



## Report of the Cabinet Member for Care Services

### Adult Services Scrutiny Performance Panel – 31 October 2023

#### Briefing on Deprivation of Liberty Safeguards

<b>Purpose</b>	To provide a briefing on Deprivation of Liberty Safeguards.
<b>Content</b>	This report includes a summary of what Deprivation of Liberty Safeguards are, when they are required, performance detail and future developments.
<b>Councillors are being asked to</b>	<ul style="list-style-type: none"> <li>• Give their views.</li> <li>• Consider the report as part of their Adult Services Scrutiny performance function.</li> <li>• Make recommendations to Cabinet Member.</li> </ul>
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#### 1. Background

- 1.1 The Deprivation of Liberty Safeguards (DoLS) is a procedure prescribed by law when it is necessary to deprive a person (age 18 and above) of their liberty to keep them safe, when they lack mental decision-making capacity to consent to their care and treatment.

- 1.2 Deprivation of Liberty Safeguards are embedded into the Mental Capacity Act 2005, being introduced as amendments in 2007 and brought into practice in 2009. The legal framework underpinning DoLS ensures that any decisions made on behalf of a person or actions being taken are in their 'best interests' and that they are not subjected to any unnecessary supervision, control, or restrictions.
- 1.3 DoLS are non-transferrable and authorisation relates to a singular care setting. This means that a transfer of care requires a new assessment and authorisation process to be embarked upon.
- 1.4 Following landmark case law in 2014 (P v Cheshire West and Chester Council and another, and P and Q v Surrey County Council) the threshold for authorisation of a DOLS was broadened and clarified with two 'acid test' questions being set to define the need for the safeguards:
  1. Is the person under continuous supervision and control?
  2. Are they free to leave?

This has created an ongoing pressure in relation to volume and capacity for case work and broadened the threshold under which a DoLS authorisation must be made. It also resulted in a significant increase in applications for authorisations.

## 2. **Local Authority as the Supervisory Body**

As part of its Adult Social Care function the Local Authority authorises DoLS as the 'Supervisory Body'. The Supervisory Body responsibilities for DoLS arrangements within Swansea are managed through the Deprivation of Liberty Safeguards Team.

- 2.1 The DoLS team comprises of qualified Social Work Best Interest Assessors, Business Support, Senior Social Work practitioners and Team Leader who can authorise. The two Senior Social Workers and Team Leader fulfil the role of supervisory body authoriser on behalf of the supervisory body for Swansea in addition to their other roles within the team. The team receive DoLS applications for all those in Care Homes, whether they are funded by the Local Authority, self-funders or Health funded.
- 2.2 For a DoLS to be lawful a rigorous process with six different assessments must be completed to determine whether:
  1. The deprivation is in the person's best interests
  2. They fulfil the age criteria for detention under the Mental Capacity Act (age 18 years plus)
  3. There are no prior refusals to the proposed care and treatment (Advanced Decisions/Lasting Power of Attorney/Court Appointed Deputy)
  4. The person lacks mental capacity

5. The person is suffering from a mental health disorder as defined by Mental Health Act 1983
6. They meet eligibility criteria for detention under the Mental Health Act (as opposed to under the Mental Capacity Act)

