Deprivation of Liberty Safeguards

Annual Monitoring Report for Health and Social Care

February 2014

AGGCC CSSIW
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Care and Social Services Inspectorate Wales

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Healthcare Inspectorate Wales

DRIVING IMPROVEMENT THROUGH INDEPENDENT AND OBJECTIVE REVIEW

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Purpose of this report

1. This report sets out data collated by the Care and Social Services Inspectorate Wales and Healthcare Inspectorate Wales in relation to the operation of the Deprivation of Liberty Safeguards.

2. The report examines the key findings for the year 2012-13, providing an analysis of the information and a description of trends, concerns and achievements. It is designed to highlight the key themes and set the scene for the forthcoming national review which will investigate the use of the Safeguards in more detail. It is designed to contribute to the improvement in outcomes for people in need of support from the Deprivation of Liberty Safeguards.

Who should read it?

3. The report should be of interest to anyone working in, or interested in, the operation of the Deprivation of Liberty Safeguards across health and social care in Wales.

How can I find out more?

4. More information is available from:

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Background

This is the fourth annual report on the operation of the Deprivation of Liberty Safeguards in Wales. The Safeguards were introduced to respond to the challenge that arises when a person does not have capacity to make an informed decision about their care or treatment. The Safeguards exist to empower and protect any individual with mental disorder, where there is doubt about their mental capacity, to make informed decisions about their care when they are hospital patients, or residents in a care home. CSSIW and HIW's role is to monitor the operation of the Safeguards and report annually.

People affected by the Safeguards are some of the least empowered in Welsh society. For this reason it is concerning that the data shows continuing and unexplained variation across Wales in the population based application rates made to use the safeguards. There is also marked variation in the number of authorisations granted. Taken at face value this represents inconsistency in the meeting of people's legal entitlements. Put plainly, it may point to a neglect of the human rights of some of the most vulnerable citizens in Wales. It is for this reason that will be undertaking a national review of the use of the Safeguards in 2014.

Background: Human Rights and the Safeguards

The Mental Capacity Act 2005 Deprivation of Liberty Safeguards are a response to a European Court of Human Rights judgement in October 2004, the case of HL v UK. The court found that a man with autism and a learning disability, who lacked the capacity to decide about his residence and medical treatment, and who had been admitted informally to Bournewood Hospital, was unlawfully deprived of his liberty in breach of Article 5 of the European Convention on Human Rights.

The Safeguards are intended to remedy the breach of the ECHR and to help protect the rights of vulnerable people in hospitals and care homes. They should make a real difference to people receiving care and support who have no or limited choice about their life.

Recognising and responding to deprivations of liberty

The evidence suggests that much more needs to be done to understand the relevance of the Safeguards and implement them consistently in practice.
There were 526 (545 in 2011-12) applications made to supervisory bodies. These applications were concerned with 417 individuals (428 last year). While these figures represent a slight fall in activity compared to last year they are very similar to the figures for the previous three years. They suggest that the level of activity in relation to the Safeguards has not changed significantly since their implementation in 2009. It remains significantly less than was expected when the Safeguards were introduced.

There is significant variation in how local health boards and local authorities carry out their duties as supervisory bodies. The detail within this big picture merits close attention as some supervisory bodies – local authorities or local health boards – have very different levels of activity compared to others. This will, of course, reflect in part the different social and demographic characteristics of the geographical areas served. It is also likely that the varying amount and profile of care homes with nursing care in the different local authority and local health board locations has some impact on the level of applications to use the Safeguards. These factors alone, however, are unlikely to fully explain the differences.

The total number of standard authorisations granted by supervisory bodies was 254. Local authority supervisory bodies granted 72% of the total (182) and health board supervisory bodies granted 28% (72). The respective percentage authorisations granted by local authorities and by health boards in 2012-13 are exactly the same as the figures for 2011-12. In care homes, the proportion of authorisations granted (55%) was very similar to last year, while in hospitals the proportion granted has fallen from just over half last year to 43% in 2012-13. Overall, once again, the figures suggest that little has changed in the last year.

Requests for reviews of the qualifying arrangements in social care and health are infrequent. They amount to very few when compared to the number of standard authorisations issued in 2012-13 and in previous years. The total number of reviews requested fell to 17 from 30 held in 2011-12. The number of reviews requested in Health increased this year, but this was offset by a decline in the number requested of Local Authorities. The relevant person, their representative or the Independent Mental Capacity Advocate (IMCA) may request a review at any time. In addition the Supervisory Body may carry out a review if there is a question about whether the person meets the requirements for deprivation of liberty to be authorised, the reason the person meets the qualifying requirements, or the conditions attached to the authorisation. Reviews should be a crucial part in ensuring that the Safeguards are relevant and properly applied. The absence of timely reviews raises questions about the proper consideration of any change in a person's capacity or circumstances. An effective review process is central to the safeguarding of individual liberty and human rights.

Fewer people received support from Independent Mental Capacity Advocates in 2012-13 than in the previous year. The number of cases where the relevant person and relevant persons' representatives received help from IMCAs fell to 70 in 2012-13 (75 in 2011-12). The Safeguards require that care homes and hospitals must inform the person and their representative of their statutory right to an IMCA and how to obtain this support when an authorisation is granted. While the reasons for the low use of IMCAs cannot be determined by the data, it should be a priority for supervisory bodies to understand the reasons and make improvements.

A greater proportion of men aged 85 years and over had requests for authorisations approved (62%) than women in the same age group (50%). In all other age categories there was a greater percentage of requests for authorisations approved for women than for men.

