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| **Meeting Date** | **08 August 2019** | **Agenda Item** | **4.1** |
| **Report Title** | **Mental Capacity Act 2005 Update Monitoring Report** | | |
| **Report Author** | Jodie Denniss, Safeguarding Specialist | | |
| **Report Sponsor** | Gareth Howells, Director of Nursing and Patient Experience | | |
| **Presented by** | Gareth Howells, Director of Nursing and Patient Experience | | |
| **Freedom of Information** | Open | | |
| **Purpose of the Report** | This paper will provide the Committee of the Health Board position in relation to the Mental Capacity Act 2005 | | |
| **Key Issues** | This report highlights the importance of consistent and robust safeguarding and governance processes, which are an essential part in contributing to effective safeguarding for adults at risk. | | |

| **Specific Action Required** ***(please choose one only)*** | **Information** | **Discussion** | **Assurance** | **Approval** |
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| | ☒ | ☐ | ☐ | ☐ |

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| **Recommendations** | Members are asked to:<br>• **NOTE** |

# MENTAL CAPACITY ACT 2005 UPDATE MONITORING REPORT

## 1. INTRODUCTION

The Mental Health and Capacity Act Legislative Committee has requested a monitoring report to assure the Board of Swansea Bay University Health Board (SBU HB) compliance with the Mental Capacity Act 2005.

## 2. BACKGROUND

The Mental Capacity Act 2005 (MCA) came into force in October 2007, amended to include the Deprivation of Liberty Safeguards (DoLS) in April 2009.

The HB supports a significant number of patients with impaired decision-making, therefore this report aims to provide assurance of awareness and the use of MCA throughout the Health Board, via training and the use of the Independent Mental Capacity Advocacy Service (IMCA's).

## 2.1 LEGISLATIVE UPDATE

In March 2018, the Government announced it would proceed with legislation to alter the Mental Capacity Act. The Mental Capacity (Amendment) Bill received Royal assent in May 2019 and is now an Act of Parliament – the Mental Capacity (Amendment) Act 2019. The Deprivation of Liberty Safeguards (DoLS) will be replaced with the Liberty Protection Safeguards (LPS).

The main changes that will impact on the Health Board are as follows.

- There is no statutory definition of a Deprivation of Liberty beyond that in the Cheshire West and Surrey Supreme Court judgement of March 2014 – the 'acid test'.
- In addition to current hospital and care home settings, LPS will be able to authorise arrangements in supported living, shared lives and domestic settings. In Wales, Health Boards will also be responsible for arrangements under Continuing Health Care outside of a hospital.
- Arrangements in 1 or more settings will not require separate authorisations.
- Will include 16 and 17 year olds, thereby aligning with the MCA.
- The role of the Supervisory Body in Wales will change, to be replaced by that of a 'Responsible Body' which for NHS hospitals is deemed to be a 'hospital manager'.
- The Best Interest Assessor role will be removed. Instead, the role of Approved Mental Capacity Professionals (AMCPs) will be implemented to be involved in

the review of cases where there is an actual or suspected objection to the care arrangements.

- Removal of 'urgent' DoLS authorisations; 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.

It is anticipated that the target date for implementation is from Autumn 2020, with 12 months of transitional arrangements – "double-running" of both DoLS and LPS – with full implementation in 2021.

A Revised Mental Capacity Act Code of Practice is currently under development, being led by the Ministry of Justice, and a Code for LPS is being co-produced by the Department of Health & Social Care (DHSC) and Association of Directors of Social Services (ADSS). There will be public consultation for both Codes, and the intention is that they will be published together, with review within 3 years and 5 yearly thereafter.

The Corporate Safeguarding Team and Primary Care & Community Service Delivery Unit have representation on the Wales' MCA/DoLS/LPS Network; at the most recent meeting it was discussed that there is a NHS Welsh Safeguarding group currently in the process of being set up, with terms of reference for MCA/DoLS/LPS.

## 2.2 MCA TRAINING

MCA training continues to be delivered via e-learning for MCA Levels 1 & 2 for all SBU HB staff. MCA Level 3 training is taught as a workshop directed at ward managers, senior nurses and senior clinicians.

Training delivery data is reported in a separate paper.

In addition to formal training, it is important that learning from cases is disseminated more widely across the Health Board. The Safeguarding Committee has recently implemented quarterly rotational learning events to ensure wider distribution of learning, and the inaugural event was held in June, hosted by Neath Port Talbot Service Delivery Unit. The theme for the session centred on MCA and DoLS, and was attended by 35 staff across a range of disciplines and grades. Overall feedback from evaluations indicate that the event was well received.

