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Court of Protection Procedure and Guidance	
<p>Introduction and Aim</p> <p>This procedure document attempts to clarify the process, where decisions are finely balanced or there is a difference of opinion between interested parties for an individual who lacks capacity to make a specific decision around their care and treatment or discharge arrangements, which may ultimately result in the matter being taken to the Court of Protection for a decision to be made.</p> <p>It is imperative that patients are supported to make decisions around their care and treatment and/or discharge arrangements so far as is reasonably possible. In order to facilitate decision making patients should be given independent support and advocacy to make decisions, with clear information around all of the options available, in a way that takes account of their personal needs.</p> <p>Differences of opinion will usually lead to delays in treatment or discharge which is rarely in the interests of the health board or individual concerned. Disputes around discharge arrangements can often become particularly protracted and obtaining a decision from the Court can be both timely and costly. Therefore, it is important that attempts are made to resolve issues early on; using mediation where necessary. Matters should only be taken to court where all other avenues to make a decision have been exhausted.</p>	
<p>Objectives</p> <p>This procedure and guidance is designed to support staff within Cardiff and Vale UHB (referred to as the UHB throughout this guidance) where an application to the Court of Protection may be required or in instances where an order has been served on the UHB. Further information on the Mental Capacity Act and the support to be provided for people to make decisions can be found within the UHB's Mental Capacity Act Policy.</p>	
<p>Scope</p> <p>This procedure applies to all of our staff in all locations including those with honorary contracts who are caring for patients that may lack capacity to make decisions.</p>	
<p>Equality and Health Impact Assessment</p>	<p>An Equality and Health Impact Assessment (EHIA) has not been completed, as this procedure has been developed in support of the Mental Capacity Act Policy.</p>
<p>Documents to read alongside this Procedure</p>	<p>Mental Capacity Act Policy, 2024 Independent Mental Capacity Advocate Procedure (UHB 186) Lasting Power of Attorney and Court Appointed Deputy Procedure (UHB 113) Department for Constitutional Affairs (2007) Mental Capacity Act 2005 Code of Practice, TSO London</p>

	Ministry of Justice (2008) Mental Capacity Act 2005 Deprivation of Liberty Safeguards: Code of Practice to supplement the main Mental Capacity Act 2005 Code of Practice HMSO (2005) Restraint in the care management of patients aged 16 years and over with impaired mental capacity – Policy and Procedure (UHB 044)
Approved by	Mental Health Legislation Committee
Accountable Executive or Clinical Board Director	Executive Nurse Director
Author(s)	MCA Project Lead
<u>Disclaimer</u> If the review date of this document has passed please ensure that the version you are using is the most up to date either by contacting the document author the Governance Directorate .	

Summary of reviews/amendments			
Version Number	Date of Review Approved	Date Published	Summary of Amendments
1	26.08.2025	21.10.2025	New document

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1. INTRODUCTION

1. Patient safety issues arise when:
 - a. There are delays in admission to hospital due to lack of bed space caused by delayed discharges;
 - b. When patients need medical treatment yet disputes about capacity or best interest result in delays;
2. The Health Board may be acting unlawfully if:
 - a. A person is deprived of their liberty without proper lawful authorisation;
 - b. It does not speedily refer to court when it is known that a person is objecting to their deprivation of liberty

In cases where the patient lacks capacity to make decisions themselves the Health Board needs to ensure it is fully compliant with the Mental Capacity Act 2005 and is protective of patients human rights.

The aim of this Guidance is to help Health Board staff understand:

- a) What the Court of Protection is
- b) The types of issues that may be referred to the Court of Protection
- c) Roles and responsibilities
- d) Clarify who can and should make an application to the Court
- e) How to access legal advice
- f) What staff should do if they are notified that the Health Board needs to respond to a Notice or Order from the Court

2. THE COURT OF PROTECTION

2.1 What is the Court of Protection?

The Court of Protection is a specialist court in England and Wales that was created by the Mental Capacity Act 2005. The Court deals with decisions affecting people aged 16 and over, who may lack capacity to make specific decisions for themselves. The role of the Court is to apply the rules of the MCA (2005) to matters relating to a wide range of different issues and these are normally split into three categories-

