# Mental Health and Capacity Act Legislative Committee Annual Report 2017-18



GIG CYMRU NHS WALES

Bwrdd Iechyd Prifysgol Abertawe Bro Morgannwg University Health Board

# Contents

## 1. Introduction

1.1 The principle remit of the Mental Health and Capacity Act Legislative Committee is to consider and monitor the use of the Mental Health Act 1983, Mental Capacity Act 2005 (which includes the Deprivation of Liberty Safeguards (DoLS)) and the Mental Health (Wales) Measure 2010. A summary of the definitions of the legislation and a glossary of terms are appended at **appendix 1**.

1.2 DoLs were introduced as an amendment to the Mental Capacity Act 2005 and came into force in April 2009 following the case *HL vs United Kingdom.* They aim to provide legal protection for vulnerable people who are deprived of their liberty as part of their care and to prevent arbitrary decisions about deprivations of liberty. In March 2014, a Supreme Court judgement in the case of *Cheshire West* clarified what constitutes a deprivation of liberty; consequently there has been a significant increase in the number of applications.

1.3 During 2017-18, the committee met its responsibility by fulfilling its role as outlined in its terms of reference, and through the delivery of its work programme. A summary of key issues discussed was presented to the board following each committee meeting. The annual report summarises these.

## 2. Committee Structure

2.1 The membership of the Mental Health and Capacity Act Legislative Committee during 2017-18 comprised four non-officer members of the board:

- Charles Janczewski, vice-chairman of ABMU Health Board (committee chair until September 2017);
- Emma Woollett, vice-chair of ABMU Health Board (committee chair from October 2017);
- Chantal Patel, non-officer member;
- Maggie Berry, non-officer member.

In addition, the committee had in attendance executive directors of the health board:

- Rory Farrelly, Director of Nursing and Patient Experience/Interim Chief Operating Officer (until December 2017);
- Angela Hopkins, Interim Director of Nursing and Patient Experience (from December 2017);
- Chris White, Interim Chief Operating Officer (from December 2017);

Each meeting was also attended by David Roberts, Service Director for Mental Health and Learning Disabilities and Lynda Rogan, Mental Health Act Manager.

2.2 Committee support in terms of the circulation of the meeting papers and minute taking was undertaken by the corporate governance function to ensure continuity with other board committees. The secretary to the committee was Liz Stauber, committee services manager.

2.3 The terms of reference required the committee to meet quarterly. During 2016-17, the committee met on two occasions, which was reflective of the changeover in board members.

2.4 At its February 2018 meeting, the committee discussed its purpose and role and agreed that it needed to focus solely on compliance with the Mental Health Act 1983, Mental Capacity Act 2005 and the Mental Health Measure (Wales) 2010 as per its terms of reference. Any issues relating to performance and quality of services would need to be referred to more appropriate board committees. Agendas would be structured accordingly going forward.

## 3. Reports Received

3.1 Each meeting opened with a patient story.

3.2 The committee received a range of reports which have been summarised below according to their categories:

### Mental Health Act 1983

i. *Mental Health Act Performance Report*

A regular report was received on the use of the Mental Health Act and the committee made suggestions as to how the content of future reports could be expanded.

### Mental Health Capacity Act 2005

i. *Deprivation of Liberty Standards (DOLS) / Mental Capacity Act Performance Report*

Regular status reports were received setting out DOLS activity for each reporting period and the level of breaches and examples of the reasons for these.

### Mental Health (Wales) Measure 2010

i. *Mental Health Measure Performance Report*

Reports were received at each meting outlining performance against the Mental Health (Wales) Measure 2010.

### Healthcare Inspectorate Wales Reports

i. *Healthcare Inspectorate Wales (HIW) Annual Report 2016-17*

The annual report from Healthcare Inspectorate Wales (HIW) report was received. It was noted that the report outlined the findings of inspections undertaken during the year and stated that there was little evidence of lessons being learned. The committee heard that improvement groups were now being established across all sites and the findings of HIW visits part of the agendas.