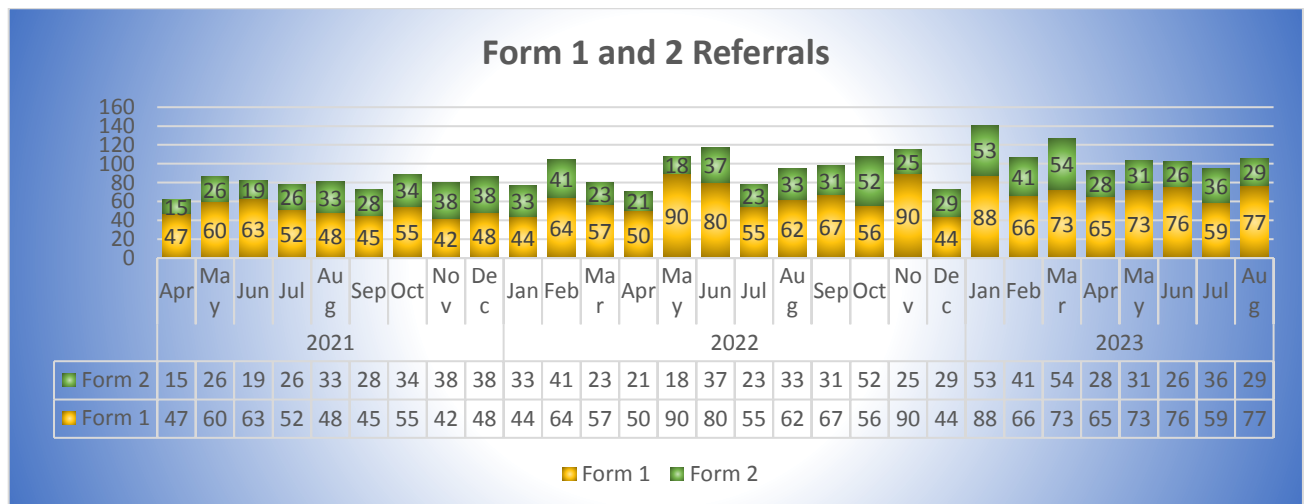
The DoLS team make use of a screening tool to support prioritisation of urgent, critical and high cases. Timely processing of applications is an important aspect of ensuring individuals are not deprived of their liberty without due process, handling the volume of demand in a timely fashion is critical. Authorisation requires the six assessments to be completed for the decision on whether to authorise the deprivation of liberty can proceed.

### 3. DoLS Applications

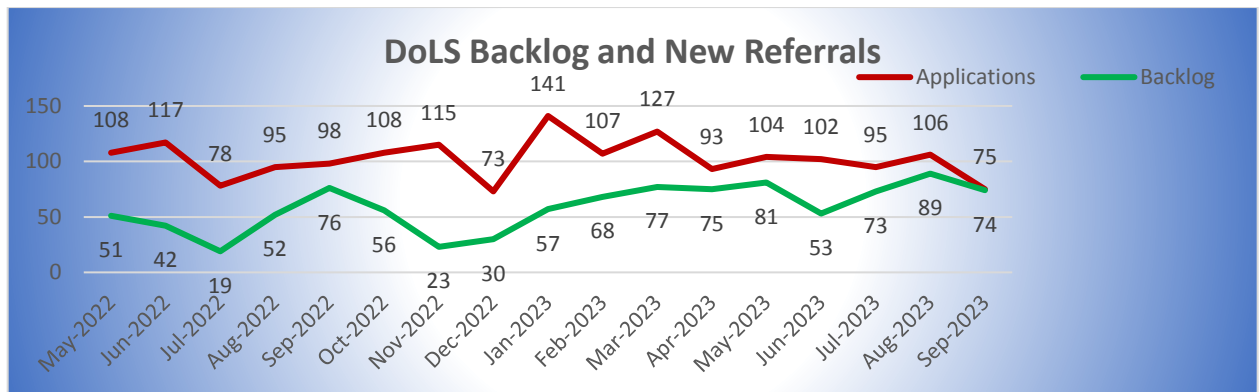
#### 3.1 Number of referrals applications for period 2021-2023

Year	April-August Comparison	Full Year
2021-2022	389	979
2022-2023	469	1238
2023-2024	500	<i>tbc</i>

- 3.2 The team receive Form 1 – New Applications and Form 2 - Renewal applications. The below graph shows an increase in applications over the past three years.



- 3.3 Due to the high number of new and renewal applications we have a backlog of authorisations which is increasing. The number of authorisations completed by us as the Supervisory Body authoriser has not always kept pace with the number of applications.



