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Bwrdd Iechyd Prifysgol
Bae Abertawe

Swansea Bay University
Health Board



Meeting Date	03 November 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 2, July to September 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 2 • Update on Welsh Government funding for DoLS/MCA training and DoLS breaches • Update on proposed new LPS 		
Specific Action Required <i>(please choose one only)</i>	Information	Discussion	Assurance
	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Recommendations	Members are asked to: <ol style="list-style-type: none"> 1. Note the performance data for Quarter 2 – July to September 2022 together with cumulative information for year to-date. 		

	<ol style="list-style-type: none"> 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 submitted on 14th July 2022 following a 16-week consultation period. 3. Note the work relating to the DoLS backlog utilising funds from Welsh Government. 4. Note that further Welsh Government funding to manage the DoLS backlog and DoLS/MCA Training has been made available.
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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 2 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 and Draft regulation for LPS and the MCACOP was published on the 17th March 2022 for 16-week consultation date. SBUHB response as well as a regional response was submitted 14th July 2022.

3. PERFORMANCE, GOVERNANCE AND RISK ISSUES

Referrals

Referrals received	July 54	August 83	September 64	Total
Urgent	45	70	59	174
Standard	9	12	5	26
Review	0	1	0	1
Breaches from previous months	2	5	33 Increased due to AL and sickness	

Status	July	August	September	Total
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Granted	26	30	36	92
Not granted (regained capacity)	6	6	3	15
Not granted (discharged)	19	33	23	75
Not granted (RIP)	8	8	7	23
Not Granted (sectioned)	0	1	2	3
Ongoing*	36	40	47	

Please note – the numbers will not correlate each month as there is a rolling backlog each month, in this case, there were 47 cases carried over into October 2022.

*Ongoing – **awaiting assessments from BIAs 11**

Awaiting allocation to BIA 36

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 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.

	Breaches carried over & Longest breach time	Referrals received	Assessments granted/not granted	Breaches
July	36 – from June	54	Granted 26 Not Granted 33	24
August	40 2 from July	83	Granted 30 Not Granted 48	11
September	47 2 from July & Aug	64	Granted 36 Not Granted 35	5

Please note, the longest breaches are associated with the backlog of assessments that the external BIA's are completing. Whilst there is 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 have procured 250 assessments, the performance by the company was slow in Q1. As a result, performance management meetings are in place with the external company 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, this funding takes us through to December. The additional 30 cases per month will be undertaken by the newly appointed HB BIA and independent BIAs.

Although the number of breaches have reduced considerably to 47 for Q2, most breaches are due to a continuing lack of BIA Assessors – both internal and external, along with the fact that 84% of all referrals received for Q2 were for urgent authorisations and the timescale to complete those specific authorisations is challenging.

[Deprivation of Liberty Safeguards caseloads hit record levels in 2021-22](#)

Statistics reported by NHS England 2022 identified a dip in deprivation of liberty applications in 2020-2021 reversed in 2021-2022, with statutory timescales falling to one in five. Councils in England received 270,650 applications to deprive a person of liberty from care homes and hospitals, up 5.5% on the 2020-21. Applications of urgent authorisations increased to 56%, from 54% in 2020-21.

SBUHB has undertaken some work through benchmarking across health boards in Wales to ascertain the number of urgent authorisations submitted compared to standard authorisations. Outcome identified that SBUHB is reporting similar numbers of urgent authorisations compared to other health boards. However there is concern that wards submitting high levels of urgent authorisations dilutes the urgency of some referrals placing the supervisory body at risk of being unable to sufficiently prioritise individuals at higher risk. To mitigate this risk to patient care the form 1a referral template is being reviewed to help support ward staff in their decision making around their decision-making when requesting an urgent or standard authorisation.

Current DoLS Workforce

- 1 WTE 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. Number of BIA's undertaking assessments has reduced dramatically possibly due to recruiting agencies offering a higher remuneration reward.

Funding

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

An additional £102,000 of Welsh Government funding phase 1 has been awarded to the Health Board for 2022/23 to help manage the ongoing DoLS breaches and provide additional training in preparation of LPS which predicted to be implemented between October 2023 and April 2024. Phase 2 bid of £152,000 was agreed by Welsh Government to support workforce development plans and can be used to support:

