

England & Wales

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The UK ratified both the CRPD and its Optional Protocol in 2009. Adult protection measures (known domestically as ‘adult safeguarding’) are largely devolved and addressed differently across the four jurisdictions of the UK. Some elements of the adult safeguarding framework are the same across England and Wales, others are fully or partially devolved.

The Mental Capacity Act 2005 (MCA) provides the main legal framework for supported and substitute decision making, and for authorising safeguarding measures that may amount to a deprivation of liberty or require a court order; it applies across both England and Wales.

Since 2014 social care legislation that establishes powers and duties for local authorities to provide social care services, statutory duties to investigate allegations of abuse, establishes adult safeguarding bodies, and (in Wales) contains some additional investigatory powers, are devolved. These duties and powers are established under the Care Act 2014 (CA) in England and the Social Services and Wellbeing Act 2014 (SSWA) in Wales. Some additional protection is also provided through the exercise of powers under the inherent jurisdiction of the High Court, which are exercisable across both England and Wales. Positive obligations to investigate allegations of abuse are also underpinned by the Human Rights Act 1998 (HRA) and the common law,¹ which are both applicable across England and Wales.

The investigation of safeguarding allegations

Local authority adult social services departments are the lead agencies for adult safeguarding. If they have ‘reasonable cause to suspect’ that an adult in its area: a) ‘has needs for care and support’; b) ‘is experiencing, or is at risk of, abuse or neglect’, and, c) ‘as a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it’, then they must make whatever enquiries it thinks necessary to determine what action should be taken (s42 CA; s126). Abuse is defined broadly as including financial, physical, sexual and psychological abuse, domestic violence, modern slavery, female genital mutilation, institutional and peer abuse, discriminatory abuse, and additionally encompassing neglect and self-neglect.²

Local authorities must coordinate the response to a ‘safeguarding referral’, but other agencies such as the NHS, care providers and police, have a duty to co-operate (s6 CA; s160 SSWA). In Wales, but not in England, ‘relevant partners’ of the local authority are under a duty to inform the local authority if they have ‘reasonable cause’ to suspect that an adult is at risk of abuse (s128 SSWA). And in Wales, but not in England, local authorities can seek additional powers from a magistrate to enter a property (including potentially by force) and interview a person in private in order to determine whether they are at risk of abuse (s127 SSWA). In England, local authorities received 394,655 safeguarding referrals during 2017-18, and conducted 150,070 enquiries.³

¹ Re Z (Local Authority: Duty) [2004] EWHC 2817 (Fam).

² s42 CA; SSWA s197; Welsh Government, Working Together to Safeguard People: Volume 6 – Handling Individual Cases to Protect Adults at Risk (Code of Practice issued under section 131 of the Social Services and Well-being (Wales) Act 2014, 2018); Department of Health, Care Act Statutory guidance (Updated version published 26 September 2016) <https://www.gov.uk/government/publications/care-act-statutory-guidance>.

³ NHS Digital, Safeguarding Adults, England, 2017-18 [PAS] (2018) <https://digital.nhs.uk/data-and-information/publications/statistical/safeguarding-adults/annual-report-2017-18-england>.

Each local authority must establish ‘Safeguarding Adult Boards’ (SABs) comprised of local agencies to co-ordinate investigations and responses to enquiries (s43 CA; s143 SSWA).⁴ Wales, additionally, has a National Independent Safeguarding Board to provide additional support to SABs (s132 SSWA).

If local authority safeguarding enquiries determine that adults are at risk of neglect or abuse, they have no specific powers of protection. However they may take a broad range of steps, including reporting any potential criminal offences to the police for further investigation and potential prosecutions. A range of specific offences exist relating to abuse and neglect, domestic violence and – more recently ‘coercive control’. Local authorities may offer the person social care services that may reduce or remove the relevant risks. If the person objects to such measures or lacks the capacity to consent to interventions such as receiving care services, moving into residential care, or measures that might restrict contact with alleged abusers, then steps may be taken under the MCA or by application to court.

The Mental Capacity Act 2005

The MCA provides a legal framework for making substitute decisions in the ‘best interests’ of people who lack ‘mental capacity’ to make a specific decision. Although the overarching principles and concepts are the same for all kinds of decisions, the MCA approaches ‘personal welfare’ and property and affairs matters differently. Generally speaking, aside from everyday cash payments and contracts for necessities (s7-8 MCA), formal authority is needed to make substitute decisions regarding a person’s property and affairs. An adult with capacity can make a Lasting Power of Attorney (LPA) for either property and affairs, or personal welfare, or both. The Court of Protection can appoint a deputy with authority to make substitute decisions concerning property and affairs, or for personal welfare decisions, but the latter is very rare. In 2018 the Court of Protection appointed made 15448 orders appointing deputies for property and affairs, 420 appointing personal welfare deputies. The Office of the Public Guardian received 753,676 applications to register LPAs.⁵

Some safeguarding decisions may be taken informally under the MCA by relying on a ‘general defence’ against liability for acts of care and treatment (s5 MCA). However the limits of this authority are extremely unclear – particularly if the person or those close to them object. In such circumstances, it is advisable to seek an order from the Court of Protection authorising such interventions, but safeguarding guidance does not explicitly set out when this would be appropriate.

