

The Care Act 2014:



A new direction for adult safeguarding?

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Law Commission, 2011



‘..neither systematic nor coordinate, reflecting the sporadic development of safeguarding policy over the last 25 years. Unlike in Scotland, there is no single or coherent statutory framework for adult protection in England and Wales. Instead it must be discerned through reference to a wide range of law including general community care legislation and guidance, the Mental Health Act 1983, the Mental Capacity Act 2005, the Safeguarding Vulnerable Groups Act 2006, the inherent jurisdiction of the High Court and the civil and criminal justice systems.’

The Care Act 2014



- Consolidates and modernises adult social care law
- Establishes a statutory framework for adult safeguarding
- Supported by Care & Support Statutory Guidance
- Gateway to a range of associated legislation, caselaw, policy including:

Mental Capacity Act 2005

Human Rights Act 1998

Safeguarding Provisions



- S.42 Duty to make enquiries
- S.43 Statutory Safeguarding Boards (SAB)
- S.44 Safeguarding Adult Reviews (SAR)
- S.68 Advocacy support

Human Rights Act 1998



Underpins good practice

Section 6 – duty on public authorities to act compatibly with the articles

Article 3

- freedom from inhuman and degrading treatment
- Positive duty

Article 8

- Right to respect for private and family life, home and correspondence
- Proportionate and lawful interference



Adult Support & Protection (Scotland) Act 2007

Social Services and Well-being (Wales) Act 2014

Philosophy of the Care Act



Making Safeguarding Personal

- Person-led
- Outcome focussed

Promoting well-being

- Central duty in all work with adults

Principles, S.1(3)



- (a) the importance of beginning with the assumption that the individual is best-placed to judge the individual's well-being;
- (b) the individual's views, wishes and feelings;
- (c) the importance of preventing or delaying the development of needs for care and support or needs for support and the importance of reducing needs of either kind that already exist;
- (d) the need to ensure that decisions about the individual are made having regard to all the individual's circumstances (and are not based only on the individual's age or appearance or any condition of the individual's or aspect of the individual's behaviour which might lead others to make unjustified assumptions about the individual's well-being);

Principles...



- (e) the importance of the individual participating as fully as possible in decisions relating to the exercise of the function concerned and being provided with the information and support necessary to enable the individual to participate;
- (f) the importance of achieving a balance between the individual's wellbeing and that of any friends or relatives who are involved in caring for the individual;
- (g) **the need to protect people from abuse and neglect;**
- (h) the need to ensure that any restriction on the individual's rights or freedom of action that is involved in the exercise of the function is kept to the minimum necessary for achieving the purpose for which the function is being exercised

Well-being, S.1(2)



(a) personal dignity;

(b) physical and mental health and emotional well-being;

(c) **protection from abuse and neglect;**

(d) control by the individual over day-to-day life;

(e) participation in work, education, training or recreation;

(f) social and economic well-being;

(g) domestic, family and personal relationships;

(h) suitability of living accommodation;

(i) the individual's contribution to society.

‘Organisations should always promote the adult’s well-being in their safeguarding arrangements. People have complex lives and being safe is only one of the things they want for themselves. Professionals should work with the adult to establish what being safe means to them and how that can be best achieved. Professionals and other staff should not be advocating ‘safety’ measures that do not take account of individual well-being.’
(14.8)

The emphasis must be on sensible risk appraisal, not striving to avoid all risk, whatever the price, but instead seeking a proper balance and being willing to tolerate manageable or acceptable risks as the price appropriately to be paid in order to achieve some other good – in particular to achieve the vital good of the elderly or vulnerable person's happiness.

What good is it making someone safer if it merely makes them miserable?

Assessment



S.9 LA duty to assess where it appears that an adult may have needs for care and support, the authority must assess whether the adult does have needs for care and support, and if so what those needs are.