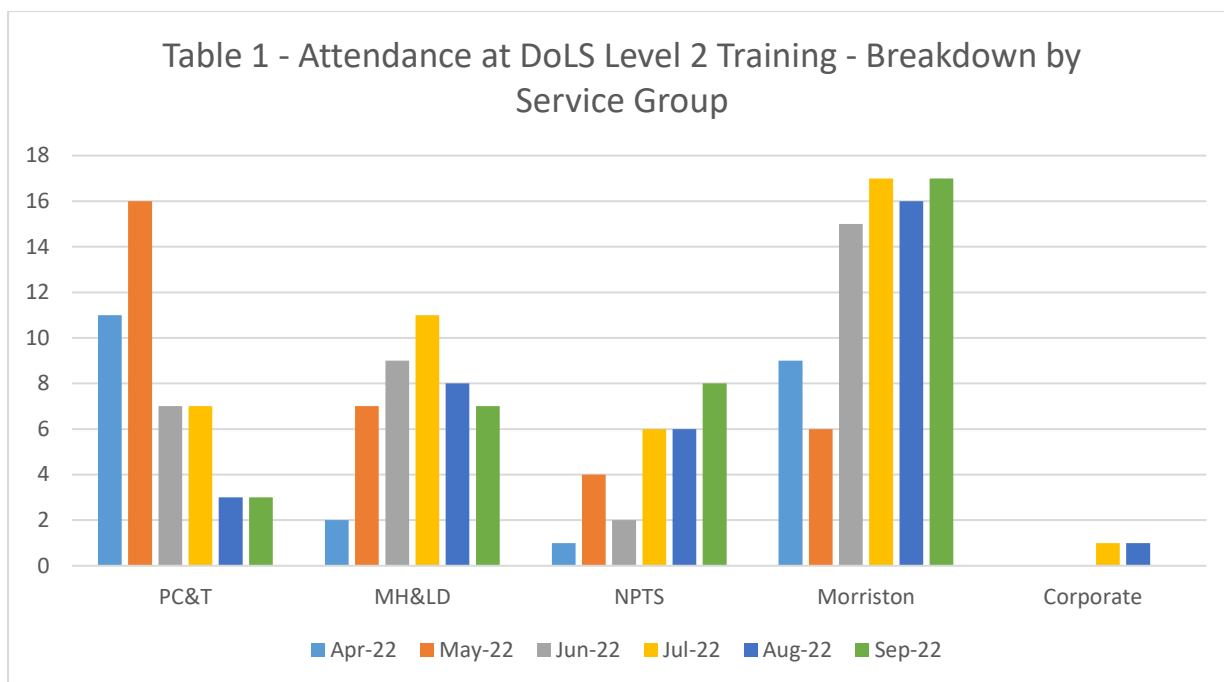
- Development of data capacity
- Additional DoLS backlog work
- Additional advocacy arrangements
- Additional training needs identified through development of local workforce and training plan

DoLS Training

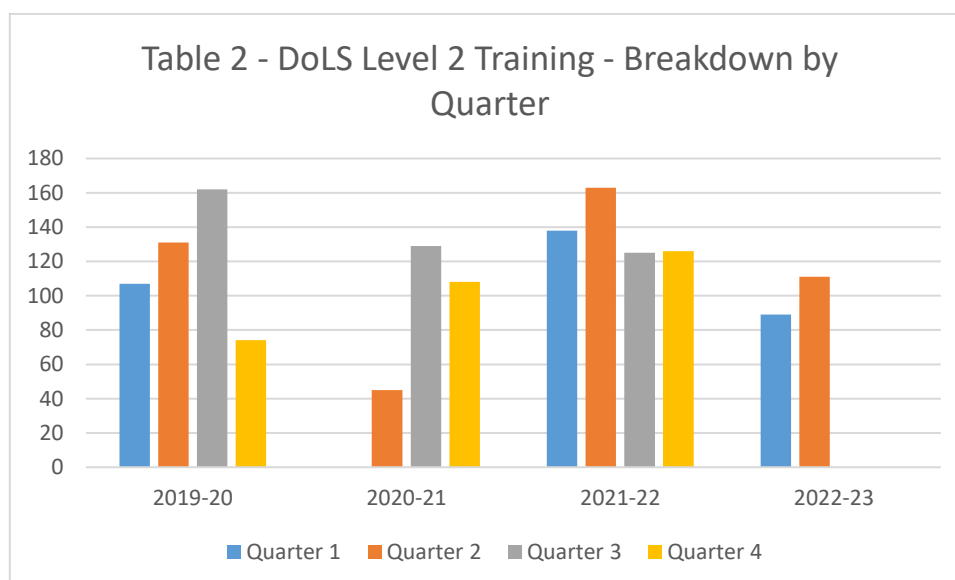
DoLS training delivery continues via virtual platforms, and incorporates links between theory and practice in an aim to increase staff confidence and improve standards in practice.

