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Bwrdd Iechyd Prifysgol
Bae Abertawe

Swansea Bay University
Health Board



Meeting Date	02 February 2023	Agenda Item	3.1	
Report Title	Update position on Mental Capacity Act (MCA), Deprivation of Liberty Safeguards (DoLS) and proposed Liberty Protection Safeguards (LPS) for Quarter 3, October to December 2022			
Report Author	Tanya Spriggs, Nurse Director Primary Community & Therapy Service Group, Karen Gronert, Deputy Nurse Director Primary Community & Therapy Service Group Paul Stuart Davies, Assistant Director of Nursing, Nicola Edwards, Head of Nursing Safeguarding. Amanda Davies Long Term Care Manager.			
Report Sponsor	Gareth Howells, Executive Director of Nursing			
Presented by	Tanya Spriggs, Nurse Director Primary Community & Therapy Service Group			
Freedom of Information	Open			
Purpose of the Report	To provide an update and assurance around the management of Deprivation of Liberty Safeguards (DoLS), MCA update and proposed new Liberty Protection Safeguards (LPS).			
Key Issues	<ul style="list-style-type: none">• DoLS performance in Quarter 3• Update on Welsh Government funding for DoLS/MCA training and DoLS breaches• Update on proposed new LPS• Inclusion of overall staff DoLS and MCA training compliance• Risk rating update			
Specific Action Required (please choose one only)	Information	Discussion	Assurance	Approval
	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Recommendations	Members are asked to:			

	<ol style="list-style-type: none"> 1. Note the performance data for Quarter 3 – October to December 2022 together with cumulative information for year to-date. 2. Note that there is a further delay on the implementation date for LPS. Suggested proposed time scale is likely to be April 2024. 3. Note the work relating to the DoLS backlog and LPS training utilising funds from Welsh Government. 4. Note the Risk Rating
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Update position on Deprivation of Liberty Safeguards and MCA

1. INTRODUCTION

The purpose of this report is to provide an update on Quarter 3 in relation to Deprivation of Liberty Safeguards.

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 1st 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). The Mental Capacity Amendment act received royal assent on the 16th May 2019, introducing the new Liberty Protection Safeguards to replace the Deprivation of Liberty Scheme. The Draft COP (code of practice) and Draft regulation for LPS and the MCACOP were published on the 17th March 2022 for 16-week consultation date. SBUHB response as well as a regional response was submitted 14th July 2022.

The Proposed date for implementation of LPS has changed on a number of occasions it is now proposed that full implementation will be in April 2024.

3. PERFORMANCE, GOVERNANCE AND RISK ISSUES

Referrals

Referrals received	October	November	December	Total
Urgent	46	49	43	138
Standard	20	8	10	38
Review	1	5	2	8
Breaches from previous months	13	14	7	34

Status	October	November	December	Total
Granted	24	14	11	49
Not granted (regained capacity)	0	0	0	0
Not granted (discharged)	23	23	12	48
Not granted (RIP)	7	4	4	15
Not Granted (sectioned)	6	6	4	16
Ongoing*	5	10	9	24

Please note – the numbers will not correlate each month as there is a rolling backlog each month, in this case, there were 27 cases carried over into January 2023.

*Ongoing – awaiting assessments from BIAs (best interest assessors) - 26

Awaiting allocation to BIA - 20

Breaches

Breaches are recorded in accordance with Welsh Government guidance;

- Standard Authorisation: 21 days from allocation to the second assessor until sign off by the Supervisory Body.
- Urgent Authorisations: 7 days from the date the Managing Authority sign the form to allocation and sign off by the Supervisory Body.

