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Bae Abertawe
Swansea Bay University
Health Board



Meeting Date	04 February 2021	Agenda Item	3.1	
Report Title	Update position on Mental Capacity Act (MCA) and Deprivation of Liberty Safeguards (DoLS), for Quarter 3			
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Report Sponsor	Christine Williams Interim 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 Court of Protection Information.			
Key Issues	<ul style="list-style-type: none"> • DoLS performance in Quarter 3. • The implications of COVID19 and ward visiting restrictions in relation to DoLS • New Liberty Protection Safeguards (LPS) legislation will be replacing DoLS, these changes have been postponed to April 2022. • Twenty-three Court of Protection Cases are being managed by Legal & Risk Services on behalf of the Health Board, advise on any further information required for future reporting. 			
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	<p>Members are asked to note:</p> <ol style="list-style-type: none"> 1. Note the performance data for Qtr 3 – Oct to 31 Dec 2020 (Appendix 1). 			

	<p>Cumulative data for information only - April to December 2020 (Appendix 2)</p> <p>2. Note that further LPS guidance has been delayed due to the COVID-19 pandemic. The new implementation date, has been confirmed as April 2022.</p>
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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 (Appendix 1), MCA and Court of Protection information.

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).

3. PERFORMANCE, GOVERNANCE AND RISK ISSUES

Referrals

In Q3 there were 174 referrals received, of those 25 were assessed by the 2 dedicated BIAs, the internal (not primary role) BIA's did not complete any assessments. The external BIAs assessed 22 resulting in 47 being granted (**Appendix 1**)

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

The external BIA's assessed 39 of which 28 were granted, with 0 awaiting completion for the period Oct to Dec 2020 and 10 not granted as patients were either discharged/not a deprivation or died.

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

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

Activity performance has only marginally improved throughout the year, compared to the same period last year which was due to the overall lack of capacity from the internal BIA resource. If the Health Board is unable to undertake timely completion of DoLS authorisations the Health Board will be in breach of legislation and claims may be pursued as a result. This is noted both on the Coporate Risk Register and the PCT Group Risk Register with a score of 16.

The cumulative number of discharges from 1st April to 31st December 2020 equates to 433, which includes 140 for Qtr 3 – (this figure includes discharges, death, further assessments, reviews of conditions, patients not meeting DoLS criteria therefore DoLS applications are stopped).

Although the number of breaches are greatly reduced, most breaches are due to a continuing lack of BIA Assessors and COVID restrictions.

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

Discussions have taken place with corporate nursing colleagues, and whilst all acknowledge the need to develop a business case around DoLS and MCA, COVID 19, has adversely impacted on management time to progress. However, we will look to progress the business case in the latter part of quarter 4.

DoLS Training:

Due to COVID-19, all DoLS training delivery remains via virtual platforms. The Health Board BIA's have linked with trainers in Swansea University following feedback received from MA's and the training has been amended to incorporate links between theory and practice in an aim to increase staff confidence and improve standards in practice.

Swansea University Health Law department has also developed and recorded a webinar to provide training on the application of DoLS in 16 and 17 year olds. This additional invaluable resource focuses on how the DoLS legislation applies to young people and the specific requirements in order to deprive a young person of their liberty.

