Meeting Date	**05 May 2022**	**Agenda Item**	**3.2**
Report Title	Health Board Management of Liberty Protection Safeguards and the Mental Capacity (Amendment) Act 2019		
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Report Sponsor	Paul Davies Assistant Director of Nursing		
Presented by	Carol Killa, Head of Nursing for Liberty Protection Safeguards		
Freedom of Information	Open		
Purpose of the Report	To provide an update on the implications for the Health Board and its preparedness for the Liberty Protection Safeguards (LPS) as required by the change in legislation brought about by the 2019 Mental Capacity (Amendment) Act		
Key Issues	• The changes required for implementation of LPS; • Current implementation of the Mental Capacity Act across the Health Board; • UK and Welsh Government Consultation; • Current resources; • Staff competence; • Legal and financial risks; and • Way forward.		
Specific Action Required ***(please choose one only)***	**Information**	**Discussion**	**Assurance**	**Approval**
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Recommendations	Members are asked to: • **NOTE** the changes required to implement LPS and plan to develop a business case and; • **AGREE** to keep the Committee being updated on progress at each meeting.		

Update on the requirements and preparedness for transition to LPS

1. INTRODUCTION

The Mental Capacity (Amendment) 2019 Act (MCA) introduced the Liberty Protection Safeguards (LPS), which will replace the previous Deprivation of Liberty Safeguards. (DoLS) The aim being to move away from a beurocratic time consuming process to a situation where the MCA is embedded into practice and care planning, with the focus more widely on the human rights of the individual in care and treatment planning. The Liberty Protection Safeguards will ensure that the human rights, views and wishes of those people, who are assessed as lacking capacity, are protected.

This report outlines the changes required and the challenge the Health Board will face in meeting the requirements identifying key financial and legal risks.

2. BACKGROUND

2.1 The main changes required for LPS are:

- Responsible Bodies will replace the Supervisory body to authorise an incapacitated person's deprivation of liberty. It is clear that in Wales the Responsible Body with be the local Health Board;
- The LPS scheme arrangements will cover hospitals and care homes, supported living, shared lives and private and domestic settings. The LPS can also provide authorisation of day centre and transport arrangements;
- Continuing Health Care patients will now be the responsibility of the local Health Board Responsible Body to arrange LPS assessments, make the determination and carry out the authorisation;
- LPS will apply to 16 and17 year-old young people in line with the MCA (2005);
- Authorisations can also be for multiple settings built into the person's care plan and so is transportable across care settings.

2.2 Changes in practice

The aim of the changes is to bring the Human Rights of people accessing care treatment to the fore and that the MCA is embedded into everyday care and planning. ***The role of the Best Interest Assessor will cease*** and new roles will be introduced:

- Approved Mental Capacity Professional (AMCP)
- Pre authoriser / Reviewer

2.3 Changes to the assessment process

The current five assessments will reduce to three. Assessments required to determine an LPS are:

1. Mental capacity assessment to consent to arrangements,
   Determination on having a mental disorder as defined under the MHA 1983/2007

2. Medical Assessment

3. Assessment required on deprivation of liberty is' necessary and proportionate 'to prevent harm to themselves

If the person is undergoing other health and or care assessments, then these should be carried out alongside that process. In practice, this means that front line staff will now be undertaking capacity assessments with referral to AMCP's where there is dispute or complexity evident. It is therefore important that staff are confident and competent in using the MCA in everyday practice.

The "acid test" arising for the "Cheshire West" Judgement will remain. (P v Cheshire West and Chester Council and P and Q v Surrey County Council).

The Health Board will need to have in place a robust process for managing practice relating to the Mental Capacity Act and to support both internal and external referrals ensuring the responsible body role is in place to authorise these with the timescales set. (21 days)

The use of 'urgent' DoLS authorisations is removed; instead the new Act broadens the scope to treat people and deprive them of their liberty in a medical emergency (giving life-sustaining treatment or doing any vital act that is deemed necessary to prevent a serious deterioration in a person's condition), without gaining prior authorisation. However, the wishes of appropriate persons or of the person's previous wishes will need to be taken into account.

