulatory reform of all statutory healthcare regulators. Regulators argue that reform is needed to update the existing legislative frameworks, to ensure that a more modern and responsive framework is put in place to allow them to respond in a more efficient and flexible manner when patient safety is at risk.

The latest UK Government statement contends that this regulatory reform, for other professionals, will take place over the *"next couple of years"*.

It is imperative that NHS bodies are alive to any further regulatory reforms that are proposed and/or enacted, in order to ensure that they understand any such changes and react appropriately.

8. FREEDOM OF EXPRESSION – UPDATED HEALTH AND CARE PROFESSIONS COUNCIL SOCIAL MEDIA GUIDANCE

On 1 September 2024, the Health and Care Professions Council (“HCPC”) published updated guidance for its Registrants relating to their use of social media.

The HCPC have stated that they have made these changes to encourage Registrants to focus on what they say and the language they are using regardless of whether they are communicating with service users, carers and colleagues in person or on social media and networking sites.

The HCPC state that the following Standards of Conduct, Performance and Ethics must be considered by Registrants when using social media:

- Standards 2.1 to 2.5, which relate to communication with service users and carers.
- Standards 2.6 to 2.9, which relate to working with colleagues.
- Standards 2.10 to 2.12, which relate to social media and networking sites.

The HCPC have outlined that they have clarified their expectations surrounding these standards as they want to encourage Registrants to focus on the content of their communications, regardless of whether these are happening in person or through social media.

The HCPC has also added a requirement for Registrants to make reasonable checks to ensure information they share on social media and networking sites is accurate, true, does not mislead the public and is in line with their duty to promote public health. The HCPC state that this requirement was added as the rapid increase of misinformation on social media has the potential to undermine public safety.

Other regulators, such as the Nursing and Midwifery Council, have also published similar guidance for their Registrants.

As a result of this updated guidance, NHS bodies in Wales should consider carrying out a review of any social media policies to ensure that registered professionals are aware of the requisite standards both inside and outside of work.

NHS bodies should also take note of a regulators social media guidance to ensure that any necessary fitness to practice referrals are made, in order to ensure public safety and uphold standards in the relevant profession.

9. ASSISTED DYING BILL

On 16 October 2024, the [Terminally Ill Adults \(End of Life\) Bill 2024-25](#) (“the Bill”) was presented to the UK Parliament, . It is expected that this bill will introduce proposals to give terminally ill people but its long title states it will *“allow adults who are terminally ill, subject to safeguards and protections, to request and be provided with assistance to end their own life”*.

The Bill's second reading is scheduled for Friday 29 November 2024, although the details of the bill have not been published, it is considered that the bill will likely be similar to the Assisted Dying Bill introduced into the House of Lords by Lord Falconer. This bill would allow terminally ill adults, who have six months or fewer to live, to obtain medical assistance to end their life.

We will be tracking the progress of the Bill and will publish a full briefing once further details of its contents are available.

10. THE BUILDING SAFETY ACT 2022 (“BSA”) AND THE BUILDING SAFETY (WALES) BILL

The BSA has been one of the most significant changes in the Building Environment sector in decades, with much more robust regulation and accountability introduced to the construction industry. The effect in Wales is currently limited, but significant change is on the horizon.

We anticipate the detail of that change being included in the Building Safety Bill (Wales), which is due to be presented to the Senedd in this Senedd term. The Welsh Government has said that it plans to “go further” than the rules that now apply in England, but it remains to be seen what that will look like.

One thing that is for sure, is that the NHS Wales will need to stay on top of this changing legislative and regulatory landscape. Welsh Government has published its definition of a Higher Risk Building in Building Safety (Description of Higher-Risk Building) (Design and Construction Phase) (Wales) Regulations 2023. This definition includes, but is not limited to, buildings that are over 18m or seven storeys in height AND (1) contain at least one residential unit; or (2) are a hospital. Where a building contains residential units, it will be a Higher Risk Building for the entire lifespan of the building (design, through to demolition). Hospitals in tall buildings, however, will only be treated as Higher Risk Buildings for the purposes of design and construction works.

The BSA in England impacts all construction projects, not just Higher Risk Buildings, and we can expect the same to be the case in Wales. NHS Wales Estates and Development teams will need to stay abreast of these changes, and keep their internal policies and procedures up to date, in order to ensure that they do not fall foul of the new regulations.

In late 2024, there will be a consultation on the changes to building safety in Wales. NHS bodies may wish to provide input into that consultation.