Talking to practitioners and managers – engagement with stakeholders in 2013

More needs to be done to explain the usefulness and purpose of the Safeguards and to encourage their implementation. In 2013 CSSIW and HIW held several workshops across Wales for staff responsible for implementing the Safeguards. The workshops explored some of the issues and questions arising from the data. Concerns about a lack of understanding of the Safeguards in care homes and hospitals emerged as a strong theme. Practitioners felt that there was a perception that to make an application was, in some way, an indication of failure rather than a positive response to a challenging situation. Another issue that emerged was a feeling that the inspectorates, in addition to collecting and collating the monitoring data, should take a closer look at the operation of the Safeguards through our inspection and reviews.

Next steps for CSSIW and HIW

The inspectorates will undertake a thematic inspection on the operation of the Safeguards in early 2014. This inspection will look at the way in which local authorities and local health boards are delivering their responsibilities as supervisory bodies. It will also explore practice in care homes and hospitals and the way in which leaders at all levels are supporting and encouraging staff to make best use of the Safeguards. This inspection will result in a thematic, overview report for Wales.

Findings 1

The pattern of reporting of the Safeguards

CSSIW and HIW collect and collate data from supervisory bodies concerning the pattern of reporting of the Safeguards from Care Homes and Hospitals. The inspectorates have a key role in monitoring the impact of the Safeguards on residents in care homes and patients in hospitals. CSSIW aims to visit each care home in Wales at least once a year, with some homes visited more often, especially where concerns have been raised. In hospitals, HIW undertake a range of inspection and review activities, looking at the circumstances of the care given to individuals who lack capacity, as well as exploring with staff their understanding of the Mental Capacity Act and the Safeguards.

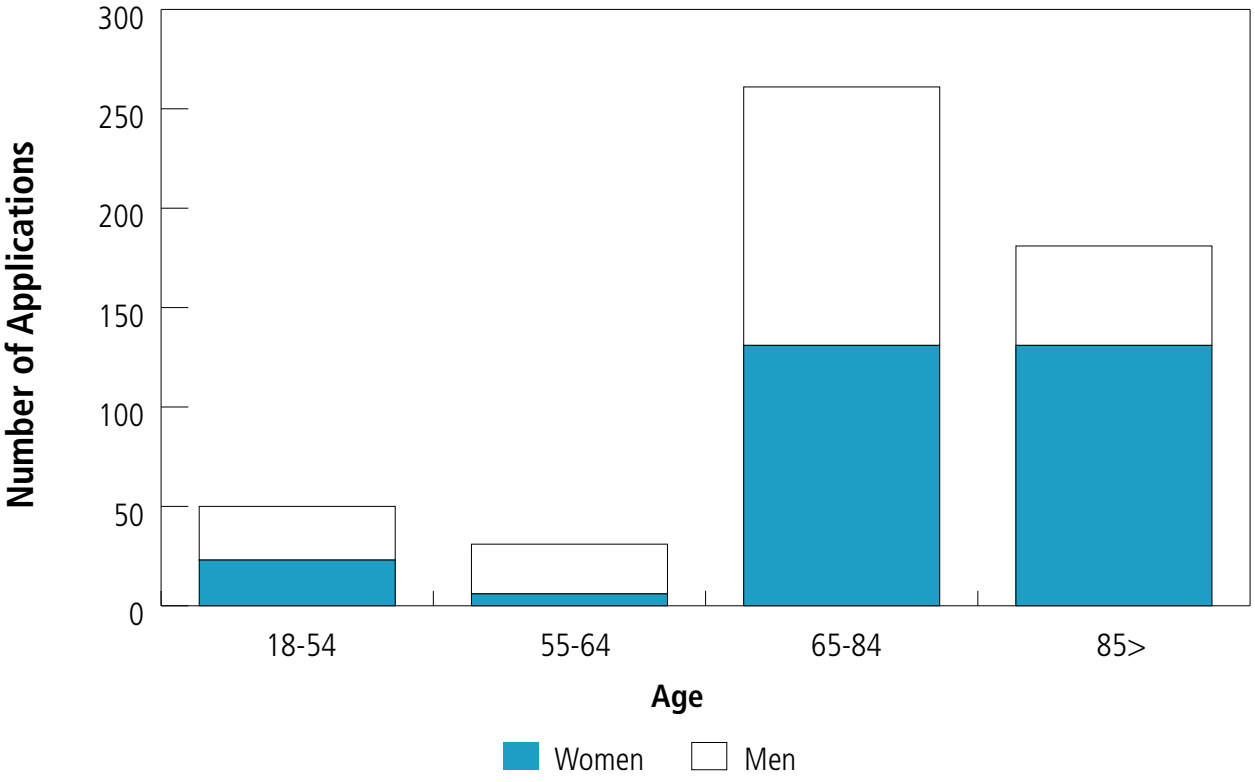
Key Points

- While there has been a slight fall in activity this year, the data suggests that amount of activity is very similar to that of the previous three years.
- Some local authorities and health boards have very different levels of reporting compared to others. This is likely to partly reflect differences in numbers of care home and hospital beds in particular areas, but this does not fully explain the differences. All involved need to be vigilant in ensuring that the Safeguards are used when they are needed.
- The amount of reviews of the qualifying arrangements in social care and health is low when compared with the number of standard authorisations issued in 2012-13 and in previous years. The total number of reviews fell to 17 from the 30 held in 2011-12. The absence of reviews is a concern. While it is possible that this reflects a recording issue, supervisory bodies need to assure themselves that reviews are being held as required: they should be a key feature in ensuring that the Safeguards are relevant and applied properly.
- It should be a priority for supervisory bodies to understand the reasons for the low use of Independent Mental Capacity Advocates (IMCAs). This will also be an area for enquiry in the forthcoming national review.