1. Health and welfare issues, including:
 - Disputes in relation to issues such as where someone should live or the care and support they should receive
 - Challenges to the Deprivation of Liberty Safeguards (DoLS)
 - Whether or not someone has the mental capacity to make certain decisions and challenges to capacity assessments
 - Safeguarding issues
 - Medical treatment disputes

2. Property and financial affairs:

E.g. if P lacked capacity to make decisions around their finances and needed someone to help them manage their money, the Court might be asked to consider whether someone is appropriate to hold a Lasting Power of Attorney for P or whether a deputy should be appointed

3. Cases involving both health and welfare and property and financial affairs issues

It is within the Court's jurisdiction to:

- Make declarations and decide whether a person has the capacity to make a decision
- Make a decision for the person in their best interests
- Make declarations as to the lawfulness of acts done in relation to the person
- Determine whether a person is being deprived of their liberty
- Decide upon issues relating to the validity and applicability of Lasting Powers of Attorney and Advance Decisions
- Appoint and remove Deputies

The Court cannot:

- make decisions on behalf of a person who has capacity to make their own decisions
- choose something for the person that is not available i.e. demand a treatment option that is not medically appropriate or a placement that is not available or willing to accept the person

Before any case goes to court it is important that all appropriate steps have been taken to try and resolve the situation. For example, through the use of mediation and independent second opinions, where there is dispute about the best course of action and time allows.

In order to make a decision, the Court will require evidence from involved parties. For health and welfare related decisions the Court will usually request evidence including, but not limited to:

- A clear outline of options relating to the person's care and treatment or discharge planning and the perceived benefits and disadvantages of each
- Care plans and risk assessments
- Nursing assessments
- Medical records/patient notes for a specified period
- A clear and thorough assessment of the person's capacity to make the decision
- Records of any best interest meetings or discussions, including meeting minutes, balance sheets etc., statements from involved parties, in particular the decision maker

- Documentation relating to any DoLS authorisations or assessments (these can be obtained from contacting the DoLS Team, if copies are not readily available in the patient's notes)
- Occasionally, the Court may request a specific professional (e.g. psychiatrist, social worker, nurse) visit the patient and report to the Court (s49 report)
- For more complex cases, the Court may request a second opinion regarding the person's capacity to decide or view of what treatment options would be most appropriate

2.2 Applications for Care and Treatment Decisions

Where it is determined that a patient lacks capacity to make a decision regarding an aspect/s of their care and treatment, a decision should be made in their best interests. However, there are times when it may be appropriate to seek legal advice to establish whether the matter needs to be taken to the Court of Protection.

Examples of this are outlined below:

1) Where the decision is particularly difficult, complex, or finely balanced

This may be due to ethical considerations or where there is a fine balance between the benefits and burdens of a particular treatment.

2) Where there are disagreements amongst or between clinicians, consultees, the person, IMCA, attorney etc.

This may include differences in opinion as to whether the person has capacity to make the decision or not, or about what option is in their best interests.

3) Where more than transient restraint is likely to be required in order to facilitate a treatment or intervention.

This may amount to a deprivation of the person's liberty that is not authorised by a Deprivation of Liberty Safeguards (DoLS) Authorisation.

4) Excluded decisions

There are some decisions that cannot be made on behalf of a person. These are called 'excluded decisions' and are outlined in Sections 27, 28, 29 and 62 of the Act. Examples include:

- Consenting to marriage or a civil partnership
- Consenting to sexual relations
- Consenting to divorce
- Consent to treatment under the Human Fertilisation and Embryology Act 1990 or the Human Fertilisation and Embryology Act 2008
- Consent for a child of an incapacitated parent to be placed for adoption by an adoption agency
- Consent to the making of an adoption order
- The discharging of parental responsibility for a child's welfare
- Decisions about voting in a public election or referendum

If there are concerns about a person's ability to make any of these decisions their capacity should be assessed and action should be taken as appropriate to safeguard the person from any risk of harm or abuse. Legal advice should be sought as required to determine the appropriate course of action and establish whether the case should be taken to the Court for a judge to decide what is in the person's best interests.

