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Bae Abertawe

Swansea Bay University
Health Board



Meeting Date	05 May 2022		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 4, January to March 2022			
Report Author	Tanya Spriggs, Nurse Director Primary Community & Therapy Service Group, Karen Gronert, Head of Nursing, 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 4 Update on Welsh Government funding for DoLS/MCA training and DoLS breaches Update on proposed new LPS HIW DoLS annual monitoring report for 20/21 			
Specific Action Required <i>(please choose one only)</i>	Information	Discussion	Assurance	Approval
	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Recommendations	Members are asked to: <ul style="list-style-type: none"> NOTE the performance data for Quarter 4 – January to March 2022 together with cumulative information for year to-date (Appendix 1). 			

	<ul style="list-style-type: none"> • NOTE that there is a further delay on the implementation date for LPS. Suggested proposed time scale is likely to be Oct 2023/April 2024. LPS Code of Practice and Guidance has been disseminated for a 16-week consultation period (17th March 2022 until 7th July 2022). • NOTE that an external Agency has been commissioned to undertake Best Interest Assessments to meet the DoLS backlog utilising funds from Welsh Government. • NOTE that further Welsh Government funding to manage the DoLS backlog and DoLS/MCA Training is to be made available. Proposals for this funding are to be submitted by 25th April 2022. • NOTE the DoLS annual monitoring report (appendix 2)
Appendices	Appendix 1 and Appendix 2

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).

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 and Draft regulation for LPS and the MCACOP was published on the 17th March 2022 for 16-week consultation date.

3. PERFORMANCE, GOVERNANCE AND RISK ISSUES

Referrals

In Q4 there were 214 referrals received, of those a total of 8 were assessed by the two dedicated BIAs, two Internal staff members completed 9 BIA assessments (not primary role). Total number granted 13.

The external BIA's assessed 14 patients, of which 6 were from the previous quarter. 9 were granted, with 4 awaiting completion for the period January to March 2022, of the 28 assessed 5 were not granted as patients were either discharged/not a deprivation or deceased. (**Appendix 1**).

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: 5 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 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 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 12.

The cumulative number of discharges from 1st April 2021 to 31st March 2022 equates to 807, (this figure includes discharges, death, further assessments required, reviews of conditions those subject to a DoLS which may result in a breach of time scales, patients not meeting DoLS criteria therefore DoLS applications not applicable).

Although the number of breaches have risen again (106 in Q1, 109 in Q2 and 125 in Q3 and 147 in Q4), most breaches are due to a continuing lack of BIA Assessors – both internal and external. The breach timeframes range between 3 weeks and 5 months. 89% of all referrals received for Q4 were for urgent authorisations.

The health board currently has funding in place for one Best Interest Assessors (BIA) band 6, one Team Leader band 7 and one band 4 administrator. The band 6 post is currently vacant and is in the process of being advertised.

An opportunity to bid for funding from Welsh Government to address the current backlog and keep pace with the new applications, and to prepare for the implementation of LPS was successful and secured £327,730 which will be used to address the following: -

- DoLS backlog - £232,917
- Assessing mental capacity and best interest training - £94,813

Best Interest Assessor training has been sourced from Swansea University and to train nine nurses to address the backlog of DoLS assessments. Further training has been secured for Mental Capacity Act via Swansea University and EDGE. Local Authority colleagues are undertaking this training jointly which will offset some funding costs. External Best Interest Assessors are commissioned to help support the DoLS team in conjunction with overtime from the recently trained Best Interest Assessors. However, this has not been as successful as hoped with only three assessors out of nine trained undertaking DoLS assessments. Furthermore, the health board now has only one external BIA undertaking assessments due to recruiting agencies offering a higher remuneration reward. An SBAR is to be submitted to explore the option of a higher assessment rate for external BIA's.

To address the back log of DoLS assessments an external agency has been commissioned to undertake 250 DoLS assessments utilising Welsh government

funding. Contracts have been agreed and the agency commenced on 4th April 2022. It is predicted that the current breaches will be cleared by end of Q1 2022.

