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Bwrdd Iechyd Prifysgol
Bae Abertawe

Swansea Bay University
Health Board



Meeting Date	11 May 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 4, January to March 2023		
Report Author	Sian Passey, Nurse Director Primary Community & Therapy Service Group, Karen Gronert, Deputy Nurse Director Primary Community & Therapy Service Group Nicola Edwards, Head of Nursing Safeguarding. Amanda Davies Long Term Care Manager.		
Report Sponsor	Gareth Howells, Executive Director of Nursing		
Presented by	Sian Passey, 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 the 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 • Inclusion of overall staff DoLS and MCA training compliance • Risk rating update 		
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 4 – January to March 2023 together with cumulative information for year to-date. 2. Note that the UK government have confirmed that they do not intend to bring forward the necessary legislation to implement the Liberty Protection Safeguards (the LPS) within this Parliament. 3. Note the work relating to the DoLS backlog and 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 4 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. Notification received from UK Government on the 6th April 2023 that they do not intend to bring forward the necessary legislation to implement the Liberty Protection Safeguards (the LPS) within this Parliament. Welsh Government has also confirmed this.

3. PERFORMANCE, GOVERNANCE AND RISK ISSUES

Referrals

Referrals received	January	February	March	Total
Urgent	65	41	60	166
Standard	5	6	18	29
Review	1	2	3	6
Breaches from previous months	41	20	19	80

Status	January	February	March	Total
Granted	39	25	22	86
Not granted (regained capacity)	7	5	2	14
Not granted (discharged)	16	23	17	56
Not granted (RIP)	2	4	4	10
Not Granted (sectioned)	3	2	0	5
Ongoing*	23	23	44	90

Please note – the numbers will not correlate each month, as there is a rolling backlog each month, in this case, there were 44 cases carried over into April 2023.

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 20 and included below

	Breaches carried over	Longest breach time
January	18	August 2022
February	14	November 2022
March	7	March 2023

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. This contract is to cease once all assessments are completed. There are currently 10 assessments outstanding.

Approximately 67 referrals received on a monthly basis. Most breaches are due to a continuing lack of BIA Assessors – both internal and external, along with the fact that 82% of all referrals received for Q4 were for urgent authorisations and the timescale to complete those specific authorisations is challenging. Two WTE band 6 nurses have been appointed and are currently being trained to be BIA.

Current DoLS Workforce

- 1 WTE (whole time equivalent) Team Leader/Best Interest Assessor band 7
- 3 WTE Best Interest Assessor band 6
- 1 WTE Administrator band 4
- External Best Interest Assessors recently commissioned at a standard rate per assessment £250. A higher remuneration was agreed by PCT (primary, community, therapies) Group Board (31.01.2023) to increase numbers of available BIAs and mitigate further risk to the HB.

Funding

The Health Board have received funding from WG (Welsh Government) since 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.

Action Plan

In light of the UK Government delaying the implementation of LPS, Welsh Government proposed to make £8million funding available to strengthen the current Deprivation of Liberty Safeguards (DoLS) system in Wales and continue to protect and promote the human rights of those people who lack mental capacity. This is to be made available for 2023/24 and to be reoccurring. Bids to be submitted by 9th May 2023. This funding is to support work to:

- Address DoLS backlog
- Deliver Mental Capacity Act training
- Improve monitoring and reporting of DoLS
- Embed the principles of the Mental Capacity Act across care, support and treatment planning
- To take forward any other work necessary to improve the application of DoLS while awaiting the decision of future UK Government to implement the LPS.

Additional support staff have been appointed for the implementation of LPS and are as follows;

- 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.

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.