3.4 In collaboration with partner local authorities, a longer-term plan is being developed to consider how best to manage normal flow of applications including the introduction of revised application forms to allow the Supervisory Body to screen and prioritise cases more effectively. To address the backlog and ongoing demand, external and independent internal Best Interest Assessors have been commissioned to provide an additional BIA support/resource.

#### 4. Court of Protection

4.1 To comply with Article 5(4) of the European Convention on Human Rights, anybody deprived of their liberty in accordance with the safeguards described in the Code of Practice is entitled to the right of speedy access to a court that can review the lawfulness of their deprivation of liberty. The Court of Protection, established by the Mental Capacity Act 2005, is the court for this purpose.

4.2 Cases may go to court due to the person's objection to being in a Care Homes or their Relevant Person's Representative could raise an objection.

4.3 The court may make an order directing the Supervisory Body to vary or terminate the authorisation.

4.4 To ensure scrutiny of cases that are subject to court proceedings the DoLS team hold monthly meetings with the internal/external legal team representing the local authority regarding court applications.

4.5 The DoLS Team Manager currently has oversight of over 25 DoLS cases that are subject to court proceedings regarding a review of the lawfulness of the person's deprivation of liberty.

#### 5. Deprivation of Liberty Order (Community DoL)

5.1 The DoLS procedure only covers people who are deprived of their liberty in care homes or hospitals (the local authority only authorises deprivations in care homes, and the local health board will be

responsible for authorising deprivations in a hospital setting). People living in other placements such as supported living, in their own home, schools or 'shared lives' placements are not currently covered by this piece of legislation. To legally authorise their deprivation an application has to be made to the Court of Protection.

This has become an increasing stream of work for all community social work teams both in Adult and Child and Family. It was hoped the implementation of the Liberty of Protection Safeguards (LPS) would reduce the bureaucracy and time taken in making court applications for people who are deprived of their liberty outside of a care home setting. As the UK Government have delayed making a decision on LPS (see section 7) Swansea Council need to continue working with the current legislative systems for the foreseeable future.

- 5.2 There are two legal routes to authorising a DoL. The first is the streamlined procedure which enables the Court of Protection to authorise a deprivation of liberty (DoL) on the papers i.e. without the need for a court hearing – this minimises time and costs for authorising a deprivation of liberty, where there are no concerns/objections that the arrangements are in the individual's best interests. The streamlined procedure is known as the 'Re X procedure', established in the case of *Re X and others (Deprivation of Liberty) [2014] EWCOP 25*. It is a more proportionate and efficient way of authorising any non-contentious deprivations of liberty in the community (where care is provided outside of care homes and hospitals). A judge will consider the application and if satisfied, will make an order authorising the deprivation of liberty. This authorisation will last for a maximum of 12 months (this can be less, but will not be more than a 12 month period). If an order is granted the deprivation of liberty will be reviewed by the court at least annually. The local authority must make an application to the Court no less than one month before the expiry of the review period if at that time the care plan still applies to the individual i.e. that the individual is still being deprived of their liberty. The review application is effectively the same as the original application. This is a large piece of work for Social Workers and requires input and support from Team Leaders and the legal team.
- 5.3 The second is when there is when there is an objection to the proposed placement or restrictions by either the person or someone on their behalf, or if the proposed restrictions are of a high degree. These cases need to have an oral hearing before a judge and the applications to court are made via a COP1 form and various attachments. Again this is a large piece of work to make the application to the court with all of the relevant up to date paperwork and then on-going court hearings and complying with any court directions.
- 5.4 Both of these types of orders only last for a certain length of time, up to 12 months, and then the process must start again with a fresh application.