Further Welsh Government funding is being made available during 2022/23 to help manage the ongoing DoLS breaches and provide training in anticipation of LPS predicted to be implemented between October 2023/April 2024. Application for £102,000 funding to be submitted to Welsh Government by 25th April 2022.
Bid request;

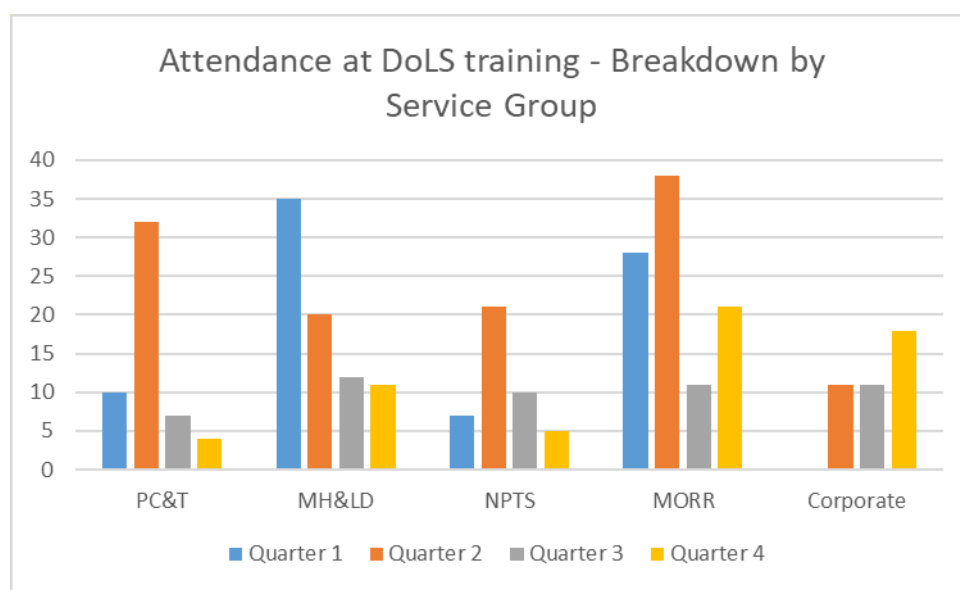
- Agency Best Interest Assessors to provide 190 assessments @ £375 + VAT = £85,500
 - Tailored MCA Training with University of Wales Swansea £16,500
- Total £102,000**

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 Table below.

