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Llywodraeth Cymru  
Welsh Government

Welsh Government  
Consultation – summary of response



## Representatives for young people and parents lacking capacity

A consultation on Chapter 31 of the draft ALN Code; relating to representatives for parents of children and young people who lack capacity in relation to the Additional Learning Needs and Education Tribunal (Wales) Act 2018

Date of issue: 22 January 2021

Mae'r ddogfen yma hefyd ar gael yn Gymraeg.  
This document is also available in Welsh.

# Representatives for young people, and parents of children, lacking mental capacity

<b>Audience</b>	Maintained schools, further education institutions, local authorities, local health boards, early years settings, third sector organisations and anyone else with an interest in additional learning needs.
<b>Overview</b>	This report provides a summary of responses to the consultation and sets out the changes made to the draft ALN Code chapter and regulations in light of the comments received.
<b>Action required</b>	No further action is required
<b>Further information</b>	Enquiries about this document should be directed to:  Additional Learning Needs Transformation Team Support for Learners Division, Education Directorate Welsh Government Cathays Park Cardiff CF10 3NQ  e-mail: <a href="mailto:SENreforms@gov.wales">SENreforms@gov.wales</a> Tel: 03000 062 6666   @WG_Education   Facebook/EducationWales
<b>Additional copies</b>	This document can be accessed from the Welsh Government's website at <a href="https://gov.wales/representatives-young-people-and-parents-children-lacking-mental-capacity">https://gov.wales/representatives-young-people-and-parents-children-lacking-mental-capacity</a>
<b>Related documents</b>	A consultation on Chapter 31 of the draft ALN Code; relating to representatives for parents of children and young people who lack capacity in relation to the Additional Learning Needs and Education Tribunal (Wales) Act 2018. WG39574 (2020).

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## **Introduction**

The Welsh Government published a consultation on 3 September 2020. The consultation asked about proposals to allow representatives to act on behalf of young people, and parents of children, who lack mental capacity, when exercising their rights under the Additional Learning Needs and Education Tribunal (Wales) Act 2018.

The consultation documents can be accessed from the Welsh Government website <https://gov.wales/representatives-young-people-and-parents-children-lacking-mental-capacity>.

The consultation period lasted 8 weeks, concluding on 29 October 2020.

The list of respondents is provided at Annex A, with anonymity protected where requested. Copies of the responses are available on request.

This document presents a summary of respondents' views to the questions contained in the consultation document, and Welsh Government's response to the main themes contained within the consultation responses.

## **Targeted consultation workshops**

Due to the specialist and technical nature of the proposals, and given the shorter length of the consultation, Welsh Government explored ways to enrich the consultation through targeted workshops.

Working in partnership with Children in Wales, consultation workshops were held in two special schools in Wales where young people with complex ALN could respond to the consultation by way of an informal discussion. Our partners used the Easy Read version of the consultation document, along with additional material, to explain the proposals and the wider ALN reforms in an understandable way to help encourage students to offer their views on the proposals.

## Consultation questions

The consultation asked three main questions;

**Question 1:** Are the provisions for interpreting a child’s parent as the representative, or both the parent and the representative, in instances where that parent lacks capacity, appropriate?

**Question 2:** Are the provisions for interpreting a young person as the representative, or both the representative and the young person, in instances where that young person lacks capacity, appropriate?

**Question 3:** The provisions in the draft regulations and code chapter allow for a young person’s parent, where the young person does not have a representative (as defined in regulation 2) to act as their representative. Does this proposal strike the right balance between allowing individuals to make their own decisions, and allowing representatives to make decision on behalf of those individuals who are lacking capacity?

The fourth question asked for respondent’s to provide any other comments related to the draft regulations and code chapter.

Questions 5, 6 and 7 were mandatory questions relating to how the proposals will impact on the Welsh language.

## Responses

A total of 27 complete consultation responses were received to the main consultation. A further 17 online responses were incomplete when submitted and could not be used for the purposes of this report. For example, most of the incomplete responses had submitted their forms without completing any fields, whereas a few others had answered some questions but left others unanswered and had provided no comments.

From the 27 full responses, two provided written text to the first three questions without providing a specific “yes” or “no” answer, which is why the table below shows a total of 25 responses.

### Answers to the three main consultation questions

	Question 1	Questions 2	Questions 3
Yes	19	21	20
No	1	2	0
Not sure	5	2	5
Total	25	25	25

Very few answered all the mandatory Welsh language questions. The answers given tended to indicate a positive attitude towards the Welsh language, but did not provide suggestions on how the proposals themselves could be improved to bring about more positive effects on the Welsh language.

A further 22 young people from special schools in Wales took part in targeted consultation workshops. These responses were given as a group and are not included in the table

above. However the responses have been considered alongside the main consultation when finalising the regulations and ALN Code.

The table at Annex A provides a breakdown of the number of respondents from the formal consultation into types, based on category and location.

