

<b>MEETING</b>	<b>SCRUTINY PANEL</b>
<b>DATE</b>	<b>13.06.24</b>
<b>TITLE</b>	<b>DEPRIVATION OF LIBERTY SAFEGUARDS (DoLS)</b>
<b>REASON FOR SCRUTINY</b>	<b>COUNCIL'S ABILITY TO IMPLEMENT THE DEPRIVATION OF LIBERTY SAFEGUARDS</b>
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### **1. Why does it need to be scrutinised?**

The ongoing challenge to comply with statutory duties relating to DoLS puts the Council in a position of risk of being financially penalised. There are some examples of local authorities having to pay compensation of between £3000-4000 for every month in which the individuals have been deprived of their liberty without authorisation.

### **2. What needs to be scrutinised?**

There is a high risk that the Council will be penalised due to non-compliance with the DoLS arrangements with the number of days to complete a standard authorisation assessment exceeding statutory requirements. Although the waiting list has reduced through the efforts made to date, a large number of applications continue to be made.

Due to the lack of existing resources within the DoLS 'team', there does not appear to be any viable options to mitigate the risk and therefore there is a likelihood that the Council will inevitably accept the risk of being penalised due to non-compliance with Acts relating to DoLS.

### **3. Summary and Key Issues**

The Deprivation of Liberty Safeguards is an amendment to the Mental Capacity Act 2005. Article 5 of the Human Rights Act states that everyone has the right to freedom and security. No one shall be deprived of his 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 a resident or patient of their liberty when they do not have the ability (capacity) to agree to their care and treatment in order to keep them safe from harm. Conditions such as dementia or brain injury can lead to lack of capacity.

In March 2014, a Supreme Court ruling referred to the 'acid test' to see if a person is deprived of their liberty. This included two questions to ascertain that an individual does not have the capacity to agree to their care arrangements:

1. Is the person subject to ongoing control and supervision? and
2. Is the person free to leave? (permanently)

If an individual receives a high level of supervision, and is not free to leave the building permanently, then they are almost certainly deprived of their liberty. It is important to consider each case on its own merits, but in addition to the two 'acid test' questions, if one of the following features is present, an application for assessment is required for a deprivation of liberty authorisation:

- Regular use of a tranquilizer/medication to control behaviour
- Regular use of physical restraint to control behaviour
- The person concerned verbally or physically objected to the restriction and/or restraint
- Opposition from family and/or friends to the restriction or restraint
- The individual is confined to a specific part of the building in which they are cared for
- The location is unstable or unsustainable
- A potential challenge to the restriction and restraint being offered to the Court of Protection or the Ombudsman, or a letter of complaint or solicitor's letter
- The individual is already subject to an impending deprivation of liberty authorisation.

DoLS arrangements ensure that people who cannot agree to their care arrangements in a care home or hospital are protected if those arrangements deprive them of their freedom. Those arrangements are checked to ensure they are necessary and in the best interests of the individual.

The Mental Capacity Act allows some restrictions and restraint to be applied – but only if they are in the best interests of the individual and are necessary and proportionate.

Additional safeguards are needed if the restrictions and restraints used deprive a person of their liberty. These are known as Deprivation of Liberty Safeguards.

Deprivation of Liberty Safeguards need to be used if the individual is deprived of their liberty in a care home or hospital. The Court of Protection may authorise deprivation of liberty in other locations.

The Local Authority has a duty to authorise applications to deprive an individual of their liberty in care and nursing homes but the duty sits with the Health Board for individuals receiving care in hospitals. Under the DoLS procedures, the authorising bodies are known as the Supervisory Body.

Care and nursing homes have a duty to apply for standard or emergency authorisation that gives them the authority to deprive an individual of their liberty.

As part of the process to protect individuals, it is imperative that the person has someone with legal powers to represent them. This is known as the representative of the relevant person and usually a family member or friend will take the role but it is possible to commission an advocate to do this role.

A request for authority will be sent to the supervisory body which must decide within 21 days for a standard authorisation and 7 days for an emergency authorisation if the person can be deprived of their liberty.

The supervisory body shall appoint a best interest assessor to assess whether the conditions are being met to allow the person to be deprived of their liberty under the safeguards. They include:

- the person is over the age of 18
- the individual suffers from a mental disorder (recognised by the Mental Health Act).
- The individual does not have the ability to decide for themselves about the restrictions offered to enable them to receive the necessary care and treatment.
- The restrictions would deprive a person of their liberty
- That the proposed restrictions are in the best interests of the individual.
- Consideration needs to be given to whether detention under the Mental Health Act is more suitable.
- No advance decision has been made by the individual to refuse treatment or support that would be overridden by any DoLS process.
- Does the individual have a Lasting Power of Attorney (LPA) for Health and Welfare and agree with a DoLS authorisation.

If none of the above conditions are met, an individual cannot be authorised to be deprived of his liberty. This may mean that the care home or hospital has to change their care and support plan to enable them to care for the person in a less restrictive way.