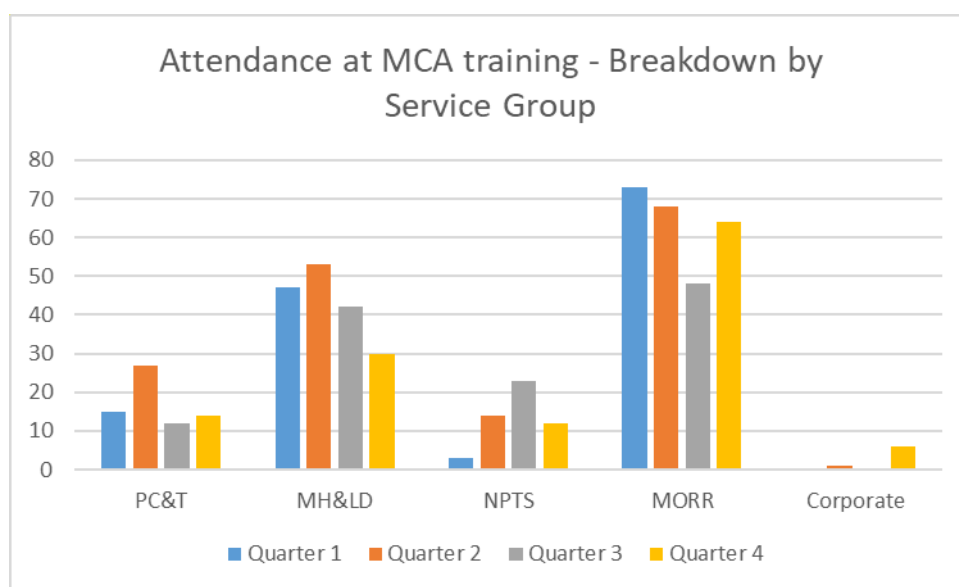


MCA Training

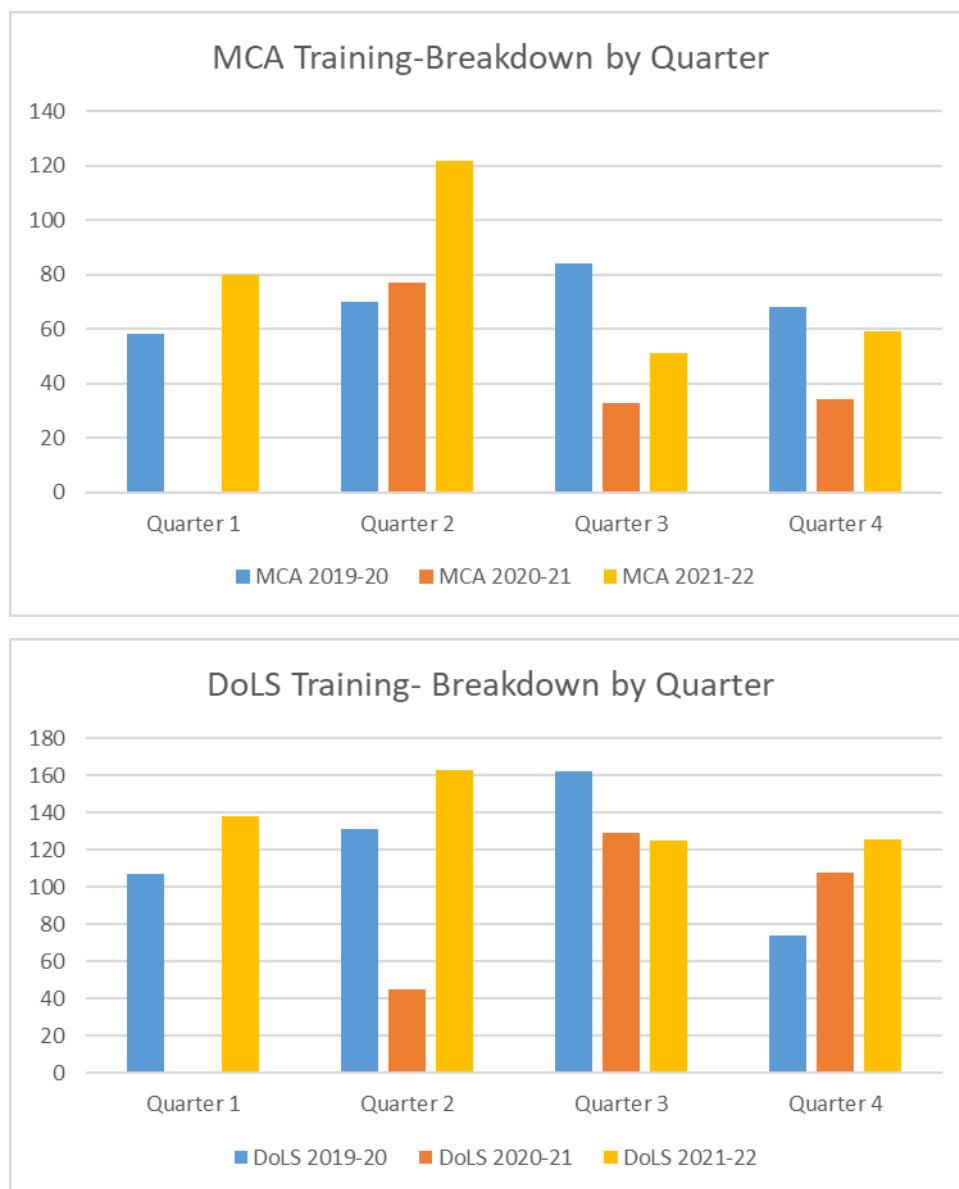
MCA Level 1 & 2 training is delivered as an e-learning package for all SBUHB staff. MCA Level 3 training is directed at ward managers, senior nurses and senior clinicians.

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 table below indicates training attendances during the reporting period.