## **Methodology**

Given the relatively small numbers involved in this consultation, we have not provided percentage points to the closed-ended questions. Neither have we included a demographic analysis of the responses received. However, enough responses were received to indicate a general consensus on the proposals. Key themes were also identified throughout the consultation which are discussed below.

## **Executive summary**

Generally, respondents were very supportive of the proposals to ensure that the rights under the ALN system of a young person or a child's parent, when lacking mental capacity, can be exercised on their behalf by a representative.

Most believed the approach outlined in the consultation succeeded to strike the right balance between allowing a young person in particular, to be as independent as possible, whilst providing the support necessary to ensure decisions can be made in their best interest.

Some respondents were a little concerned that a representative appointed by a court may not be best placed to understand the views, wishes and feelings of the young person or parent who lacks capacity. However, most also understood that those who lack capacity would not be able to fully engage with the ALN system without a representative. It is also likely that those with a court appointed representative would require support in other areas of their life, not only in relation to ALN. Additionally, young people with a court appointed representative would still benefit from their parent's involvement during meetings or when decisions were being made about their ALN.

The majority of consultees also felt the addition of a parent of a young person who lacks capacity being able to act as their representative where a court has not appointed a representative, was a positive addition. Some thought this strengthened the role of the parent within the ALN system, whilst respecting the independent voice of the young person.

However, some consultees believed representatives, particularly when the role is undertaken by a young person's parent, would need training and guidance to ensure they understood the extent of their powers; i.e. what decisions they could and could not make. Others raised the issue that mental capacity is generally not well understood outside of professionals working within the discipline, and that further education or training would benefit families with mental capacity issues.

There was also concern over the assessment of mental capacity, and whether further training was required to ensure capacity was properly assessed.

Finally, some respondents wanted clarity on the difference between an advocate and a representative, with an explanation of the different roles these two can play.

## Themes from responses

### 1) Safeguarding and accountability

Some respondents raised safeguarding as a potential issue for representatives. The concern related to the absence of a mechanism within the ALN Code to ensure representatives are adequately informed to carry out their duty, both in terms of understanding the ALN system and the relevant legal entitlements, and in knowing the young person well enough to adequately represent their views.

Some felt there were insufficient safeguards in place to ensure children and young people lacking capacity, and their representatives (including parents), are appropriately informed and supported to understand their legal entitlements under the ALN system.

The consultation workshops also raised the importance of young people having a representative they know well to ensure their views, wishes and feelings are properly reflected in the decisions made on their behalf.

Others have asked for specific guidance to assist representatives with their duties.

### Welsh Government response

Representatives may ask a local authority to be referred to their independent advocacy services (IAS) to help them understand the ALN system. If required, this service will help a representative to make informed decisions on behalf of a young person, and may support their knowledge in other related areas, such as further education provision. The ALN Code has been amended to make clear that representatives have a right to IAS.

It should also be noted that court appointed representatives will already have guidance on their role, in addition to specific terms related to their role set by the court. However, this will not apply to parents acting as representatives unless they are appointed by a court. In these cases, we expect social workers to be working with the young person and their parent to overcome any safeguarding issues. This may include, for example, arranging a best interest meeting with the young person and their parent. Given that social workers are already bound by a legal duty to ensure the best interest of the young person in the decisions made on their behalf, no further safeguarding or guidance is required.

### 2) Advocacy

A number of the comments received related to advocacy services.

As representatives may not have much experience of the ALN system, they may require support to understand certain aspects of the system to enable them to properly understand all options before an informed decision can be made. Some wanted clarity over whether representatives were able to access independent advocacy services (IAS) which must be provided by local authorities under the Additional Learning Needs and Education Tribunal (Wales) Act 2018.

Related to this point, other respondents asked whether involving Independent Mental Capacity Advocates (IMCA) would also be useful in certain cases where a young person lacks mental capacity.

There were a number of comments relating to advocacy services more generally. Some asked for more references to advocacy services throughout the ALN Code, noting how useful advocates can be to help young people and parents to understand certain processes, decisions or to help them articulate themselves. Some commented that advocacy services can provide support before any concerns or disputes arise, cutting the number of official disputes.

### **Welsh Government response**

The ALN Code has been amended to make clear that IAS are available to representatives. We understand that IAS may be better placed to provide advice on specific ALN related issues and agree that representatives should also have access to this service.

IMCA services are also available for young people with a representative; this has also been addressed in the relevant chapter of the ALN Code.

We have not discussed the role that other, non-statutory advocacy services may provide to children and young people more generally. Although Welsh Government recognises the useful resource other advocacy services can provide, the ALN Code is not a code of practice and as such does not include good practice or recommendations for how duties should be carried out.

### **3) Guidance and training**

Some respondents asked about training for representatives, particularly in cases where a young person's parent becomes their representative. Another asked whether there would be a requirement to provide support for parents acting as representatives. It was felt by some that parents who take on this new role as their child's representative would need information and possibly training to ensure they can confidently undertake the role and not feel anxious about their new duties.