It is important to note that figures for activity in each quarter will not correlate 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 the legislation and claims may be pursued as a result. This is noted both on the Corporate Risk Register and the PCT Group Risk Register with a score of 15 and included below

	Breaches carried over & Longest breach time	Referrals received	Assessments granted/not granted	Breaches
October	8 August	67	Granted Not Granted	24 granted 8 breaches 40 not granted

November	6 August	62	Granted	26 granted
			Not Granted	5 breaches
December	8 September	55	Granted	75 not granted
			Not Granted	18 granted
				8 breaches
				56 not granted

Please note, the longest breaches are associated with the backlog of assessments that the external BIA's are completing. Whilst there are a significant number breaching, it is important to note that the number of breaches are reducing month on month and there is a focus on reducing the length of time of breach. The HB (health board) have procured 250 assessments from an independent agency, the performance by the company has been poor and as a result, performance management meetings are in place to improve timescales for completion and have agreement over the number of assessments expected each month.

Approximately 67 referrals are received on a monthly basis. The external provider has been set a target of 35 assessments each month (on average 26 are completed per month). On the basis of accrued assessments, the funding will be sufficient until the end of March 2023. The additional 30 cases per month will be undertaken by the substantive HB BIA and independent BIAs.

Although the number of breaches have reduced considerably to 27 by end of Q3, most breaches are due to a continuing lack of BIA Assessors – both internal and external, along with the fact that 75% of all referrals received for Q3 were for urgent authorisations and the timescale to complete those specific authorisations is challenging.

Current DoLS Workforce

- 1 WTE (whole time equivalent) Team Leader/Best Interest Assessor band 7
- 1 WTE Best Interest Assessor band 6
- 1 WTE Administrator band 4
- External Best Interest Assessors commissioned at a standard rate per assessment £120. Number of BIA's undertaking assessments has reduced dramatically possibly due to recruiting agencies offering a higher remuneration reward. A paper is going to PCT (primary, community, therapies) Group Board to increase BIA payments to £250 that aligns more favourably with other areas, which will hopefully increase numbers of available BIAs. This will further mitigate the HB risk.

Funding

The Health Board received additional funding from WG (Welsh Government) in 2021 to address the DoLS backlog (£232,917) and to support training delivery (£94,813).

Additional Welsh Government funding 2022/23 agreed;

- Phase 1 £102,000
- Phase 2 £152,000
- £292,000 for additional IMCA services.

This funding will be used to support:

- Development of data capacity
- Additional DoLS backlog work
- Additional advocacy arrangements
- Additional training needs identified through development of local workforce and training plan

Action Plan

Funding for phase 1 & 2 has now been transferred over to Corporate Nursing to assist in the implementation of LPS. Welsh Government money has been utilised to fund the following roles to assist with the DoLS backlog and to support with the implementation of LPS.

- Best Interest Assessors band 6 WTE x2 (substantive positions). Interviews arranged for 23.01.2023. The 2 BIA's will be managed by the DoLS team.
- Business Administrative Manager band 5 WTE (fixed term 18 months) to manage the implementation for LPS training.
- Clinical Nurse Educator band 6 x1 (0.6 WTE fixed term contract 18 months) to support training delivery.
- Task & Finish Group meetings, chaired by Gareth Howells are to commence January 2023 to look at the transition plan from DoLS to LPS.

DoLS Training

DoLS training delivery continues 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 developed and recorded a webinar to provide training on the application of DoLS for 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.

Staff attendance at DoLS Training is demonstrated in the Tables below.