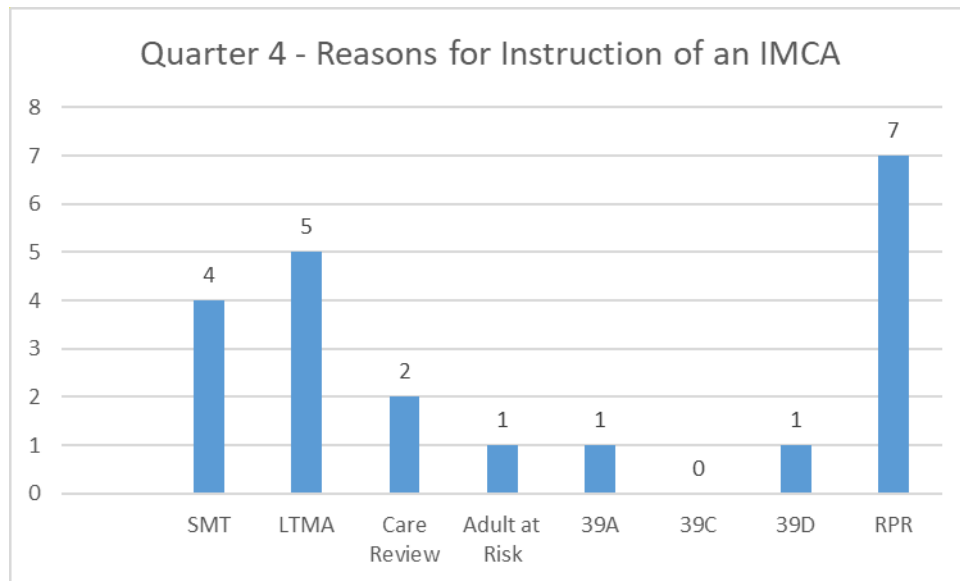
The below tables shows a comparison of training data for 2019/20, 2020/21 and 2021/22 across each Quarter. MCA Training compliance has been identified as an area that requires prioritising across all Service Groups and Health Boards in Wales, and it has been recommended nationally that MCA training is given priority. MCA is imperative to underpinning the preparation for the transition to Liberty Protection Safeguards (LPS). A paper relating to LPS was presented to the Safeguarding Committee in May 2021 highlighted this issue amongst others, to ensure LPS implementation remains a priority for the Health Board. In addition, the Corporate Safeguarding Team continue to raise Safeguarding training during the completion of Ward/Department Safeguarding Assurance Audits across all Service Groups. These Audits include all staff Safeguarding training compliance. 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 and DoLS 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 unfriended; 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 Quarter 4 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.

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) updates are now reported separately on the Mental Health Legislation In-Committee agenda due to the sensitivity of the information.

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 one dedicated BIA to undertake all assessments.
- Restrictions on visiting patients to carry out assessments.
- Limited ability to undertake remote assessments (time for front line staff to support the patient with the assessment).
- There is a back log of cases awaiting assessment with 90 outstanding assessments, this is due to COVID restrictions, reduced footfall on the ward areas and limited BIA availability.

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

- 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

- There has been an impact on the day to day delivery of the current DoLS service and the introduction of the proposed LPS service due to limited resources. A full time band 6 BIA fixed term contract until 31st March 2022 had been secured and commenced 3rd January 2022. This ceased on 31st March 2022. As LPS is now no longer being implemented April 2022 it was decided to revise the band 6 BIA Job Description to incorporate the '*willingness to retrain as an Advanced Mental Capacity Practitioner (AMCP)*'. This post is in the process of being advertised.

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. COVID-19 has had an impact on the number of breaches, 110 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. 89% of all referrals received for Q4 were for urgent authorisations. Urgent authorisations require to be completed within 5 days of referral completion by the MA.

Liberty Protection Standards (LPS)

The implementation date for legislative changes from Deprivation of Liberty Safeguards to Liberty Protection Safeguards is now predicated to be between October 2023 – April 2024. The aim of this longer period is to allow health boards to have sufficient time to implement these changes. LPS Code of Practice and Guidance has now been disseminated for a 16-week consultation period (17th March 2022 until 7th July 2022). 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 Groups and dedicated workstreams that feed into the Welsh Government National Steering Implementation Group.

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 to lead in these changes a fixed term contract has been appointed as Head of LPS (8b) role. This is to be extended, date to be confirmed. The new lead will explored if the Health Board is able to meet the new LPS and MCA legislative requirements.

Annual Monitoring Report 2020-21

The Deprivation of Liberty's Safeguarding annual monitoring report for Health and Social Care 2020-21 has now been published. This is 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. The report is produced on behalf of Welsh Ministers. The report covers the period April 2020 until the end of March 2021. It is important to highlight that the data in this report will have been significantly affected by the Covid-19 pandemic.