### Governance of Other Groups and Committees

i. *Minutes of the Power of Discharge Committee*

The committee received and reviewed the minutes of the Power of Discharge Committee following each meeting.

ii. *Matters Arising from the Operational Group*

The committee received verbal updates from the operational group within the Mental Health and Learning Disabilities Unit.

## Other Reports

*i. Care and Treatment Plans (Including Children And Adolescent Mental Health Services (CAMHS))*

A report was received outlining care and treatment plans. The committee heard that the unit was performing well in relation to compliance targets and an audit programme had been developed. It was noted that there was a model care and treatment plan which should be used as part of the audit tool. The committee also felt it was unclear with whom the results of the audit would be shared and the intended outcomes and asked for an update at its next meeting.

*ii. End of Life Care Issues*

An oral report was received regarding end of life care issues. It was agreed that a report be received by the service's operational group to outline how the pathway was implemented and then in turn, report this to the committee as part of its regular update.

*iii. Standard of Medical Reports to Mental Health Review Tribunals*

An oral report was received regarding the standard of medical reports to the mental health review tribunals. The committee heard that a standard template was to be developed and asked for an update at its next meeting.

**4. Conclusion**

This report demonstrates that the committee fulfilled its responsibilities through the reports it had received during the year from various services and sources.

**Appendix 1**

## Mental Health and Capacity Legislation - Definitions

### Mental Health Act

1.4 The Mental Health Act 1983 covers the detention of people deemed a risk to themselves or others. It sets out the legal framework to allow the care and treatment of mentally disordered persons. It also provides the legislation by which people suffering from a mental disorder can be detained in hospital to have their disorder assessed or treated against their wishes.

1.5 The MHA introduced the concept of "Hospital Managers" which for hospitals managed by a Local Health Board are the Board Members. The term "Hospital Managers" does not occur in any other legislation.

1.6 Hospital Managers have a central role in operating the provisions of the MHA; specifically, they have the authority to detain patients admitted and transferred under the MHA. For those patients who become subject to Supervised Community Treatment (SCT), the Hospital Managers are those of the hospital where the patient was detained immediately before going on to SCT - i.e. the responsible hospital or the hospital to which responsibility has subsequently been assigned.

1.7 Hospital Managers must ensure that patients are detained only as the MHA allows, that their treatment and care is fully compliant with the MHA and that patients are fully informed of and supported in exercising their statutory rights. Hospital Managers must also ensure that a patient's case is dealt with in line with associated legislation.

1.8 With the exception of the power of discharge, arrangements for authorising day to day decisions made on behalf of Hospital Managers have been set out in the UHB Scheme of Delegation.

### Mental Health Measure

1.9 The Mental Health (Wales) Measure received Royal Assent in December 2010 and is concerned with:

- providing mental health services at an earlier stage for individuals who are experiencing mental health problems to reduce the risk of further decline in mental health;
- making provision for care and treatment plans for those in secondary mental health care and ensure those previously discharged from secondary mental health services have access to those services when they believe their mental health may be deteriorating;
- extending mental health advocacy provision.

### Mental Capacity Act

1.10 The MCA came into force mainly in October 2007. It was amended by the

Mental Health Act 2007 to include the Deprivation of Liberty Safeguards (DoLS). DoLS came into force in April 2009.

1.11 The MCA covers three main issues –

- The process to be followed where there is doubt about a person's decision-making abilities and decisions may need to be made for them (e.g. about treatment and care)
- How people can make plans and/or appoint other people to make decisions for them at a time in the future when they can't take their own decisions
- The legal framework for caring for adult, mentally disordered, incapacitated people in situations where they are deprived of their liberty in hospitals or care homes (DoLS)

Thus the scope of MCA extends beyond those patients who have a mental disorder.