Applications for authorisation

Managing authorities made 526 applications for authorisations from supervisory bodies, 19 fewer than last year. Local authorities received 347 of the applications, with health boards accounting for 179. The age and gender of individuals in all applications in 2012-13 is illustrated below. It is noticeable that men make up the largest category of applicants for those aged 64 and under, with women constituting by far the largest category for those aged 85 and over.

Chart 1: Age and gender of individuals – all applications in 2012-13



The charts below illustrate the number of applications made per 100,000 of the population. They highlight the variation in the applications made across Wales.

Chart 2: Applications to local authorities as a proportion per 100,000 population 2012-2013

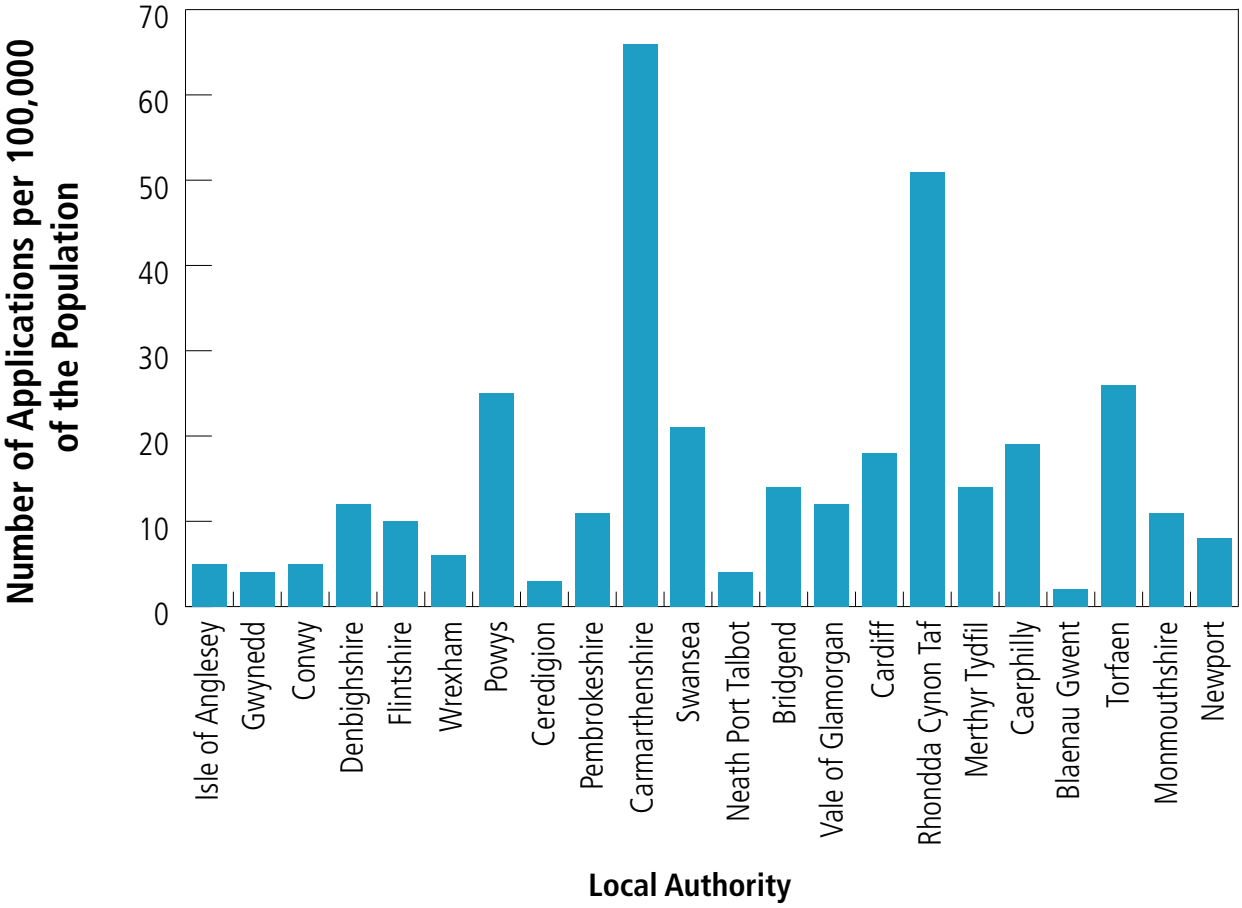
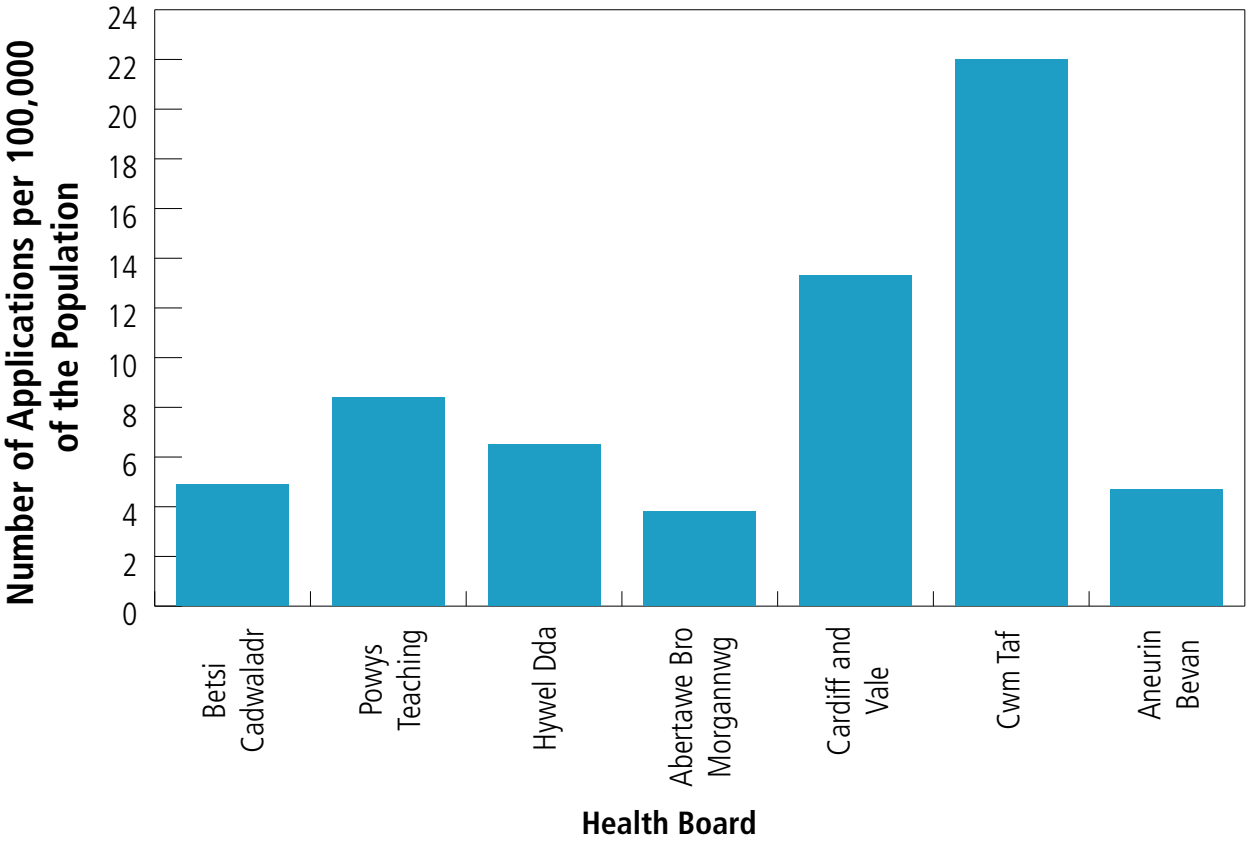