Table 3 - DoLS Level 2 Total HB compliance

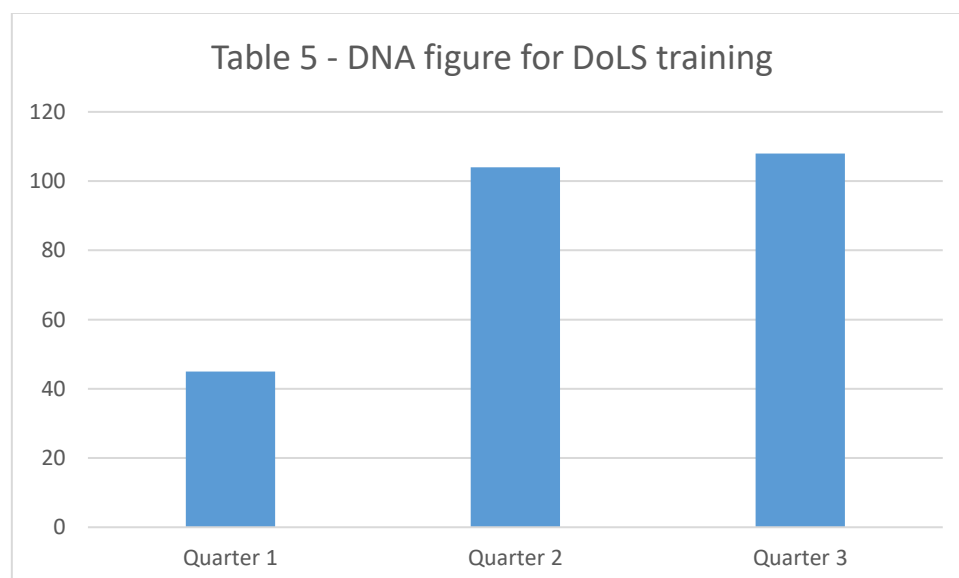
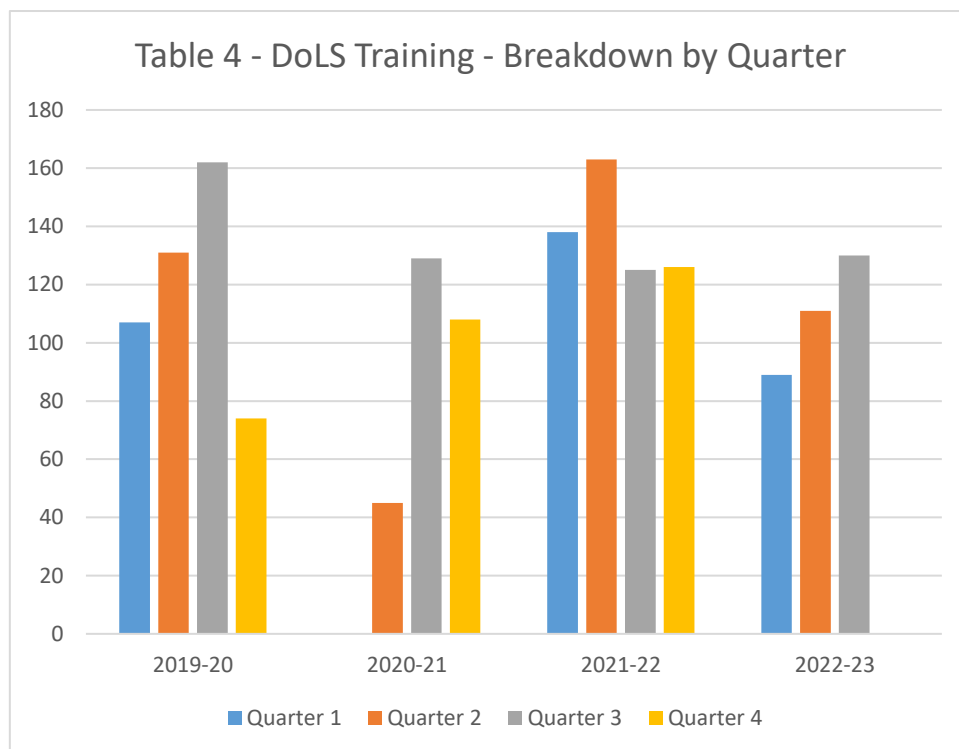
	Q1	Q2	Q3
Total HB compliance	7.9%	8.35%	8.9%

The above tables demonstrate a breakdown of staff attendances at DoLS training to the end of Quarter 3. A total of 10 DoLS Level 2 training sessions have been delivered by Swansea University Law lecturers in Quarters 1, 2 and 3. 328 Health Board Staff have attended this training (Table 1). Staff compliance as recorded by Service Group on ESR (electronic staff record) is demonstrated in Table 2. The overall Health Board staff compliance with Level 2 DoLS training is demonstrated in Table 3. Staff compliance across all Service Groups is low, however it must be noted that the

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compliance will be calculated using all Health Board staff rather than as a percentage of staff required to hold the competency. Therefore, ESR cannot provide an accurate measure of staff compliance.

