Accepted version of article: Not to be reproduced or used without author's permission

Accepted for publication in Child and Family Law Quarterly, 27 Apr 2020

Protecting Vulnerable Adults from Abuse: Under-protection and Over-protection in Adult Safeguarding and Mental Capacity Law

Jaime Lindsey, University of Essex, School of Law

Key words: Mental capacity, safeguarding, vulnerability, domestic abuse, protection orders

Abstract:

In this article I explore law and practice at the intersection between adult safeguarding and mental capacity law to show that adults vulnerable to abuse are left under-protected in some cases and over-protected in others. In particular, I argue that the MCA has become a tool for protecting vulnerable adults from abuse, yet this is done in ways that restrict and control the vulnerable victim. Instead, the approach to adult safeguarding needs to shift from restricting and controlling vulnerable adults towards tackling perpetrators of abuse. Learning from recent developments in civil law responses to domestic abuse, I suggest that safeguarding adults law should similarly adopt an approach that focuses on perpetrators of abuse by incorporating a safeguarding adults protection order instead of resorting to mental capacity law.

A. INTRODUCTION

The domain of adult safeguarding crosses the boundaries of law, social care, health, criminal justice and beyond. Safeguarding concerns 'an adult's right to live in safety, free from abuse and neglect'[1] and generally encompasses an obligation on the state to secure such freedom from abuse and neglect. Abuse in this context is a broad concept and can include physical, emotional, sexual and financial

[1] Department of Health and Social Care (2018) Care and Support statutory guidance, available at: https://www.gov.uk/government/publications/care-act-statutory-guidance/care-and-support-statutory-guidance#safeguarding-1, chapter 14.7.

abuse. Given the breadth of safeguarding in English law, criminal law, mental capacity law, forced marriage, modern slavery, domestic abuse legislation, and aspects of public law are just some of the options where a safeguarding concern arises. Such a network of legal mechanisms might suggest that vulnerable adults have sufficient protection. However, the variety of different frameworks in English law can mean that adults vulnerable to abuse can fall between the gaps of the different legal regimes, being left under-protected in some cases and over-protected in others.

In this article I focus on the intersection of adult safeguarding and mental capacity law to show how both under-protection and over-protection occur. Under-protection means a failure to sufficiently protect a person from abuse. Generally this will mean that no or limited action is taken, the victim is insufficiently supported, and the abuse is left to continue with few consequences for the perpetrator. As emphasised throughout, under-protection is particularly evident when allegations of abuse are reported but not pursued. For example, one social worker that I interviewed, Robert,[2] told me 'if you are vulnerable you know, if you are elderly if you have a learning disability or whatever and someone commits a crime against you that gets investigated by the social workers … and the rest of the population get the police.' This quote reflects the core of the problem discussed in this article - that adults vulnerable because of their disability are left without sufficient protection from abuse. This may partly be because the police do not take action in those cases. However, it may also be because local authorities do not have the power, knowledge or resources to take appropriate action and therefore these adults fall between the gaps.[3] Over-protection on the other hand means more protection than is necessary to allow the individual to be free from abuse. For example, over-protection is clear where a person is removed from an abusive situation and put into a care home against their wishes. That response to abuse goes beyond what is necessary to protect. Over-

[2] Robert was a qualified social worker. He told me that at the time of interview he was a manager of a learning disability team in a local authority for six years during which time the MCA came into force and subsequently a manager for a transition social work team for a local authority for 18 months.

[3] Even though the Care and Support statutory guidance makes clear that involvement of the police in potentially criminal safeguarding matters can be beneficial, see Department of Health and Social Care above at n 1, chapter 14.83.

protection is common in mental capacity law responses because the nature of mental capacity determinations are that they apply to all decisions that the adult makes in that particular domain. The potential for over-protection is clear because the intervention goes beyond merely protecting the adult from a specific perpetrator of abuse but allows for interventions in a range of areas across their life.

A case that I return to later typifies the debate between under-protection and over-protection that arises at the intersection of mental capacity and adult safeguarding. Here, a learning disabled woman was married to a learning disabled man who had a significant history of criminality, including a number of allegations of rape against him and allegations of domestic abuse. The woman was seen to need safeguarding from her husband's abuse, but in the absence of criminal action against him, the social workers found it challenging to identify the most appropriate way to protect her. They knew the woman wanted to stay with her husband and making her leave would cause her considerable distress and undermine her wishes. On the one hand it could be argued that because the woman had learning disabilities she must be protected, even if that meant separating her from her husband against her wishes. On the other hand, the woman should be treated like any other victim of domestic abuse and be given the support to leave in her own way and in her own time. There are no easy answers to this problem. However, I argue that the law on safeguarding adults could be developed based on the domestic abuse field by incorporating safeguarding-specific civil law remedies such as protection orders which target the perpetrators of abuse.

I refer to 'vulnerable adults' throughout this article, a term that is not without criticism. I use it to refer to adults who are likely to fall within adult safeguarding law and practice. This means adults who fall within the section 42(1) Care Act 2014 definition of adults with 'needs for care and support (whether or not the authority is meeting any of those needs)', who are 'experiencing, or is at risk of, abuse or neglect' and 'as a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it.' Historically, this meant disabled adults. However, defining vulnerability by reference to a person's inherent features such as their disability has been criticised

and it is important to understand vulnerability in more nuanced ways.[4] I accept that adults can be vulnerable for many reasons beyond their disability and the language of vulnerability when associated with specific groups can be stigmatising.[5] In reality, for many adults their vulnerability is caused by being in a position of abuse. Therefore, when using the term vulnerable adults, I mean adults who are situationally vulnerable to abuse, but who, as a result of their particular needs for care and support, are unable to properly protect themselves from that abuse. In this sense, their vulnerability to abuse is exacerbated by their support needs. The importance of the provision of support to facilitate a person's functioning is made clear in the United Nations Convention on the Rights of Persons with Disabilities (CRPD). In contexts of abuse against disabled adults, Article 16 CRPD requires that the state provides protection from that abuse. In some ways therefore, the use of mental capacity law might be seen as a legitimate route to achieve that protection. However, reading Article 16 in light of the CRPD as a whole, measures that do not directly coerce the individual are required to ensure the proper realisation of the rights to support and non-coercion contained within the CRPD.[6]

The article starts with an overview of safeguarding legislation, the Mental Capacity Act 2005 (MCA) and domestic abuse law. It then proceeds with an outline of the methods used for the original empirical research which informs this article, including observations and case file reviews at the Court of Protection (CoP) and interviews with social workers. The CoP is the court that deals with disputes that arise under the MCA and the nature of the cases explored in this research were welfare cases

[4] B Clough, 'Vulnerability and capacity to consent to sex - asking the right questions?' (2014) 26 *Child and Family Law Quarterly* 371, J Lindsey, 'Developing vulnerability: A situational response to the abuse of women with mental disabilities' (2016) 24 *Feminist Legal Studies* 295.

