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Bwrdd Iechyd Prifysgol  
Bae Abertawe  
Swansea Bay University  
Health Board



<b>Meeting Date</b>	<b>11 May 2023</b>	<b>Agenda Item</b>	<b>3.2</b>
<b>Report Title</b>	<b>Update on Liberty Protection Safeguards and Mental Capacity Act</b>		
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<b>Report Sponsor</b>	Gareth Howells, Director of Nursing and Patient Experience		
<b>Presented by</b>	Gareth Howells, Director of Nursing and Patient Experience		
<b>Freedom of Information</b>	Open		
<b>Purpose of the Report</b>	To update the committee on the implications for the Health Board following the delay of the Liberty Protection Safeguards (LPS) and the current status in relation to oversight of the Mental capacity Act (MCA)		
<b>Key Issues</b>	<p>The UK Governments have decided not to implement the MCA (Amendment) Act 2019 in this Parliament and so removing the necessary legislation to implement LPS.</p> <p>The Welsh Government remains supportive of the reforms that the LPS would have introduced and the need to strengthen the current DoLS system. It intends to continue work with the Health boards to take this forward.</p> <p>Funding has been used to support the development of the DoLS team and is now recurring</p> <p>The need to continue to develop an MCA resource and agree where this should sit in the Health Board to strengthen the DoLS processes and protect the rights of those people who lack capacity</p>		
<b>Specific Action Required</b> <i>(please choose one only)</i>	<b>Information</b>	<b>Discussion</b>	<b>Assurance</b>
	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Recommendations</b>	<p>Members are asked to:</p> <ul style="list-style-type: none"> <li><b>Note the update and ongoing work relating to MCA / DoLS</b></li> </ul>		

# **Update on Liberty Protection Safeguards and Mental Capacity Act**

## **1. INTRODUCTION**

This update is to alert the committee to the change in direction from the Westminster Government with regards to the Mental Capacity (Amendment) Act 2019 and its impact on the introduction of Liberty Protection Safeguards (LPS) within Wales. It also outlines the impact on the current MCA / DoLS work in SBUHB.

## **2. BACKGROUND**

On the 5th April 2023 the Westminster Government announced their intention to delay the implementation of the Mental Capacity (Amendment) Act 2019 and confirmed that the necessary legislation to implement the LPS will not be brought forward within this Parliament. With the Parliament due to run until 2024 and no guaranteed outcome of any future General Election, there is no agreed timescale for a future implementation date.

The Deputy Minister for Mental Health and Wellbeing in the Welsh Government issued an immediate written Statement providing an update. She expressed the Welsh Government's disappointment with the decision, as "the right to liberty is one of our most fundamental human rights".

Further correspondence indicates that the Welsh Government remains supportive of the reforms that the LPS would have introduced and to integrating and embedding the principles of the Mental Capacity Act into care, support and treatment arrangements. Health Boards are tasked to consider how we strengthen the current DoLS system, and protect and promote the human rights of those people who lack mental capacity. The WG intends to re-engage with stakeholders to continue the work and ensure the momentum generated through previous contributions of stakeholders is not lost.

£8m funding was available in 2022/23 to support preparations for the LPS of which £254,000 was allocated to SBUHB. Despite the decision by UK Government, this will continue to be made available to support Health Boards and partners to continue to protect the rights of those who lack mental capacity under the current DoLS system. This funding is now to be recurring, which will support the development of the MCA/DoLS resource within Swansea Bay.

The funding of £254,000 allocated as available to bid for, needs to incorporate the Best Interest Assessor posts already appointed, as well as supporting our need for a dedicated MCA lead post and the training and admin posts to implement the MCA in practice. Calculating the number of applications received over the past year it is anticipated that the Health Board needs a minimum of five Best Interest Assessors (BIA's) in post. Using Welsh Government funding we have increased our resource to three, but the Health Board will remain reliant on external BIA's to support, if it is not to replicate the backlog.