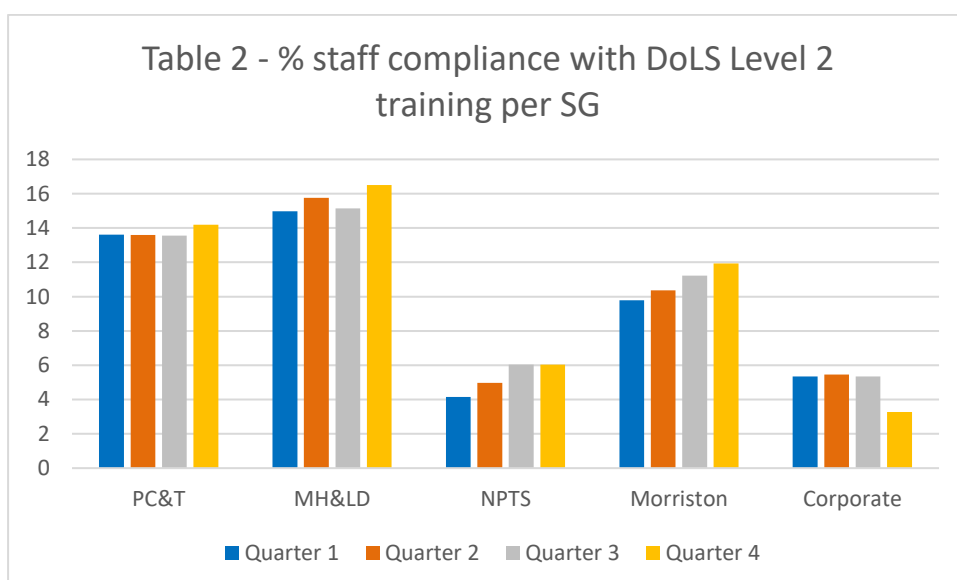
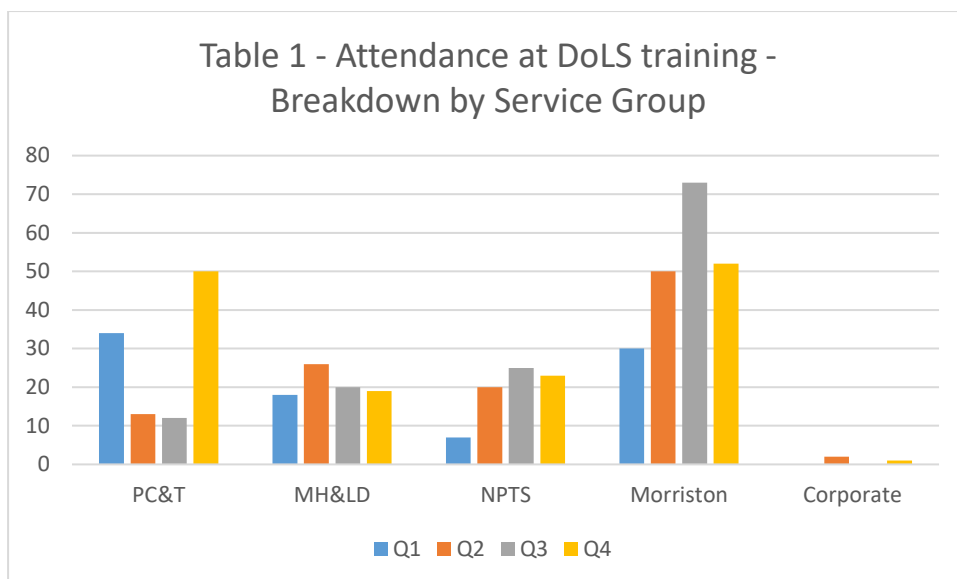