[5] A Hollomotz, *Learning difficulties and sexual vulnerability: a social approach* (Jessica Kingsley Publishers, 2011) V E Munro and J Scoular, 'Abusing vulnerability? Contemporary law and policy responses to sex work in the UK' (2012) 20 *Feminist Legal Studies* 189, L Pritchard-Jones, 'The good, the bad, and the 'vulnerable older adult'' (2016) 38 *Journal of Social Welfare and Family Law* 51.

[6] P Bartlett and M Schulze, 'Urgently awaiting implementation: The right to be free from exploitation, violence and abuse in Article 16 of the Convention on the Rights of Persons with Disabilities (CRPD)' (2017) 53 *International Journal of Law and Psychiatry* 2. See also J Herring and J Wall, 'Autonomy, capacity and vulnerable adults: filling the gaps in the Mental Capacity Act' (2015) 35 *Legal Studies* 698; J Herring, *Vulnerable adults and the law* (Oxford University Press, 2016); A Keeling, ''Organising objects': Adult safeguarding practice and article 16 of the United Nations Convention on the Rights of Persons with Disabilities' (2017) 53 *International Journal of Law and Psychiatry* 77.

which are typically brought to court by social workers in their role on local authority safeguarding teams. This was one of the first research studies authorised by the Ministry of Justice and judiciary to take place at the CoP, thereby making it a highly original piece of research into an important and developing area. A clear theme emerged from the data – that mental capacity law was being used as a tool to protect vulnerable adults from abuse. It is this intersection between adult safeguarding and mental capacity law that I use the empirical data to explore. I then move on to my discussion of the research, arguing that there is under-protection and over-protection of adults vulnerable to abuse, meaning that sometimes vulnerable adults fall through the gap and receive no protection and at other times they are given more protection than is needed. I consider the failures of the criminal justice system which mean that adults considered 'vulnerable' are left without sufficient protection. I also highlight that, in some instances, vulnerable adults can be subject to over-protection where local authorities seek alternative ways of protecting them. The example I put forward is the use of mental capacity law drawing on my original empirical research. In the final section I discuss how to better safeguard vulnerable adults from abuse moving away from mental capacity law, by drawing on the Domestic Abuse Bill (the Bill), which, at the timing of writing, is before the UK Parliament.[7] I suggest that we should learn from the developments in legal responses to domestic abuse to provide local authorities with the power to apply for protection orders in the safeguarding context, but in ways that focus on perpetrators rather than coercing the vulnerable adult.

B. SAFEGUARDING VULNERABLE ADULTS FROM DOMESTIC ABUSE

[7] The Domestic Abuse Bill was published in draft in January 2019 but, for various reasons, it is not yet law. The Bill was introduced into the House of Commons on 3 March 2020 alongside the Government's response to the Joint Committee on the Draft Domestic Abuse Bill. See Domestic Abuse Bill, available at: https://www.gov.uk/government/collections/domestic-abuse-bill. At the time of writing, it is still possible that the Bill will not pass into law and so this article is written on the basis of the proposals made in the Bill and is accurate at the time of writing.

A number of different public and private bodies will be involved in adult safeguarding but the primary duty is on local authorities. These safeguarding duties are contained within the Care Act 2014 and associated guidance, which makes clear that safeguarding relates to adults with care and support needs who are experiencing, or are at risk of, abuse or neglect, and as a result are unable to protect themselves.[8] The legislation placed adult safeguarding on a statutory footing, but it does not contain any enforcement mechanisms. The primary safeguarding obligation on local authorities is to carry out a section 42 safeguarding enquiry. Once an enquiry has been undertaken, if it results in abuse being identified there is no legal requirement in the Care Act 2014 for the local authority (or any other relevant body) to take any action. In some instances, local authorities may refer the matter for criminal investigation;[9] in others they may decide to take no action.

Many scenarios where safeguarding concerns arise involve situations typically viewed as 'domestic' abuse: namely, abuse that occurs within the adult's home environment, perpetrated by people close to them.[10] There is, at present, no specific cross legislative definition of domestic abuse. The Government's current working definition focuses on an 'incident or pattern of incidents of controlling, coercive, threatening behaviour, violence or abuse between those aged 16 or over who are, or have been, intimate partners or family members.'[11] The Bill followed an extensive consultation on a number of proposals. The Bill proposes a similar definition of abusive behaviour[12] between two people with a personal connection.[13] Therefore while there is no crime of 'domestic abuse' as such, prosecutions can be pursued for specific criminal offences such as rape, assault or harassment and the police can issue Domestic Violence Protection Notices (DVPN)[14] or apply for a Domestic Violence

[8] Care Act 2014, s 42 (1).
[9] There is some case law which suggests they may be under a duty to do this in some cases, see *Re Z (Local Authority: Duty)* [2004] EWHC 2817.
[10] See Care and Support statutory guidance, Department of Health and Social Care above at n 1, chapter 14.17.
[11] This definition was subject to a government consultation on domestic abuse which proposed to put the definition on a statutory footing accompanied by guidance see Consultation on Domestic Abuse Bill, available at: https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/supporting_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf.
[12] Domestic Abuse Bill, s 1(2) and (3).
[13] Domestic Abuse Bill, s 1(2) and s 2.
[14] Crime and Security Act 2010, s 24.