Attendance in Quarter 3 has improved across all Service Groups, to similar levels as previous years (Table 4), although it is important to note that non-attendance has also increased with a 108 staff not attending the session they were booked for in Quarter 3 (Table 5). Also to note, during Quarter 3 DoLS training was provided as part of Nurse Induction, with an additional 104 staff attending those sessions. As these attendances are not recorded by Service Group they are not included in Table 1 but will be included in compliance recorded via ESR as per Tables 2 and 3.



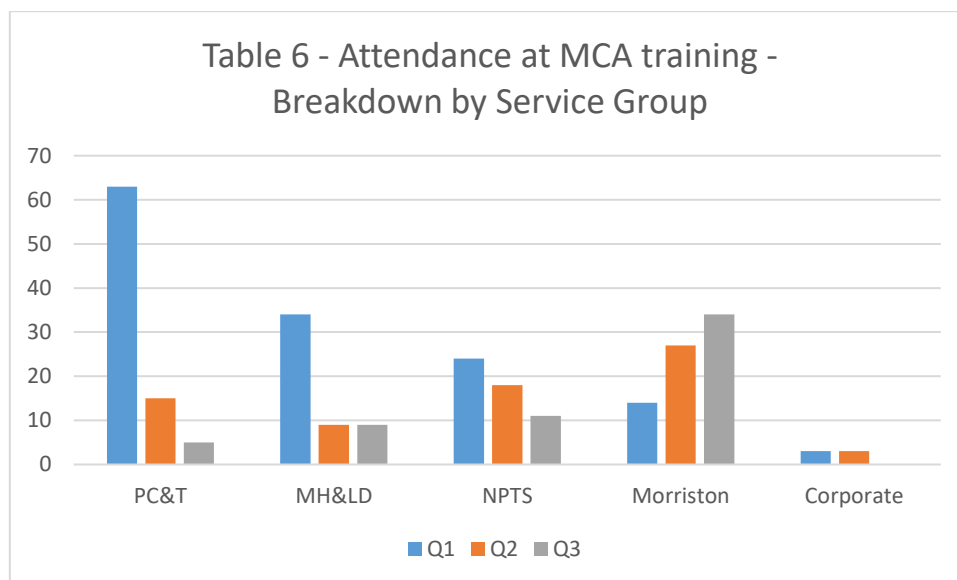
MCA Training

MCA Level 1 & 2 training is delivered as e-learning packages for all SBUHB staff. MCA Level 3 training is directed at ward managers, senior nurses and senior clinicians. MCA Level 3 training continues to be delivered remotely via Microsoft Teams.

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.

In preparation for the introduction of Liberty Protection Safeguards, additional funding for specialist training has been received from Welsh Government. For the period June to December 2022, 4 MCA Principles and 4 MCA Essentials of Mental Capacity Assessments virtual training sessions have been arranged by Swansea University Law lecturers. The MCA Principles session sets out the aim and purpose of the Mental Capacity Act 2005, with particular emphasis on the application of the principles set out in section 1 to practice. MCA Essentials of Mental Capacity Assessment training introduces staff to the essential evidence which will enable them to undertake Mental Capacity Assessments in the course of their practice.

The tables below indicate MCA training attendances during the reporting period.