Key findings were;

- Decrease in the number of Deprivation of Liberty Safeguards (DoLS) applications received by supervisory bodies in 2020-21. Applications to health boards decreased by 6%.
- Compared to the previous year, the total number of DoLS applications to local authorities decreased by 12%.
- The majority of DoLS applications continue to be for older people, with 87% of applications being for people over the age of 65. Most applications for DoLS continue to be from care homes for older adults, and from hospital wards for older adults.
- As in previous years there were significantly more DoLS authorisations for men compared with women, up to the age of 64. However, after the age of 85 a significantly higher number of authorisations related to women.
- Compared to the previous year, the proportion of applications received by health boards classed as urgent increased from 75% to 81%. Conversely, the figures for local authorities decreased from 21% to 17%.
- The length of time taken to process applications remains poor. This suggests supervisory bodies were unable to assure themselves that people's human rights were not being breached by being deprived of their liberty unlawfully.
- The proportion of standard applications processed that took over 28 days in health boards and local authorities, were 55% and 85% respectively.
- The proportion of applications processed via the urgent route that took over 7 days in health boards and local authorities, were 94% and 93% respectively.
- Over the last three years there has been an increase in both the number of DoLS reviews undertaken, and representations made by Independent Mental Capacity Advocates (IMCAs).
- The proportion of authorisations referred to the Court of Protection has seen year on year increases for the period 2018-21

SBUHB update

In respect of SBU, the data in the report highlights SBU as an outlier on the below;

- 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%)

Explanation

SBU employed 2 wte BIA. To help support with the applications external BIA's are commissioned as well as utilising health board BIA's. During this time period, due to Covid-19, health board BIA's were unable to undertake any assessments due to redeployment and allocation of resources to acute sites. External BIA's were reluctant to undertake assessments in acute sites due to the risk of infection. As a result of these factors, the health board only had 2 BIA's to undertake the assessments during this time period, hence 74% of standard applications and 76% of urgent applications breaching 28 days.

- SBU processed the greatest proportion of applications with duration of over 3 months (62%) (The next nearest was 59%)

Explanation

This report does not highlight the percentage of long stay beds across Wales in assessment units. SBUHB currently has 7 long stay assessment units. These include, Cefn Coed Hospital, Tonna Hospital and Neuro Rehab Unit.

92.5% of applications with a duration of over 3 months were due to residing in a long stay assessment unit.

Applications made to SBUHB 20/21

Total Referrals
712
530 urgent
166 standard
16 reviews

MH/LD/NIU
250
140 urgent
88 standard
14 reviews

Positive outcomes

SBUHB have been recorded as being the highest users for IMCA services. Thereby identifying that SBUHB ensures that patients have appropriate representation.

Actions

To prevent further breaches and in preparation for LPS, SBUHB is to set out a number of actions;

- External company commissioned to support ongoing back log issues

- The current DoLS structure is fragmented and under resourced. It is necessary to consider the new roles required and that the HB does not have BIA's to transition into these roles within the current resource. There is one substantive BIA post out to advert which is the sole post for the Health Board. The DoLS team leader is a qualified and experienced BIA who supports with the most complex cases and those are often in the court arena and take up substantial time and expertise. This is in comparison to Hywel Dda who have seven full time employed BIA's and a dedicated lead for MCA. The Health Board has tried to manage this with the use of independent BIA's and training others to undertake assessments alongside their substantive posts, but this has not worked and the applications total for last year exceeded 800 resulting in the Health Board being noted as an outlier in achieving the required targets as outlined in ***HIW Annual Report - Deprivation of Liberty Safeguards (DoLS) annual monitoring report 2020-2021.***
- Additional training for MCA/DoLS to be provided to relevant professionals in anticipation for LPS.
- Further learning from other Health Boards around management of DoLS and further strategies we may consider adopting.

RECOMMENDATIONS

Members are requested to:

1. Note the performance data for Quarter 4 – January - March 2022 together with cumulative information for year to-date (Appendix 1)
2. Note that there is a further delay on the implementation date for LPS. Suggested proposed time scale is likely to be Oct 2023/April 2024. LPS Code of Practice and Guidance has been disseminated for a 16-week consultation period (17th March 2022 until 7th July 2022).
3. Note that Liquid Personnel Agency has been commissioned to undertake Best Interest Assessments to meet the DoLS backlog utilising funds from Welsh Government.
4. Note that further Welsh Government funding to manage the DoLS backlog and DoLS/MCA Training is to be made available. Proposals for this funding are to be submitted by 25th April 2022.
5. Note the DoLS annual monitoring report (appendix 2)

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 November 2021	
Appendices	Appendix 1 provides performance information for Q4, together with cumulative totals for period 01.04.2021 to 31.04.2022. Appendix 2	