

THE VALE OF GLAMORGAN COUNCIL

AUDIT COMMITTEE: 19<sup>TH</sup> NOVEMBER, 2018

REFERENCE FROM HEALTHY LIVING AND SOCIAL CARE SCRUTINY  
COMMITTEE: 11<sup>TH</sup> SEPTEMBER, 2018

“265 DEPRIVATION OF LIBERTY SAFEGUARDS AUDIT (DSS) -

The Operational Manager for Safeguarding and Service Outcomes presented the report the purpose of which was to highlight the implications that case law had in relation to the Deprivation of Liberty Safeguards (DoLS) 2009, and the impact upon Social Services Directorate’s capacity to meet statutory obligations under DoLS.

DoLS ensured people who could not consent to their care arrangements in a care home or hospital were protected if those arrangements deprived them of their liberty. It applied to all those persons who (a) lacked capacity; (b) who were under continuous supervision and control and (c) who were not free to leave. The person's care arrangements, and the restrictions upon their liberty, were assessed to check they were necessary, proportionate and in the person’s best interests. Representation and the right to challenge a deprivation were other safeguards that were part of the DoLS regime.

The Cheshire West ruling effectively lowered the threshold for what constitutes deprivation of liberty in care. In doing so, it significantly increased the number of people requiring assessment for protection under the DoLS scheme, which covered placements in care homes and hospitals.

Since the Cheshire West Supreme Court ruling, the team had seen a significant increase in the number of referrals.

Table A below showed the number of DoLS referrals prior to the Cheshire West decision compared with 2017/18 referral rates:

Table A

REFERRALS	2013/14	2017/18
Cardiff Council	32	1,012
Vale Council	6	458
C&V UHB (Hospital Wards)	55	1,036
Total	93	1,326

Table B showed the number of completed assessments undertaken by the DoLS team for 2017/18 per Supervisory Body and the number of DoLS Authorisation Requests that are outstanding as of April 2018. Hospital generated DoLS referrals had to be prioritised because of the unpredictable nature of hospital admissions and

therefore an increased proportion of authorisations with Cardiff and the Vale UHB were urgent.

Table B

ASSESSMENTS	Completed Assessments	% Workload	Outstanding Assessments
Cardiff Council	508	32%	504
Vale Council	328	21%	230
Cardiff and Vale UHB	840	47%	95
Total	1,676		829

Where a Managing Authority (Care Home for the Local Authority or Hospital Ward for the UHB) made an Urgent Authorisation following a sudden and unforeseen event, they were in effect authorising themselves to deprive a person of their liberty for up to 7 days. The Managing Authority must request a Standard Authorisation from the Cardiff and Vale MCA/DoLS Team at the same time as issuing their own urgent Authorisation. The team then had 7 days to undertake a full DoLS assessment to consider an ongoing Standard Authorisation.

There had been significant impact on the number of referrals the team received since the Cheshire West ruling as had been previously outlined in Table A. Some additional resource by the three partners was initially provided in terms of extra posts, however, the rate of referrals and demand far exceeded the capacity that the team currently had, resulting in a backlog of outstanding requests.

Further case law has impacted on the financial resource of the team. *AJ v A Local Authority (2015)* changed the guidance in terms of who could be appointed as the Relevant Persons Representative (RPR) for the person being deprived of their liberty. Historically, this role could be undertaken by a friend or family member who had been identified as wanting and being able to challenge when a person's liberty was being removed (Article 5 Humans Rights Act 1998). However, following this case law it had been determined that there may be a conflict if this person was involved in the best interest decision to place the person within the current setting. In essence, this would mean that the person undertaking the RPR role would be challenging, if required, their own previous decision. The team now sought to appoint an independent paid RPR in these circumstances, which had resulted in a significant rise in costs for this service.

The issues being faced in terms of increase in numbers and backlog of assessments were not unique to the Vale of Glamorgan or to this DoLS team. This reflected the picture nationally and all Supervisory Bodies report the same challenges relating to capacity, both in terms of the numbers of assessments being requested and the financial implications.