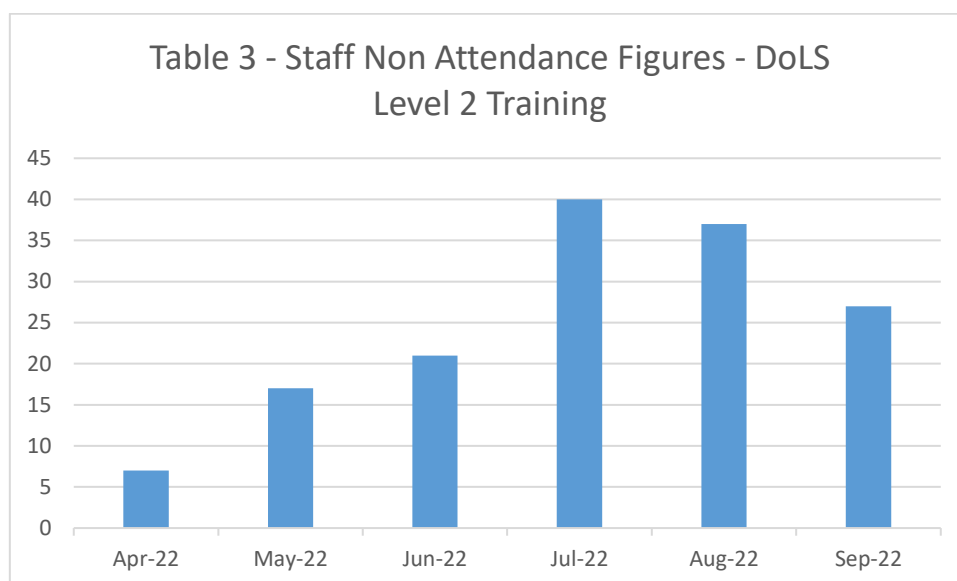
Swansea University Health Law Department has developed and recorded a webinar to provide training on the application of DoLS for 16 and 17 year olds. This webinar can be accessed at any time and provides an additional resource for staff who may be involved with young people as part of their role. This 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.



The table below shows a comparison of training data for 2019/20, 2020/21, 2021/22 and 2022/23 across each Quarter. In 2022 staff attendance at DoLS training has reduced in Quarters 1 and 2. Table 3 demonstrates the numbers of staff who book on DoLS training and do not attend. In Quarter 2 111 staff attended DoLS training and 104 staff who had been booked onto DoLS training did not attend. In the main no reason is provided for non-attendance. The Corporate Safeguarding Team will continue to monitor staff training attendance and the numbers of staff booking onto training and not attending, this issue will also be highlighted in Safeguarding Committee 10th November.