**Glossary of Terms**

| **Definition** | **Meaning** |
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| Informal patient | Someone who is being treated for mental disorder in hospital and who is not detained under the Act |
| Detained patient | A patient who is detained in hospital under the Act or who is liable to be detained in hospital but who is currently out of hospital eg on Section 17 leave |
| Section 135 | Allows for magistrate to issue a warrant authorising a policeman to enter premises, using force if necessary, for the purpose of removing a mentally disordered person to a place of safety for a period not exceeding 72 hours, providing a means by which an entry which would otherwise be a trespass, becomes a lawful act. |
| Section 135(1) | Used where there is concern about the well being a person who is not liable to be detained under the Act so that he/she can be examined by a doctor and interviewed by an Approved mental Health Professional in order that arrangements can be made for his/her treatment or care. |
| Section 135 (2) | Used where the person is liable to be detained, or is required to reside at a certain place under the terms of guardianship, or is subject to a community treatment order or Scottish legislation. In both instances, the person can be transferred to another place of safety during the 72 hour period. |
| Section 136 | Empowers a policeman to remove a person from a public place to a place of safety if he considers that the person is suffering from mental disorder and is in immediate need of care and control. The power is available whether or not the person has, or is suspected of having committed a criminal offence. The person can be detained in a place of safety for up to 72 hours so that he can/she can be examined by a doctor and interviewed by an Approved Mental Health |

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| | Professional in order that arrangeme4nts can be made for his/her treatment or care. The detailed person can be transferred to another place of safety as long as the 72 hour period has not expired. |
| Part 2 of the Mental Health Act 1983 | This part of the Act deals with detention, guardianship and supervised community treatment for civil patients. Some aspects of Part 2 also apply to some patients who have been detailed or made subject to guardianship by the courts or who have been transferred from prison to detention in hospital by the Secretary of State for Justice under Part 3 of the Act.<br>As part 2 patient is a civil patient who became subject to compulsory measures under the Act as a result of an application for detention by a nearest relative or an approved mental health professional founded on medical recommendations. |
| Section 5(4) | Provides for registered nurses whose field of practice is mental health or learning disabilities to invoke a holding power for a period of not more than 6 hours by completing the statutory document required.<br>During this period the medical practitioner or approved clinician in charge, or his or her nominated deputy should examine the patient with a view to making a report under section 5(2).<br>Alternatively a patient can be detained under section 2 or 3 if a full Mental Health Act assessment is achieved during the 6 hour period. |
| Section 5(2) | Enables an informal inpatient to be detained for up to 72 hours if the doctor or approved clinician in charge of the patient's treatment reports than an application under section 2 or 3 ought to be made.<br>The purpose of this holding power is to prevent a patient from discharging him/herself from hospital before there is time to arrange for an application under section 2 or section 3 to be made. As soon as the power is invoked, arrangements should be made for the patient to be assessed by a potential applicant and recommending doctors. |
| Section 4 | In cases of urgent necessity, this section provides for the compulsory admission of a person to hospital for assessment for a period of up to 72 hours.<br>An application under this section should only be made when the criteria for admission for assessment are met, the matter is urgent and it would be unsafe to wait for a second medical recommendation i.e where the patient's urgent need for assessment outweighs the alternative of waiting for a medical recommendation by a second doctor.<br>A psychiatric emergency arises when the mental state or behaviour of a patient cannot be immediately managed. To |