Despite intended streamlining of process and removal of urgent authorisations, it is highly likely that these changes will result in an increased number of patients requiring assessment and authorisations, due to the inclusion of 16/17 year olds and those in additional settings to hospitals.

There is currently a Health Board wide sub group of the Mental health and Legislative committee in place that has been meeting regularly to consider future needs to successfully implement LPS. (TOR appendix 1)

2.4 The current situation:

1. The supervisory body and DoLS processes are managed within the LTC team within the Primary Care Community & Therapies Delivery Service Unit. (PCCT DSU) This was appropriate to the requirements at the time, as the managing authorities were hospital in patients for the Health Board with the Local Authorities managing applications in nursing residential settings and the community.

2. Staff competence, training and education – A part time admin role sits within Corporate Safeguarding and liaises with Swansea University the current commissioned provider, to ensure staff are booked onto training. Data is collated on numbers attending from across the Health Board. There is currently no strategic oversight for this training and no agreed budget. It has historically been funded out of the Nursing contract, but notice was given by the Health Board to cease this at the end of March 2022 and without the intervention of

WG funding the Health Board level 3 training for MCA and DoLS would have ceased.

3. **Court of protection work** – this is managed by the area governance teams and escalated to legal and risk and corporate Governance with the DSU governance teams dealing with relevant concerns and complaints feeding into this. Currently the DoLS team leader also supports with this work, but there is no one place or process for the management of court referrals or those cases which escalate into the court arena.

4. **Consent to care and treatment and assessment of capacity** sits within every DSU, but a review of current practice and training needs analysis carried out by the Subgroup has indicated that all areas feel that staff will struggle with capacity and competence to fulfil the changes required and more bespoke training to this area of practice is required.

5. **Management of the IMCA services** sits within Corporate Nursing with an historic agreement supporting the provision. Currently there is no agreed process or contract evident to support this provision. A contract for the provision of Responsible Person Representatives is in place between PCC & T DSU and the providers Mental Health Matters. Work will need to be undertaken to consider both these elements and support the formal contracting of these services against the increasing need that LPS will bring. This is likely to increase the amount we currently pay.

2.5 The siting of the management of the supervisory body role and the DoLS team.

With the introduction of the LPS bringing continuing care placements both residential and domiciliary under the Health Board, the Long Term Care team in the PCC&T SDU will become a managing authority and therefore will be unable to fulfil the role of Responsible body. There is a need to agree how the Health Board will enact the requirements of the Responsible Body.

2.6 RESOURCE

The whole structure is fragmented and under resourced. It is necessary to consider the new roles required and that the HB does not have BIA's to transition into these roles within the current resource. There is one substantive BIA post out to advert which is the sole post for the Health Board. The DoLS team leader is a qualified and experienced BIA who supports with the most complex cases and those are often I the court arena and take up substantial time and expertise.

This is in comparison to Hywell Dda who have seven full time employed BIA's and a dedicated lead for MCA. The Health Board has tried to manage this with the use of independent BIA's and training others to undertake assessments alongside their substantive posts, but this has not worked and the applications total for last year exceeded 800 resulting in the Health Board being noted as an outlier in achieving the required targets as outlined in ***HIW Annual Report - Depravation of Liberty Safeguards (DoLS) annual monitoring report 2020-2021***

Comparative data within the report has highlighted the following in respect of SBU in 2020/21:

- SBU had the greatest proportion of standard applications taking over 28 days to process (74%)
- SBU had the greatest proportion of urgent applications taking over 28 days to process (76%)
- SBU processed the greatest proportion of applications with duration of over 3 months (62%)
- SBU processed the greatest proportion of applications with duration of over 3 months (62%)

The full report will be received by the Committee.