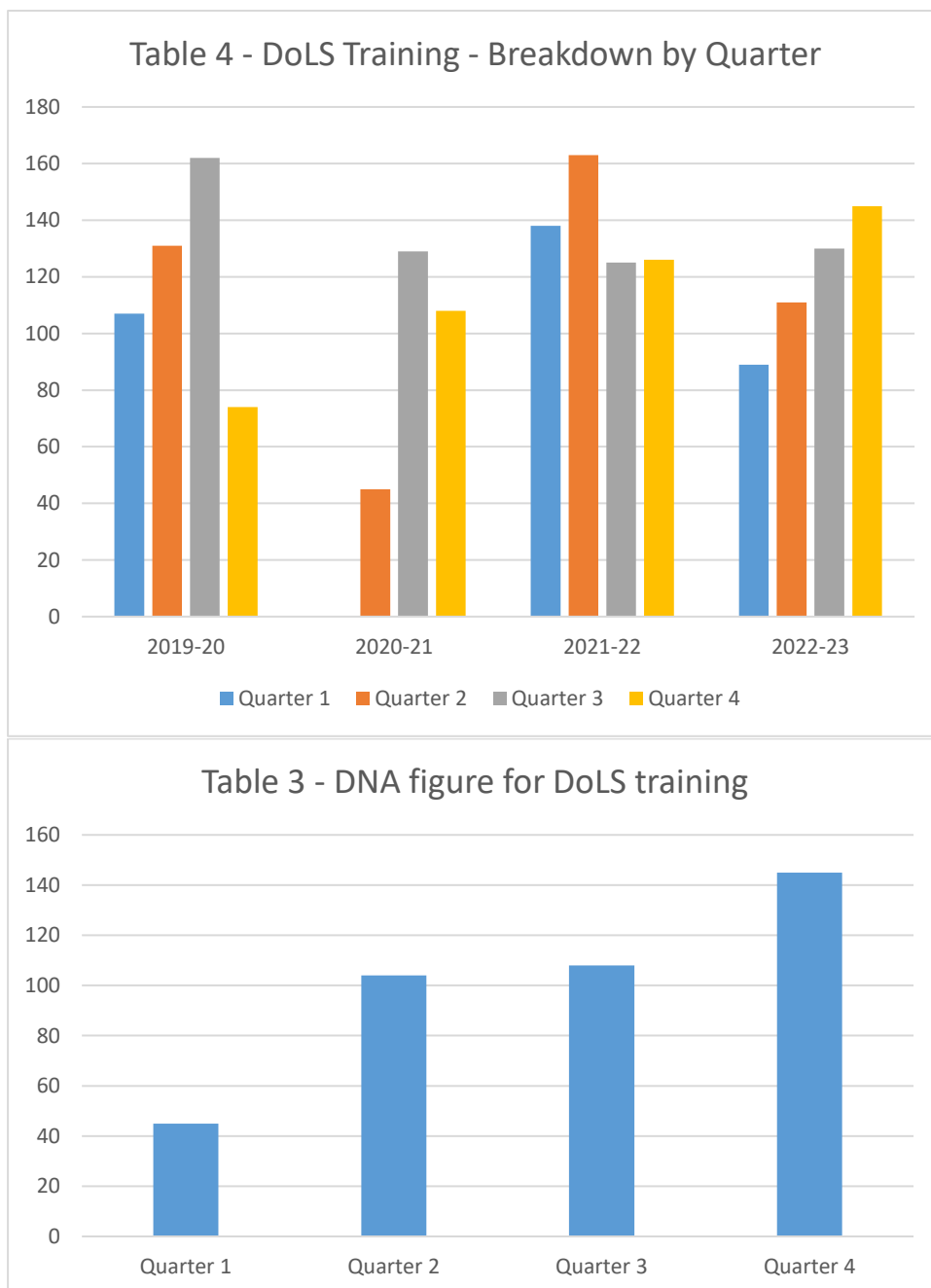
Table 3 - DoLS Level 2 Total HB compliance

	Q1	Q2	Q3	Q4
Total HB compliance	7.9%	8.35%	8.90%	9.49%

The above tables demonstrate a breakdown of staff attendances at DoLS training. A total of 12 DoLS Level 2 training sessions have been delivered by Swansea University Law lecturers in Quarters in the reporting period. 577 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, but slightly improving. However, it must be noted that 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 4 has improved across all Service Groups (Table 4), although it is important to note that staff non-attendance rates continue to increase (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 Table 3.