Protection Order (DVPO).[15] DVPNs and DVPOs would become Domestic Abuse Protection Notices (DAPNs)[16] and Domestic Abuse Protection Orders (DAPOs)[17] if the Bill gets enacted into law. These proposals were supported during the Bill's consultation with 56% of respondents agreeing 'that the DAPN should operate in the same way as the existing Domestic Violence Protection Notice'.[18] Crown Prosecution Service (CPS) guidance states that the 'domestic nature of the offending behaviour is an aggravating factor because of the abuse of trust involved'.[19] Furthermore, prosecutions can be brought for coercive control under legislation designed to deal with the emotional, psychological and financial aspects of abusive relationships.[20]

One immediate difficulty that arises is that this statutory definition only covers people who have a personal connection. In the Bill this meant people who have either been in an intimate relationship with or who are related to the victim.[21] To get protection under the domestic abuse provisions, the perpetrator would have to fall within one of these categories. This can be challenging for certain forms of abuse against vulnerable adults which, whilst domestic in nature, will often not be perpetrated by a partner or relative. For example, a carer could abuse a person in a domestic setting and many of the same issues would arise, but they would not be covered by the Bill. This is not an uncommon occurrence in cases at the intersection of adult safeguarding and mental capacity law. For example, in *London Borough of Redbridge v G & Ors*[22] a 94 year old woman, G, was alleged to have been abused by her lodger[23] and her carers. G was ultimately found to lack the mental capacity to make decisions about her financial affairs on the basis that she had dementia which prevented her

[15] Under Crime and Security Act 2010, s 27, which can provide protection to victims for a further 28 days.
[16] Domestic Abuse Bill, s 19.
[17] Domestic Abuse Bill, s 24.
[18] Transforming the response to domestic abuse: consultation response and draft bill, (HMSO, 2019), available at: www.gov.uk/government/publications/domestic-abuse-consultation-response-and-draft-bill, p 26.
[19] Crown Prosecution Service. Domestic Abuse Guidelines for Prosecutors, available at: www.cps.gov.uk/legal-guidance/domestic-abuse-guidelines-prosecutors.
[20] Serious Crime Act 2015, s 76.
[21] Domestic Abuse Bill, s 2. Something also noted as a difficulty for disabled people abused their carers by the Joint Committee on the Draft Domestic Abuse Bill (House of Commons, 2019), para 51, available at: https://publications.parliament.uk/pa/jt201719/jtselect/jtddab/2075/2075.pdf.
[22] [2014] EWCOP 485.
[23] At [11].

from retaining information relevant to the decisions she needed to make.[24] The abuse was clearly domestic in nature in that it occurred in G's home environment by at least one individual who lived with her. However, the relationship between G and the perpetrators would not fall within the definition of domestic abuse, which only covers a narrow form of personal connection. Again, showing how vulnerable adults can fall between the gaps in the law.

It is clear from an analysis of case law that local authorities use mental capacity law in adult safeguarding cases, as occurred in *London Borough of Redbridge v G & Ors*. Mental capacity law relates to decisions made under the MCA, a civil law framework that sets out the legal test for determining whether a person lacks capacity in relation to a particular decision at a particular time. Decisions under the MCA are wide ranging and can cover health (e.g. medical treatment), welfare (e.g. consent to sex or to marry), property and financial affairs (e.g. giving money to family). The breadth of the MCA means it has a central role in any safeguarding investigation because a key factor is whether or not the adult had the mental capacity to give their consent to the alleged abusive activity. Capacity is an important safeguard against the voluntary, but perhaps unwise, decisions of adults being interfered with by the state. Yet abuse and exploitation goes beyond the simple act of consent and can involve undue influence and coercion. This means that the question of capacity is not the end of the matter and therefore I explore the boundaries and limits of mental capacity law at the intersection with adult safeguarding.[25]

Throughout this article I show that the MCA has become a tool for protecting vulnerable adults from abuse. Whilst there are benefits of using the MCA to safeguard vulnerable adults, I raise some concerns about the use of this law in safeguarding cases. In doing so, I accept the value in using the civil law to respond to abuse but argue that targeted, safeguarding interventions are required. In the same way that others have argued that the civil law can and should be used to hold public bodies,

[24] At [80].

[25] For a broader analysis of the boundaries of mental capacity law see B Clough, 'New legal landscapes: (Re) constructing the boundaries of mental capacity law' (2018) 26 *Medical Law Review* 246.

such as the police, accountable for their failures to respond to domestic abuse,[26] the civil law can provide ways of protecting vulnerable adults and prevent them from falling through the gaps, but in ways that focus on the perpetrator rather than controlling the victim of abuse. This non-coercive approach is more aligned with the requirements of the CRPD as well as extending the dominant approach now taken in the domestic abuse sphere.

One other important legal 'solution' that is often raised is the inherent jurisdiction of the High Court, which is cited as a way that protection is achieved.[27] The inherent jurisdiction is a common law power that explicitly allows High Court judges to intervene to protect a vulnerable adult, even where the person has capacity to make a decision under the MCA.[28] The inherent jurisdiction can be used where a vulnerable adult is 'reasonably believed to be, (i) under constraint, (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'.[29] The inherent jurisdiction provides professionals with another route to safeguard vulnerable adults[30] and in some of the cases explored below it was considered. However, the inherent jurisdiction itself raises a number of other problems which do not make it the most appropriate solution to the over-protection of mental capacity law. For example, it lacks the authority of a statutory framework, being a judicial power of last resort. This means that it lacks clear guidelines and boundaries and can lead to judges over-stepping their role in intervening in the lives of adults who are otherwise found to have the mental capacity to make their own decisions. Relatedly, it is too often used as a way of restricting the vulnerable adult herself, rather than the perpetrator. This can

[26] J Conaghan, 'Investigating rape: Human rights and police accountability' (2017) 37 *Legal Studies* 54.
[27] J Lindsey above at n 4.
[28] *A Local Authority v DL and others* [2012] EWCA Civ 253.
[29] *A Local Authority v SA* [2005] EWHC 2942, at [77].
[30] J Lindsey above at n 4.

be seen in a number of cases that involve the inherent jurisdiction that I have discussed elsewhere[31] including *In Re A (Capacity: Refusal of Contraception)*[32] and *Southend on Sea v Meyers*.[33]

Similarly, I highlighted earlier some of the difficulties in focusing on vulnerability as a descriptor of those affected by mental capacity law and adult safeguarding. Yet the inherent jurisdiction is quite explicitly about vulnerability, focusing 'on the inherent features of a person's disability rather than understanding them as primarily being in a situation of vulnerability to abuse'.[34] The use of the inherent jurisdiction as a way of safeguarding 'vulnerable people' risks further over-protection and the stigmatising effects of vulnerability discourse, both of which I seek to avoid. Therefore while I draw on some of the procedural strengths of the inherent jurisdiction, such as its use of court orders to protect, it is not put forward as the solution to this problem of under- and over-protection at the borderline of mental capacity and adult safeguarding.