- 5.5 The Social Work teams use a prioritisation tool for DoL applications (along the same lines as the one used in DoLS) to enable teams to prioritise the work within social work teams. This ensures the people under the highest restrictions or those who are objecting to their placement or restrictions are dealt with in a swift manner upholding their human rights.
- 5.6 The majority of DoL cases are held within the Community Learning Disability Team as there are more people supported by this team who lack capacity and live either in supported living or at home with family. There are also DoL cases in the community Social Work teams and this is mainly people living in their own home with dementia supported by family.

## **6. Advocacy**

- 6.1 The Under the Mental Capacity Act 2005 the role of the Independent Mental Capacity Advocates (IMCA) became part of the assessment process. The role of the IMCA (Section 39d IMCA) is to support the Relevant Persons Representative (RPR). The RPR could be a family member, friend or anyone who is willing and able to advocate on behalf of the person who the DoLS applies to. IMCA's can also be appointed by the Supervisory Body (the Local Authority) to act as advocate for the person when they are going through the DoLS assessment.
- 6.2 Once the authorisation is in place a paid RPR will be appointed by the Supervisory Body if there is no one else suitable to take on the role. The paid RPR will regularly have face to face visits with the person who has the DoLS in place.
- 6.3 Mental Health Matters Wales are currently commissioned to provide IMCA and paid RPR services.
- 6.4 We also commission what are known as Rule 1.2 representatives to provide advocacy support for people who lack capacity to consent to restrictions on their freedom within community or domestic settings. The Rule 1.2 representative will provide a statement to explain whether they think that it is in the person's best interests to have a package of care and support that would include depriving them of their liberty. This forms a part of the application to the Court of Protection,
- 6.5 Monthly meetings are held with the DoLS Team Manager and Mental Health Matters Wales to consider individual cases and people subject to a deprivation.

## **7. Future – Liberty Protection Safeguards**

- 7.1 The current Deprivation of Liberty Safeguards system came into force in 2009. These safeguards were, however, later found to be 'bureaucratic' and 'too complex' by a House of Lords Select Committee in 2014. The

number of cases awaiting approval locally and nationally demonstrated that the current system is failing to provide many people with the protections they are entitled to.

- 7.2 Following a review by the Law Commission in 2015, the Liberty Protection Safeguards (the LPS) were proposed and subsequently introduced by the UK Government through the Mental Capacity (Amendment) Act 2019. The aim of the LPS system was to be more streamlined and reduce duplication by working better alongside existing care, support and treatment planning, allowing vulnerable people to access vital protections more quickly.
- 7.3 The LPS was to extend the safeguards to 16 and 17 year olds and include those persons deprived of their liberty in all settings (not just those in hospitals and care homes).
- 7.4 The Welsh Government asked Local Authorities to ensure that the fundamental concepts and key principles of the Mental Capacity Act (MCA) were understood in their area to enable the LPS to be embedded quickly and effectively once introduced. Grant funding was made available to improve MCA training within their local area.
- 7.5 On 5 April 2023, the UK Government announced that the introduction of the LPS would be delayed “beyond the life of this Parliament.” Therefore organisations including Swansea Council will need to work with the current DoLS regime for the foreseeable future. However the work that has been done to date in relation to MCA training won’t be lost and the Welsh Government confirmed that the current grant funding will continue until March 2025.
- 7.6 The grant money has been used to employ agency workers to reduce the backlog of DoLS applications awaiting authorisation across Adult Services and Child and Family, additional legal costs and some MCA, Community DoL and court skills training.
- 7.7 The work we have done in preparation for LPS both internally and with our regional partners has identified areas which need to be improved in relation to staff knowledge, experience and confidence in using and applying the principles of the MCA. It has also shown how important it is for Swansea Council to raise awareness of the MCA with partners such as care home staff, domiciliary care staff, day services, schools, police, ambulance service, healthcare staff and colleges to ensure we are all working in a legally compliant manner and upholding the human rights of the people of Swansea.
- 7.8 Although LPS will now not be introduced in the short term we are looking to build on the work already done to build a workforce who are well trained and confident to apply the principles of the MCA in their everyday practice. Before the latest delay three grant funded roles were created to make the Mental Capacity Act Team. The MCA Team work cross

directorates as the Mental Capacity Act 2005 applies to anyone 16 and over.