Chart 3: Applications to health boards as a proportion per 100,000 population



It is likely that the variation in activity is, in part, explained by the demography of the social care and health provision in particular areas. The table below, for example, shows the difference between the number of care home places between the neighbouring authorities of Carmarthenshire and Ceredigion. The number of care home beds in Ceredigion amounts to 30% of the figure for Carmarthenshire.

Table 1: Maximum number of places registered for

	Carmarthen	Ceredigion
Care Home – Older Adults	888	295
Care Home – Younger Adults	410	62
Care Home Nursing – Older	687	235
Care Home Nursing – Younger	26	0
Total	**2011**	**592**

The two charts below demonstrate the extent of variations in the numbers of applications between local authorities and between health boards over several years.

Chart 4: Applications to health boards showing three year trends 2009-2013

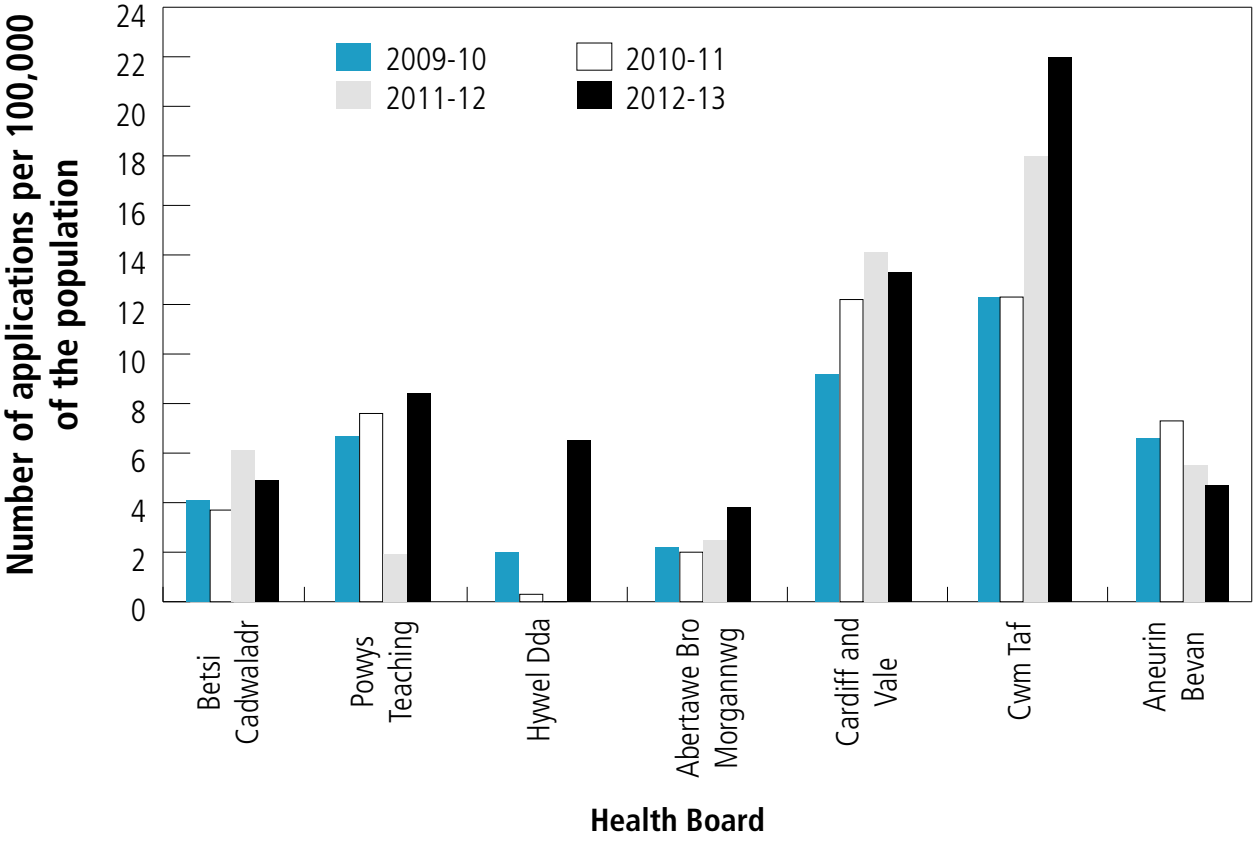
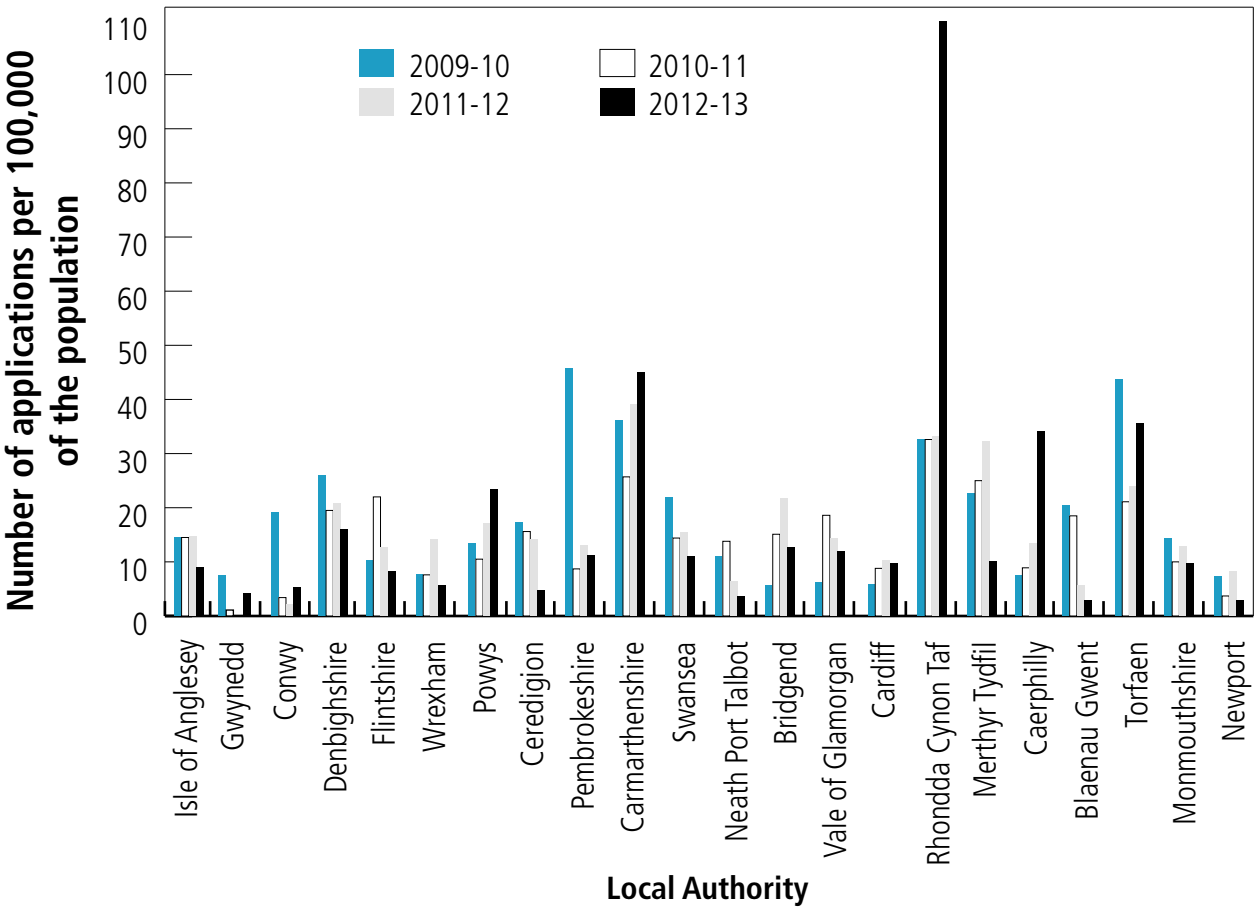


Chart 5: Applications to local authorities showing four year trends 2009-2013



This year, Hywel Dda Health Board received 20 applications, compared to none received in the previous year. Gwynedd County Council received 4 applications compared to zero recorded in 2011-12. As last year, Cwm Taf Health Board received the highest number of applications per 100,000 head of population, with the relevant local authorities for the same area – Merthyr and Rhondda Cynon Taf – also recording relatively high number of applications.

Is it good or bad to have high or low number of applications to use the Safeguards?

The safeguards are meant to provide a legal framework for the necessary deprivation of liberty ensuring that breaches of the European Convention on Human Rights are prevented. It could be argued that low numbers of applications represent good practice in avoiding the need for any necessary deprivation of liberty. Equally, high numbers could be said to indicate good awareness of legislation and a readiness to be open about the challenges of working with vulnerable people. The evidence from our stakeholder events with practitioners and managers is that variation in the amount and quality of training and therefore understanding is influencing the level of activity. There is some anecdotal and intuitive evidence to suggest that low levels of applications results in low levels of training which in turn further limits the identification of the need to use the safeguards. Conversely those bodies with high levels of activity will tend to accrue higher levels of training and awareness of the safeguards.