C. METHODS

This phenomenon of under- and over-protection was a clear theme that emerged from the empirical research, the use of which can help to elucidate the reality of how cases relating to abuse of vulnerable adults are dealt with. This article draws on data gathered from observational and case file research at the CoP as well as in-depth interviews with social workers who had experience of dealing with the MCA. The different methods were chosen to triangulate the data from different sources and to strengthen the validity of the research findings. However, the data was not originally gathered with the aim of investigating adult safeguarding. Instead, the use of mental capacity law in cases which were predominantly about protecting people from abuse was a clear theme that emerged at the data

[31] [References to be inserted after peer review].
[32] [2010] EWHC 1549.
[33] [2019] EWHC 399.
[34] [References to be inserted after peer review].

analysis stage. Other findings, which were the primary focus of the research, have been published elsewhere.[35]

Observational and case file research at the CoP was chosen for two reasons. First, it allowed me to better understand the culture of proceedings[36] and provided a greater insight into the cases than simply looking at reported case law. Second, the CoP has only recently opened up access to researchers and the public. Until the Court of Protection Practice Direction – Transparency Pilot 2016, CoP hearings were held in private. This research was not carried out under the transparency pilot, but was carried out at the same time[37] and therefore the movement towards greater openness had an impact on the relative ease with which I accessed proceedings. In total I observed eight cases over 11 hearings, some of which lasted more than one day. I also reviewed 20 CoP case files, which provided an insight into a greater number of cases than I was able to observe and helped to identify themes in the types of cases that were reaching the CoP in the sex, marriage and contact sample. I was advised by court staff that all of the sex and marriage cases that were issued at the London office of the CoP during the time frame for my research were provided for inclusion in my sample.

Interviews with social workers were chosen because most cases in the welfare context are brought to the CoP by local authorities. Therefore social workers were the key professionals who work with this area of law in practice and would be key decision-makers in relation to taking matters to the CoP. Semi-structured in-depth interviews were carried out to gain an insight into how social workers viewed and utilised mental capacity law. A purposive sample of eight social workers was obtained, despite difficulties in recruiting participants - a common challenge in elite interviews with professionals.[38] The issue of abuse was not a theme identified in advance of the interviews, but it became clear in data analysis that this was a common issue that arose in each, particularly given that

[35] [References to be inserted after peer review.]
[36] M-A Jacob, *Matching Organs with Donors: Legality and Kinship in Transplants* (University of Pennsylvania Press, 2012).
[37] Approval was given in November 2015, the research commenced in January 2016 and finished in December 2016.
[38] S Kvale and S Brinkmann, *InterViews: Learning the Craft of Qualitative Research Interviewing* (Sage, 2009), 147.

the subject matter of the welfare cases explored was capacity to consent to sex, capacity to marry and capacity to decide on contact. The original empirical research is used alongside analysis of case law and existing literature to understand the responses to abuse of vulnerable adults. All references are anonymised throughout and the social workers have been given pseudonyms.

D. UNDER-PROTECTION AND THE CRIMINAL JUSTICE SYSTEM

The criminal justice system would seem to be the natural starting point for dealing with abuse against any person, 'vulnerable' or otherwise. Yet when vulnerable adults suffer abuse the criminal justice system at times fails to take action. The reasons for this will be considered below and it will be shown how the criminal justice system contributes to the problem of under-protection of vulnerable adults at the intersection of mental capacity law and adult safeguarding.

The criminal justice failures to respond to abuse

The failures of the criminal justice system to respond to domestic abuse are well documented.[39] However, these failures are exacerbated where victims of abuse have particular inherent vulnerabilities such as a learning disability or mental health difficulty. This problem was highlighted by one interviewee, Sarah,[40] who told me about a difficult mental capacity and domestic abuse case that she was in the early stages of taking to the CoP. The case concerned a learning disabled couple and was referred to in the introduction. Sarah told me that concerns arose when the woman presented in accident and emergency saying that her partner had assaulted her. She said:

[39] MM Dempsey, 'Toward a feminist state: What does 'effective' prosecution of domestic violence mean?' (2007) 70 *Modern Law Review* 908, and see Domestic Abuse Consultation above at n 11.
[40] Sarah told me she was a qualified social worker and had been working in an adult safeguarding enquiry team for the past four years. She did not provide any further information about her previous experience.

> … but then the police had came out and spoke to her and she'd given a different story. She'd also said … that her husband punished her for something that she'd done and … that she'd gone to another house, another man's house, and this man had paid her to perform a sexual act … so we were worried basically that she was involved in some kind of sexual exploitation. She'd gone back and told her husband what she'd done and he got her to strip off as punishment, but when police came out, when they came out and spoke to her she basically backtracked and said none of this happened … but then when we kind of looked into it over back over like the last few years there's loads of similar incidents like this and when we spoke to all different agencies, then it was quite scary then what we'd uncovered and then we uncovered all this about his criminal history and these rape charges and we were thinking, oh crikey …

The local authority's enquiries revealed that the man had been charged with the rape of his sister and step sister and that he was also being investigated for raping another woman with a learning disability. Sarah went on to tell me that when the police attended to allegations of violence nothing was ever pursued, she said:

> … once they get there they always go out they always speak to her, but she never then makes the statement … she never takes the next step … I think it fell apart from his sister, she withdrew early on and then it was due to go to court for his step sister in early January, apparently the court date was set and everything, but she said that she couldn't go through with it, through it all, so it didn't happen … so we're hoping that it'll happen with this other girl but it's one of our cases … she's known to us coz she's got a learning disability and that's all kind of caught up in it so I don't know whether that will happen either.