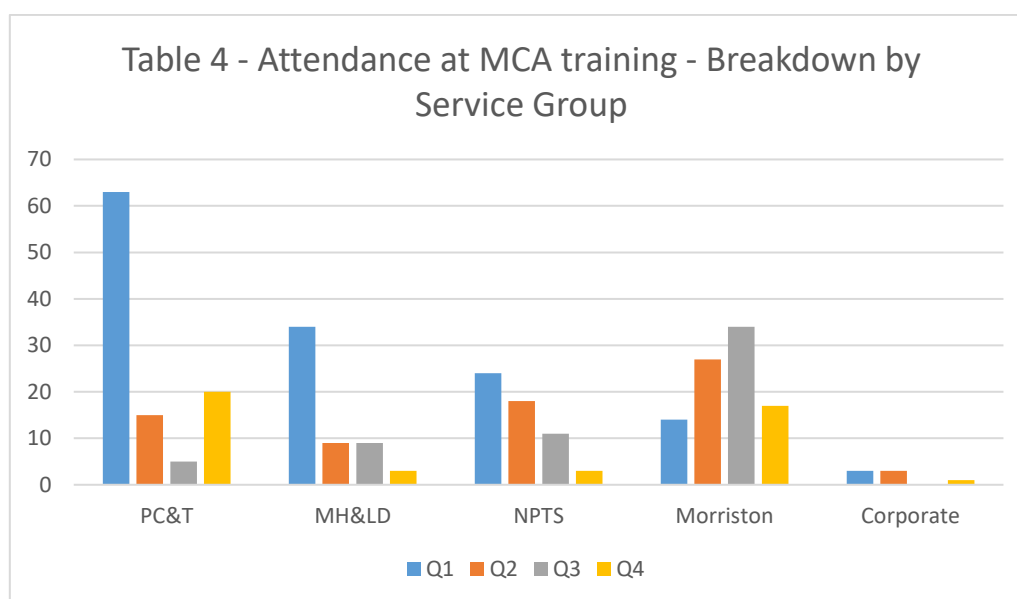
MCA Training

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 1st June 2022 to March 31st 2023, 8 MCA Principles and 8 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.



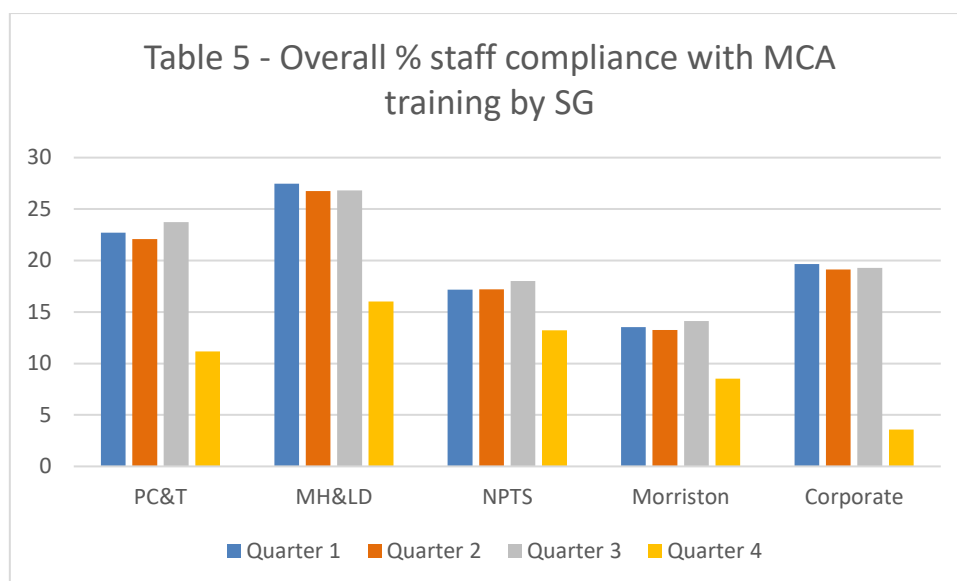
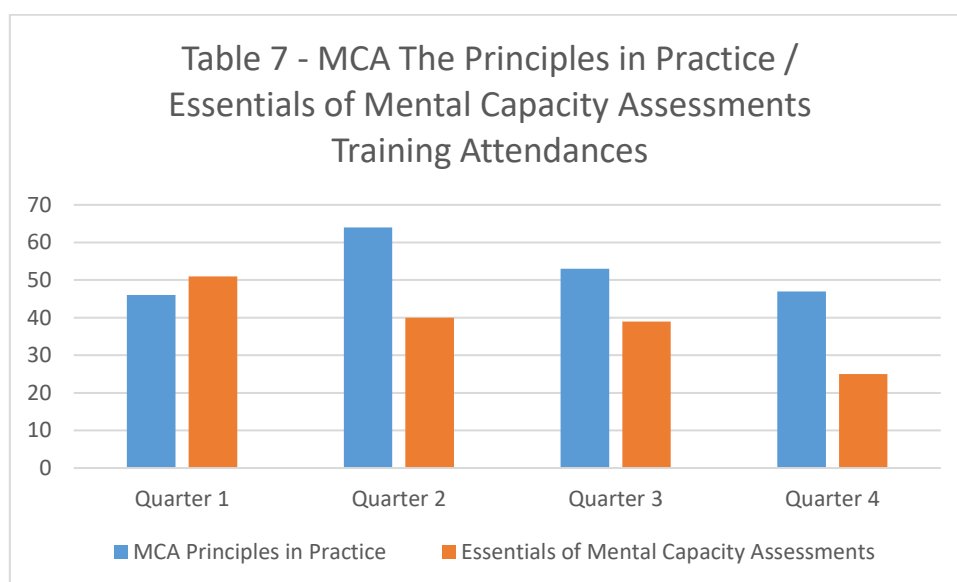