The assessment must include

- (a) the impact of the adult's needs for care and support on wellbeing (including protection from abuse and neglect)
- (b) the outcomes that the adult wishes to achieve in day-to-day life,

S.11 An adult may refuse a needs assessment,

BUT the local authority must carry out a needs assessment if—

- (a) the adult lacks capacity to refuse the assessment and the authority is satisfied that carrying out the assessment would be in the adult's best interests, or
- (b) the adult is experiencing, or is at risk of, abuse or neglect

Six principles



Empowerment

presumption of person-led decisions / informed consent

Prevention

it is better to take action before harm occurs

Proportionality

proportionate, appropriate and least intrusive response

Protection

support and representation for those in greatest need

Partnership

local solutions through services working with their community

Accountability

accountability and transparency in delivering safeguarding

Co-operation



S.6 - LA and relevant partners must co-operate in the exercise of their respective functions relating to adults with needs for care and support e.g. providing information on how to raise concerns

- Councils, NHS, DWP, Police, Prisons, Probation
- Others as appropriate e.g. service providers, housing, public health and children's services

S.7 - Where LA requests co-operation of a partner ...the partner must comply unless-

- Incompatible with own duties
- Adverse effect on functions

Purposes of co-operation



- Promoting well-being
- Protecting adults with needs for care and support who are experiencing or at risk of abuse or neglect
- Identifying lessons to be learned ...applying to future cases

S. 42 Care Act 2014



(1) This section applies where a local authority has reasonable cause to suspect that an adult in its area (whether or not ordinarily resident there)—

(a) has needs for care and support (whether or not the authority is meeting any of those needs),

(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.

(2) 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 (whether under this part or otherwise) and, if so, what and by whom.

Who?



- a person over 18 years who:
 - has needs for care and support (including people who fund their own care); and
 - is experiencing, or at risk of, abuse or neglect; and
 - as a result of those care and support needs is unable to protect themselves from either the risk of, or the experience of abuse or neglect

Types of Abuse



Familiar- 'No Secrets'

- Physical
- Sexual
- Psychological
- Financial or material
- Discriminatory
- Neglect, acts of omission

New Guidance

- Domestic violence
- Modern slavery
- Organisational abuse
- Self-neglect

Financial Abuse



“Abuse” includes financial abuse; and for that purpose “financial abuse” includes—

- (a) having money or other property stolen,
- (b) being defrauded,
- (c) being put under pressure in relation to money or other property, and
- (d) having money or other property misused. S.42(3)

Reasonable cause to suspect...



- Against arbitrary use of powers
- Suspicion is a lower threshold than belief
- A state of mind which falls short of belief but is more than mere idle wondering whether the situation exists or not
- Based on some reasonable factual basis – own knowledge /observation or information received

Cause to be made...



- LA may require others to undertake enquiries
- LA retains overall responsibility to ensure s.42 duty is satisfied

Independent advocate, s.68



LA must arrange for an independent advocate to represent and support an adult who is the subject of a safeguarding enquiry or SAR where:

- the adult has ‘substantial difficulty’ in being involved in the process, and
- there is no other suitable person to represent and support them. S.68

IMCA / IMHA

Outcome



- LA must determine further action –involve other agencies
 - Safeguarding Plan
- ‘Action might be primarily supportive or therapeutic, or it might involve the application of civil orders, sanctions, suspension, regulatory activity or criminal prosecution, disciplinary action or de-registration from a professional body’ (14.82)
- A duty without powers

Access to the adult



‘Under the Care Act, there is no express legal power of entry or right of unimpeded access to the adult’

Power of Entry Consultation

The purpose of the safeguarding enquiry is to decide whether or not the local authority or another organisation, or person, should do something to help and protect the adult. In almost every case it is likely to be necessary to physically see and talk to the adult in order to be able to make that decision.