2.7 BACKLOG

The Primary Care, Community and Therapies Delivery Service unit (PCC&T DSU) has already put in place a robust plan to manage the backlog of DoLS cases and this is being closely monitored. With the funding secured by the HB from Welsh Government (WG) 2021 /22 the Liquid Personal agency were awarded the contract to address the DoLs backlog and commenced their services on the 04/04/22, supplying five Best Interest Assessor's to take on an average between two to three assessments each per week. With current numbers and assessors availbel it is hoped that the backlog can be cleared within six mnths. However the ongoing lack of substqantive BIA's does not support he Health Board DoLS team to manage the ongoing workload, whch is a concnern.

- Based on last years data with referrals exceeding 800 cases, (this averages at 15 referrals a week)

- Each BIA can undertake 3 cases a week (average)

- The Health Board should have approximately 5 BIA's to adequately meet current demand.

The need to operate a DoLS process to manage DoLS cases is likley to continue into 2023 due to the delay in the implementaion of LPS and even when the new process is put in place there will be a need for a parallel process for both DoLS and LPS for a period of one year to support the transition over to the new LPS process as each DoLS agreement lapses.

2.8 WELSH GOVERNMENT FUNDING

From 2021/22 with WG funding the HB commissioned more dedicated training from Swansea University to ensure staff are competent and confident in implementing the Mental Capacity Act in practice.

A bid for further WG monies has been drafted to try to manage the ongoing numbers of DoLS applications, but without long term commitment to funding it is felt that the best use of this is to support ongoing use of agency resource. Health Board wide training for designated staff who will be identified as assessors under the new LPS processes will also be provided.

The HB has successfully bid for monies to effectively manage the DoLS backlog last year and also supported provision of level three training for one year as well as four bespoke training sessions for key staff and commissioned an increase in IMCA hours to support reducing the backlog of DoLS applications.. We have submitted a further bid against the £102,000 allocated for Swansea Bay Health Board for this financial year to support further use of agency services and increased numbers of bespoke training places to ready our staff for the future changes and WG training to come.

Indications are that WG will be allocating an increased amount of funding for 22/23 and 23/24 to support the introduction of LPS and it is acknowledged that there will be ongoing future costs. However, Swansea Bay is starting from a lower baseline than any other health board and there is a need for a review of long term substantive funding for this area of work. It may be that the coordination of all elements into one team may produce cost efficiencies to support the budget requirements.

2.9 CONSULTATION

The implementation of LPS was planned for April 2022 but has now been delayed until the consultation process via Welsh Government is complete and the Regulations have been finalised agreed in the Senedd. No future implementation date has been agreed, but it is likely to be late 2023 / early 2024. Consultation was launched on the 17th April 22 from Welsh Government for the changes to the legal regulations for the Mental Capacity (Amendment) Act and the UK Government for the Code of Practice for the MCA., it is open for 4 months for consultation with stakeholders. A brief outline of the requirements is at (appendix 2)
Included are:

Welsh Government Consultation:

- The Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Wales) (Amendment) Regulations
- The Mental Capacity (Deprivation of Liberty: Eligibility to carry out Assessments, Make Determinations and Carry out Pre Authorisation Reviews) (Wales) Regulations 2022
- The Mental Capacity (Deprivation of Liberty: Training and Criteria for Approval as an Approved Mental Capacity Professional) (Wales) Regulations 2022
- The Mental Capacity (Deprivation of Liberty: Monitoring and Reporting) (Wales) Regulations 2022

https://gov.wales/liberty-protection-safeguards

UK Government Consultation:

- New Metal Capacity Act 2005 Code of Practice

Changes to the MCA Code of Practice and implementation of the LPS - GOV.UK (www.gov.uk)

The HON LPS will be formulating a HB and regional response along with LA partners. WG have recommenced their working sub groups forums, and the HB is now attending these as well as attending the regional groups with NPT LA and Swansea LA.

The Sub group of the Mental health and Legislative committee in place will form one vehicle to encourage feedback to the consultation to support a HB wide response. However, attendance is variable and limited from some of the key SDU's. While it is understandable due to operational pressures and the ongoing impact of Covid – 19, it is important to ensure Heads of Service are aware of and understand the implications for their service and ensure any comments / concerns or feedback are fed into the HB response

The delay in implementing LPS allows for preparation of staff for what is likely to be a complex change in practice and to ensure the Health Board is assured of a level of competence where it is feasible to make the transition. It also gives time for Swansea Bay to put in place a safe infrastructure to support and monitor compliance with the MCA going forward.