Consequently it is better for local authorities and local health boards to ask,

'What do the low number of applications to my authority or board tell me about health and social care practice in this area and how does that fit with what I know about performance in other aspects of our work with people?'

Or,

'How confident am I that the relatively high number of applications to my authority or board have resulted in appropriate use of the safeguards in relation to necessary deprivations of liberty and how does that fit with what I know about performance in other aspects of our work with people?

The challenge for managing authorities in health and social care is to get behind the figures and understand the background and causes of the variation in activity. For our part CSSIW and HIW will explore this issue more fully in the forthcoming national review.

Findings 2

The monitoring of supervisory bodies

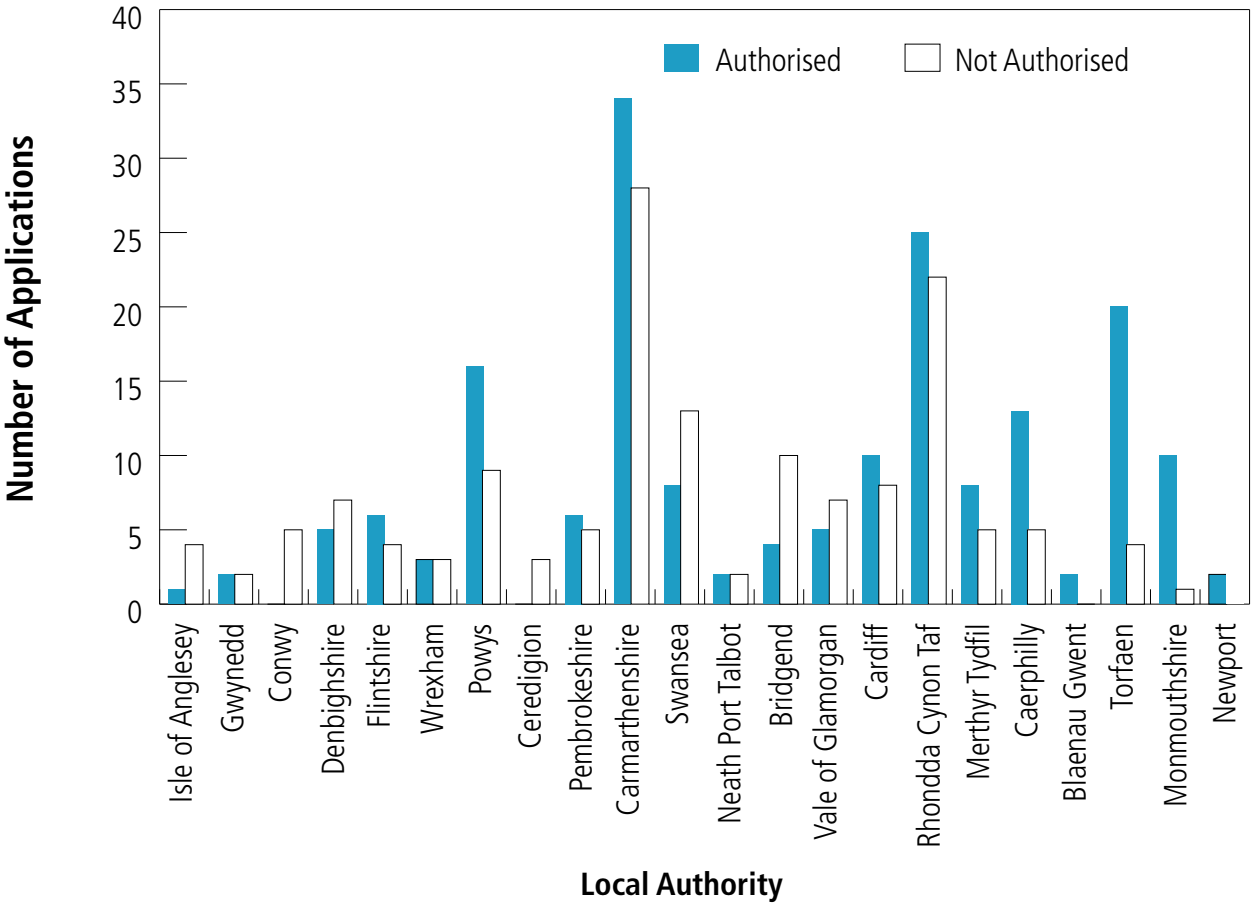
A supervisory body is a local authority social services or a local health board that is responsible for considering a deprivation of liberty application from a managing authority. Supervisory bodies are responsible for commissioning the statutory assessments and, where all the assessments agree, authorising a deprivation of liberty.

Key points

- There were 254 standard authorisations in Wales in 2012-13. Of these, 182 were granted by local authorities and 72 by Health. The proportion of applications granted by local authorities (72%) and by health boards (28%) is exactly the same as in 2011-12.
- Two local authorities – Conwy and Ceredigion – did not grant any standard authorisations. In South East Wales, three neighbouring authorities: Newport (1.9), Monmouthshire (15.2) and Torfaen (29), have marked variation in the number of authorisations granted per 100,000 population. Of all the Welsh health boards, Cwm Taf authorised the highest number of applications in the year as a proportion of their population. The health boards and local authorities where the safeguards have not been used, or used rarely, should consider their approach to raising awareness of the safeguards and making them available to people who need them.
- The fall in both the number of reviews requested and in the number of people receiving support from IMCA's merits further investigation by local authorities and health boards. All concerned need to be confident that these essential components of quality assurance are used properly.

