

The legal framework for safeguarding adults

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agenda

- 1) The Care Act/SSWBA frameworks
- 2) When to intervene
- 3) MCA & safeguarding
- 4) Inherent jurisdiction

The Care Act/SSWBA frameworks



The safeguarding enquiries duty

The local authority must make enquires it considers necessary (or cause enquiries to be made) if has reasonable cause to suspect ...

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graph TD; A[The local authority must make enquires it considers necessary (or cause enquiries to be made) if has reasonable cause to suspect ...] --> B[Care & support needs]; A --> C[Abuse or neglect]; A --> D[Unable to safeguard him/herself];
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Care & support needs

Abuse or neglect

Unable to safeguard him/herself

Safeguarding enquiries & consent

- The duties in s.42 Care Act & s.126 SSWBA are not contingent on the person's consent
- Therefore, the duty applies irrespective of whether the adult has or lacks the capacity to the enquiry
- But capacity may be relevant to how the inquiry is carried out & the outcome of the inquiry
- Eg, if the person lacks capacity, a best interests decision may be needed in respect of accessing the person & putting in place protective measures
- Some outcomes do not rely on capacity eg referral to the police & CQC intervention

Inability to safeguard him/herself

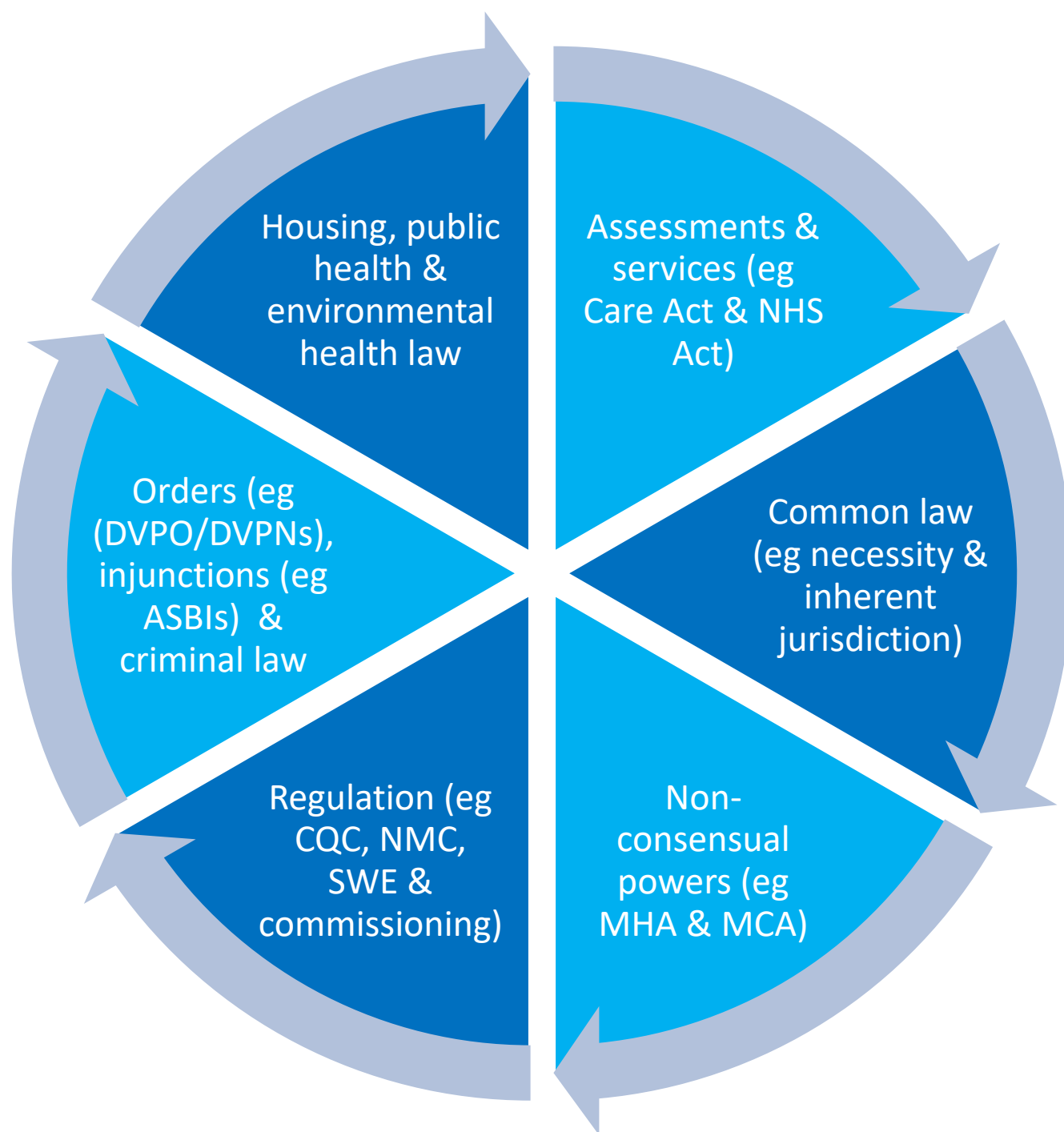
- Not defined in the Care Act or SSWBA (or in the guidance)
- In principle, the safeguarding duty does not apply if the adult is able but not willing to safeguard themselves, but ...
- A key consideration is whether the adult has capacity to make the relevant decision
- Note – the test of capacity needs to be fact specific (ie not 'unable to safeguard themselves')
- But a person's ability to safeguard themselves is not solely a matter of mental capacity