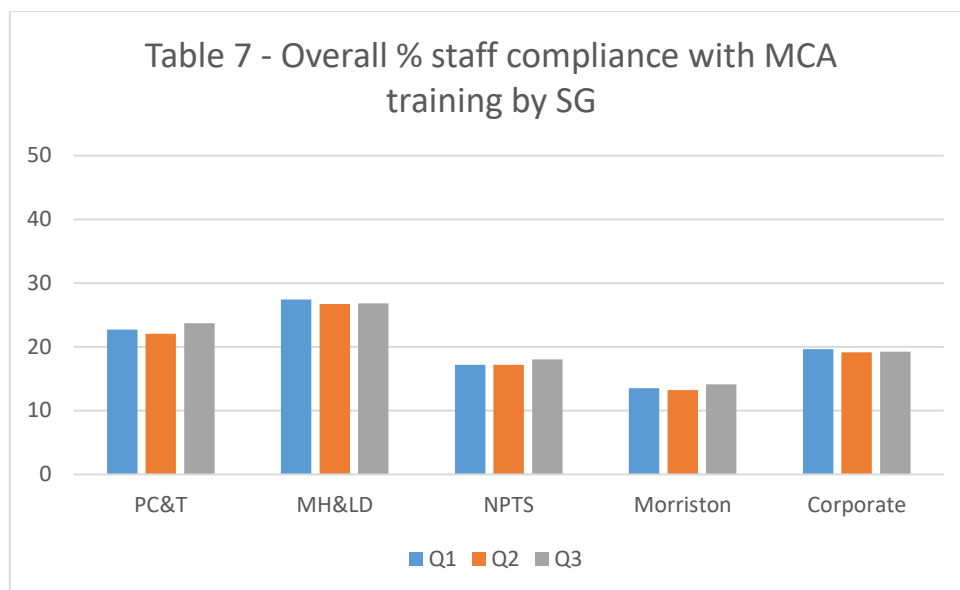
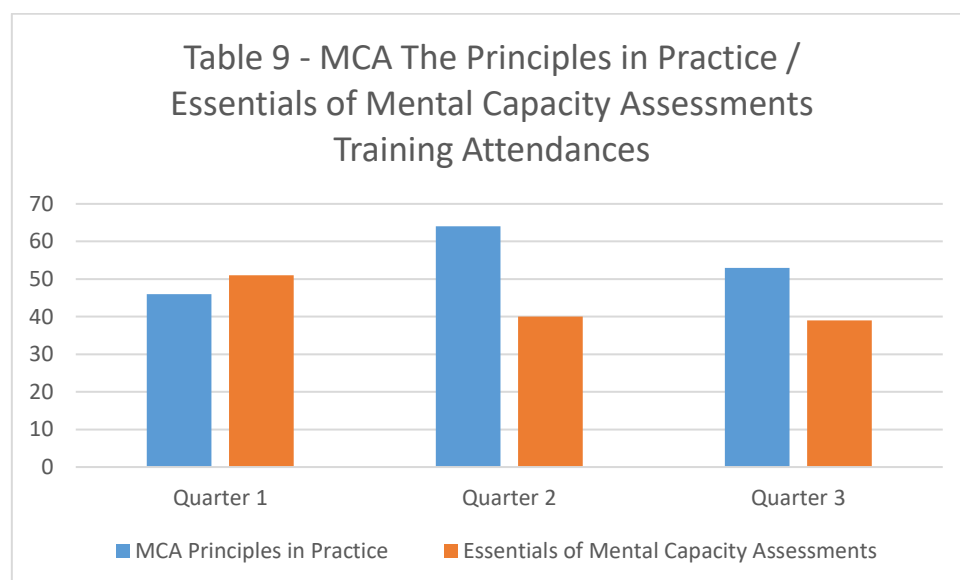


