



**GIG**  
CYMRU  
**NHS**  
WALES

Bwrdd Iechyd Prifysgol  
Bae Abertawe  
Swansea Bay University  
Health Board



<b>Meeting Date</b>	<b>06 May 2021</b>	<b>Agenda Item</b>	<b>3.1</b>
<b>Report Title</b>	Update position on Mental Capacity Act (MCA) and Deprivation of Liberty Safeguards (DoLS), for Quarter 4, January to March 2021		
<b>Report Author</b>	Paul Stuart Davies, Interim Assistant Director of Nursing, Tanya Spriggs, Nurse Director Primary Community & Therapy Service Group, Diane Fletcher, Head of Long Term Care, Nicola Edwards, Head of Nursing Safeguarding, Jodie Denniss Safeguarding Specialist, Hazel Lloyd, Head of Patient Experience Risk and Legal Services.		
<b>Report Sponsor</b>	Christine Williams, Interim Executive Director of Nursing		
<b>Presented by</b>	Tanya Spriggs, Nurse Director Primary Community & Therapy Service Group		
<b>Freedom of Information</b>	Open		
<b>Purpose of the Report</b>	To provide an update and assurance around the management of Deprivation of Liberty Safeguards (DoLS), MCA update and Court of Protection Information.		
<b>Key Issues</b>	<ul style="list-style-type: none"> <li>DoLS performance in Quarter 4.</li> <li>Update on COVID19 and ward visiting restrictions in relation to DoLS</li> <li>New Liberty Protection Safeguards (LPS) legislation will be replacing DoLS, these changes have been postponed to April 2022.</li> <li>Twenty-three Court of Protection Cases are being managed by Legal &amp; Risk Services on behalf of the Health Board, advise on any further information required for future reporting.</li> </ul>		
<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>	Members are asked to note:		

	<ol style="list-style-type: none"> <li>1. Note the performance data for Quarter 4 – January to March 2021 (Appendix 1). Cumulative annual data for information only - April to March 2021 (Appendix 2 &amp; 3)</li> <li>2. Note that further LPS guidance has been delayed due to the COVID-19 pandemic. The new implementation date, has been confirmed as April 2022.</li> <li>3. Note the detail provided (Appendix 4) for the Court of Protection Cases.</li> <li>4. Welsh Government Letter (Appendix 5) to set out governance arrangements to implement the Mental Capacity (Amendment) Act 2019 and to seek partner organisations' assurances that equivalent executive level engagement, planning and scrutiny is in place to deliver LPS implementation within your organisation.</li> <li>5. LPS Baseline Data Questionnaire SBU HB Response (Appendix 6)</li> </ol>
--	--

# Update position on Deprivation of Liberty Safeguards and MCA

## 1. INTRODUCTION

The purpose of this report is to provide an update on Quarter 4 in relation to Deprivation of Liberty Safeguards (Appendix 1), MCA and Court of Protection information (Appendix 4).

## 2. BACKGROUND

The Mental Capacity Act, Deprivation of Liberty Safeguards provides a legal framework to protect vulnerable adults, who may become, or are being deprived of their liberty in a care home or hospital setting. These safeguards are for people who lack capacity to decide where they need to reside to receive treatment and/or care and need to be deprived of their liberty, in their best interests, other than under the Mental Health Act 1983 (MCA Code of Practice). The safeguards came into force in Wales and England on the 1<sup>st</sup> April 2009.

The Mental Capacity Act 2005 (MCA) came into force in October 2007, SBU 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 (IMCAs).

## 3. PERFORMANCE, GOVERNANCE AND RISK ISSUES

### Referrals

In Q4 there were 167 referrals received, of those 25 were assessed by the 2 dedicated BIAs, as a result of the COVID 19 pandemic the internal (not primary role) BIA's did not complete any assessments. The external BIAs assessed 22 resulting in 26 being granted (**Appendix 1**)

The internal (not primary role) BIA's have not completed any assessments.

The external BIA's assessed 39 of which 28 were granted, with 0 awaiting completion for the period Jan to March 2021 and 10 not granted as patients were either discharged/not a deprivation or died.