The MCA team's work plan includes writing full guidance on the MCA 2005 and guidance on completing capacity and best interests assessments with links to the relevant case law. They are providing the teams with training, knowledge and skills including support with court applications, regular updates with case law changes and MCA awareness sessions with home care and care home staff to ensure they are aware of their legal obligations under the current DoLS and Community DoL system and, if it is introduced, the LPS.

## **8. Legal implications**

- 8.1 Article 5 of the Human Rights Act states that 'everyone has the right to liberty and security of person. No one shall be deprived of his or her liberty [unless] in accordance with a procedure prescribed in law'.

The Deprivation of Liberty Safeguards (DoLS) is the procedure prescribed in law when it is necessary to deprive of their liberty a resident or patient who lacks capacity to consent to their care and treatment in order to keep them safe from harm. DoLS can only apply to people who are in a care home or hospital.

If a person is living in another setting, including in supported living or their own home, it is still possible to deprive the person of their liberty in their best interests, via an application to the Court of Protection. The Local Authority may face legal challenges in relation to unlawful or incorrectly authorised deprivations of liberty if appropriate applications are not made.

The Deprivation of Liberty Safeguards form part of the Mental Capacity Act (MCA) 2005. They were to be replaced by the Liberty Protection Safeguards (LPS), but government has announced implementation will be delayed. DoLS therefore continues to be the mechanism for authorising a deprivation of liberty for those aged 18 or above in either a care home or a hospital and authorisation from the Court of Protection is still required in other settings.

## **9. Finance Implications**

- 9.1 There are no direct financial implications arising from this report.

## **10. Integrated Assessment Implications**

- 10.1 The Council is subject to the Equality Act (Public Sector Equality Duty and the socio-economic duty), the Well-being of Future Generations (Wales) Act 2015 and the Welsh Language (Wales) Measure, and must in the exercise of their functions, have due regard to the need to:



- Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Acts.
- Advance equality of opportunity between people who share a protected characteristic and those who do not.
- Foster good relations between people who share a protected characteristic and those who do not.
- Deliver better outcomes for those people who experience socio-economic disadvantage.
- Consider opportunities for people to use the Welsh language
- Treat the Welsh language no less favourably than English.
- Ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs.

10.1.1 The Well-being of Future Generations (Wales) Act 2015 mandates that public bodies in Wales must carry out sustainable development. Sustainable development means the process of improving the economic, social, environmental and cultural well-being of Wales by taking action, in accordance with the sustainable development principle, aimed at achieving the ‘well-being goals’.

10.1.2 Our Integrated Impact Assessment (IIA) process ensures we have paid due regard to the above. It also takes into account other key issues and priorities, such as poverty and social exclusion, community cohesion, carers, the United Nations Convention on the Rights of the Child (UNCRC) and Welsh language. The Integrated Impact Assessment Screening form is in **Appendix A**.

10.2 The principles and priorities underpinning the Deprivation of Liberty Safeguards are based on Article 5 of the Human Rights Act: "Everyone has the right to liberty and security of person. No one shall be deprived of his or her liberty (unless) in accordance with a procedure prescribed in law." The Deprivation of Liberty Safeguards is a procedure prescribed in law. The procedure involves having the arrangements independently assessed to ensure they are in the best interests of the individual concerned, the person being deprived should be provided with a representative and the person subject to a deprivation of liberty has the right to challenge a granted authorisation. Our team focus on strengths, enablement and keeping people safe. A positive co-productive approach and advocacy is embedded in the DoLS / Community DoL processes.

**Background papers:** None

**Appendices:**

**Appendix A:** Integrated Impact Assessment Screening