Table 8 MCA Level 2 & 3 Total HB staff compliance

	Q1	Q2	Q3
MCA Level 2	8.39%	8.2%	8.22%
MCA Level 3	15.66%	15.48%	16.25%

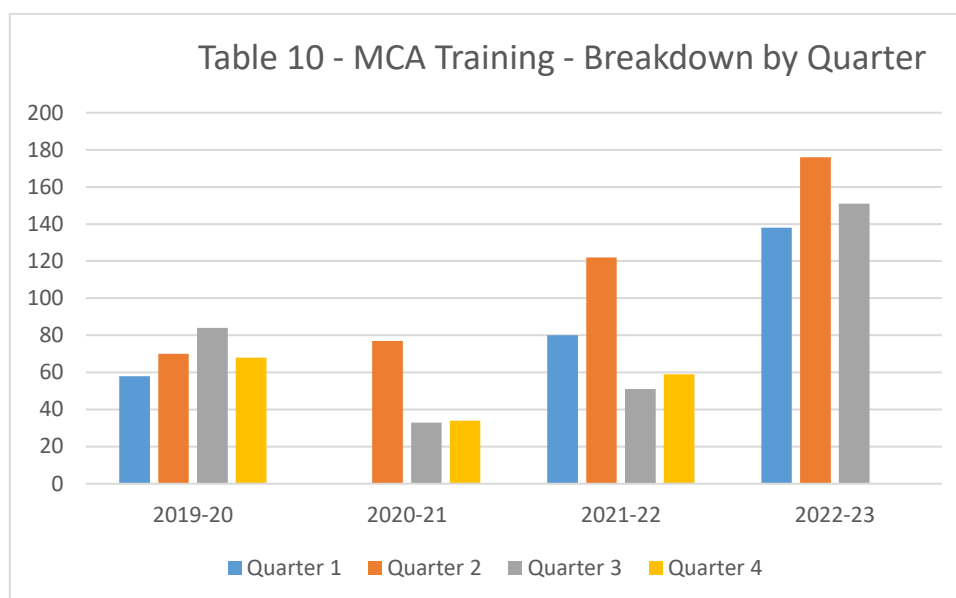


10 virtual MCA Level 3 training sessions have been delivered in Quarters 1, 2 and 3, with 269 Health Board staff attending the training (Table 6). Staff compliance per Service Group is low, however as advised ESR cannot provide an accurate compliance percentage as it does not allow for staff groups not required to hold the competency (Tables 7 and 8). 153 staff attended MCA Principles and 130 staff attended Essentials of Mental Capacity Assessments to date (Table 9).Table 10

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shows a comparison of training data for 2019/20, 2020/21, 2021/22 and 2022/23 across each Quarter.

MCA Training compliance is identified as an area that requires prioritising across all Service Groups and Health Boards in Wales, and it has been recommended nationally that MCA training is given priority. In 2022/23 there has been an improvement in numbers of staff attending MCA Training across all three Quarters.

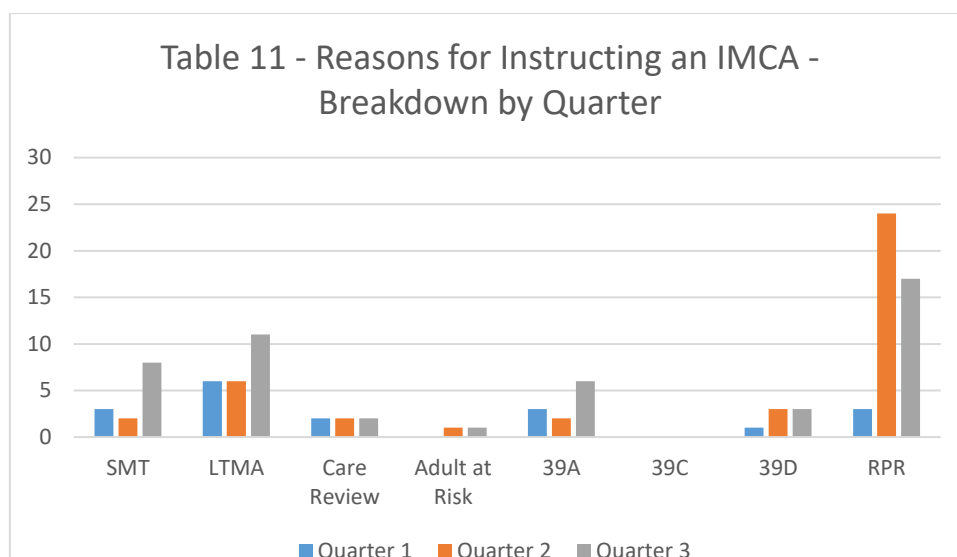


MCA training is imperative to underpinning the preparation for the transition to Liberty Protection Safeguards (LPS). To ensure LPS implementation remains a priority for the Health Board the Corporate Safeguarding Team continue to raise Safeguarding training compliance during the completion of Ward/Department Safeguarding Assurance Audits across all Service Groups. Safeguarding Training compliance is also reported by the Service Groups in their Performance Reports to Safeguarding Committee. There has been an increase in staff attendance at MCA training.