3. GOVERNANCE AND RISK ISSUES

There are key legal and financial risks for the Health Board if the deficits identified are not addressed. As outlined at (appendix 3)

4. FINANCIAL IMPLICATIONS

This work is currently sits within the Primary Care, Community and Therapies Service Delivery Unit where there is a budget line, however this is limited to the DoLS aspect alone, which is already acknowledged to be under resourced. To fulfil its legal requirements under the Mental Capacity (Amendment) Act and ensure safe, dignified care, the Health Board would need to commit to an improved structure to replace the one lost via prior reorganisations. The Management Board are considering proposals in May 2022 and a business case will be developed and taken through the Business Case Assurance Group as the next steps. An update on the discussions will be provided to the next Committee meeting.

Timescales

The WG will allocate monies over the next two years to support planning and the delay in implementation gives the Health board a year to consider the needs and develop the service. Various business cases have been developed but none has progressed to service change. With a fuller picture of requirements and current issues across all areas it is timely to consider presenting a new Business case for this work.

5. RECOMMENDATION

Members are asked to:

- **NOTE** the changes required to implement LPS and plan to develop a business case and;
- **AGREE** to keep the Committee being updated on progress at each meeting.

Governance and Assurance		
Link to Enabling Objectives *(please choose)*	**Supporting better health and wellbeing by actively promoting and empowering people to live well in resilient communities**	
	Partnerships for Improving Health and Wellbeing	☒
	Co-Production and Health Literacy	☒
	Digitally Enabled Health and Wellbeing	☒
	Deliver better care through excellent health and care services achieving the outcomes that matter most to people	
	Best Value Outcomes and High Quality Care	☒
	Partnerships for Care	☒
	Excellent Staff	☒
	Digitally Enabled Care	☒
	Outstanding Research, Innovation, Education and Learning	☐
Health and Care Standards		
(please choose)	Staying Healthy	☐
	Safe Care	☒
	Effective Care	☒
	Dignified Care	☒
	Timely Care	☒
	Individual Care	☐
	Staff and Resources	☒
Quality, Safety and Patient Experience		
Effective proportionate care based on choice and necessity with the person at the centre of decision making should be the norm within any statutory organisation. For those people who lack capacity to make time specific decisions it is essential that the Health Board has the infrastructure, processes and expertise in place to ensure this is the case for all its citizens.		
Financial Implications		
As outlined above		
Legal Implications (including equality and diversity assessment)		
MCA is a vital piece of UK legislation with clear WG regulations to be fulfilled. Currently the Health Board cannot provide assurance on compliance and is open to challenge.		
Staffing Implications		
Need for a future dedicated MCA team as outlined above. Need for adequate number of Best Interest Assessors to convert into AMCP roles for complex and contentious cases with enough Pre authoriser roles to support the delivery areas in day to day practice.		
Long Term Implications (including the impact of the Well-being of Future Generations (Wales) Act 2015)		
Increasing numbers of our service users have problems with capacity to consent and make decisions about their care and treatment with predictions indicating this is		

likely to rise in the future. The Health Board has a duty of equality to ensure the wellbeing of the population and to support those most vulnerable and ensure they have the same rights as others. The Mental Capacity Act is fundamental to protecting the human rights of the citizen and requires ongoing partnership work between the statutory bodies to enact and develop MCA practice. The Health Board needs to harness and develop its expertise to support the protection of rights for all taking a joined up approach to caring for our most vulnerable clients who cannot make decisions for themselves. Developing this area of service is essential to achieving this.	
Report History	
Appendices	Appendix 1 – Terms of Reference Appendix 2 - MCA (Amendment)ACT 2019 Consultation Appendix 3 - Identified Risks related to Mental Capacity (Amendment) Act 2019