The MCA additionally contains deprivation of liberty safeguards (DoLS) for authorising deprivation of liberty in care homes and hospitals. Care homes and hospitals may seek authorisation for deprivation of liberty from supervisory bodies – who are generally also local authorities (but in Wales may be Local Health Boards if the application is from a hospital). Often DoLS teams are located with safeguarding teams, creating a potential conflict of interest where they are asked to authorise a deprivation of liberty that has followed from decisions made by safeguarding teams. Deprivation of liberty can also be authorised by the Court of Protection.

In 2014 a House of Lords Committee on the MCA conducted post-legislative scrutiny of the MCA and concluded that its ‘empowering ethos’ had not been realised because of implementation problems and paternalistic and risk averse cultures in health and social care.

⁴ Care Act 2014 s43(1)

⁵ Ministry of Justice, *Family court statistics quarterly: July to September 2018* (2018)

<https://www.gov.uk/government/statistics/family-court-statistics-quarterly-july-to-september-2018> .

The Committee recommended the DoLS be reviewed and replaced.⁶ Following a Supreme Court ruling interpreting the meaning of ‘deprivation of liberty’ more broadly than previous judgments⁷ the number of applications for DoLS authorisations increased from under 20,000 to over 200,000, and supervisory bodies are unable to keep up with the volume of applications.⁸ Following a review by the Law Commission⁹ the government introduced a Bill to replace the DoLS with a new scheme (the Liberty Protection Safeguards), which are anticipated to come into force in 2020. The Bill did not introduce the additional measures proposed by the Law Commission that would have brought the MCA into closer compliance with the CRPD.

Additional protection measures

The main mechanisms for effective adult safeguarding interventions by local authorities tend to be the provision of social care services, with the MCA potentially in operation if the person is deemed to lack mental capacity. Where a person is regarded as having mental capacity, is objecting to the proposed measures, but nevertheless is regarded as at risk, two further mechanisms may be considered. The first is guardianship under s7-8 Mental Health Act 1983, however the powers of guardians are limited and use of the mechanism is declining; there were only 105 new cases in 2017-18.¹⁰ Where a person is regarded as having mental capacity under the MCA, but they are viewed as vulnerable or their decision making is regarded as impaired by virtue of their situation (for example through undue influence), the High Court may make an order under its ‘inherent jurisdiction’. Such orders were initially only imposed to protect the autonomy of the person, for example an injunction against assaulting or threatening a person, restricting contact with a person.¹¹ More recently, some orders have entailed direct restrictions on the autonomy and even liberty of the person themselves, and the compatibility of this with article 5 of the ECHR has been contested.¹²

⁶ House of Lords Select Committee on the Mental Capacity Act 2005, *Mental Capacity Act 2005: post-legislative scrutiny* (HL Paper 139, 2014).

⁷ *P v Cheshire West and Chester Council and another; P and Q v Surrey County Council* [2014] UKSC 19.

⁸ NHS Digital, *Mental Capacity Act 2005, Deprivation of Liberty Safeguards England, 2017-18* (2018) <https://digital.nhs.uk/data-and-information/publications/statistical/mental-capacity-act-2005-deprivation-of-liberty-safeguards-assessments/annual-report-2017-18-england>; Care Inspectorate Wales and Healthcare Inspectorate Wales, *Deprivation of Liberty Safeguards Annual Monitoring Report for Health and Social Care 2016-17* (2018) <https://careinspectorate.wales/deprivation-liberty-safeguards-annual-monitoring-report-health-and-social-care-2016-17>.

⁹ Law Commission, *Mental Capacity and Deprivation of Liberty* (Law Com No 372, 2017).

¹⁰ NHS Digital, *Guardianship under the Mental Health Act 1983, England, 2016-17 and 2017-18, National Statistics* (2018) <https://digital.nhs.uk/data-and-information/publications/statistical/guardianship-under-the-mental-health-act-1983/england-2016-17-and-2017-18-national-statistic>.

¹¹ *A Local Authority v DL* [2011] EWHC 1022 (Fam); *DL v A Local Authority & Ors* [2012] EWCA Civ 253.

¹² *Mazhar v The Lord Chancellor* [2017] EWFC 65; *AB (Inherent Jurisdiction Deprivation of Liberty)* [2018] EWHC 3103 (Fam); *Re PB* [2014] EWCOP 14; *Southend-On-Sea Borough Council v Meyers* [2019] EWHC 399 (Fam); *A Local Authority v BF* [2018] EWCA Civ 2962.