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| | be satisfied that an emergency has arisen, there must be evidence of:<br>• An immediate and significant risk of mental or physical har to the patient or to others<br>• And/or the immediate and significant danger of serious harm to the property<br>• And/or the need for physical restraint of the patient.<br>Section 4 cannot be renewed at the end of the 72 hour period. If compulsory detention is to be continued, the application must either be converted into a section 2 (admission for assessment) with the addition of a second medical recommendation, in which case the patient can be detained for a maximum of 28 days under that section beginning with the date of admission under section 4 or an application for treatment under section 3 should be made. The Act does not provide for a section 4 to be converted into a section 3 because the criteria for admission under each of these sections are different. |
| Section 2 | Authorises the compulsory admission of a patient to hospital for assessment or for assessment followed by medical treatment for mental disorder for up to 28 days. Provisions within this section allow for an application to be made for discharge to the Hospital Managers or Mental Health Review Tribunal for Wales.<br>If after the 28 days have elapsed, the patient is to remain in hospital, he or she must do so, either as an informal patient or as a detained patient under Section 3 if the grounds and criteria for that section have been met.<br>The purpose of the section is limited to the assessment of a patient's condition to ascertain whether the patient would respond to treatment and whether an application under section 3 would be appropriate.<br>Section 2 cannot be renewed and there is nothing in the Act that justifies successive applications for section 2 being made.<br>The role of the nearest relative is an important safeguard but there are circumstance in which the county court has the powers to appoint another person to carry out the functions of the nearest relative:<br>• The patient has no nearest relative within the meaning of the Act<br>• It is not reasonably practicable to find out if they have such a relative or who that relative is<br>• The nearest relative is unable to act due to mental disorder or illness<br>• The nearest relative of the person unreasonably objects to an application for section 3 or guardianship<br>• The nearest relative has exercised their power to discharge the person from hospital or guardianship |

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| | without due regard to the persons welfare or the public interest<br>This procedure may have the effect of extending the authority to detain under section 2 until the application to the County Court to appoint another person is finally disposed of.<br>Patients admitted under section 2 are subject to the consent to treatment provisions in Part 4 of the Act. |
| Section 3 | Provides for the compulsory admission of a patient to a hospital named in the application for treatment for mental disorder. Section 3 provides clear grounds and criteria for admission, safeguards for patients and there are strict provisions for review and appeal.<br>Patients detained under this section are subject to the consent to treatment provisions contained in Part 4 of the Act below. |
| Supervised Community Treatment (SCT) | Provides a framework to treat and safely manage suitable patients who have already been detained in hospital in the community. SCT provides clear criteria for eligibility and safeguards for patients as well as strict provisions for review and appeal, in the same way as for detained patients. |
| Community Treatment Order (CTO) | Written authorisation on a prescribed form for the discharge of a patient from detention in a hospital onto SCT. |
| Section 17E (recall of a community patient to hospital) | Provides that a Responsible Clinician may recall a patient to hospital in the following circumstances:<br>• Where the RC decides that the person needs to receive treatment for his or her mental disorder in hospital and without such treatment there would be a risk of harm to the health or safety of the patient or to other people.<br>• Where the patient fails to comply with the mandatory conditions set out in section17B (3) |
| Revocation | Is the rescinding of a CTO when a SCT patient needs further treatment in hospital under the Act. If as patient's CTO is revoked the patient is detained under the powers of the Act in the same way as before the CTO was made. |
| Part 3 of the Act | Deals with the circumstances in which mentally disordered offenders and defendants in criminal proceedings may be admitted to and detained in hospital or received into guardianship on the order of the court, It also allows the Secretary of State for Justice to transfer people from prison to detention in hospital for treatment for mental disorder.<br>Part 3 patients can either be restricted, which means that they are subject to special restrictions on when they can be discharged, given leave of absence and various other matters, or they can be unrestricted, in which case they are treated for the most part like a part 2 patient. |
| Section 35 | Empowers a Crown Court or Magistrates Court to remand an accused person to hospital for the preparation of a report on his mental condition if there is reason to suspect that the |