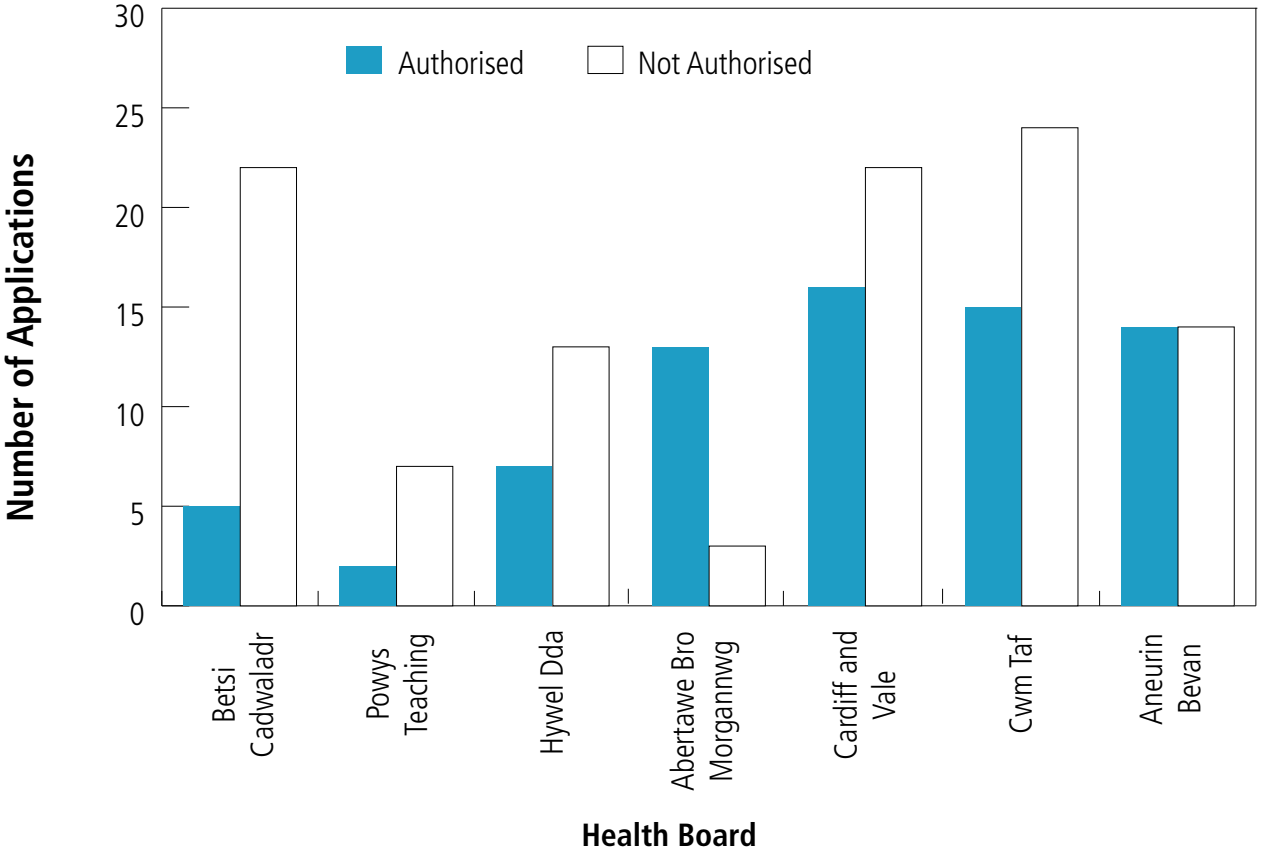
The charts below show the number of applications authorised and not authorised by local authorities and health boards.

Chart 6: Numbers of applications authorised and not authorised by local authority supervisory bodies in 2012-13



There were 182 standard authorisations granted by local authorities, a decrease on last year's figure (216).

Chart 7: Number of applications authorised and not authorised by health board supervisory bodies in 2012-13



This year, in health, 72 applications were authorised with 105 not being authorised (two requests were in progress at the time of data collection). This is a small decrease from the previous year. Of the 179 applications in 2012-13, 146 were standard following an urgent authorisation already being put in place. Urgent authorisations are, arguably, more likely to happen in health settings as admissions are often unplanned and therefore arrangements for individuals cannot be put in place prior to admission.

Authorisations were not granted where one or more of the 6 assessments that a supervisory body is required to undertake identified that a condition had not been met. The most common reason for an authorisation not being granted, by both local authorities and health boards, was that the supervisory body considered that the individual was not deprived of their liberty. Previous monitoring reports have noted the difficulty that can arise in correctly identifying a deprivation rather than a restriction of liberty. Despite this difficulty, if there is doubt as to whether an individual's liberty is being deprived or restricted, the fact that it has been referred and considered is preferable to no action.

The six assessments that a supervisory body is required to undertake in making its decision about the request for an authorisation' include a best interests assessment. This is an assessment of whether a deprivation of liberty is in the relevant person's best interests, is necessary to prevent harm, and is a proportionate response to the likelihood and seriousness of that harm. Even where the safeguards are not deployed, managing authorities – hospitals or care homes – need to keep a relevant person's needs and circumstances under review to ensure that a fresh application is made if their circumstances change. Where a deprivation of liberty is approved the supervisory body should carry out a review if there is any question about whether the person continues to meet the requirements or qualifying conditions attached to the authorisation. The table below illustrates the low numbers of reviews in the last three years. The slight rise in the number of reviews undertaken by health boards is more than offset by the decline in the number of local authority reviews.

Table 2: Number of reviews requested in social care and health, and by whom

		2009-10	2010-11	2011-12	2012-13
Local Authority	Relevant person	2	2	5	1
	Relevant person's representative	2	3	1	0
	Managing authority	19	6	5	7
	Supervisory body	25	10	18	6
	Total Local Authority	**48**	**21**	**29**	14
Health Board	Relevant person	0	0	0	0
	Relevant person's representative	1	0	0	0
	Managing authority	10	1	1	2
	Supervisory body	6	0	0	1
	Total Health Board	**17**	**1**	**1**	3

Concern about the infrequency of reviews has been raised in successive monitoring reports. There is some suggestion that the lack of reviews could reflect a failure to record the fact that the Safeguards have been lifted at the earliest opportunity. Supervisory bodies should explore this matter thoroughly through their own quality assurance processes. CSSIW and HIW will investigate this issue further in the forthcoming national review.