Table 6 - MCA Level 2 & 3 Total HB staff compliance

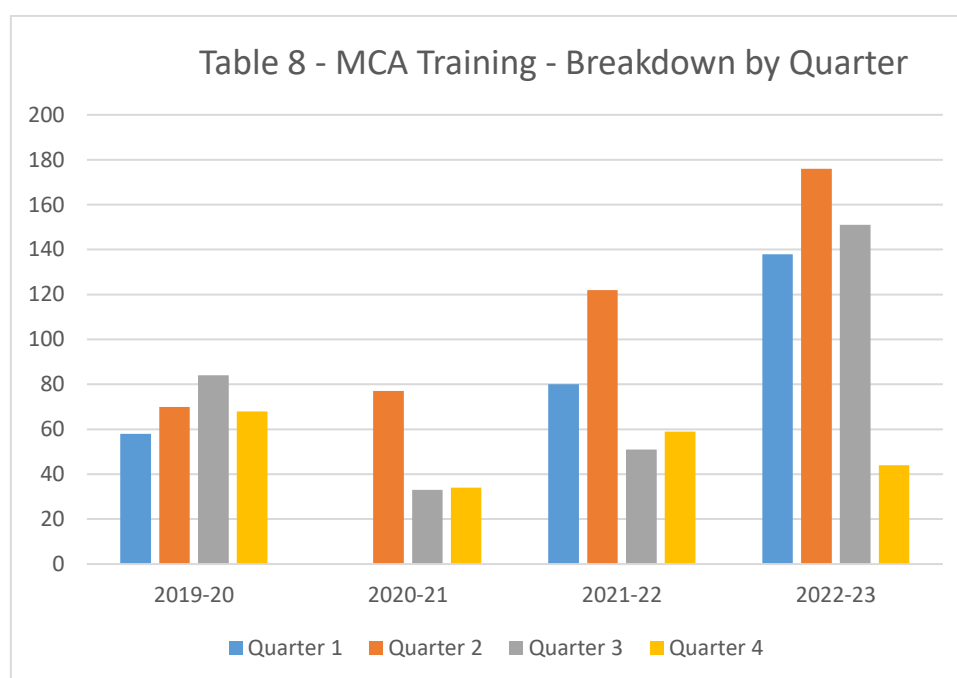
	Q1	Q2	Q3	Q4
MCA Level 2	8.39%	8.2%	8.22%	8.37%
MCA Level 3	15.66%	15.48%	16.25%	1.32%



12 virtual MCA Level 3 training sessions have been delivered in Quarters 1-4, with 317 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). 210 staff attended MCA Principles and 155 staff attended Essentials

of Mental Capacity Assessments to date (Table 7). Table 8 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 was an improvement in numbers of staff attending MCA Training across Quarters 1-3, with a fall noted in Quarter 4.