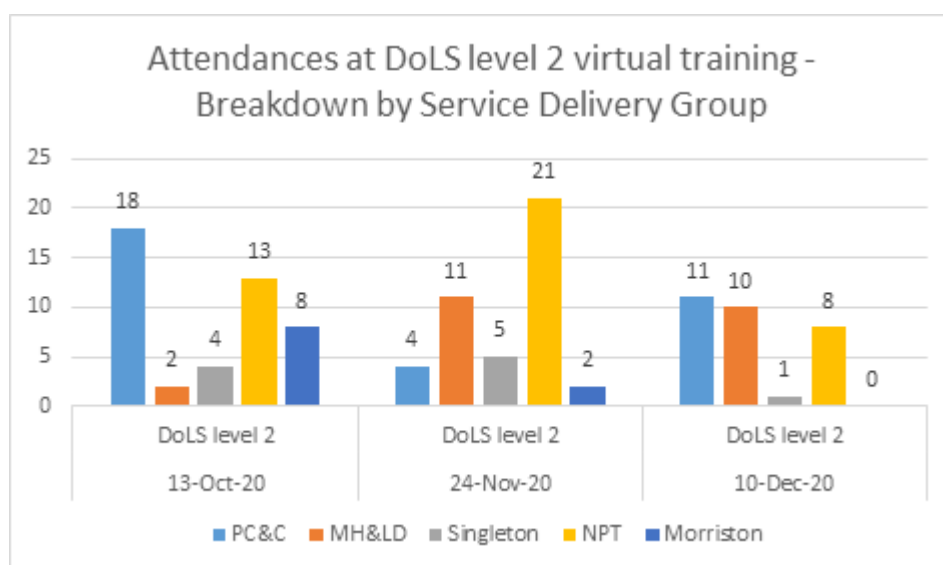
This presentation can be accessed at any time and provides an additional resource for staff who may be involved with young people as part of their role. This training has been promoted via the Health Board intranet and can be accessed either through the Corporate Safeguarding SharePoint or the DoLS/MCA page on the intranet.

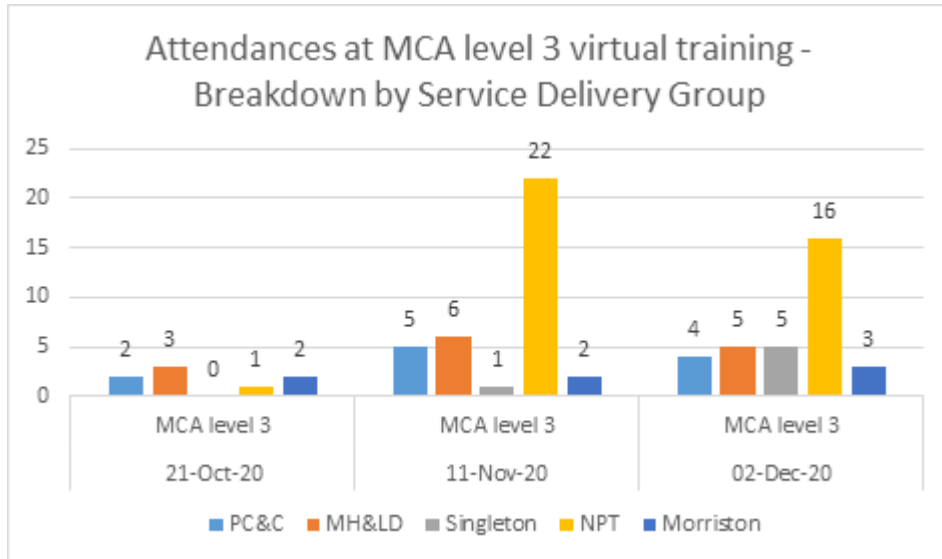
MCA Training

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

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

Following the re-introduction of all Safeguarding training via a virtual platform in June 2020, MCA Level 3 training is now delivered via Microsoft Teams. Feedback from the DoLS training is positive, with attendees indicating that they found the webinar format useful, and felt more able to ask questions than in a face-to-face session. Training attendances have begun to increase but there is still a requirement for all Service Delivery Groups to promote attendance. The graphs below indicate training attendances during the reporting period.





INDEPENDENT MENTAL CAPACITY ADVOCATES (IMCAs)

The Independent Mental Capacity Advocate (IMCA) service is a statutory service which came into effect in Wales on the 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.

The IMCA service that is currently contracted to the HB is provided by Mental Health Matters Wales, and quarterly monitoring reports are provided to the Health Board. The below table indicates the number of new IMCA instructions from the Health Board during Quarter 3.

	Serious Medical Treatment	Long term move of accommodation	Care Review	Vulnerable Adult	39a*	39d*
Q3	3	6	1	0	7	3

Quarter 3 REASONS FOR INSTRUCTION OF AN IMCA

* These different categories are, when a person who is deprived of their liberty, does not have a representative e.g. a friend, family member or advocate

During this reporting period the IMCA Service reported they continued to receive a similar number of referrals to previous quarters despite the pandemic and have acknowledged that the complexity of the cases is made more difficult by the circumstances surrounding the pandemic. They have adapted their service to ensure

they maintain contact with clients, professionals and care providers via phone and video conferencing services to compliment face-to-face meetings.