There were fewer numbers of people supported by Independent Mental Capacity Advocates in 2012-13 than in the previous year. The supervisory body should consider whether the relevant person or their representative would benefit from the support of an IMCA. The IMCA can assist with understanding the authorisation and in challenging it.

Table 3: Number of cases where IMCAs were appointed in social care and health

		2010-11	2011-12	2012-13
Local Authority	39A IMCA	22	23	26
	39C IMCA	0	2	2
	39D IMCA	14	30	22
Health Board	39A IMCA	9	11	10
	39C IMCA	0	1	1
	39D IMCA	6	8	9
	Total	**51**	**75**	**70**

Information on use of IMCAs was not collected in 2009-10

The number of IMCAs appointed in 2012-13 (70) amount to 28% of the number of standard authorisations granted (254). Section 39D IMCAs can offer significant support to the family members, carers and friends who make up the majority of the relevant persons' representatives. The reasons for the low number of IMCAs appointed need to be explored by the supervisory bodies.

Findings 3

Engagement with practitioners and managers in 2013

During the autumn of 2013 CSSIW and HIW facilitated four engagement events for professionals involved in using the Safeguards. While the timing of these events falls outside the reporting period for this report, the information gathered at them is useful in providing some context for the largely quantitative analysis in this report.

Three Key Themes

Awareness and understanding

Participants felt that there was still more that needed to be done to raise awareness of the safeguards and to enable better understanding of when and how to use them. This applied to staff working for managing authorities, but also to those with relevant responsibilities in supervisory bodies. It can be hard for even experienced professionals to be confident on the right response when faced with the complexity of emerging case law and the potential relevance of alternative legislative remedies.

Training and development

While the introduction of the safeguards in 2009 was accompanied by training, there was a view that more needs to be done to support staff in knowing how to use the safeguards. This is particularly the case in relation to managing authorities. This issue is about both the availability of training and the need to encourage and perhaps require staff to take up the opportunities on offer.

Leadership, guidance and governance

Those involved in using the safeguards saw the code of practice as an initially useful document that needed updating to take account of developments in practice and case law. More generally, there was a view that more needed to be done by government to provide leadership in relation to the use of the Mental Capacity Act and of the Safeguards. Governance arrangements – the process of decision making and the way decisions are implemented – are not consistent across the individual supervisory bodies.

The overall effect of these three key themes is, arguably, a lack of confidence in the use of the safeguards. We cannot be sure about the impact of this on the data that is discussed in this report. What we can say is that practitioners and managers, when they reflect on the figures, feel that the issues outlined above are at least part of the explanation for the relatively low level of activity, and for the variation in the use of the safeguards.

Conclusion

It is important to acknowledge what has been achieved since the implementation of the Safeguards in 2009. People who lack the capacity to consent or disagree to deprivations of their liberty are better protected than previously. The Mental Capacity Act remains a relatively new piece of legislation. It is not supported by the same degree of accumulated practitioner experience and knowledge that, for example, surrounds the operation of the Mental Health Act or, for that matter, safeguarding children and vulnerable adults. For this reason it is not particularly surprising that the Safeguards have not been used consistently across Wales over four years. But we cannot be complacent. While consistency in the use of the Safeguards would not, in itself, be an indicator of positive outcomes for people, the variation that we see in the data may well indicate genuine variation in response to similar concerns. The informal evidence from practitioners and managers at our engagement events would certainly suggest that there are real issues about performance that need to be investigated.

Improvement will require:

- Leadership across health and social care that supports better understanding and confidence in the use of the Safeguards. This is something that requires action by both commissioners and providers of health and social care. It is also likely to be more effectively and efficiently delivered through regional networks or partnerships that can pool existing expertise and resources. The provision of training and guidance is an obvious example of activity that would benefit from a regional approach. Peer audit and practice reviews are other tools that could assist both supervisory bodies and managing authorities in delivering their responsibilities more effectively.

- Better quality assurance processes to monitor outcomes for people subject to the Safeguards and to identify the action needed to improve performance. Reviews should be a core part of quality assurance. It is clear from the data that more needs to be done to explain their relevance and promote their use.
- A concerted effort from commissioners of health and social care to use their contracts with providers to drive improvement. This not only includes the written detail of contracts but, more importantly, extends to the way in which commissioners monitor the success of the services that they commission.

Next Steps for CSSIW and HIW

- From 1st May 2013 CSSIW began asking registered persons of adult care homes to provide it with written notification of all DoLs authorisation requests. CSSIW will use this information to improve its monitoring of the use of the Safeguards in adult care homes across Wales. The operation of the Safeguards will also be monitored by continued sampling of practice during routine inspection visits. Evidence from this activity will be reflected in the next annual monitoring report.
- In 2014 CSSIW and HIW will by undertaking a national review to examine the application and effectiveness of the Safeguards in Wales. This will include inspection activity in a sample of local authorities and health boards which will include interviews with practitioners, managers and providers; coupled with further interrogation of performance information. In addition, routine inspections of care homes will follow up previously reported notifications of applications to use the Safeguards and will look closely at the experience of people who have been subject to the Safeguards, or should have been. This information will be used to create a better picture of the overall quality of practice in implementing the Safeguards in Wales. The national overview report of the review will be published in the summer of 2014.