Good safeguarding practice begins with talking to the adult who there is concern about, unless there are exceptional circumstances that would increase the risk of abuse. That conversation will need to establish facts and, importantly, what the person wants to happen and how. Practitioners need to make personal contact with the people they are working with and establish a relationship. **Therefore the issue of access and ability of the person to talk freely is critical.**

Examples



- access to the premises is being denied altogether by a third party on the premises, typically a family member, friend or other informal carer
- access to the premises can be gained, but it is not possible to speak to the adult alone – because the third party is insisting on being present
- the adult at risk themselves (whether or not unduly under the influence of the third party) is insisting that the third party be present – clearly in such cases if the person is known to have capacity the issue of access in terms of the law does not arise.

A duty to attempt access?



- A London Borough v G [2014] EWCOP 485
- ‘The local authority had no alternative but to visit on numerous occasions and attempt to see G on her own. Anything else would have been a dereliction of their duty to her as a vulnerable person about whom they had received complaints about possible financial predation. Local authority staff must be permitted to carry out their duty to investigate reports relating to safeguarding unhindered’

Powers



S.17 Police and Criminal Evidence Act 1984

S. 135 Mental Health Act 1983, Magistrates warrant authorising police entry with force if necessary

S. 115 AMHP power to enter and inspect any premises

Court of Protection may order a third party to allow access, order a third party to leave, remove the adult to alternative accommodation

Powers- Inherent Jurisdiction



Orders against third party allowing access to adult

DL v A Local Authority [2012] EWCA Civ 253

Declaration prohibiting son from:

- assaulting or threatening to assault parents
- preventing parents from having contact with friends and family members
- giving orders to care staff
- Interfering in the provision of care and support
- refusing access to health and social care professionals
- behaving in an aggressive and/or confrontational manner to care staff and managers

Inherent Jurisdiction



- Ever expanding safety net
- Birmingham City Council v Safraz Riaz [2014] EWHC 4247 (Fam)
- Injunction to prevent further contact or association by 10 men with a vulnerable 17 year old (or any previously unknown female u 18) in a public place.
- Accessible?

Criminal law



- Ill-treatment and wilful neglect
- S.127 MHA 1983, s.44 MCA 2005
- Criminal Justice & Courts Act 2015
- S. 20 - Offence for an individual who has the care of another by virtue of being a care worker to ill-treat or wilfully neglect that person (includes managers and directors)
- S. 21 – Care providers

Accountability



- Costs of poor practice

Essex County Council v RF & Ors [2015] EWCOP 51 - 'Fluffy'

- Unlawful deprivation of liberty of 91 year old for 13 months = £60,000 damages

LGO Investigation, Cambridgeshire CC

- refresher training for social care staff on mental capacity assessments, best interest decisions, deprivation of liberty and the role of the Court of Protection and how to advise the public on their rights.

Challenges & Solutions



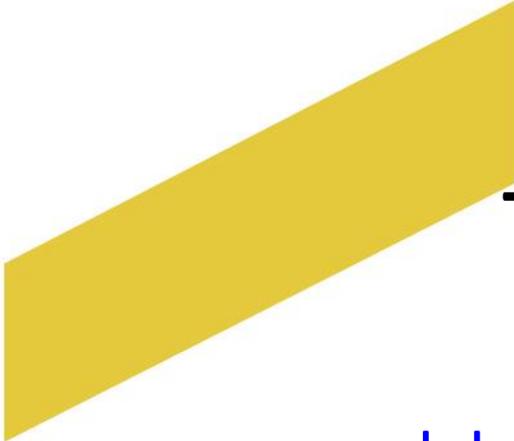
- Human Rights
- Devolution
- Embedding new concepts
- Types of abuse
- Assessment and enquiry
- Lack of power of entry
- Capacity and DOLS
- Inherent Jurisdiction

Legal literacy



Challenges of achieving good safeguarding practice grounded in law

- Complexity
- Pace of change
- Knowledge and utilisation
- Good practice - skills
- Legal system in turmoil
- Commitment to workforce development



Thank you

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Director of MA Safeguarding Adults: Law,
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Best Interests Assessor Award (Sept 2015)

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