If all conditions are met, the supervisory body must authorise the DoLS and notify the person and the managing authority in writing. It may be authorised for a period of up to one year. If an individual needs to continue to be deprived of their liberty at the end of the period, it is necessary to apply for another authorisation.

The person does not have to be deprived of their liberty for the duration of the authorisation. The restrictions should end once they are no longer needed.

The Liberty Protections Safeguards (LPS) were introduced in the amended Mental Capacity Act 2019. The LPS were being introduced to replace DoLS and the new procedures were much more proportionate as they simplified the legal framework and the assessment process would take place as part of an individual's care planning.

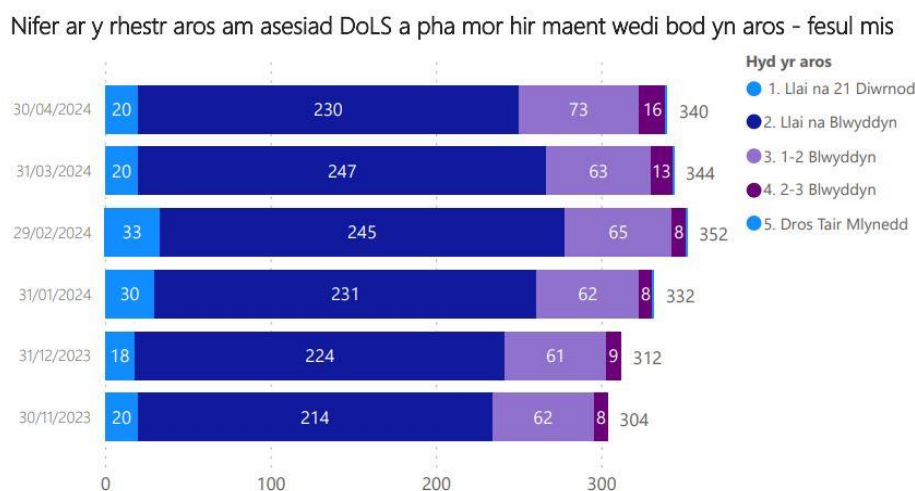
The LPS was due to become operational in October 2020. This was delayed due to the pressures arising from the Covid-19 situation, however, there was an announcement in June 2023 that the current Westminster Government would not introduce the changes. Welsh Government did not have the money to continue with

the plans independently of Westminster. This meant that we continued with the DoLS procedures.

#### 4. Gwynedd's position

There is an expectation that all standard authorisation requests are completed within 21 days and emergency requests are completed within 7 days.

There is a waiting list in Gwynedd of 340 individuals who have been deprived of their liberty without authority. See the graph below which shows the wait time for an assessment. Note that 20 individuals have been waiting over 3 years for an assessment:



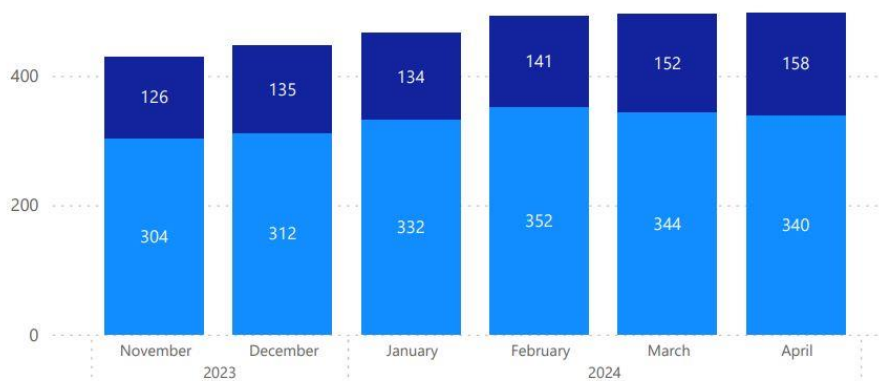
The Gwynedd Adult Department DOLS 'team' consists of one BIA who works two days a week and one Coordinator who works 4 days a week, we also receive administrative support. It is not possible for an administrator to manage all processes and therefore the vast majority of the Coordinator's time is spent managing the waiting list and prioritising and allocating cases. The time she has to complete assessments herself is limited.

A Best Interest Assessor (BIA) and a s.12 Approved Doctor are required to complete a DoLS assessment. 18 staff within the Adult Department are qualified as BIA's. Several attempts have been made to try to introduce an effective arrangement whereby each BIA would commit to making a number of DoLS assessments on an annual basis. But, because each assessment takes approximately 10 hours to complete, the BIA work that could contribute somewhat to dealing with the DoLS waiting list reduces the capacity of the services to carry out their day-to-day work and therefore creates waiting lists within the Services.

On average, 67 DoLS applications come to our attention on a monthly basis and 16 cases are authorised and the others are placed on the waiting list.