In April 2018 Care Inspectorate Wales published the following report; *Deprivation of Liberty Safeguards: Annual Monitoring Report for Health and Social Care 2016-17*. This report examined the key findings for the year 2016-17 across all Welsh Local Authorities and Health Boards, providing an analysis of the information and a description of trends, concerns and achievements. This report recognises that the

Supreme Court ruling (Cheshire West case) had resulted in a very large increase in the number of applications for DoLS authorisations, resulting in a backlog for health boards and Local Authorities. The report stated that of the applications progressed for assessment and authorisation, The DoLS Team completed 94% of applications which puts it in the top 1% of authorised assessments for 2016-17.

As a result of the most recent audit findings a business mapping process was being undertaken to consider the current business operational functions of the team and how they may be streamlined to be more efficient in terms of time and resource.

A Committee Member stated that it appeared that the Council was facing a significant challenge and that new cases coming into the Authority could be prioritised before older ones. In reply, the Operational Manager stated that this had been the case and this was why a review of DoLS had been undertaken. The Operational Manager added that if the DoLS assessment was urgent then it had to be prioritised and so a matrix had been put in place in order for the service to prioritise cases. She also advised that the priority in each individual case was around meeting the care and support needs for those people whilst waiting for a DoLS assessment. The Committee also noted that the DoLS team was not working in isolation and social workers from other teams continue to work with service users ensuring that their needs had been assessed and were being met.

The Committee asked whether there was anything that the Voluntary Sector could do in order to help the situation. In reply, the Operational Manager stated that the service was always willing to operate with the assistance of the Voluntary Sector but that this would depend on the individual case.

Subsequently, it was

#### RECOMMENDED -

- (1) T H A T the implications of the judgement of the Supreme Court in the Cheshire West case in 2014 be noted.
- (2) T H A T case law in respect of arrangements for safeguarding adults who are unable to consent to their health and social care arrangements, and also the increased risk to the Council of legal challenge where statutory timescales are not met, be noted.
- (3) T H A T the report be referred to the Audit Committee for its consideration.

#### Reasons for recommendations

- (1) To ensure that the Scrutiny Committee is aware of the impact of the decision in the Cheshire West case which extended the scope of the Deprivation of Liberty Safeguards. The Local Authority has a duty to ensure that all care arrangements for people lacking mental capacity do not deprive a person of their liberty without an independent legal process to authorise the care regime.

(2) To ensure that the Scrutiny Committee can continue to exercise oversight of the service and the risk to the Council.

(3) To ensure that there is a robust scrutiny of a risk that remains on the Local Authority Risk Register and to address questions posed by the Audit Committee.”

Attached as Appendix – Report to Healthy Living and Social Care Scrutiny Committee: 11<sup>th</sup> September, 2018

## **The Vale of Glamorgan Council**

### **Healthy Living and Social Care Scrutiny Committee: 11th September 2018**

#### **Report of the Director of Social Services**

#### **Deprivation of Liberty Safeguards**

##### **Purpose of the Report**

1. To update Scrutiny Committee on the implications that case law has had in relation to the Deprivation of Liberty Safeguards ('DoLS') 2009, and the impact upon the Social Services Directorate's capacity to meet statutory obligations under DoLS.
2. To highlight the resource and capacity issues that has resulted in this area of work being included on the Local Authority's risk register.
3. To ensure appropriate scrutiny following a recent national audit. The audit report will also be presented to Audit Committee.

##### **Recommendations**

1. That Scrutiny notes the implications of the judgment of the Supreme Court in the Cheshire West case in 2014.
2. To highlight awareness of case law in respect of arrangements for safeguarding adults who are unable to consent to their health and social care arrangements, and also the increased risk to the Council of legal challenge where statutory timescales are not met.
3. That Scrutiny refers this report to the Audit Committee for consideration.