2.3 Roles and Responsibilities

There is often no one person within the UHB who is the decision maker for all of a person's care and treatment decisions. There are usually a number of decisions to be made within the multi-disciplinary team and therefore it can be helpful to prepare a list of all the key contacts who will be potential witnesses in any court proceedings.

This will often include:

- Care co-ordinator (Mental Health)
- Ward Manager, Senior or Lead Nurse
- Consultant
- Therapists e.g.: Occupational Therapy, Speech and Language, Psychologist, Physiotherapy.
- Social Worker.

The Court of Protection has the ability to call any health care professional to provide evidence to the Court. Failure to comply with the Directions of the Court can result in the Chief Executive Officer being called to give evidence on the UHB's failure to comply. The court can also make costs orders against the Health Board.

2.4 Who can make an application to the Court?

Applications can be made to the Court of Protection by:

- 5) Representatives of P e.g. an advocate or RPR;
- 6) Family members;
- 7) Local Authority or
- 8) The Health Board .

There is often an advantage to the Health Board making the application rather than responding to one brought by another party.

Where an application is being made by the UHB please follow the process outlined in Section 3.

2.5 Accessing Legal Advice

Where it is identified that an application to the Court may be required, legal advice should be sought at the earliest opportunity in order for the legal team to be involved in any relevant discussions, such as best interest meetings etc.

Details on how to access legal advice can be found on the UHB's [Corporate Governance Sharepoint](#) page.

Further information relating to when an application may be required in relation to disputed discharge arrangements is contained in Section 4 of this guidance.

2.6 Recording of Court of Protection Matters

In most cases, Legal & Risk Services will need to be instructed to support the UHB with Court of Protection matters.

To instruct Legal & Risk services, the person requesting legal advice must complete the [Complex Patient Electronic Instruction Form](#) on the Corporate Governance Sharepoint page here.

On completion, the electronic instruction form will automatically be sent to the Complex Patient Team in Legal & Risk Services for review and will then be allocated to the most appropriate Solicitor. Corporate Governance will maintain a repository of all complex patient instructions and monitor the numbers and types of Court of Protection matters across the UHB.

2.7 Responding to Notices or Orders from the Court

Notices and Orders from the Court are usually received by Corporate Governance who will look to identify the relevant clinical team to respond as soon as possible. If any requests are sent directly to a person's care team, it is essential that Corporate Governance are made aware of the request as soon as it is received.

It is important to establish early on if the requested information is:

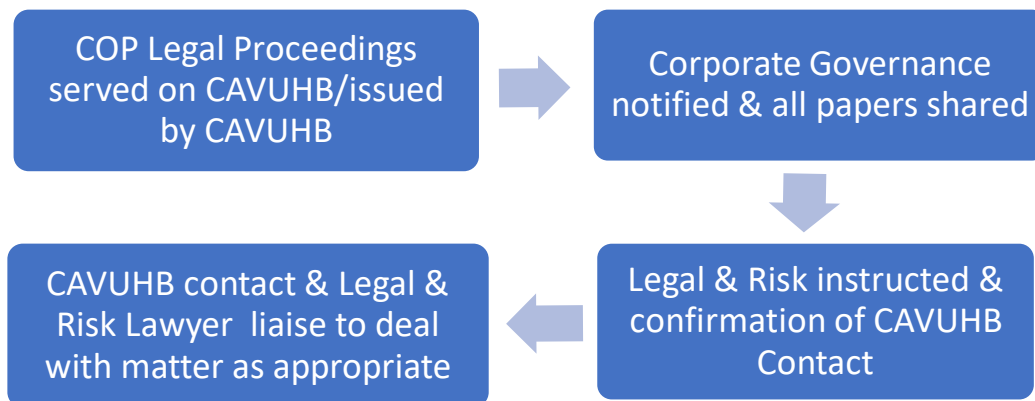
- a) A realistic and appropriate request
- b) Achievable in the timeframe set

If not, then a request can be made to vary the Court Order however, this must be done within the timeframe given in the order (usually 7 calendar days of the order being made)).