The IMCA quarterly monitoring reports are shared via the Safeguarding Committee and include case scenarios.

COURT OF PROTECTION (CoP)

The Court of Protection (CoP) is a key decision making component of the Mental Capacity Act and has jurisdiction over property, financial affairs and the welfare of people who lack capacity. It has the same powers, rights, privileges and authority as the High Court. It was identified in late 2019 that links between the Corporate Safeguarding Team and the Legal Team have not been sufficiently robust to enable a regular oversight and assurance regarding Cop cases.

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

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

Committee members previously requested information in relation to the Court of Protection cases which Legal & Risk Services are managing on behalf of the Health Board. To date Legal & Risk Services are currently managing 23 Court of Protection cases for the Health Board of which proceedings have been issued in thirteen cases and a Pre Letter of Claim received in ten of the cases.

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 BIA's largely relying upon the two dedicated BIA's to undertake all assessments.
- Restrictions on visiting patients to carry out assessments.
- Limited ability to undertake remote assessments (lack of equipment and time for front line staff to support the patient with the assessment).
- There is a back log of cases awaiting assessment with 83 outstanding assessments, this is mainly as a result of the COVID restrictions, reduced footfall on the ward areas and BIA's not being released due to hospital pressures.

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

- BIA's will only be undertaking face-to-face assessment on the acute sites in urgent cases such as CoP, or for cases where ward staff require support due to behavioural concerns.
- A telephone triage and support service will be available Monday to Friday 9am to 5pm.
- BIA's will work with staff in the acute settings to ensure robust care plans are in place.
- For patients with existing DoLS the review will be undertaken remotely where possible and the previous Section 12 Doctors report will be used.
- Admin support will still be available.
- BIA's will support acute staff with any complex cases and to ensure patients are not delayed in hospital for concerns related to best interest decisions.
- Resume normal service as soon as possible.

In addition:

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

Mental Capacity Act

MA compliance: Evidence of inconsistent understanding and implementation of MCA/DoLS across the service areas, our observations are that compliance and application is significantly better where ward leads have an interest in MCA/DoLS and have attended training or are BIA trained. In other areas there is a clear deficit where frontline staff are not confident or are lacking the skills and knowledge in undertaking mental capacity assessments and completing best interest meetings. This is a concern particularly for the future in relation to LPS as there is likely to be greater responsibilities on MA's when LPS is implemented.

Breaches – There is a significant improvement in compliance, however, 46.5% of referrals breach. The actions taken include encouraging MA's to submit a Form 1a (providing a further 7 day extension). COVID-19 has had an impact on the number of breaches during the last quarter, 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 MA's to access additional support (1:1) or access support from onsite security services. This triggers inappropriate referrals and evidences the lack of knowledge and application of the use of the MCA without the need for DoLS. This issue has been addressed by providing staff and security services with additional training.

Liberty Protection Standards (LPS)

The date for the implementation of legislative changes moving from Deprivation of Liberty Safeguards to Liberty Protection Safeguards has been delayed due to COVID-

19 and is now April 2022. The Managing Authority is still awaiting further legislative guidance in order to determine the future DoLS team structure. In the interim MCA and DoLS will remain core business, there has been no change to SBU HB's statutory obligations during the pandemic. Representatives from the DoLS Team and Corporate Safeguarding Team attend the NHS Wales Review of DoLS/MCA/LPS Network Task & Finish Group and workstreams.

As of 16th July 2020, the UK Government announced a new date for LPS with full implementation aimed for April 2022. A link to the full ministerial announcement can be found here: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-07-16/HCWS377/>

4. FINANCIAL IMPLICATIONS

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

5. RECOMMENDATIONS

Members are requested to:

1. **Note** the performance data for Quarter 3 - 1 October to 31 December 2020.
2. **Note** that further LPS guidance has been delayed due to the COVID-19 pandemic. The new implementation date, has been confirmed as April 2022.

Governance and Assurance		
Link to Enabling Objectives <i>(please choose)</i>	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		
<i>(please choose)</i>	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 August	
Appendices	Appendix 1 provides performance information Q3 Appendix 2 cumulative performance information April to December 2020.	