The local authority must make (or cause to be made) whatever enquiries it thinks necessary **to enable it to decide whether any action should be taken in the adult's case and, if so, what and by whom.**

Section 42(2) of the Care Act





Adult Protection & Support Orders (Wales only)

SSWBA, s.127 & Working Together to Safeguard People – Vol 4

- An authorised officer (ie by the local authority) can apply for an APSO to magistrates court
- Purposes:
 - 1) speak to the suspected adult at risk,
 - 2) ascertain if the adult is making decisions freely, &
 - 3) properly assess whether they are an adult at risk & decide what, if any, action should be taken
- May enter premises but no powers of removal or to force care & treatment
- Conditions may be attached to an APSO

When to intervene



The State's positive ECHR obligations

Article 2: to protect life

Article 3: to protect against torture, inhuman or degrading treatment

Article 5: to protect against unlawful interferences with liberty, including by private individuals

Article 8: to protect physical & moral integrity of the individual (especially, but not exclusively) from the acts of other persons

Explains why you might need to be acting, but not what you can do

What are your duties?

Re Z [2004] EWHC 2817 (Fam)

- Mrs Z, aged 65, was suffering from an incurable & irreversible condition (cerebella ataxia) & becoming increasingly disabled
- She wished to be assisted to take her own life in Switzerland (where assisted suicide is legal)
- She had received extensive support from the local authority
- Her husband had initially been opposed to her wife's wishes & kept the local authority informed of the situation
- Mr Z informed them that he had changed his mind & proposed to make all the necessary arrangements & accompany his wife to Switzerland for the assisted suicide

The local authority's duties ...

- 1) Investigate what is the person's true position & intention
- 2) Consider capacity to make & carry out decision & intention
- 3) Consider any other influence on the person's position & intention
- 4) Consider the inherent jurisdiction of the High Court
- 5) If the person lacks capacity, make a best interests decision
- 6) If the person has capacity, allow them in a lawful way to give effect to their decision (with advice & information)
- 7) If criminal offence suspected, refer to the police
- 8) In exceptional circumstances, invoke s.222 Local Government Act 1972 (LA power to prosecute or defend)

(now – add to the list if relevant such things as Domestic Violence Protection Notice/Order, injunction under Protection from Harassment Act)