Breaches are recorded in accordance with Welsh government guidance – the legislative time frame for assessors to complete the assessments does not start until 2<sup>nd</sup> assessor has been allocated - breach occurs if the urgent is not completed in 5 days of allocation; standard 21 days – we do not include 'breaches' between lapse of an urgent to point when standard is authorised.

It is important to note that figures for activity in each quarter will not equate as some assessments would have been received in the previous quarter, while some assessments whilst allocated will not be authorised until following quarter.

If the Health Board is unable to undertake timely completion of DoLS authorisations the Health Board will be in breach of legislation and claims may be pursued as a result. This is noted both on the Coporate Risk Register and the PCT Group Risk Register with a score of 16.

The cumulative number of discharges from 1<sup>st</sup> April to 31<sup>st</sup> March 2021 equates to 655, which includes 162 for Qtr 4 – (this figure includes discharges, death, further assessments, reviews of conditions, patients not meeting DoLS criteria therefore DoLS applications are stopped).

Although the number of breaches are greatly reduced (85 in Q3, 60 IN Q4), most breaches are due to a continuing lack of BIA Assessors and COVID restrictions. As from mid April the 2 internal BIA assessors will be accessing acute sites, appropriate risk assessments will be undertaken prior to visiting wards.

The existing plan was to reduce the reliance on the externally contracted BIA roles and use internal Health Board BIA's who are currently employed in substantive roles within Service Delivery Units. This model has been challenging due to staffing pressures throughout the COVID period. The Delivery Units have not been able to release staff particularly during winter pressures and the COVID 19 period. The internal BIAs were allocated 2 days a month but have not been released to the Supervisory Body to deliver the required functions due to COVID-19. This results in the Supervisory Body having to fund external BIA's, however, this is insufficient to deliver all assessments within the required time scales. In order to prepare and deliver on the LPS agenda a lead 8a role to encompass LPS and MCA will be explored. Welsh Government funding was made available in Q4, this enabled additional BIA assessments to be undertaken out of hours, however identifying BIA's has been challenging.

Discussions have taken place with corporate nursing colleagues, and whilst all acknowledge the need to develop a business case around DoLS and MCA, COVID 19 has adversely impacted on management time to progress. However, we are seeking opportunities to progressing the business case in quarter 1 of 2021/2022.

### **DoLS Training:**

Due to COVID-19, all DoLS training delivery remains via virtual platforms, and incorporates links between theory and practice in an aim to increase staff confidence and improve standards in practice.