The ineffectiveness of the criminal justice system appeared to make Sarah feel that she had to choose between doing nothing (under-protection) and pursuing a resolution through the MCA that could prevent this woman from having a sexual relationship ever again (over-protection). Sarah's concerns are understandable in light of the failures of the criminal justice system. When vulnerable adults make allegations of sexual violence, they often do not proceed to criminal investigation or prosecution.[41] Even where a complaint is made, there are high rates of attrition throughout the criminal justice process. As Louise Ellison *et al*. note, rape complainants with psychosocial disabilities 'were significantly more likely to have their case no-crimed than complainants without … (11 per cent and 5 per cent, respectively) and significantly more likely to have their case dropped through a police NFA decision (45 per cent vs 38 per cent).'[42]

There is little research investigating the high attrition for rape complainants with disabilities. However, a number of reasons have been put forward. First, attitudinal barriers exist in relation to violence against people with disabilities. Meta-analysis suggests that victims with a 'less respectable' character are perceived to be more responsible for their sexual assault than those with a 'more respectable' character.[43] Adults with mental disabilities, and more specifically women, have their character questioned and have been categorised as 'dangerous'[44] and 'over-sexed'.[45] It is possible therefore that some victims of sexual assault in particular, especially those with mental health diagnoses, are likely to be blamed for their assault. This is more likely in relation to adults with mental health diagnoses because of their close links to other exacerbating factors such as poor housing, childhood abuse and addiction.[46]

---

[41] J Benedet and I Grant, 'Sexual assault and the meaning of power and authority for women with mental disabilities' (2014) 22 *Feminist Legal Studies* 131, L Ellison V E Munro, K Hohl and P Wallang, 'Challenging criminal justice? Psychosocial disability and rape victimization' (2015) 15 *Criminology and Criminal Justice* 225.
[42] L Ellison et al. *ibid*, 236.
[43] MA Whatley, 'Victim characteristics influencing attributions of responsibility to rape victims: A meta-analysis' (1996) 1 *Aggression and Violent Behavior* 81.
[44] R Sandland, 'Concubitu prohibere vago: Sex and the idiot girl' (2013) 21 *Feminist Legal Studies* 81, R Sandland, 'Sex and capacity: The management of monsters?' (2013) 76 *Modern Law Review* 981.
[45] S Doyle, 'The notion of consent to sexual activity for persons with mental disabilities' (2010) 31 *Liverpool Law Review* 111.
[46] L Ellison et al. above at n 41.

Relatedly, attitudes by those who work within criminal justice have been given as a reason for high attrition and low conviction rates. For example, Jan Jordan explains, in a study of police responses to rape in New Zealand, that high levels of scepticism were found in relation to allegations made by victims with a psychiatric illness.[47] Similar concerns exist throughout the criminal justice process from police to prosecutors, judges to juries, albeit that evidence suggests 'the highest proportion of cases is lost at the earliest stages, predominantly during the police investigation'.[48] Yet even if the individual officer or prosecutor do not share this scepticism, they may attribute that belief to those who ultimately need to be convinced (i.e. judge and juries) and therefore conclude there is no realistic prospect of conviction.[49] Therefore, the pervasive attitudes of disbelief about disabled adults appears to be a major factor in preventing them from receiving justice.

For many reasons, disabled people may choose not to pursue a criminal justice resolution. There is evidence to suggest that they may be less likely than non-disabled adults to come forward and report a crime[50] and that people with a history of mental illness in particular are more likely to withdraw from the criminal justice process, albeit evidence on this latter point is mixed.[51] Some may not recognise their experiences as criminal. For example, if a person has only ever experienced abusive relationships in their lives then they may perceive it as acceptable behaviour. Similarly, poor sex and relationships education may mean they struggle to articulate their experiences of sex.[52] This 'voluntary' withdrawal from the criminal justice system is also likely to be attributable to the widespread belief that the experience of giving evidence in a rape trial is not a pleasant one, and as Betsy Stanko and Elisabeth Williams explain 'they cannot face such invasive scrutiny'.[53] Perhaps this is exacerbated by the presence of inherent vulnerabilities as adults with mental disabilities in particular

[47] J Jordan, *The word of a woman? Police, rape and belief* (Palgrave Macmillan, 2004).
[48] B Stanko and E Williams, *Reviewing rape and rape allegations in London: what are the vulnerabilities of the victims who report to the police?* (Taylor and Francis, 2013), 209.
[49] L Ellison et al. above at n 41, 234.
[50] *Ibid*, 230.
[51] *Ibid*, 236.
[52] A Hollomotz above at n 5, 49-51.
[53] B Stanko and E Williams above at n 48, 217.

may feel less prepared to go through the potentially traumatic experience of being questioned and having one's own health explored in court. Therefore, such attitudes are likely to be even stronger in relation to criminal proceedings given the personal and traumatic nature of the subject matter.

The low reporting rates and high attrition of cases relating to disabled people is likely to be caused by a complex interplay of factors. However, the presence of a disability appears to be an important factor because such adults are less likely to have their allegations validated. This repeats the recurring failure to respect and protect disabled adults because their bodies are not subject to the same protections as other bodies.[54] It further leads to an over reliance on mental capacity law to solve the problems of abuse; when Sarah was faced with a situation where the criminal justice system failed to provide justice, she arguably had little choice but to turn to mental capacity law. Yet Sarah's choices were constrained within this paradox of under-protection (failure of the criminal justice and safeguarding system) and over-protection (reliance on mental capacity law interventions). That is not to say that dealing with abuse should be the sole domain of the criminal justice system; instead, a multi-agency approach is clearly required. However, the persistent failures of the criminal justice system to take action in relation to vulnerable victims leads to an over reliance on other areas which too often leads to over-protection.