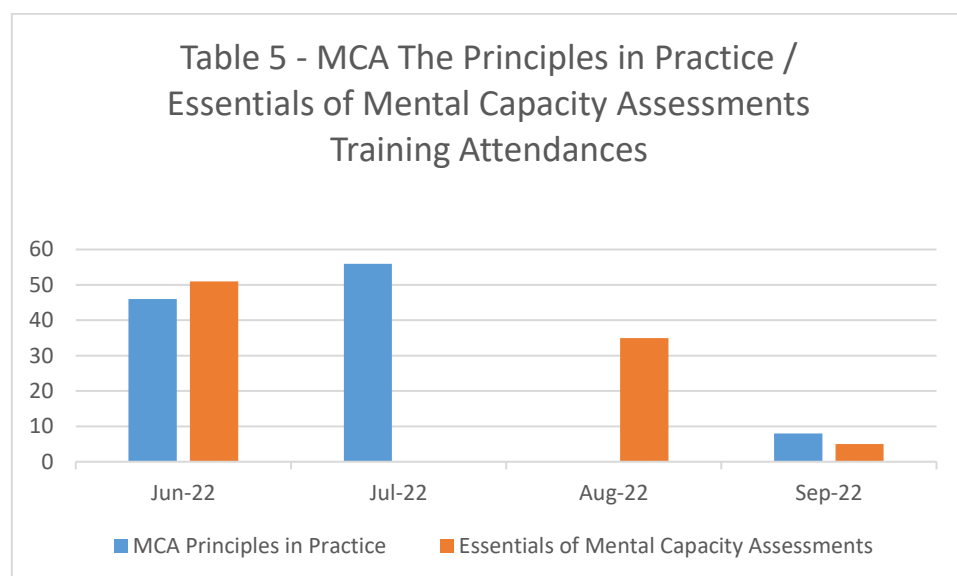
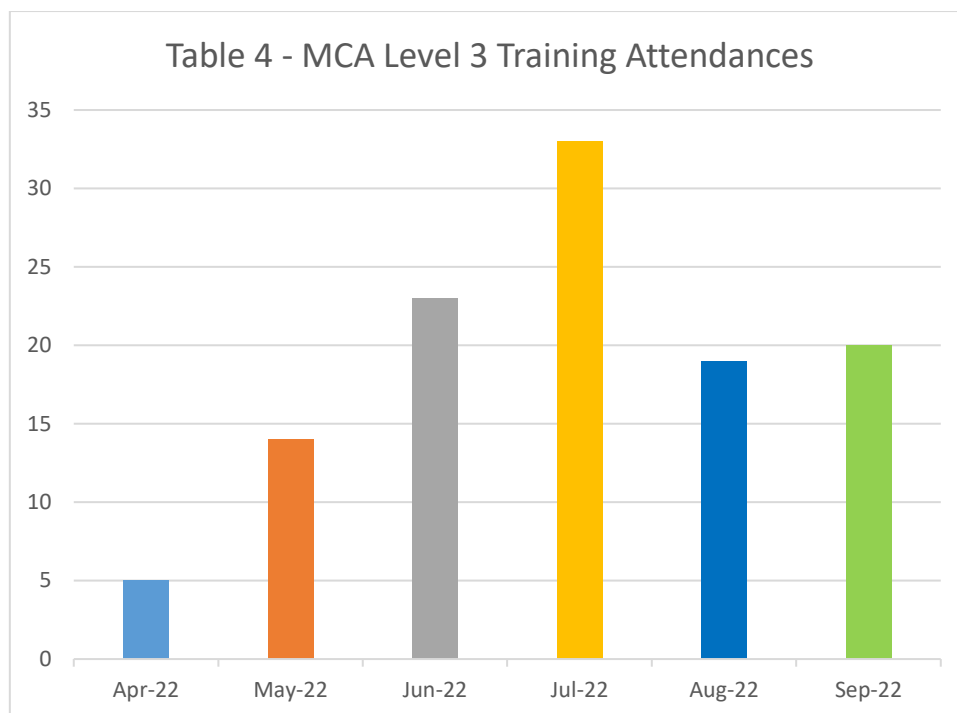
MCA Training

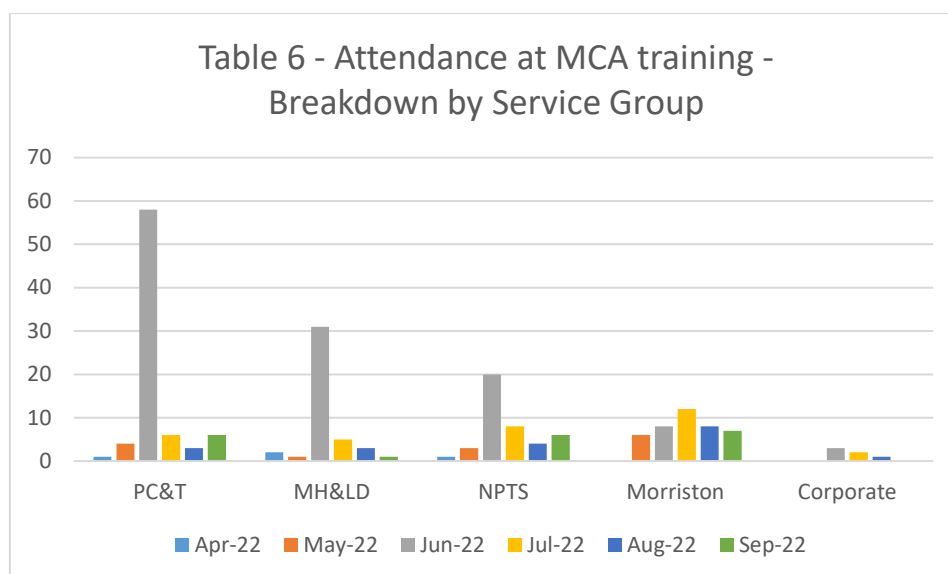
MCA Level 1 & 2 training is delivered as e-learning packages for all SBUHB staff. MCA Level 3 training is directed at ward managers, senior nurses and senior clinicians. MCA Level 3 training continues to be delivered remotely via Microsoft Teams.

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.