Second National Analysis of SARs: April 2019 - March 2023

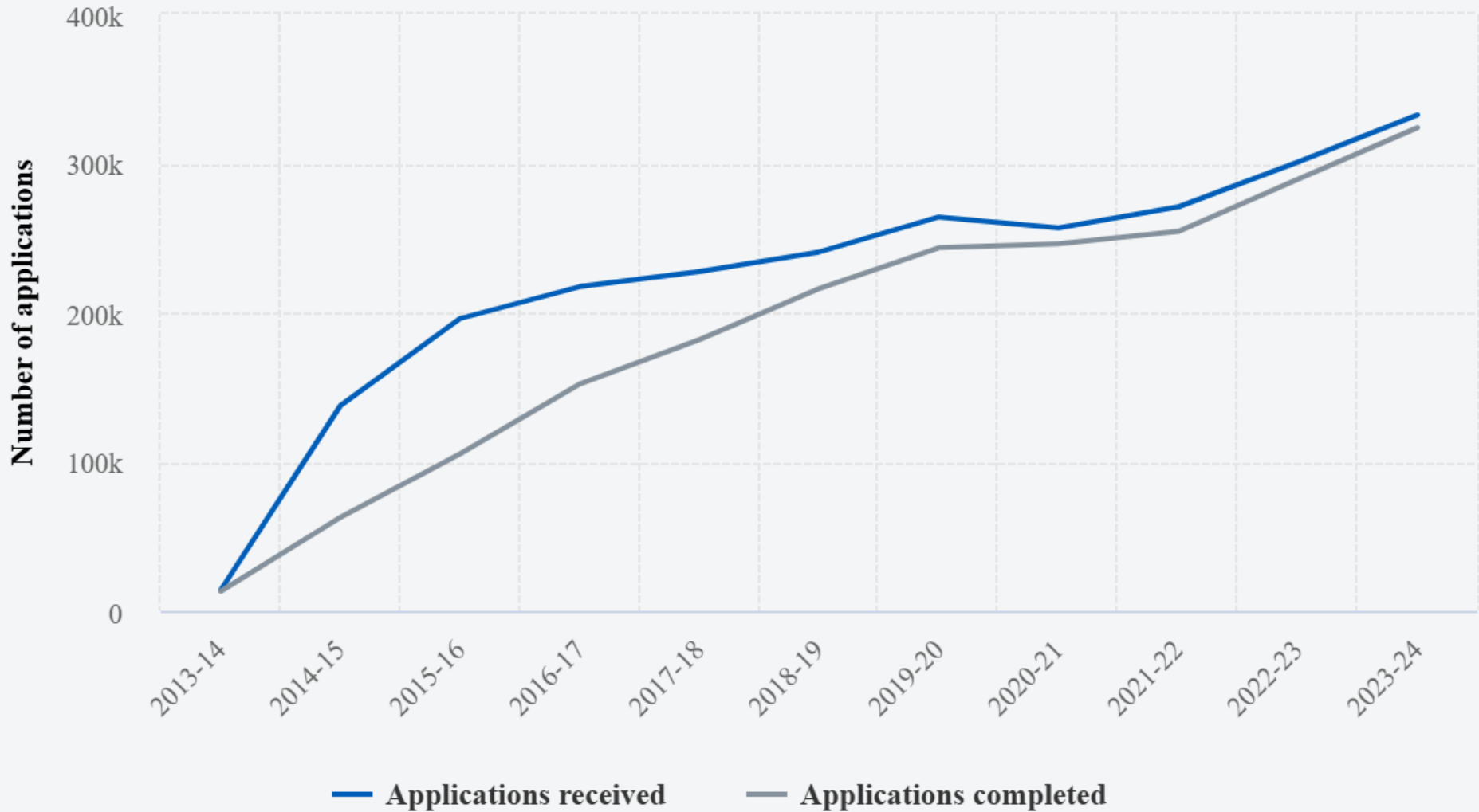
Commissioned by Local Government Association & ADASS (2024)

- Revisions to the definitions of abuse/neglect within the Care & Support Statutory Guidance
- DHSC should consider an adult safeguarding power of entry & inclusion of social workers in the Assaults of Emergency Workers (Offences) Act 2018
- Guidance for local authorities & ICBs on roles & responsibilities for out of area placements is insufficient & needs statutory provision
- New framework needed to promote best practice in transitional safeguarding in legislation & guidance
- The revised MCA Code should give sufficient guidance on executive functioning & substance misuse
- Mental health law reform should consider the relationship between mental illness & substance misuse

MCA & safeguarding



Number of DoLS applications received and completed by year, England.



Unlawful deprivation of liberty – the consequences

- *LB Haringey v Emile* (2020): damages of £143,000 awarded after failure to authorise DoL in a care home for 8 years (not a technical breach of Art.5 as there were options other than residential care)
- *Essex CC v RF* (2015): an award of £60,000 plus costs (£50-64,000) & repayment of £23,000 in care home fees where the council's conduct - depriving P of liberty for 13 months - had been 'reprehensible'
- Burden of proof on detaining (&/or authorising) body to show no harm caused
- Plus, the Ombudsman: eg ordered Surrey to produce an action plan to address its significant DoLS backlog of 5,700 (rep no 22 014 808)

MCA 2005 misunderstandings

The first principle:

“The presumption of capacity, in particular, is widely misunderstood by those involved in care. It is sometimes used to support non-intervention or poor care, leaving vulnerable adults exposed to risk of harm. In some cases this is because professionals struggle to understand how to apply the principle in practice. In other cases, the evidence suggests the principle has been deliberately misappropriated to avoid taking responsibility for a vulnerable adult.”

(House of Lords Select Committee PLS of MCA, para 105)

The third principle: A person is not to be treated as unable to make a decision merely because they make an unwise decision – a right to make unwise decisions?