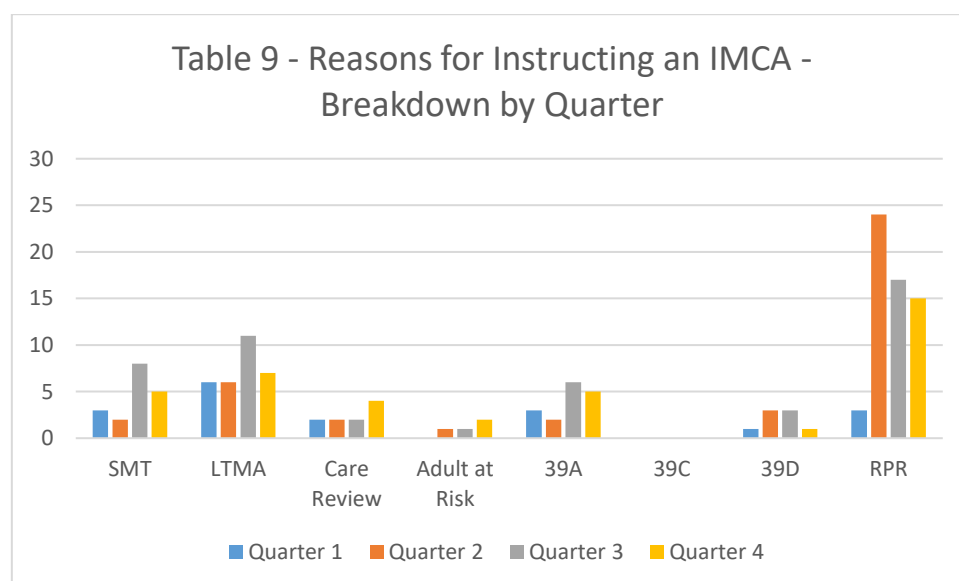
MCA training is imperative to underpinning the preparation for the transition to Liberty Protection Safeguards (LPS). To ensure LPS implementation remains a priority for the Health Board the Corporate Safeguarding Team continue to raise Safeguarding training compliance during the completion of Ward/Department 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 Quarters 1-4 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. Reoccurring WG funding will assist in the development of a MCA/DoLS Team to address this deficit.

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

Covid incidences within community and the acute sector have reduced in recent months, therefore the approach to assessments is returning to business as usual. Where there are restrictions in place, the following mitigations remain options:

- Undertake 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.
- 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.
- BIAs have put in place 'traffic light' triage system in order to support prioritisation for transparency and consistency.

High Risk

- The two newly appointed Registered Nurses have recently undertaken BIA training and are being supervised by the Team Leader and substantive BIA until they are able to work autonomously. Due to limited BIA's 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 2023 Current Risk Rating 20	
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	
Risk Rating (consequence x likelihood): Initial: 4 x 4 = 16 Current: 5 x 4 = 20 Target: 3 x 2 = 6	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.	
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)

Confirmation of funding for Mental Capacity Act (2005) for financial year 2023/24 was received by Welsh Government following the recent announcement by UK Government that they do not intend to bring forward the necessary legislation to implement the Liberty Protection Safeguards (the LPS) within this Parliament. This means that Welsh Government cannot bring forward its own regulations to implement the LPS in Wales. Welsh Government have confirmed that £8million funding will be available to health boards on an annual reoccurring basis to strengthen the current Deprivation of Liberty Safeguards (DoLS) system in Wales and continue to protect and promote the human rights of those people who lack mental capacity.

2023/24 Funding Objectives

Funding to be made available to support work to:

- Address the DoLS backlog;
- Deliver Mental Capacity Act training;
- Improve monitoring and reporting on DoLS, including the collection and quality of DoLS data and supporting systems and processes;
- Embed the principles of the Mental Capacity Act across care, support and treatment planning;

Please note, this will be discussed in the Mental Health and Legislative Committee Meeting presented by Carol Killa Head of Nursing (LPS).

RECOMMENDATIONS

Members are requested to:

1. Note the performance data for Quarter 4 – January to March 2023 together with cumulative information for year to-date.
2. Note that the UK government have confirmed that they do not intend to bring forward the necessary legislation to implement the Liberty Protection Safeguards (the LPS) within this Parliament.
3. Note the work relating to the DoLS backlog and 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 recent decision by UK Government to delay implementation of LPS within this parliament.		
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 Legislative Committee in February 2023
Appendices	