Any delays in identification of the correct team to respond can have a negative impact on the UHB's ability to vary a Court Order within this timeframe; this can impact on the ability of the UHB to comply with what has been requested and the timeframe it is expected by. It is imperative that any requests from Corporate Governance are responded to in a timely manner so that the correct team can be established and legal representation can be sought.

Once the referral for legal representation is received, a co-ordination meeting can be arranged with the allocated solicitor from Legal & Risk Services, to discuss next steps and requirements.

The below flowchart provides a brief overview of the process for responding to orders and notices:



2.8 Case Examples and Process Flowchart

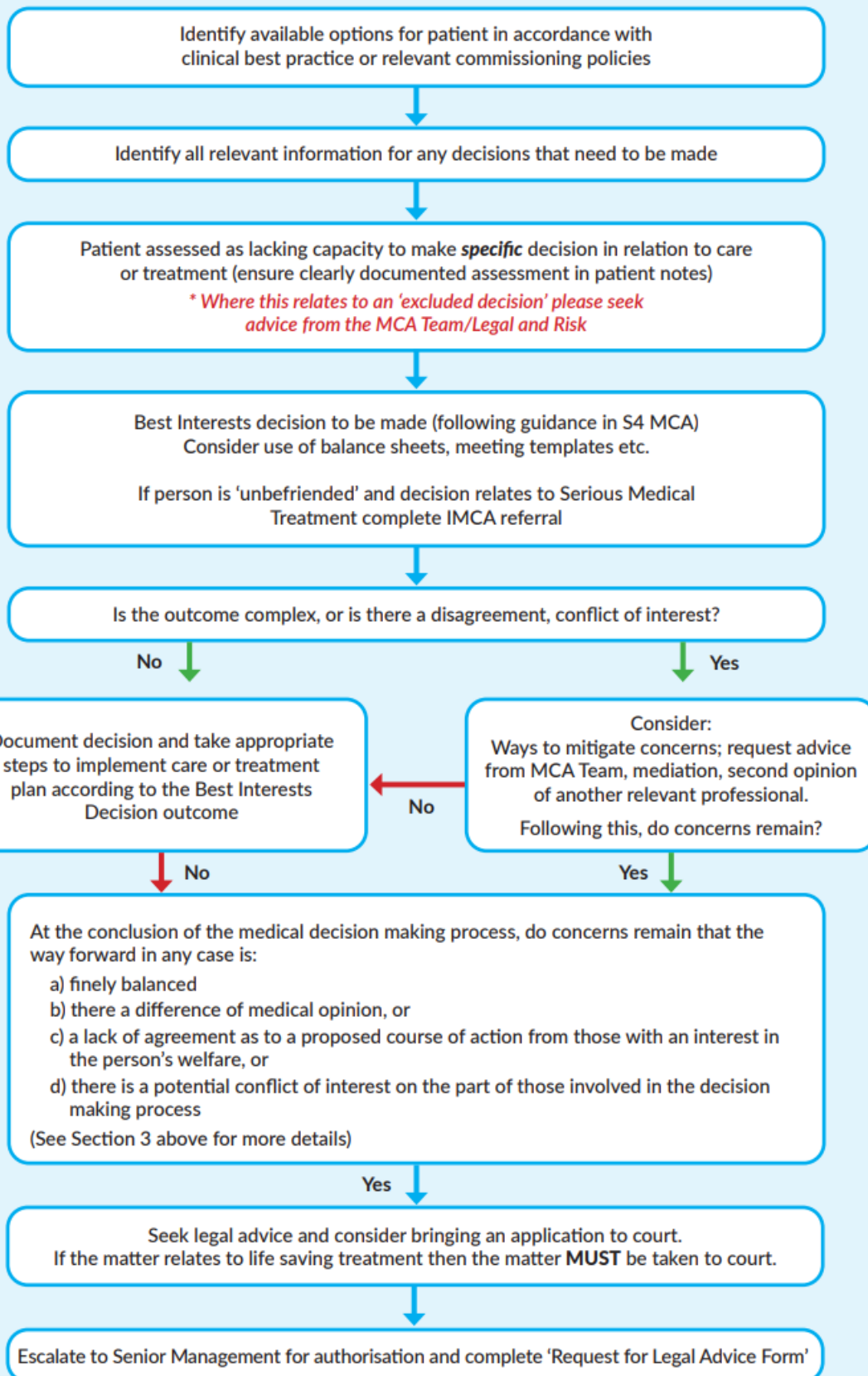
The below table includes some (non-exhaustive) examples of cases which would require Court of Protection proceedings.