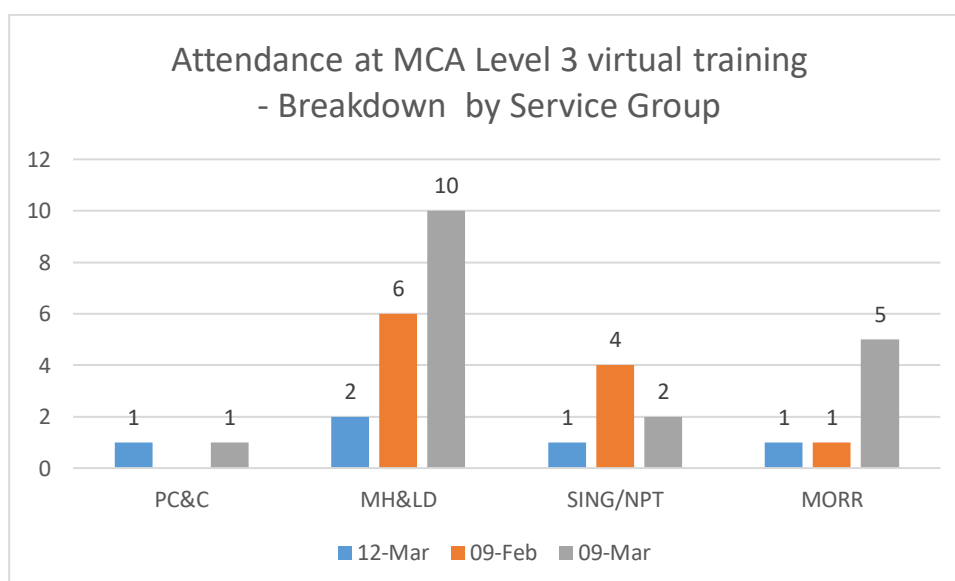
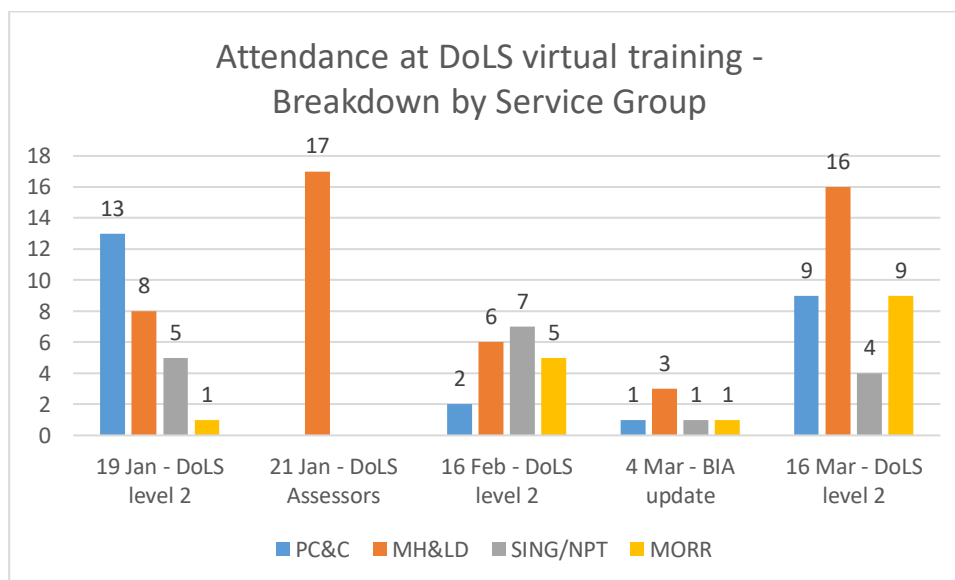
Swansea University Health Law Department has also developed and recorded a webinar to provide training on the application of DoLS in 16 and 17 year olds. This webinar can be accessed at any time and provides an additional resource for staff who may be involved with young people as part of their role. This training has been promoted via the Health Board intranet and can be accessed either through the Corporate Safeguarding SharePoint or the DoLS/MCA page on the intranet.