In cases where sexual abuse against vulnerable adults is present, under-protection is at its greatest. In particular, 'risky' sexual behaviour by women with mental disabilities was perceived to be the cause of their abusive situation, such that their vulnerability to abuse could have been avoided if only *they* behaved differently. This characterisation of sexual vulnerability chimes with theoretical work on the intersection of female sexuality and disability.[55] Ralph Sandland, for example, argues that women and girls with learning disabilities are characterised as vulnerable and dangerous as a result of their sexual instinct. Such characterisations provide the discourse to 'articulate and justify the need

[54] R Fletcher M Fox and J McCandless, 'Legal embodiment: analysing the body of healthcare law' (2008) 16 *Medical Law Review* 321, R Garland-Thomson, 'Misfits: A feminist materialist disability concept' (2011) 26 *Hypatia* 591.
[55] S Doyle above at n 45, R Sandland above at n 44.

for legal-psychiatric, institutional, control of the dangerous/vulnerable sexuality of mentally deficient women'.[56] This vulnerable/dangerous dichotomy can also lead to under-protection. The sexual instinct analysis is central to under-protection because certain adults are not protected on the basis that they are perceived to desire, instinctively, the abusive sexual contact.[57] The implication of this being that if the victim did not desire the sexual contact then they would and should have avoided it like any other 'normal' person would do. The examples I provide in this section could similarly be viewed as 'victim blaming': a phenomenon prevalent in understandings of rape and sexual assault.[58] By blaming the victim, the sexual abuse is obscured and instead she is seen as vulnerable because of her disability.

One of the social workers I interviewed, Thomas,[59] discussed a case he worked on, which was taken to the inherent jurisdiction of the High Court. It concerned a young woman approaching her 18th birthday about whom there was incredible concern about her vulnerability to exploitation. When I asked him about this exploitation he said:

> Sexual exploitation … just broad kind of brush of her circumstances, horrifying self harming … Her own family circumstances were that she was part of a family that had been well known in [X location] … the circumstances surrounding that were extremely tragic, her mother killed herself … her father had been one of the principal suspects for the abuse that she had suffered, sexual abuse that she'd suffered … there was a

[56] *Ibid* R Sandland, 104.
[57] V Bell, *Interrogating incest: Feminism, Foucault and the law* (Routledge, 1993), 23.
[58] MA Whatley above at n 43, A Grubb and E Turner, 'Attribution of blame in rape cases: A review of the impact of rape myth acceptance, gender role conformity and substance use on victim blaming' (2012) 17 *Aggression and Violent* Behavior 443.
[59] Thomas had been retired from full time social work for four years at the time of the interview and was instead carrying out research into adult social care. He qualified as a social worker in 1977 and practised for 12 years in a local authority. He then commenced a series of management posts at various levels, mainly in mental health teams. He told me he had particular experience of implementing the deprivation of liberty provisions from when the MCA came into force until 2012.

> very close relationship between them so it was a very difficult … it wasn't one where she didn't want to see him anymore in fact it was exactly the opposite.

Whilst Thomas referred to various factors which made the woman vulnerable, he focused on the things that she had done to herself, such as self-harming and overdosing. He later mentioned the reason for the vulnerability - the sexual abuse by her father – but still related it back to her. This woman presented as difficult to deal with because she still wanted to see her father and she kept 'absconding to get contact with her father'. Unsurprisingly Thomas said that the woman had later struck up a relationship with an '[o]lder man … who had a history was known to the agencies up in the area where he was from … It was quite easy to locate her because everyone knew where this man lived and she was there. They'd go and pick her up and either the police force there would bring her all the way down or the other police would come up …'. Thomas' interview contained many references to this woman's failure to keep herself safe, suggesting a degree of victim blaming. For example, he said that 'the source of her vulnerability lay in her as much as in any threat' despite the fact that she was a 17 year old woman who had been sexually abused by her father and was suspected of being sexually abused by another older man with a criminal history. Grubb and Turner explain in relation to sexual assault that, when responsibility is attributed to internal factors such as the victim's behaviour, victims are more likely to be considered to blame for their assault. In contrast, when responsibility is attributed to external factors, blame is more likely to be attributed to the situational cause.[60] This is important because if responsibility for sexual violence is seen to be caused by features internal to the victim, such as their disability, this leads to under-protection as they are viewed as to blame for engaging in risky activity. Later, when asked about the response to this woman's situation, Thomas told me 'it was always about bringing her back to her accommodation … in both areas the police would interview the young woman formally to establish if there were grounds for prosecution they certainly

[60] A Grubb and E Turner above at n 58, 444.

didn't proceed with any prosecution …'. This passage suggests that this woman's vulnerability to sexual abuse was only addressed in terms that focused on the individual woman by taking her back to her accommodation. Yet she was in a harmful, abusive and vulnerable situation. Her apparent choice to return to her abusers were most likely influenced by the role of male power within the complicated dynamic of familial relationships[61] and the cycle of abuse that can exist for those who suffer childhood trauma.[62] In a similar example in the context of mental capacity law, Robert explained to me that there was a woman with a mild learning disability who was:

> routinely kind of sexually abused by a host of local taxi drivers … as you know the Mental Capacity Act doesn't rule … an unwise decision doesn't make it an incapacitated decision and … she … certainly wasn't protecting herself from the situation as much as we'd like
>
> …
>
> we decided that she wasn't capacitated to consent to the sexual relationship … we really wrestled with the notion of … what was she consensually having sex with them or not, and we concluded that she wasn't.

Robert told me that he did not think this woman had capacity to engage in a sexual relationship with these men, and, furthermore, it was not a consensual relationship. Yet he also emphasised that she was not protecting herself. I asked him what they did next and he explained:

> the police were very good, slow but, you know, we're all over stretched I guess … she had a big support package … there was a lot of general work around trying to give herself things to feel positive about so … her only source of validation wasn't the odd

[61] V Bell above at n 57.
[62] J G Noll, 'Does childhood sexual abuse set in motion a cycle of violence against women?: What we know and what we need to learn' (2005) 20 *Journal of Interpersonal Violence* 455.