##### **Reasons for the Recommendations**

1. To ensure that Scrutiny Committee is aware of the impact of the decision in the Cheshire West case which extended the scope of the Deprivation of Liberty Safeguards. The Local Authority has a duty to ensure that all care arrangements for people lacking mental capacity do not deprive a person of their liberty without an independent legal process to authorise the care regime.
2. To ensure that the Scrutiny Committee can continue to exercise oversight of the service and the risks to the Council.
3. To ensure that there is a robust scrutiny of a risk that remains on the Local Authority Risk Register and to address questions posed by Audit Committee.

## Background

4. DoLS ensures people who cannot consent to their care arrangements in a care home or hospital are protected if those arrangements deprive them of their liberty. It applies to all those persons who (a) lack capacity; (b) who are under continuous supervision and control and (c) who are not free to leave. The person's care arrangements, and the restrictions upon their liberty, are assessed to check they are necessary, proportionate and in the person's best interests. Representation and the right to challenge a deprivation are other safeguards that are part of the DoLS regime.
5. The Cheshire West ruling effectively lowered the threshold for what constitutes deprivation of liberty in care. In doing so, it significantly increased the number of people requiring assessment for protection under the DoLS scheme, which covers placements in care homes and hospitals.
6. The Cardiff and the Vale Deprivation of Liberty Safeguards/Mental Capacity Act (DoLS/MCA) Team continues to fulfil the Supervisory Body responsibilities required for DoLS on behalf of Cardiff and Vale UHB, Cardiff City Council and the Vale of Glamorgan Council. This is overseen by a partnership management board consisting of senior representatives from each Supervisory Body. This partnership board meets on a quarterly basis.
7. On behalf of the three Supervisory Bodies, the team:
  - Coordinates DoLS assessments as requested by Managing Authorities by examining the following requirements in each case referred:
    - Age - 18 and over.
    - Mental Health - Is a person medically diagnosed with a mental disorder?
    - Mental Capacity - Does the person lack mental capacity to make the decision to be accommodated in the hospital or care home?
    - No refusals - there is no decision previously made to refuse treatment or care, or conflict relating to this such as a Lasting Power of Attorney, an Advanced Decision or a nominated court appointed deputy.
    - Eligibility - This determines whether the person meets the requirements for detention under the Mental Health Act 1983.
    - Best Interests - It is lawful to deprive a person of their liberty only when is it in their 'best interests' to do so.
  - Supervises and manages the workload of over 40 Best Interest Assessors.
8. On behalf of the three Supervisory Bodies, the team:
  - Coordinates DoLS assessments as requested by Managing Authorities Supervises and manages the workload of over 40 Best Interest Assessors;
  - Aides and supports health and social care teams across the sector in relation to MCA/DoLS issues;
  - Provides training for care homes and all in-patient sites across the hospitals of Cardiff and the Vale of Glamorgan.
9. The team is based in the Vale of Glamorgan and comprises:
  - 1 full time DOLS/MCA Coordinator (Manager)

- 1 full time administrator
- 3 full time Best Interest Assessors (37 hours)
- 1 part time Best Interest Assessors (30 hours)
- 1 part time Best Interest Assessor (22.5 hours)
- 1 part time Best Interest Assessors (18.5 hours)
- 20 Best Interest Assessors working on a rota (1 assessment per month is expected)

## Relevant Issues and Options

10. Since the Cheshire West Supreme Court ruling, the team has seen a significant increase in the number of referrals.
11. Table A below shows the number of DoLS referrals prior to the Cheshire West decision compared with 2017/18 referral rates:

Table A

REFERRALS	2013/14	2017/18
Cardiff Council	32	1012
Vale Council	6	458
C&V UHB (Hospital Wards)	55	1036
Total	93	1326

12. Table B shows the number of completed assessments undertaken by the DoLS team for 2017/18 per Supervisory Body and the number of DoLS Authorisation Requests that are outstanding as of April 2018. Hospital generated DoLS referrals have to be prioritised because of the unpredictable nature of hospital admissions and therefore an increased proportion of authorisations with Cardiff and the Vale UHB are urgent.