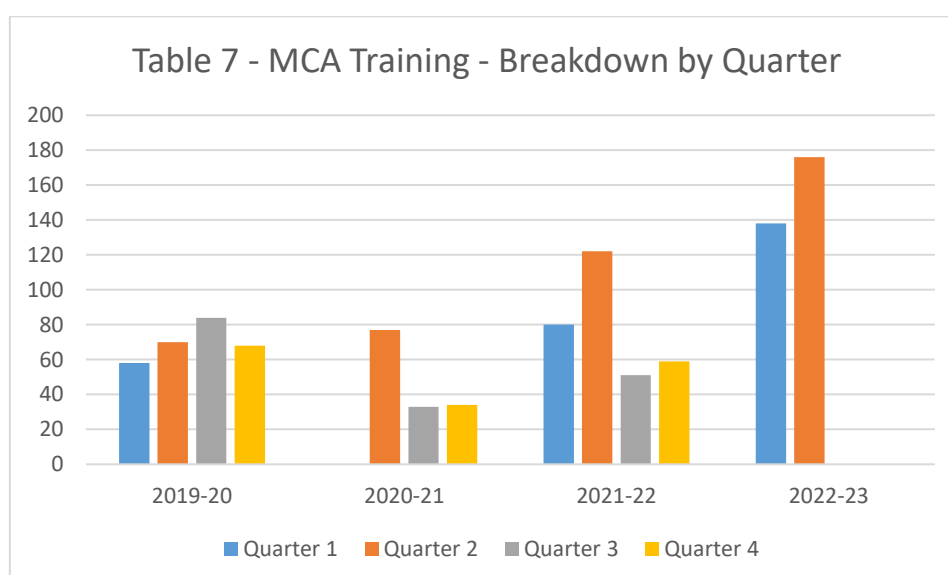
In preparation for the introduction of Liberty Protection Safeguards, additional funding for specialist training has been received from Welsh Government. For the period June 2022 to March 2023, 4 MCA Principles and 4 MCA Essentials of Mental Capacity Assessments virtual training sessions have been arranged 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.





The tables below show a comparison of training data for 2019/20, 2020/21, 2021/22 and 2022/23 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. 2022/23 Quarters 1 and 2 have seen an improvement in numbers of staff attending MCA Training.



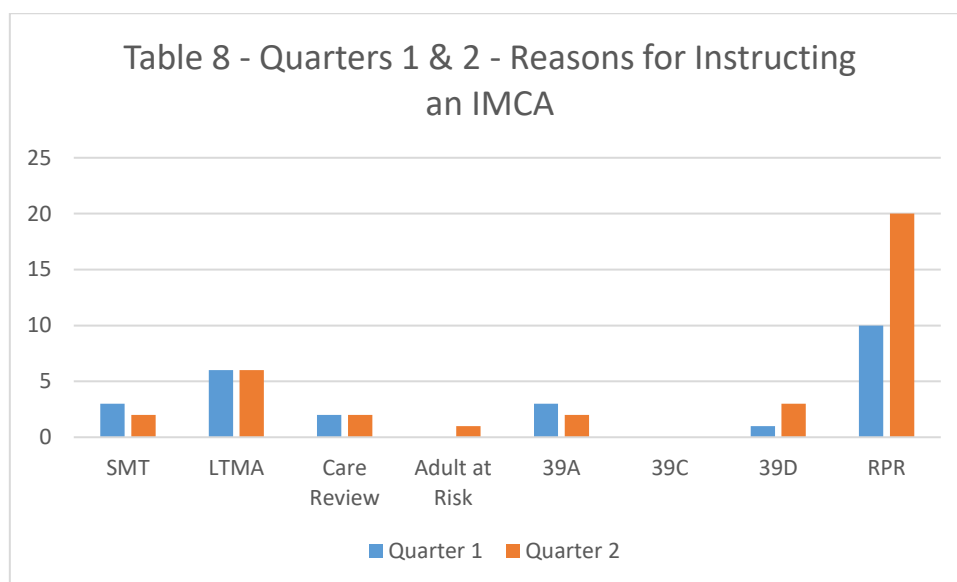
MCA training is imperative to underpinning the preparation for the transition to Liberty Protection Safeguards (LPS). To ensure LPS implementation remains a priority for the Health Board the Corporate Safeguarding Team continue to raise Safeguarding training compliance during the completion of Ward/Department 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 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.

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.

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 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.
- Restrictions on visiting patients to carry out assessments on COVID positive wards.
- 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 38 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.

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 16-week consultation period has been submitted on 14th 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. Head of LPS has been appointed on a fixed term contract for 15hrs per week to help steer the transition from DoLS to 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 2 – July - September 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 Oct 2023/April 2024. LPS Code of Practice and Guidance has been submitted on 14th July 2022 following a 16-week consultation period.
3. Note the work relating to the DoLS backlog utilising funds from Welsh Government
4. Note that further Welsh Government funding to manage the DoLS backlog and DoLS/MCA Training has been made available.

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 July 2022	
Appendices		