Nifer ar y rhestr aros o'i gymharu â'r nifer sydd ag awdurdodiad DoLS cyfredol - fesul mis

● Nifer Ar Rhestr Aros ● Wedi Awdurdodi



Over the past three years, the Department has received an annual grant of £114,00 from Welsh Government to try to meet the DoLS waiting list and to provide training. This money is used to commission an agency to supplement capacity to complete the best interest assessments and to pay the doctors for completing their capacity assessments. It is our intention to submit an annual bid for this grant.

DoLS is authorised for a period up to one year. There will be a further application at the end of the period for re-authorisation.

The table below sets out the position of DoLS other authorities across the region:

LOCAL AUTHORITY	POPULATION	DoLS WAITING LIST	NUMBER OF BEST INTEREST ASSESSORS
MÔN	68,900	91	2 + Co-ordinator
DINBYCH	96,000	236	2.5 + Co-ordinator
CONWY	114,800	248	3.8 + Co-ordinator
FFLINT	155,100	314	3 + Co-ordinator
WRECSAM	135,100	-----	-----
<b>GWYNEDD</b>	<b>117,100</b>	<b>340</b>	<b>0.4 + Co-ordinator</b>

## 6. Consultation

An Internal Audit was undertaken as part of the 2022/23 audit plan, to ensure that the Council's existing DoLS arrangements are fit for purpose. As part of the original audit we checked that adequate arrangements were in place for the new Liberty Protection Safeguards (LPS) as well as checking the existing arrangements for DoLS assessments. The audit was given a limited level of certainty, that is, although controls were in place, compliance with the controls needed to be improved and/or new controls introduced to reduce the risks posed to the Council.

In March 2024, there was a follow-up to the audit to ensure that the service had acted on the agreed actions to mitigate the associated risks.

The report concluded stating –

*'To date there are no changes to the current regime. As it stands, there remains a high risk that the Council is being penalised due to non-compliance with the DoLS arrangements i.e. the number of days to complete a standard authorisation assessment is higher than is expected. Although the waiting list has reduced a large number of applications continue to be received on top of those awaiting assessment. The Assistant Head of Safeguarding, Quality Assurance, Mental Health and Community Safety expressed that there is an intention to bring this to the attention of the Care Scrutiny Committee (date to be confirmed) to confirm if the risk can be mitigated, as with the current resources, there appear to be no viable options and therefore a likelihood it will be inevitable to accept the risk of the Council being penalised due to non-compliance with legal Acts relating to DoLS'.*

## **7. Well-being of Future Generations (Wales) Act 2015**

Have you included residents / service users? If not, when and how do you plan to consult them?

The DoLS process sets firm guidelines for the inclusion of individuals, families etc. This report relates specifically to the Council's arrangements to implement the DoLS process. There are no plans to consult about the efforts to try to improve the process.

Have you considered working together?

Each local authority as an Oversight Body has a specific duty to act within the DoLS statutory legislation and guidance. Good collaboration takes place with other authorities in sharing good practice and knowledge and with the Health Board at a local level.

What has been done or will be done to prevent problems arising or worsening in the future?

It is believed that the Department has made efforts to meet the challenges and continues to seek practical solutions. It cannot be predicted with any certainty what the situation of the future will be, however, with an ageing population, it would be logical to conclude that the pressure on the DoLS process and therefore the level of risk could increase further over the next few years.

How have you considered the long term and what will people's needs be in years to come?

This report is intended to weigh risks and therefore enable the Council to plan effectively for the future.

To ensure integration, have you considered the potential impact on other public bodies?

This is a specific issue for Gwynedd Council.

## **8. Impact on Equality, Welsh and Socio-Economic Duty Characteristics**

As far as possible, the Coordinator will strive to ensure that the active offer is made when assessing individuals and when engaging with their families. There are several doctors who can also assess in the Welsh language but this often depends on the location of the person.

Due to the need to use an external specialist agency to complete the best interest assessments, the vast majority of assessors are conducted in the English language. Linguistic factors are considered when allocating the assessments.

## **9. Next steps**

Around 100 of the individuals on the waiting list are individuals living in the community, in care and support accommodation. These cases are classed as community DoLS and require an application to the Court of Protection to deprive them of their liberty. The assessor does not need to be a BIA to make an application. These individuals receive support from the Learning Disabilities service. Discussions are underway within the Department to change arrangements to ensure that these assessments are being completed by the service as part of the annual review. This will help reduce the waiting list but we also recognise that it can have some impact on the capacity of the service as annual reviews will take longer to complete. The magnitude of the effect cannot be predicted here until the procedures have been implemented for a while.

## **Background Information**

See the links below which provide more information about the Mental Capacity Act, 2005 and the DOLS process –

[Mental Capacity Act 2005 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

[Deprivation of Liberty Safeguards \(DoLS\) at a glance - SCIE](#)

[Deprivation of Liberty Safeguards \(ageuk.org.uk\)](https://www.ageuk.org.uk)