## MCA Training

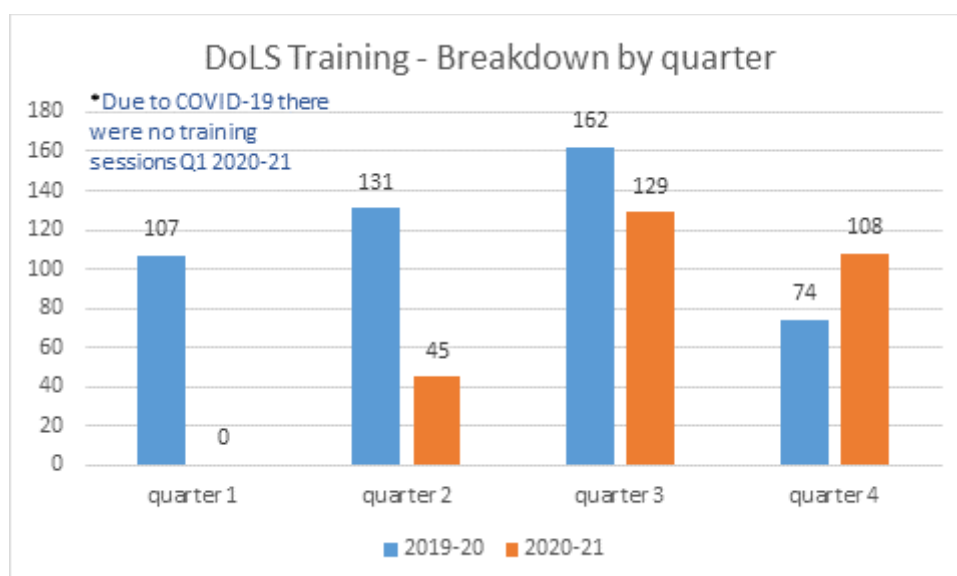
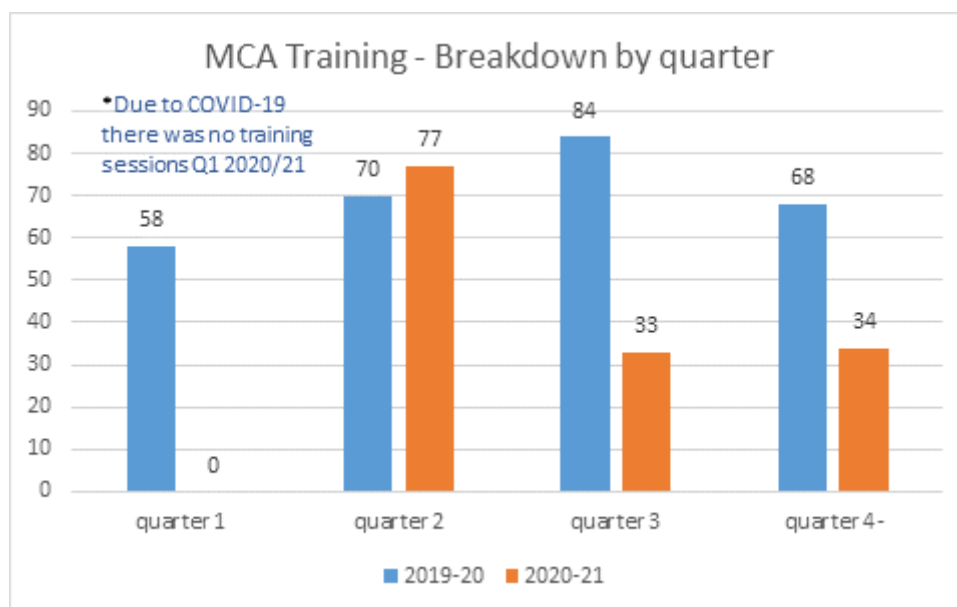
MCA Level 1 & 2 training continues to be delivered via e-learning for all SBU HB staff. MCA Level 3 training is directed at ward managers, senior nurses and senior clinicians.

In addition to formal training, learning from Safeguarding cases, including MCA/DoLS, is disseminated widely across the Health Board. As with DoLS, MCA support continues to be provided by the BIAs within the Service Groups.

MCA Level 3 training continues to be delivered remotely via Microsoft Teams. The graphs below indicate training attendances during the reporting period.



The graphs below show a comparison of training data for 2019/20 and 2020/21 across each Quarter. The COVID-19 pandemic has clearly impacted attendance, and training compliance is an area that requires prioritising across all Service Groups as part of their 'recovery' plans. A recent baseline questionnaire carried out in response to a Welsh Government request as part of preparation for Liberty Protection Safeguards (LPS) implementation demonstrates a concerning low level of total training compliance for MCA across the Health Board. A paper relating to LPS is to be submitted to the Safeguarding Committee in May and will highlight this issue with a requirement for Service Groups to formulate action plans to address this. In addition, the Corporate Safeguarding Team are carrying out a series of Ward/Department Assurance audits across all Service Groups, training compliance at local level is included.



## INDEPENDENT MENTAL CAPACITY ADVOCATES (IMCAs)

The Independent Mental Capacity Advocate (IMCA) service is a statutory service implemented in Wales from 1<sup>st</sup> 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. An IMCA must be appointed for anyone aged 16 or over who has been deemed as lacking capacity and are unfriended; they can also be appointed for Care Reviews or Adult Protection cases.

The IMCA service currently contracted to the HB continues to be provided by Mental Health Matters Wales, with quarterly monitoring reports provided to the Health Board. The below table indicates the number of new IMCA instructions from the Health Board during Quarter 4.