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| | accused person is suffering from a mental disorder. |
| Section 36 | Empowers a Crown Court to remand an accused person who is in custody either awaiting trial or during the course of a trial and who is suffering from mental disorder, to hospital for treatment. |
| Section 37 | Empowers a Crown Court or Magistrates Court to make a hospital or guardianship order as an alternative to a penal disposal for offenders who are found to be suffering from mental disorder at the time of sentencing. |
| Section 38 | Empowers a Crown Court or Magistrates Court to send a convicted offender to hospital to enable an assessment to be made on the appropriateness of making a hospital order or direction. |
| Section 41 | Empowers the Crown Court, having made a hospital order under s.37, to make a further order restricting the patients discharge, transfer or leave of absence from hospital without the consent of the Secretary of State for Justice.<br>Section 41 can also operate as a community section for people who were originally on section 37/41. When a section 37/41 is conditionally discharged it leaves the powers of Section 41 in place. This means that the person can leave hospital and live in the community but with a number of conditions placed upon them. |
| Section 45A | This is a court sentence to hospital for someone with a mental disorder at any time after admission, if the Responsible Clinician considers the treatment is no longer required or beneficial, the person can be transferred back to prison to serve the remainder of their sentence. |
| Section 47 | Enables the Secretary of State for Justice to direct that a person serving a sentence of imprisonment or other detention be removed to and detained in a hospital to receive medical treatment for mental disorder. |
| Section 48 | Empowers the Secretary of State for Justice to direct the removal from prison to hospital of certain categories of un-sentenced mentally disordered prisoners to receive medical treatment. |
| Section 49 | Enables the Secretary of State for Justice to add an order restricting the patients discharge from hospital to a S.47 or S.48 |
| CPI Act | Criminal Procedure (Insanity) Act 1964. This Act as amended by the Criminal Procedures (Insanity and Unfitness to Plead) Act 1991 and the Domestic Violence, Crime and Victims Act 2004 provides for persons who are found unfit to be tried or not guilty by reason of insanity in respect of criminal charges. The court has three disposal options:<br>• To make a hospital order under section 37 of the MHA 1983 which can be accompanied by a restriction order under section 41.<br>• To make a supervision order so that the offenders responsible officer will supervise him only to the |

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| | extent necessary for revoking or amending the order.<br>• Order the absolute discharge of the accused. |
| CTO (section 37) | Once an offender is admitted to hospital on a hospital order without restriction on discharge, his or her position is the same as if a civil patient, effectively moving from the penal into the hospital system. He or she may therefore be suitable for supervised Community Treatment (SCT) |
| Administrative Scrutiny | To be confirmed |
| Section 58(3) (a) | Certificate of consent to treatment (RC) |
| Section 58 (3) (b) | Certificate of second opinion (SOAD authorisation) |
| Section 58A(3)(c) | Certificate of consent to treatment, patients at least 18 years of age (RC) |
| Section 58A(4)(c) | Certificate of consent to treatment and second opinion, patients under 18 years of age (SOAD) |
| Section 58A(5) | Certificate of second opinion (patients not capable of understanding the nature, purpose and likely effects of the treatment) (SOAD) |
| Part 4A | Certificate of appropriateness of treatment to be given to a community patient (SOAD) |
| Section 62 – Urgent Treatment | Where treatment is immediately necessary, a statutory certificate is not required if the treatment in question is:<br>• To save the patient's life<br>• Or to prevent a serious deterioration of the patient's condition, and the treatment does not have unfavourable physical or psychological consequences which cannot be reversed and does not entail significant physical hazard<br>• Or to prevent the patient behaving violently or being a danger to themselves or others, and the treatment represents the minimum interference necessary for that purpose, does not have unfavourable physical or psychological consequences which cannot be reversed and does not entail significant physical hazard. |
| Section 23 | Provides for the absolute discharge from detention, guardianship or from a community treatment order of certain patients, by the Responsible Clinician, the Hospital Managers (or Local Social Services Authority for guardianship patients) or the patients nearest relative. The discharge must be ordered; it cannot be affected by implication.<br>Section 23 does not apply to patients who have been remanded to hospital by the courts or to patients subject to interim hospital orders.<br>The Secretary of State for Justice has powers to discharge restricted patients under section 42(2)<br>If an ay time Responsible Clinicians conclude that the criteria justifying the continued detention or community treatment |

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| | order are not met, they should exercise their power of discharge and not wait until such time that the detention order or SCT is due to expire. |
| Section 117 | Services provided following discharge from hospital; especially the duty of health and social services to provide after-care under se3ction 117 of the Act following the discharge of a patient from detention for treatment under the Act. The duty applies to SCT patients and conditionally discharged patients as well as those who have been absolutely discharged. |