Table B

ASSESSMENTS	Completed Assessments	% Workload	Outstanding Assessments
Cardiff Council	508	32%	504
Vale Council	328	21%	230
Cardiff and Vale UHB	840	47%	95
Total	1676		829

13. Where a Managing Authority (Care Home for the Local Authority or Hospital Ward for the UHB) makes an Urgent Authorisation following a sudden and unforeseen event, they are in effect authorising themselves to deprive a person of their liberty for up to 7 days. The Managing Authority **must** request a Standard Authorisation from the Cardiff and Vale MCA/DoLS Team at the same time as issuing their own urgent Authorisation. The team then has 7 days to undertake a full DoLS assessment to consider an ongoing Standard Authorisation.
14. Standard Authorisation requests are made where a Managing Authority has reason to believe that they are depriving a person of their liberty or will deprive a person of their liberty within the next 28 days. The Supervisory Body then has 21 days to undertake a comprehensive DoLS Assessment to consider authorising the Deprivation of Liberty.

## Current Issues

15. There has been significant impact on the number of referrals the team receive since the Cheshire West ruling as has been previously outlined in Table A. Some additional resource by the three partners was initially provided in terms of extra posts, however, the rate of referrals and demand far exceeds the capacity that the team currently have, resulting in a backlog of outstanding requests.
16. Further case law has impacted on the financial resource of the team. *AJ v A Local Authority (2015)* changed the guidance in terms of who can be appointed as the Relevant Persons Representative (RPR) for the person being deprived of their liberty. Historically, this role could be undertaken by a friend or family member who had been identified as wanting and being able to challenge when a person's liberty is being removed (Article 5 Humans Rights Act 1998). However, following this case law it has been determined that there may be a conflict if this person was involved in the best interest decision to place the person within the current setting. In essence, this would mean that the person undertaking the RPR role would be challenging, if required, their own previous decision. The team now seek to appoint an independent paid RPR in these circumstances, which has resulted in a significant rise in costs for this service. Table C below shows the breakdown of RPR costs; Cardiff and Vale UHB use their own service provider and do not require the use of the RPR service.

Table C

	2015/16	2017/18
Cardiff Council	TBC	£55,147.40
Vale Council	TBC	£49,253.79
Cardiff & Vale UHB	N/A	N/A

17. You will note that the costs for Cardiff and the Vale are comparable for the RPR service, despite Cardiff being an overall larger authority. There are a number of factors that are impacting on this; the number of residential care homes within the Vale of Glamorgan; the number of standard authorisations in place during the time period that require further authorisations; the issues/challenge the RPR is making on behalf of the individual.
18. The issues being faced in terms of increase in numbers and backlog of assessments are not unique to the Vale of Glamorgan or to this DoLS team. This reflects the picture nationally and all Supervisory Bodies report the same challenges relating to capacity, both in terms of the numbers of assessments being requested and the financial implications.
19. In April 2018 Care Inspectorate Wales published the following report; *Deprivation of Liberty Safeguards: Annual Monitoring Report for Health and Social Care 2016-17*. This report examined the key findings for the year 2016-17 across all Welsh Local Authorities and Health Boards, providing an analysis of the information and a description of trends, concerns and achievements. This report recognises that the Supreme Court ruling (*Cheshire West* case) has resulted in a very large increase in the number of applications for DoLS authorisations, resulting in a backlog for health boards and local authorities. The report states that of the applications progressed for assessment and authorisation, The DoLS Team completed 94% of applications which puts it in the top 1% of authorised assessments for 2016-17.