	<b>Serious Medical Treatment</b>	<b>Long term move of accommodation</b>	<b>Care Review</b>	<b>Vulnerable Adult</b>	<b>39a*</b>	<b>39d*</b>	<b>RPR</b>
<b>Q4</b>	<b>2</b>	<b>6</b>	<b>2</b>	<b>1</b>	<b>4</b>	<b>13</b>	<b>11</b>

#### **Quarter 4 REASONS FOR INSTRUCTION OF AN IMCA**

\* 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

The level of instructions for an IMCA for patients in SBUHB has remained consistent, despite the IMCA Service reporting an overall 40% increase in referrals in Q4 across the region. The advocates are continuing to carry out their role using technology, in combination with meeting patients face-to-face where able whilst following government COVID-19 guidelines and local arrangements.

The IMCA quarterly monitoring reports continue to be shared via the Safeguarding Committee and include case scenarios.

#### **COURT OF PROTECTION (CoP)**

The Court of Protection (CoP) 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. It was identified in late 2019 that links between the Corporate Safeguarding Team and the Legal Team have not been sufficiently robust to enable a regular oversight and assurance regarding Cop cases.

In January 2020 a Datix Change request was submitted to the Datix User Group meeting by the Mental Health & Learning Disabilities Delivery Unit to request an addition to the Complaints Module of Datix to enable capture of the Cop cases. This change has now been made and all Delivery Units have been notified. A new code 'type' has been added to the Complaints Module- 'Court of Protection'. This allows secure storage of documents and maintenance with a central oversight of Cop cases.

These records will be available and managed by the Units with the ability to report on all cases on a Health Board wide basis.

## **Ongoing Identified Risks**

### **COVID-19**

There have been no adjustments to Mental Capacity Act and Deprivation of Liberty Safeguards Legislative responsibilities during COVID pandemic, any deprivation of liberty needs to be authorised. There are ongoing risks to the Health Board in relation to compliance with legislation:

- Lack of availability of assessors to undertake the assessments, particularly BIAs largely relying upon the two dedicated BIA's to undertake all assessments.
- Restrictions on visiting patients to carry out assessments.
- Limited ability to undertake remote assessments (lack of equipment and time for front line staff to support the patient with the assessment).
- There is a back log of cases awaiting assessment with 77 outstanding assessments, this is mainly as a result of the COVID restrictions, reduced footfall on the ward areas and BIA's not being released due to hospital pressures.

In view of COVID restrictions agreed processes are in place: -

- BIAs will be undertaking both remote and face-to-face assessments on the acute sites.
- A telephone triage and support service will be available Monday to Friday 9am to 5pm.
- BIAs will work with staff in the acute settings to ensure robust care plans are in place.
- For patients with existing DoLS the review will be undertaken remotely where possible and the previous Section 12 Doctors report will be used.
- Admin support will still be available.
- BIAs will support acute staff with any complex cases and to ensure patients are not delayed in hospital for concerns related to best interest decisions.

In addition:

- As part of triage BIAs have put in place 'traffic light' prioritisation for transparency and consistency.
- All guidance has been updated in line with government's updated guidance and widely circulated to relevant staff.

### **Mental Capacity Act**

MA compliance: Evidence of inconsistent understanding and implementation of MCA/DoLS across the service areas, our observations are that compliance and application is significantly better where ward leads have an interest in MCA/DoLS and have attended training or are BIA trained. In other areas there is a clear deficit where frontline staff are not confident or are lacking the skills and knowledge in undertaking



mental capacity assessments and completing best interest meetings. This is a concern particularly for the future in relation to LPS as there is likely to be greater responsibilities on MA's when LPS is implemented.

**Breaches** – The actions taken to reduce breaches include encouraging MAs to submit a Form 1a (providing a further 7-day extension). COVID-19 has had an impact on the number of breaches, 60 breaches during Quarter 4, in addition to the lack of BIA resource.

**Theme:** There is a common misunderstanding that a patient has to have a DoLS authorisation in order for MAs to access additional support (1:1) or access support from onsite security services. This triggers inappropriate referrals and evidences the lack of knowledge and application of the use of the MCA without the need for DoLS. This issue has been addressed by providing staff and security services with additional training.