INDEPENDENT MENTAL CAPACITY ADVOCATES (IMCAs)

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

Mental Health Matters Wales provides the IMCA service for the Health Board and quarterly monitoring reports are provided. The below table indicates the number of new IMCA instructions from the Health Board during Quarters 1, 2 and 3 together with the reasons for instruction.



Key

SMT = Serious Medical Treatment

LTMA = Long Term Move of Accommodation

39A = Where a request has been made for a Standard Authorisation, the 39A IMCA's role is to represent the person in the assessments to be carried out.

39C = Role can be understood as covering gaps in the appointments of relevant person's representatives. The role ends when another relevant person's representative is appointed.

39D = Only available when a standard authorisation is in place and the person has an unpaid relevant person's representative. Both the person who is deprived of liberty under a standard authorisation and their unpaid representative (RPR) have a statutory right of access to an IMCA.

RPR = Paid Relevant Person Representative where the assessors have not identified someone to represent the person.

Members will note an increase in RPR requests in Q2, analysis has not identified a specific reason for this and is due to the nature of the individual and their circumstances.

The advocates are continuing to carry out their role using technology, in combination with meeting patients face-to-face where able. The IMCA quarterly monitoring reports continue to be shared via the Safeguarding Committee and include case scenarios.

Mental Capacity Act

MA compliance: Evidence of inconsistent understanding and implementation of MCA/DoLS across the service areas, 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) after an urgent request is received by the Supervisory Body.

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.

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 BIA's to undertake the assessments. Currently the health board are relying on BIAs from a number of sources due to paucity of substantive BIA's in post. DoLS assessments are being undertaken by an External Provider, external BIA and BIA's within the health board.
- There is a back log of cases awaiting assessment with 27 outstanding assessments, this is due to COVID restrictions, reduced footfall on the ward areas and limited BIA availability.

Mitigation for Covid restrictions:

- BIAs have been undertaking both remote and face-to-face assessments on the acute sites.
- A telephone triage and support service is available Monday to Friday 8am to 5pm.
- BIAs will work with staff in the acute settings to ensure robust care plans are in place to manage DoLS.
- 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 is still available.
- BIAs have been supporting acute staff with 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 local guidance has been updated in line with government's updated guidance and widely circulated to relevant staff.

High Risk

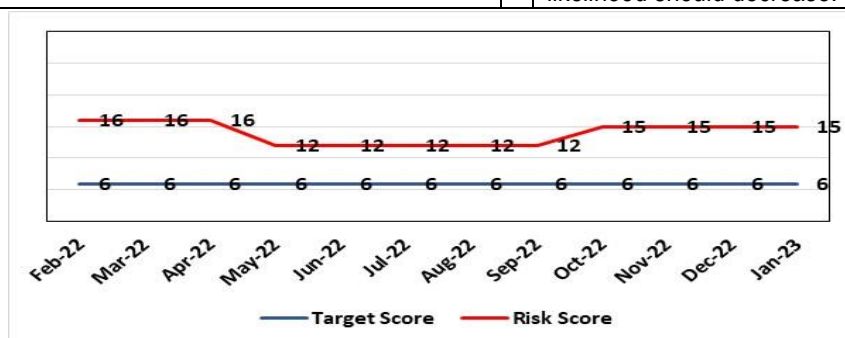
- The newly appointed BIA commenced 1st August 2022. However due to only 1 WTE BIA within the team, the DoLS team are heavily reliant on assessment's being undertaken by external BIA's.