Two further posts have been recruited to support the development of an MCA resource and consideration is being given to funding a MCA lead for the Health Board

The Welsh Government has identified that access to care through the medium of Welsh and other languages including BSL as well as supporting those people with protected characteristics will be a key requirement going forward. While we have access to welsh speaking Independent Mental Capacity Advocates (IMCA's) currently none of our BIA's are welsh speakers. As one of the principles of the MCA is to ensure we support people to be able to understand by whatever means we can, for those first language welsh speakers, access to a welsh speaking professional is required to fulfil the Act.

### **3. GOVERNANCE AND RISK ISSUES**

There is no clear agreement on where this element of legislation and care sits and what the governance and management structures should look like. Considerable work has been undertaken, led by the Executive Nurse Director to consider this previously to support the implementation of LPS. With the change this needs to be revisited, the decision not to implement LPS removes the conflict of interest for PCC&T as a host for the DoLS team as patients in the community in their own homes will not now come under LPS. The DoLS Team can therefore remain under the management of Long Term Care within the service group. However as the aim is to have an MCA / DoLS team as an overarching resource for the H

Across Wales, all other areas have a dedicated MCA Lead and the structures are:

- In Newport it sits as part of a consortium with the five Local Authorities alongside the DoLS teams
- In Cardiff it sits under Corporate Nursing with the DoLS process being managed by the Local Authority
- In Cwm Taff Morgannwg it sits as part of a MCA / DoLS team under the Nurse Director
- In Hywel Dda it is split with a DoLS team sited within the PCC & T division and an MCA team sitting under the Chief Operating Officer headed up by a Head of Nursing for capacity and consent.

Within SBUHB the lack of a MCA lead or dedicated resource has been mitigated by splitting the elements of MCA between several leads. The Long Term Care team in the PCC&T service group manages the DoLS team, with the team lead supporting MCA issues as and when they arise. Training is overseen by the Head of Nursing for Safeguarding with reporting mechanisms in place for both of these. The IMCA contract currently sits within corporate nursing and the Head of Nursing for LPS has been reviewing the current contract and supporting the work required to move to an all Wales Procurement model for IMCA services from 2024 onwards.

However there is no oversight of all the elements and some gaps have been identified.

## **DoLS**

The resource for DoLS has increased and it is positive to note that the team has now gone from:

One band 7 lead and one Band 4 administrator in 2021 to

One band 7 lead three best interest assessors and a band four administrator in 2023.

However, two other areas need to be considered:

The oversight and governance of Section 12 Doctors (Section 12 approved doctors are those approved by the secretary of state 12(2) Mental Health Act 1983 where they are described as having special experience in the diagnosis or treatment of mental disorder) who undertake the required medical assessment.

Currently these are funded assessments and a register is held by Betsi Cadwallader of approved professionals. A list of those approved within the Health Board is held by the coordinator of the Mental Health Act Service Manager on behalf of the Health board.

The role of the supervisory Body with the authorised sign off processes in place. Currently this sits within the PCC&T service group and Welsh Government funding is being used to support overtime payments for managers to review and sign off DoLS applications. Going forward the resource for this needs to be reviewed with agreement on where it sits long term.

## **MCA**

A further two posts have been recruited to, to support the establishment of the MCA resource:

- 0.6 Professional Development post
- 1 WTE Administrative manager post to support training and DoLS admin

Also consideration is being given to a new MCA lead post.

There remains a shortfall in the budget with no funding available for MCA DoLS training within the Health Board, the current training has been funded out of Welsh Government monies over the past two years, but with the resource now being employed, there is no longer funding available to support this. In addition, to manage the number of DoLS applications received month on month in Swansea Bay required approximately five whole time equivalent Best Interest Assessors.

The MCA focus is needed to ensure that the wider MCA issues are also considered, i.e.

There is a need to consider systems trend data collation relating to the impact of MCA issues within our acute hospital settings and our mental health and LD areas. There is empirical information that patients are delayed in their pathway journeys

due to capacity and consent issues, but we have no way of identifying this easily in order to target expertise and resource to support.