### **Liberty Protection Standards (LPS)**

The date for the implementation of legislative changes moving from Deprivation of Liberty Safeguards to Liberty Protection Safeguards has been delayed due to COVID-19 and is now planned for April 2022. The Health Board is awaiting further legislative guidance in order to determine the future DoLS team structure. In the interim MCA and DoLS will remain core business, there has been no change to SBU HB's statutory obligations during the pandemic. Representatives from the DoLS Team and Corporate Safeguarding Team attend the NHS Wales Review of DoLS/MCA/LPS Network Task & Finish Group and dedicated workstreams that feed into to the Welsh Government National Steering Implementation Group. Further information regarding this can be found in Appendix 5 and 6 in the letter sent from Welsh Government to all Health and Social Services organisations.

## **4. FINANCIAL IMPLICATIONS**

A review of SBUHB's service model compared to other Health Boards has shown a difference in how services are funded. Considering the similar level of referrals the comparison has highlighted that the level of funding and resource available for the SBUHB Supervisory Body is significantly lower than that of other HBs. This should remain under review in light of the implementation of LPS. In order for the Health Board to meet the new LPS legislative requirements a workforce review will need to be undertaken. In view of the preparations required and lead in time to LPS a new 8a lead role will be explored to ensure the Health Board can meet the new LPS and MCA legislative requirements.

## **5. RECOMMENDATIONS**

Members are requested to:

1. Note the performance data for Qtr. 4 – January to March 2021 (Appendix 1).

Cumulative annual data for information only - April to March 2021 (Appendix 2 & 3)

2. Note that further LPS guidance has been delayed due to the COVID-19 pandemic. The new implementation date, has been confirmed as April 2022.
3. Note the detail provided (Appendix 4) for the Court of Protection Cases.
4. Welsh Government Letter (Appendix 5) To set out Welsh Government governance arrangements to implement the Mental Capacity (Amendment) Act 2019 and to seek partner organisations' assurances that equivalent executive level engagement, planning and scrutiny is in place to deliver LPS implementation within your organisation.
5. LPS Baseline Data Questionnaire SBU HB Response (Appendix 6)

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	<input type="checkbox"/>
	Co-Production and Health Literacy	<input type="checkbox"/>
	Digitally Enabled Health and Wellbeing	<input type="checkbox"/>
	Deliver better care through excellent health and care services achieving the outcomes that matter most to people	
	Best Value Outcomes and High Quality Care	<input type="checkbox"/>
	Partnerships for Care	<input type="checkbox"/>
	Excellent Staff	<input type="checkbox"/>
	Digitally Enabled Care	<input type="checkbox"/>
	Outstanding Research, Innovation, Education and Learning	<input type="checkbox"/>
Health and Care Standards		
(please choose)	Staying Healthy	<input type="checkbox"/>
	Safe Care	<input checked="" type="checkbox"/>
	Effective Care	<input type="checkbox"/>
	Dignified Care	<input type="checkbox"/>
	Timely Care	<input type="checkbox"/>
	Individual Care	<input checked="" type="checkbox"/>
	Staff and Resources	<input type="checkbox"/>
Quality, Safety and Patient Experience		
Report highlights the importance of safe and timely assessment		
Financial Implications		
Report identifies the current financial challenges and lack of funding for Supervisory Body Function.		

<b>Legal Implications (including equality and diversity assessment)</b>	
Report reference the legal framework which is current and the future LPS implementation	
<b>Staffing Implications</b>	
Report outlines the current staffing capacity issues and identifies the potential for future staffing model to become compliant.	
<b>Long Term Implications (including the impact of the Well-being of Future Generations (Wales) Act 2015)</b>	
Report makes reference to future legislation.	
<b>Report History</b>	Presented to MHA&MCA Compliance Committee in August
<b>Appendices</b>	<p><b>Appendix 1</b> provides performance information Q4.</p> <p><b>Appendix 2 &amp; 3</b> cumulative annual performance information April to March 2021.</p> <p><b>Appendix 4</b> Welsh Government Letter -To set out Welsh Government governance arrangements to implement the Mental Capacity (Amendment) Act 2019 and to seek partner organisations' assurances that equivalent executive level engagement, planning and scrutiny is in place to deliver LPS implementation within your organisation.</p> <p><b>Appendix 5</b> LPS Baseline Data Questionnaire SBU HB Response</p>