**Please note: whilst cases relating to children are not heard in the Court of Protection and different requirements apply, the process for accessing legal advice from the Complex Patient Team remains the same.*

Case Type	Definition	Examples
Deprivation of Liberty Appeal	Health Board have been notified that a DOLS appeal has been filed or is imminent.	<p>Patient in hospital, subject to a DOL and who is objecting to remaining in hospital</p> <p>Patient in hospital, subject to a DOL and who is objecting to going into a care home in accordance with discharge plan</p>
Medical Treatment - Adult	Where the issue of medical treatment is the key issue even if other categories may apply	<p>An adult refusing treatment</p> <p>Doctors recommending withholding/discontinuing treatment and patient or family object</p>

<p>*Medical Treatment - Child</p>	<p>Where the issue of medical treatment is the key issue even if other categories may apply</p>	<p>A child refusing treatment or family refusing treatment on a child's behalf</p> <p>Doctors recommending withholding/discontinuing treatment and child or family object</p>
<p>Community Deprivation of Liberty</p>	<p>Where P is deprived of their liberty in supported living or their own home and the DOLS Safeguards do not apply</p>	<p>Someone under continuous supervision and control where they are living such as with a 24 hour care package</p> <p>Someone not free to leave where they are living (even if they are also physically incapable of leaving) - would they be stopped from leaving if they were able to try?</p>
<p>Court of Protection - Personal Welfare Application</p>	<p>Including disputes about discharge from hospital, contact with others.</p> <p>Also requests for s49 reports where the Health Board is not a party to the court proceedings</p>	<p>Can include disputes about care, contact, contraception, hospital discharge, hoarding, education, marriage, residence, social media, sex, sharing healthcare information or termination of pregnancy</p>
<p>*Deprivation of Liberty for a Child</p>	<p>In hospital or in care home. Often includes disputes with Local Authorities.</p>	<p>Child with challenging behaviour requiring restrictions but not eligible under the Mental Health Act.</p>

The below flowchart outlines the process to be followed when determining whether an application to the Court of Protection is required:



4. DISPUTED DISCHARGE ARRANGEMENTS

If resolution cannot be achieved at ward level within a reasonable period, the following process should be followed:

Phase 1

The patient will have been identified as D2RA pathway 3 due to the complexities of discharge planning. The Integrated Discharge Service (IDS) should be aware of pathway 3 patients but the ward team should contact IDS to confirm.

A Discharge Support Referral form to be completed as an early discussion may be required. This can be done before the patient is clinically optimised as long as this is made clear on the DSR.

Once the individual is clinically optimised, if there is reason to doubt their capacity in relation to decisions around their discharge arrangements, a mental capacity assessment should be completed.

If the person is found to lack capacity to make a decision about their discharge arrangements, a Best Interest Meeting (BIM) will be required. This should be attended by health staff, a local authority representative and family members/advocate/Relevant Persons Representative (if under a DOLs).

At this point it needs to be clearly documented if there is any objection from the patient regarding the outcome of the BIM.

It is important to note that if the Patient/Patient Representative is wishing to choose a particular care home and the care home has stated they cannot meet the care needs of the individual concerned, that particular care home should not be included as an option in the decision-making process.

Clarify if there are any areas of dispute. No case should proceed to the Court of Protection if related to funding issues.

Ensure all options explored e.g. interim arrangements based on D2A model.

Phase 2

1. Arrange a complex case review within 7 days of BIM to include:
 - a. Senior ward team member
 - b. Local authority colleagues
 - c. Representative from the IDS team

2. Agenda for the meeting should include:
 - a. Whether an application to the Court of Protection is required
 - b. Who will be responsible for making the application (see further guidance below).

Phase 3

If it has been agreed that the UHB will make the application, IDS will apply for legal support as per the UHB's Request for Legal Advice process and arrangements will be agreed for an initial fact finding meeting within an agreed time frame.