> tawdry gift she got off people after they slept with her … the plan was she had finally said she wanted to move away and the plan was to find her a flat … the police were very heavily involved with that and were investigating the crimes but were convinced rightly that whatever else she did she was probably a long way off having the courage to fight …

The focus on moving her to another area and the suggestion that a criminal prosecution was a long way off highlights the focus was on the victim rather than the perpetrator. Furthermore, describing this as 'her only source of validation' highlights the link between her perceived vulnerabilities and victim blaming. The woman in question was putting herself at risk because she was seen as having received pleasure or benefit from these sexual encounters. The implication being that if she had not desired them then she would not have had these sexual encounters. Similar to the 'colluding mother' and 'seductive daughter' in relation to incest,[63] the woman with mental disabilities might also be described in terms that convey her 'sexually uncontrollable' nature as a way of attributing responsibility for abuse to her.

Throughout these examples it is apparent that multiple different legal frameworks failed to provide justice in individual cases and under-protection is present in many cases of abuse against vulnerable adults. However, the clear phenomenon of victim blaming also suggests that there is an underlying cultural factor that contributes to the failure to protect. Addressing this must be part of the wider societal solution to improving the safeguarding of vulnerable adults.

Over-protection and mental capacity law responses to domestic abuse

I now turn to the use of mental capacity law in the domain of adult safeguarding. I will show that,

[63] V Bell above at n 57, 83-85.

while it can be used to protect and prevent vulnerable adults from falling through the gaps, when used in domestic abuse cases it more commonly leads to over-protection of vulnerable victims.

If an adult at risk of abuse has an impairment that falls within the definition of section 2 MCA, and consequently is unable to make a decision under the test in section 3 MCA, a professional may decide that the adult lacks the capacity to make the decision in question. For example, if the concern is that the adult is being abused or neglected by a partner or carer, a social worker may undertake a capacity assessment and if the adult lacks capacity to decide where to live they may move that adult to what is perceived to be a 'safe' environment such as a care home. There is an understandably strong imperative to protect vulnerable adults from exploitative relationships. However, the operation of section 27 MCA means that once a person is found to lack capacity to consent to sex or to marry, a court cannot decide that it is in a person's best interests to engage in sexual activity or get married.[64] This means that any finding of incapacity in respect of sex and marriage has potentially highly restrictive consequences for the adults in question. It could mean that they are prevented from engaging in any intimate contact whatsoever and may therefore be accompanied by highly restrictive supervisory arrangements. Therefore, local authorities may be reluctant to proceed down this route unless faced with a highly risky scenario of abuse, thereby allowing the adult to fall through the gaps between the different legal frameworks. However, in the cases that do proceed to a finding of incapacity, over-protection can result.

Indeed this did occur in many of the cases where mental capacity law was the tool for intervention. Findings of incapacity can result in wide-ranging decisions requiring varying degrees of monitoring. This is particularly likely if a person is found to lack capacity in relation to care and contact as this affects a person's everyday life. Similarly, in relation to sex, once it is found that an adult lacks capacity the local authority is under a duty to protect them. Concerns about over-protection appeared in my interview with Sarah. She told me that she was reluctant to take the case discussed above to

[64] MCA, s 27(1)(a).

the CoP because of concerns about the impact of findings of incapacity on the vulnerable woman she was working with. Sarah explained 'it would put me off if they were gonna be, if it was gonna be something really restrictive like that, if they were gonna say blanket, she doesn't have capacity to make decisions … that she couldn't form relationships with people, that would be, that would really concern me.' Given her concerns, I asked what she thought a good outcome would be in her case and she said:

> What I'd really like is to show her … that she's got, there is a life kind of beyond her husband, that there is there is basically there's a better world, because she'd be devastated if we removed, if we were to take her away from her husband but that's because all she ever knows, known, is her husband and her life is her husband because that's all she ever sees and all she ever spends time with, so what I'd like is for her to be able to get out of that and see that actually there is a world beyond her husband and actually there are some kind of nice people in the world that don't go about raping people and setting things on fire and that actually she could have a different life.

Sarah did not want to remove this woman from all potential risks on the basis of her disability; she simply wanted to show her that she could live a better life. Yet Sarah was concerned about the potential for the CoP to control her service user and prevent her from enjoying the benefits of even a healthy relationship ever again. This would be a clear example of using mental capacity law to overprotect. It was evident that the sole reason Sarah was taking this case to the CoP was because of the abuse and this is not unusual in welfare cases before the CoP. Findings[65] of incapacity in the CoP case files reviewed also provided numerous examples of over-protection. 18 of the 20 cases accessed

[65] By findings I mean court decisions rather than findings from the expert evidence.

involved allegations of abuse and 16 of the 20 contained findings (including interim findings) that P lacked capacity in at least one domain.

One case I reviewed, *AW v O City Council*, was brought to the CoP because of concerns about AW's contact with her father and siblings based on the history of sexual abuse by her father and of inter-sibling sexual relationships. The case concerned AW, a 34 year old woman, described as having emotionally unstable personality disorder, borderline learning difficulties and paranoid schizophrenia. The case concerned her capacity for contact with her father and brothers. In the case the CoP ordered that AW lacked capacity to conduct proceedings and make decisions about contact. As a result, an order was made that it was in her best interests not to have any contact, direct or indirect, with her father, brothers and sister. The reasons for this case centred entirely on the allegations of abuse against AW. Yet rather than prosecute AW's father or siblings, or take legal measures which restricted *them*, the law facilitated protection in the form of restricting and coercing the innocent, vulnerable party. Whilst a capacity determination is a form of protection intended to ensure that AW will likely no longer be abused by her family members, it restricts and controls the victim of abuse rather than targeting the perpetrators. Furthermore, the effect of the order that AW lacks the capacity to decide on contact is that social workers (and others) caring for her would be entirely responsible for deciding who AW could or could not have contact with. This is concerning as sexual violence is notoriously prevalent within institutionalised settings and it is well established that abusers often seek positions of authority over people with mental disabilities.[66] Furthermore, this approach failed to empower AW as a decision-maker about her own life. A blanket finding of incapacity in respect of contact was a form of over-protection which may also have exposed her to further harm; the court simply replaced one set of known risks with another set of unknown risks.