## 2.3 INDEPENDENT MENTAL CAPACITY ADVOCATES (IMCA)

The Independent Mental Capacity Advocate (IMCA) service is a statutory service which came into effect in Wales on the 1st October 2007. IMCAs are independent advocates who represent people who lack capacity in order to support them in making

important decisions, which must comply with the MCA 2005. They were introduced by the MCA to act as a person's legal safeguard and are usually instructed when there is no other independent person (e.g. a relative or friend) to act on the person's behalf. The IMCA service that is currently contracted to the HB is provided by Mental Health Matters Wales, and quarterly monitoring reports are provided to the Health Board. For the period 1st April to 30th June 2019, 17 instructions were received for an IMCA from the HB (Table 1).

**Table 1. BREAKDOWN OF REASONS FOR INSTRUCTION OF AN IMCA**

| Serious Medical Treatment | Long term move of accommodation | Care Review | Vulnerable Adult | 39a* | 39d* |
|---|---|---|---|---|---|
| **3** | **8** | **1** | **2** | **3** | **0** |

***** These different categories are, when a person who is deprived of their liberty, does not have a representative e.g. a friend, family member or advocate

## 2.4 BEST INTEREST DECISIONS

If a patient has been assessed as lacking in capacity then any action taken or decision made on their behalf must be made in his or her best interests. There are many factors within the MCA to consider in deciding what is in a person's best interests. It is good professional practice to record these, particularly as these decisions may be challenged. These best interest decisions happen on a frequent basis and can vary from simple to very complicated. Currently the Service Delivery Units (SDUs) do not report the number of occasions where best interest decisions are made or provide assurance around the process. The Primary Care and Community Care Service Delivery Unit has appointed two substantive Best Interests Assessors. In conjunction with the Primary Care and Community Service SDU's and the DoLS Improvement and Support Group, the Corporate Safeguarding Team are currently working with the SDU's to establish an effective way to record this information in order to provide assurance to the Board. This will be reported through the Safeguarding Committee and will include:

- An audit to establish the baseline position of current systems in place for recording/measuring the quality and standards of DoLS compliance within wards that is being undertaken by the two substantive Best Interest Assessors from Primary and Community Care SDU.
- A Best Interest Assessor support group has been established with a further meeting planned for September. Discussions are in progress to extend this to incorporate Mental Capacity issues and learning as part of a peer-supported environment.

## 2.5 COURT OF PROTECTION

The Court of Protection is a key decision making component of the Mental Capacity Act and has jurisdiction over property, financial affairs and the welfare of people who lack capacity. It has the same powers, rights, privileges and authority as the High Court. The Corporate Safeguarding Team are engaging with the legal team and Service Delivery Units, to ensure a clear process whereby all Court of Protection cases involving SBU HB engaged as a party, are brought to the attention of the Corporate Safeguarding team; also that subsequent actions required to have clear lines of co-ordination and that any learning from judgements are identified and disseminated via the Safeguarding Committee. There are currently 20 ongoing DoLS cases that the legal team are engaged in involving SBU HB. Future reports will identify summaries and themes of cases.

## 3. GOVERNANCE AND RISK ISSUES

The Service Delivery Units (SDUs) monitor MCA training levels as part of their overall Safeguarding training compliance, reporting to the Safeguarding Committee via their Performance reports. Accuracy issues associated with this and difficulties with obtaining correct compliance data from ESR is being addressed. A Health Board-wide training needs analyses is in progress that will compellingly extend cross-unit process improvement and enable the Health Board to identify more accurate figures of staff requiring training, thereby enhancing compliance monitoring.

## 4. FINANCIAL IMPLICATIONS

Safeguarding is a core duty of care for the Health Board. Financial implications to meet the statutory safeguarding mandatory training requirements are within existing budgets**.** Withdrawal of Bridgend Local Authority funding has resulted in an additional cost pressure for the Corporate Safeguarding Team but this is minimal.

## 5. RECOMMENDATION

The Committee is requested to note the contents of this report.

| Governance and Assurance | | |
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| **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** | | |
| **N/A** | | |
| **Financial Implications** | | |
| Safeguarding is a core duty of care for the Health Board. Financial implications to meet the statutory safeguarding mandatory training requirements are within existing budgets**.** Withdrawal of Bridgend Local Authority funding has resulted in an additional cost pressure for the Corporate Safeguarding Team but this is minimal. | | |
| **Legal Implications (including equality and diversity assessment)** | | |
| The Health Board has a statutory responsibility to make arrangements to protect and safeguard the welfare of children, young people and adults at risk.<br>Safeguarding policies uphold that patient and service users have the right to independence, dignity, respect, equality, privacy and choice. | | |
| **Staffing Implications** | | |
| N/A | | |

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| **Long Term Implications (including the impact of the Well-being of Future Generations (Wales) Act 2015)** |
| Improve population health through prevention and early intervention |

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| **Report History** | N/A |
| **Appendices** | N/A |