Examples of Court of Protection orders

- Deprivation of liberty of a man with paedophilic disorder mainly due to risk he posed to children (*N v A Local Authority* [2016] EWCOP 47)
- Restrictions on social media use to prevent a young man with LD accessing extreme porn & contacting sex offenders (*Re A* [2019] EWCOP 2)
- Covert insertion of IUD during c-section to safeguard P, who lacked capacity to engage in sexual relations, from risk of future pregnancy (*An NHS Trust v AB* [2019] EWCOP 45)
- Removal of P from her home to a care home for an assessment, in circumstances where her son was preventing services visiting (*Hull CC v A* [2021] EWCOP 60)

Injunctive relief against third parties

A Local Authority v TA [2021] EWCOP 22

- Immediate vacation of his mother's home
- Cordon of 100 yards around the property in which the son was forbidden to enter
- Barred from removing mobility scooter from the property which was for his mother's benefit
- Prohibition on son putting articles or other info in the public arena – including social media
- Civil restraint order against son for 2 years (to restrict level of court applications)

'Conditions' placed on son

AC and GC (Capacity: Hoarding: Best interests) [2022] EWCOP 39

- To be trained on moving and handling
- Should continue to see a therapist
- Must give full access to care workers
- Must not smoke in the property but can vape/smoke outside
- Keys must be left in a key safe
- Should store all shopping in appropriate places
- Kitchen & shopping bags checked regularly for out-of-date & rotten food
- Should not be under the influence of alcohol when providing care for his mother
- All serious problems relating to the property to be reported to mother's deputy immediately
- A cleaner to be employed to clean the home weekly
- Mother should not be left on her own for longer than two hours

Inherent jurisdiction



If all else fails – the inherent jurisdiction

“... the inherent jurisdiction can be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either (i) under constraint or (ii) subject to coercion or undue influence or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent.”

Munby J in *Re SA* [2005] EWHC 2942 (Fam) at [77]

MCA, inherent jurisdiction & self-neglect

London Borough of Croydon v CD [2019] EWHC 2943 (Fam)

- CD was diabetic & epileptic, poor mobility, incontinent of urine/faeces & unable to maintain his home environment
- Also, excess alcohol use & often inebriated at home
- Frequent incidents of falling in his flat, non-compliance with medication, severe self-neglect, inability to manage personal care, activities of daily living & health
- His home environment deteriorated & care agency unable to access flat due to fears of cross contamination & infection
- Frequently called emergency services
- CD lives alone and socialises with friends in the same block of flats who equally have alcohol misuse problems

Key issues

- CD's flat was soiled with human waste, putting him & visitors at high risk of infectious diseases
- He was continuing to drink alcohol and soil himself
- Carers unable to access his flat to provide the personal care CD required
- CD was not willing to change his ways or be moved to a safe environment where he could be supported with his personal care
- Local authority proposed a '20-point care plan' to allow staff to access CD's flat (1) to provide appropriate care to CD & (2) make the flat safe for human habitation

The judge's decision

- All agreed care plan was in CD's best interests but disagreed over jurisdiction (local authority sought orders under IJ but OS suggested MCA)
- Judge held that he was both a vulnerable adult for the purposes of the inherent jurisdiction & lacked capacity to make decisions about his care
- The relevant impairment / disturbance being his psychiatric background of depression and/or dysthymia and/or his chronic alcohol abuse
- It was also noted that CD's capacity fluctuated
- Judge therefore made an order under the MCA, but LAO included the finding that CD was 'vulnerable' & so the IJ was an alternative route available to the local authority

Limits of the inherent jurisdiction

London Borough of Islington v EF [2022] EWHC 803 (Fam)

- 18-year-old woman (EF) with schizo-affective disorder with psychotic and affective symptoms
- When aged 14, she met an older man from Brazil in a chat room & began an online relationship
- He came to England in 2019 & developed a sexual relationship with EF
- While in England, he was arrested on suspicion of possession of child pornography
- He returned to Brazil before the investigation was completed
- The relationship continued & EF planned to move permanently to Brazil to be with him
- Local authority sought orders to prohibit her from travelling
- Accepted she had capacity but argued she was 'vulnerable adult' & at risk of grooming & exploitation

The judge's decision

- Accepted that if EF travelled to Brazil there was a significant risk that her mental state would worsen, & she would be at risk of exploitation & suicide
- But MCA was not engaged & the only power of the court had was the inherent jurisdiction which 'must be used sparingly'
- Local authority were seeking decisions of utmost significance to be imposed upon EF – on that basis alone the inherent jurisdiction should not be used
- Also EF's Article 8 right to consider, including the right to live their personal life as they choose & develop relationships including intimate relationships
- Concluded that the court should not invoke its inherent jurisdiction
- He went on though to make a personal plea to EF urging her to listen carefully to the advice given & think more deeply about the issues

ANY QUESTIONS

DO YOU HAVE?

My contact details

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Thank you for listening