Risk

Reference number HBR 43

ID 1514

Datix ID Number: 1514 Health & Care Standard: Safe Care 2.1 Managing Risk & Promoting Health & Safety	HBR Ref Number: 43 Risk Target Date: 30th September 2022 Current Risk Rating 3 x 5 = 15
Objective: Best Value Outcomes from High Quality Care	Director Lead: Gareth Howells, Executive Director of Nursing Assuring Committee: Quality and Safety Committee
Risk: Due to a lack of Best Interest Assessor resource, there is a risk of failure to complete and authorise the assessments associated with Deprivation of Liberty/Liberty Protection Safeguards within the legally required timescales, exposing the health board to potential legal challenge and reputational damage.	Date last reviewed: January 2023 Rationale for current score: Although processes have been planned in order to reduce the breach position they have yet to be fully implemented. The impact is yet to be realised. The position will be reviewed next month.
Risk Rating (consequence x likelihood): Initial: 4 x 4 = 16 Current: 3 x 5 = 15 Target: 3 x 2 = 6	
Level of Control = 40%	Rationale for target score: Consequences of DoLS breaches for the Health Board will not change. With controls in place, over time likelihood should decrease.



Liberty Protection Standards (LPS)

There has been no further update on the implementation date for Liberty Protection Safeguards. The consultation is now complete and the Code of Practice is in the process of review by West Minister Government and the regulations by Welsh Government. Completion of this is anticipated to be later this year and a 6-month period will be required following this to manage the legislative processes. Any implementation date is now likely to be early 2024, but the expectation is still that all Health Boards will be LPS ready once the date is announced.

Work is well advanced in procuring providers to develop the all Wales training package and the Health Board has provided representation to this. It is

anticipated that the training will be launched prior to the implementation date to support staff with the changes required in practice and the Health Board will be required to implement this.

The Health Board's strategic lead for Occupational Therapy sits on the All Wales LPS Implementation Steering Group and meetings are once again in progress. Representatives from the DoLS Team and the Head of Nursing for LPS attend the NHS Wales Network Task & Finish Groups and dedicated work streams that feed into the Welsh Government National Steering Implementation Group. Regional groups with Health Board and Local Authority representation are meeting regularly to support developments required and prepare for the implementation of LPS.

Annual Monitoring Report 2020-21

The annual monitoring report of Care Inspectorate Wales (CIW) and Healthcare Inspectorate Wales (HIW), on the implementation of Deprivation of Liberty Safeguards (DoLS) in Wales covering the period April 2020 until the end of March 2021 has been received and accepted in the Health Board.

The key highlights were:

- SBU had the greatest proportion of standard applications taking over 28 days to process (74%) (The next nearest was 67%)
- SBU had the greatest proportion of urgent applications taking over 28 days to process (76%) (The next nearest was 72%)
- SBU processed the greatest proportion of applications with duration of over 3 months (62%) (The next nearest was 59%). *It was highlighted in Q4 report that SBUHB has 7 long stay assessment units (Cefn Coed Hospital, Tonna Hospital and Neuro Rehab Unit) which accounted for 92.5% of applications with a duration of over 3 months due to residing in a long stay assessment unit.*

Actions progressing as a result of the report and from Q4 report include:

- External company retained to support ongoing back log issues
- Ongoing work to identify required workforce for LPS
- Additional training for MCA/DoLS being provided to relevant professionals in anticipation for LPS.
- Learning from other Health Boards for the management of DOLs and their prep for LPS being considered.

RECOMMENDATIONS

Members are requested to:

1. Note the performance data for Quarter 3 – October to December 2022 together with cumulative information for year to-date.

2. Note that there is a further delay on the implementation date for LPS. Suggested proposed time scale is likely to be April 2024.
3. Note the work relating to the DoLS backlog and LPS training utilising funds from Welsh Government.
4. Note the Risk Rating

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.		
Legal Implications (including equality and diversity assessment)		
Report reference the legal framework which is current and the future LPS implementation		
Staffing Implications		
Report outlines the current staffing capacity issues and identifies the potential for future staffing model to become compliant.		
Long Term Implications (including the impact of the Well-being of Future Generations (Wales) Act 2015)		
Report makes reference to future legislation.		
Report History	Presented to MHA&MCA Compliance Committee in October 2022	
Appendices		