There are Limits to accessing capacity assessments in welsh which breaches principle two of the Act. Equality of opportunity to understand and participate in capacity assessments if in the groups outlined.

#### 4. FINANCIAL IMPLICATIONS

A bid for the full allocation of £254,000 has been submitted to support the DoLS and MCA requirements for the Health Board. It has also included an outline of the ongoing shortfall in funding to manage the requirements across the Health Board if we are prevent backlogs and ensure full compliance with the MCA.

Currently there is a potential shortfall of £20,000 to support training and to have in place the identified numbers of BIA resource would cost another £154,158.

#### 5. RECOMMENDATION

The committee is asked to support the work to:

Develop a MCA / DoLS resource for the Health Board

Agree where the work sits

Agree oversight of the elements of MCA including the role of the supervisory body, the DoLS sign off process, S12 oversight, IMCA contracts and wider advocacy and court requirements to improve the implementation of MCA in practice and strengthen the DoLS process

<b>Governance and Assurance</b>		
<b>Link to Enabling Objectives</b> <i>(please choose)</i>	<b>Supporting better health and wellbeing by actively promoting and empowering people to live well in resilient communities</b>	
	Partnerships for Improving Health and Wellbeing	<input checked="" type="checkbox"/>
	Co-Production and Health Literacy	<input type="checkbox"/>
	Digitally Enabled Health and Wellbeing	<input type="checkbox"/>
	<b>Deliver better care through excellent health and care services achieving the outcomes that matter most to people</b>	
	Best Value Outcomes and High Quality Care	<input checked="" type="checkbox"/>
	Partnerships for Care	<input checked="" type="checkbox"/>
	Excellent Staff	<input checked="" type="checkbox"/>
	Digitally Enabled Care	<input type="checkbox"/>
	Outstanding Research, Innovation, Education and Learning	<input type="checkbox"/>
<b>Health and Care Standards</b>		
<i>(please choose)</i>	Staying Healthy	<input type="checkbox"/>
	Safe Care	<input checked="" type="checkbox"/>
	Effective Care	<input type="checkbox"/>
	Dignified Care	<input checked="" type="checkbox"/>
	Timely Care	<input type="checkbox"/>
	Individual Care	<input type="checkbox"/>
	Staff and Resources	<input type="checkbox"/>

<b>Quality, Safety and Patient Experience</b>	
<p>Patients are entitled to be fully involved in the decision regarding their care and treatment. For those lacking capacity all decisions should be in their best interests and include families and those important to them. For those un befriended they are entitled to advocacy via and IMCA to support them and their access to the Court of Protection where necessary.</p> <p>All Health Board staff involved in patient care planning and treatment must be competent in enacting the MCA in practice if we are to protect the human rights of the most vulnerable, this includes supporting access through the medium of welsh and also for those with protected characteristics.</p> <p>A MCA / DoLS resource is essential to ensure we can deliver this across the Health Board.</p>	
<b>Financial Implications</b>	
<p>Currently there is a £20,000 shortfall for the required MCA/DoLS training. The recurring funding from Welsh Government will support the resource to date including the development of an MCA resource, but additional BIA resource is likely to be required in the future and should for part of future planning.</p>	
<b>Legal Implications (including equality and diversity assessment)</b>	
<p>Compliance with the Mental Capacity Act is primary legislation. The Health Board will be held accountable for noncompliance through the Court of Protection, which holds the same level of accountability as the High Court. This means that reputational and financial penalties for noncompliance are at a higher level.</p> <p>The requirement to support people to be as involved in their decision making as possible including supporting through the medium of welsh and other languages including BSL as well as for those with protected characteristics is upheld I the principles of the Act.</p>	
<b>Staffing Implications</b>	
None currently	
<b>Long Term Implications (including the impact of the Well-being of Future Generations (Wales) Act 2015)</b>	
A robust MCA team supports longer-term collaborative working in the best interests for those patients who may lack capacity no and in the future.	
<b>Report History</b>	
<b>Appendices</b>	None