An IDS representative will be responsible for co-ordinating the initial fact finding meeting (with potential to discuss multiple cases).

This meeting should be attended by: Legal and Risk Representative, Head of Discharge Team and Clinical Board Senior Nurse.

The outcome of the initial fact finding meeting will result in agreement of the following items:

a. Is a COP application needed before discharge?

If agreed to proceed, the Director of Nursing for the relevant Clinical Board to be made aware to ensure support is provided to ward teams in order to compile robust statements and documentation to prevent avoidable delays.

b. Who should bring the application?

This will be determined at the initial fact finding meeting and will usually be the UHB, although it may be from the Local Authority, an advocate, RPR or LPA.

c. What evidence is required?

A comprehensive list of the documentation required and any statements to be written by ward-based team and any other professional involved in the case to date will be developed. This evidence should always include the risks of remaining in hospital.

For further guidance on relevant documentation please refer to Section 2 above.

d. Identification of Coordinator

The responsible clinical team will identify an individual whose responsibility it will be to: engage with Legal & Risk for the duration of the proceedings, collate all relevant documentation, monitor progress of the application and chase any outstanding actions to prevent any avoidable delays.

This should be a member of staff from at least Senior Nurse level.

This individual will also be required to write a statement and may be called upon to give evidence in court. Please note: support will be provided both by the UHB and Legal & Risk as required.

5. EQUALITY INCLUDING WELSH LANGUAGE

An Equality Impact Assessment has not been carried out as this procedure has been developed in support of the UHB's Mental Capacity Act Policy. The MCA Policy is designed to support vulnerable individual's and there is no evidence that the policy adversely affects any of the equalities groups and it is neither directly nor indirectly discriminatory under the equalities legislation.

When assessing a person's capacity and making decisions in their best interests staff will need to consider the needs of different groups of people. These groups will include people whose first language is not English or Welsh and people with sight or communication difficulties. The Mental Capacity Act 2005 requires clinicians to optimise every patient's ability to make decisions.

The UHB is committed to providing information to patients in a range of formats i.e. other languages, easy read and other formats (including audio).

6. TRAINING

Mental Capacity Act Training is mandated for all staff working within CAV UHB at a level appropriate to their role and level of responsibility. This is available as an online ESR course for Level 1 and 2. Level 2 training is also available as a classroom based session and can be booked through ESR or by contacting the MCA Team.

Additional specialised training is also available from the MCA Team and details of courses available can be found on the [MCA Team's Training page](#) on SharePoint.

7. DISTRIBUTION

This procedure will be made available on the UHB's SharePoint site.

8. REVIEW OF THIS GUIDANCE

This procedure will be reviewed every three years or sooner if appropriate.

9. COURT OF PROTECTION CONTACTS IN CARDIFF & VALE UNIVERSITY HEALTH BOARD (AS OF JUNE 2025)

Type of Request	Contact	Email
Continuing Health Care (CHC) Mental Health	Senior Nurse CHC Project Lead	Julia.West@wales.nhs.uk

Integrated Discharge Team (IDS)	Head of Integrated Discharge	Diane.Walker@wales.nhs.uk
	Senior Nurse IDS	Frances.Woodyatt@wales.nhs.uk
Corporate Contact	Head of Corporate Governance	Francesca.thomas3@wales.nhs.uk
Deprivation of Liberty (DOLS)	DoLS Team Manager	MCA-DOLS@valeofglamorgan.gov.uk
Legal & Risk Contacts	COP Team	LegalandRiskCOPTeam@wales.nhs.uk
	CAV Lead COP Solicitor	Hannah.Watkins-Pyne@wales.nhs.uk
	COP Team Lead	Gavin.Knox@wales.nhs.uk
Medical Records (Disclosure)	Medical Records Team	CAV.AccessToRecords@wales.nhs.uk
		Sion.OKeefe@wales.nhs.uk
Mental Capacity Team	Mental Capacity Specialist Practitioners	Mca-lps.cav@wales.nhs.uk
	MCA and Consent Lead	Chloe.Evans@wales.nhs.uk