20. As a result of the most recent audit findings a business mapping process is being undertaken to consider the current business operational functions of the team and how they may be streamlined to be more efficient in terms of time and resource.
21. In response to the backlog of DoLS requests being reported by Local Authorities, ADSS (Cymru) devised a priority matrix tool. The aim of the tool is to assist Local Authorities to respond in a timely manner to those requests which have the highest priority. The tool sets out the criteria most commonly applied which indicates that an urgent response may be needed so as to safeguard the individuals concerned. The use of this tool must be balanced against the legal criteria for the Deprivation of Liberty Safeguards which remains unchanged. The DoLS team located in the Vale of Glamorgan use this tool as a means to prioritise requests being received. Whilst this tool assists in identification and prioritising requests, the backlog experienced continues to be significant.
22. It is important to note that the work of the DoLS team does not take place in isolation. Individuals who are involved in the DoLS process and who are resident within the Vale of Glamorgan Council area will have already have had a full assessment of their care and support needs by an appropriate professional, carried out under s19 Social Services and Well-being (Wales) Act 2014. An appropriate care and support plan will be in place and the Authority will have ensured that identified needs are being met.

### **Resource Implications (Financial and Employment)**

23. The DoLS team is jointly funded by City of Cardiff Council, Vale of Glamorgan Council and Cardiff and Vale University Health Board. The expenditure is apportioned across all three partners with the Vale of Glamorgan Council. There are also costs that are directly attributable to partners e.g. doctors' fees and some staff. The table below shows the increase in contributions from partners between 2013/14 and 2017/18.

Table D

Organisation	Total expenditure 2013/14	Total expenditure 2017/18
Vale of Glamorgan	£20,510	£137,186.75
City of Cardiff	£57,036	£219,998.63
Cardiff and Vale UHB	£62,454	£183,850.54

24. The number of actual requests for DoLS Authorisations has increased at different rates as shown in Table A and B. Thus far, the three Supervisory bodies have increased the budget for the team to fund the additional 1.5 WTE Best Interest Assessors, as indicated in Table D. However, for the reasons outlined earlier in the report, the additional resources have not enabled the DoLS Team to keep up with the increase in DoLS Requests.
25. The DoLS Partnership Board needs to continue to monitor the workflow and output of the team to ensure consistent and equitable distribution of the resources available.

### **Sustainability and Climate Change Implications**

26. There are no sustainability or climate change implications identified.

## **Legal Implications (to Include Human Rights Implications)**

27. Article 5 of the European Convention on Human Rights states that 'Everyone has the right to liberty and security of person', and that 'No one shall be deprived of his liberty', save for criminal proceedings and the Mental Health Act 1983.
28. The Mental Capacity Act 2005 and the Deprivation of Liberty Safeguards set out the legal framework whereby the Local Authority can authorise care arrangements that deprive a mentally incapacitated adult of their liberty as long as the care in the person's best interests and action should not otherwise be undertaken under the Mental Health Act 1983.
29. Unauthorised care that deprives a person who cannot consent to the arrangement is unlawful.

## **Crime and Disorder Implications**

30. There are no crime and disorder implications identified.

## **Equal Opportunities Implications (to include Welsh Language issues)**

31. The positive interpretation of the revised test for Deprivation of Liberty protects every person's rights as defined under Article 5 of the European Convention on Human Rights.

## **Corporate/Service Objectives**

32. Citizens of the Vale of Glamorgan are healthy and have equality of outcomes and, through appropriate support and safeguards, the most vulnerable members of our community maximise their life opportunities. Well-being Outcome 4: An active and Healthy Vale, Objective 8: Safeguarding those who are vulnerable and promoting independent living.

## **Policy Framework and Budget**

33. This is a matter for Executive decision.

## **Consultation (including Ward Member Consultation)**

34. This is an issue which affects all areas of the Vale of Glamorgan.

## **Relevant Scrutiny Committee**

35. Healthy Living and Social Care

## **Background Papers**

Deprivation of Liberty Safeguards: Annual Monitoring Report for Health and Social Care 2016-17 (Care Inspectorate Wales)

<https://careinspectorate.wales/sites/default/files/2018-04/180412dolsen.pdf>

## **Contact Officer**

Amanda Phillips, Head of Resource Management and Safeguarding.

**Officers Consulted**

Natasha James, Operational Manager for Safeguarding and Service Outcomes

**Responsible Officer**

Lance Carver, Director of Social Services