### **Welsh Government response**

Welsh Government does not currently intend to provide training for the role of representative under the ALN system.

Court appointed representatives are bound by the duties set out in the Mental Capacity Act and will therefore have guidance to follow, but this will not apply to parent's acting as representatives. However, it is important to keep in mind that the representative role discussed here only applies in relation to the ALN system; parents who act as representatives will not become the young person's legal representatives on other matters, such as matters relating to property.

Parents who act as representatives will also have a right to access IAS which can support their understanding on issues related to the ALN system.

The Mental Capacity Act 2005's Code of Practice also provides guidance for representatives including when professionals should become involved with decisions. When decisions are required to be made, a best interest meeting should be arranged with the social worker and other professionals to ensure the young person receives the appropriate support.



In the event a parent no longer wishes to be a representative, a court appointed representative can take over.

#### **4) Mental Capacity Act 2005**

The consultation received a number of comments relating to the Mental Capacity Act 2005 (MCA). Some queried how the process to determine the mental capacity of a young person or a child's parent would operate in practice, and how this process will link with the MCA.

Others asked about the role of parents under the MCA and whether it was compatible with the ALN system.

Some had concerns that current knowledge of the MCA within certain professions was limited, and this could pose a risk under the ALN system if those with statutory duties are required to follow the MCA and its Code of Practice.

Finally, some wanted information on how the ALN system would work in relation to the Deprivation of Liberty Safeguards (DoLS) being replaced by the Liberty Protection Safeguards (LPS) and how the ALN system will be reflected in the Mental Capacity (Amendment) Act 2019.

#### **Welsh Government response**

The process of assessing mental capacity for the purpose of having a representative will continue to be underpinned by the MCA and its Code of Practice. We have included additional references to the MCA's Code of Practice in the ALN Code to ensure those with responsibilities are directed to the relevant legislation. The ALN Code will not restate the law on capacity, but will make clear cross-references where appropriate.

The role of the parent in the MCA is deliberately different to a parent's role under the ALN system. The regulations that allow a young person's parent to become their representative relate to the specific ALN related functions and should not be confused with other functions under the MCA.

We expect all professionals with duties under the MCA to be familiar with the Act and Code of Practice. Additional cross-references in the ALN Code is aimed at supporting professionals to undertake these duties.

Finally, we have also included additional footnotes to explain that until the LPS comes into force, applications for authorisations of relevant placements for 16 and 17 year olds will need to be made to the Court of Protection. We intend to update some references in the ALN Code once the Mental Capacity (Amendment) Act 2019 comes into force.

## **Stakeholder consultation workshops**

The consultation workshops in Ysgol Hen Felin and Ysgol y Deri raised similar points to each other, and reflected some issues raised in the main consultation.

Both groups believed there was a need for representatives and so broadly welcomed the proposals. Both groups also believed the inclusion of parents as representatives was important as they would know the young person best.

Some had doubts over the effectiveness of a representative appointed by a court being able to carry out their duty without knowing the young person well. To counter this, some raised that the ongoing involvement of a parent when a representative had been appointed by a court would be essential to ensure the voice of the young person remained central to any decisions made. Some also suggested there should be a framework to support the parent to communicate with a young person's representative. This collaborative approach would ensure a balance of responsibility in decision making and therefore protect and support the needs of the young person.

Finally, the groups wanted to ensure that assumptions about their capacity should never be made, and that there should be a clear process for assessing mental capacity.

## Annex A: List of respondents

No.	Name	Organisation
<b>Online responses</b>		
1	Anonymous	
2	Paula Hopes	NHS Wales
3	Anonymous	
4	Yvonne Parker	
5	Anonymous	
6	Anonymous	
7	Julian Lewis	Ysgol Pen Coch
8	Julia Green	Coleg Sir Gar and Coleg Ceredigion
9	Anonymous	
10	Anonymous	
11	Alison Minett	Blaenau Gwent CBC
12	Einir Thomas	Gwynedd a Sir Ynys Môn Council
13	Anonymous	
<b>Responses sent to mailbox</b>		
14	Nicola Lewis	SBUHB - NHS Wales
15	Anonymous	
16	Deb Austin	NHS Collaborative
17	Meilyr Rowlands	ESTYN
18	Natalie Gedrych	Swansea Council
19	Gemma Halliday	Social Care Wales
20	Sally Holland	Children's Commissioner for Wales
21	Rebecca James	Ceredigion Council
22	David Goodger	Early Years Wales
23	Glyn Jones	Wales Mental Health Network
24		Royal College of Nursing Wales
25	Anonymous	
26	Kirsten Jones	Natspec
27	Anonymous	

## **Consultation workshop**

Ysgol Hen Felin (Rhondda Cynon Taf) - 11 participants (8 Male / 3 Female)

Ysgol Y Deri (Cardiff) - 11 participants (11 Male)

All workshop participants were young people in specials schools, aged between 16 and 19.