In another case, the CoP issued an order to safeguard the woman in question that more clearly focused on the perpetrator. However, because it was also associated with findings of incapacity in a

[66] A Hollomotz above at n 5, S-B Plummer P A and Findley, 'Women with disabilities' experience with physical and sexual ebuse: Review of the literature and implications for the field' (2012) 13 *Trauma, Violence, & Abuse* 15.

number of domains, it still represented a form of over-protection. *NA v (i) GI (ii) DQ* concerned the relationship between a 62 year old woman, GI, and her husband, DQ. An urgent application was made by the local authority, NA, in relation to GI's capacity to litigate, capacity to decide on her care, contact with others and residence. Since the couple's marriage in 2012, the local authority stated that there had been 'in excess of 50 domestic abuse allegations that [GI] has made against her husband'.[67] It was noted in the application that GI had Korsakoff's syndrome due to alcohol consumption, personality disorder, depressive disorder and cerebral atrophy. In this case, as in most I reviewed, the local authority's primary concern related to GI's relationship with DQ, rather than her capacity in any general sense. An interim declaration of incapacity was made in relation to all of the mentioned domains.[68] However, at a subsequent fact finding hearing the judge also issued a protection order on the following terms:

> [DQ] is forbidden whether by himself or jointly with any other person:
>
> a) To use or threaten violence against [GI] and must not instruct, encourage or in any way suggest that any other person should do so and
> b) To intimidate, pester or harass [GI] and must not instruct, encourage or in any way suggest that any other person should do so and
> c) Enter or attempt to enter the grounds of or premises known as [X] or any other property in which [GI] may from time to time reside, save for the purpose of supervised contact agreed in writing in advance by the social worker on behalf of [GI].

The crucial aspects were not the restrictions on contact, but clauses (a) and (b) - that DQ would be committing an offence in breach of a court order for being violent or intimidating to GI. These two

[67] This statement was written in 2016 meaning there were over 50 allegations over a 4 year period.
[68] Unfortunately it was unclear from the documents that I accessed what the final declaration in relation to GI's capacity was, if such a final declaration was even made.

aspects maintained GI's wishes to have some contact with DQ, if indeed this was what she wanted, whilst allowing for a civil law mechanism to protect GI should DQ's behaviour become abusive. This approach is very similar to those available in the domestic abuse context, but reflects the particular nature of safeguarding cases. For example, GI was in institutional accommodation, meaning that contact could be supervised and monitored ensuring compliance with the order. By contrast, with a non-molestation order, discussed in more detail later, the focus is typically on prohibiting all contact between the applicant and the perpetrator.

Any order restricting DQ's ability to contact GI may be criticised on the basis that GI may have wished to maintain a relationship with him, despite his abusive behaviour and we do not commonly intervene in the lives of adults without mental disabilities against their wishes when abusive relationships are identified.[69] However, the order did not prevent DQ from having any contact with GI, but required that contact be supervised. Whilst I support the order, two concerns arise. First, I question whether this outcome was best achieved through mental capacity law given the possibility of over-protection. Findings of mental incapacity in relation to very broad domains (litigation, residence, care and contact in this case) can lead to the authorisation of controlling rather than empowering interventions. For example, GI was not only abused by DQ but had to deal with surveillance, restriction and coercion in the name of her own protection. Second, and echoing the cases discussed above, I question whether capacity determinations would have been made about GI were it not for the abuse. It would seem highly unlikely given that the entire proceedings were shaped by her abusive relationship and this was the reason given for the local authority's application to the CoP. It could be argued that GI *de facto* lacked capacity in relation to these matters, but it simply would not have been identified were it not for the abuse. I do not comment on the likelihood of GI lacking capacity in relation to those specific domains, having not met or spoken to her. However, it

[69] Although prosecutions where the victim does not give live evidence are now more common following guidance, see Crown Prosecution Service, Domestic Abuse Guidelines for Prosecutors, available at: www.cps.gov.uk/legal-guidance/domestic-abuse-guidelines-prosecutors. Similarly, non-molestation orders under Family law Act 1996, s 42 can be used, albeit they require initiation from the victim.

cannot be a fair application of the MCA if those who are subjected to abuse are more likely to be found to lack capacity by a court, not because they are more likely to lack capacity, but because those cases are more likely to reach a courtroom.

I do not doubt that GI needed protection. Nor do I disagree with the outcome. However, I am concerned that the case fell within the jurisdiction of mental capacity law. A better approach would have been either to use criminal law measures against DQ or, with GI's consent, apply for a protection order against DQ. If GI's consent was not obtainable in relation to a protection order, then the local authority could have considered applying to the court to use its inherent jurisdiction to provide her with some relief, at least to enable her capacity to be assessed within a safer and more supportive environment away from DQ.

Sex, marriage and contact capacity cases before the CoP often centre on allegations of abuse and, in the absence of abuse, it is questionable whether the issue of mental capacity would have arisen. There is no doubt that mental capacity law can provide effective protection. It can lead to the adult being prevented from engaging in contact with perpetrators of abuse and removing them from abusive environments. However, it does so in a way that focuses entirely, and by definition, on coercing the vulnerable victim of abuse, rather than the perpetrator.

E. LEARNING FROM CIVIL LAW RESPONSES TO DOMESTIC ABUSE

There are various civil law mechanisms that allow for action to be taken against perpetrators of domestic abuse which contain valuable lessons for the intersection of adult safeguarding and mental capacity law and which can help in moving away from the under-protection and over-protection highlighted above. Perhaps the most widely known of these civil law mechanisms are protection orders, which are:

> … legally binding orders, which are civil in nature, to grant immediate protection to victims of domestic violence by placing various restrictions on the respondents with the object of preventing any further violence. The primary aim of protection orders is therefore to protect the victim from future harm rather than to punish for past behaviour.[70]

Protection orders are well-established civil law remedies within the domestic abuse context in England. For example, recent family court statistics show that there were 6,014 domestic violence remedy order applications in October to December 2017 and 6,961 orders made.[71] Despite this, there is surprisingly little research evaluating the impact of the use of protection orders.[72] Wing-Cheong, in analysing orders across six jurisdictions, highlights that much of their success turns on effective implementation of these remedies.[73] Obtaining a protection order is an important step in tackling abuse.[74] However, if the terms of the protection orders are not followed or if there is poor enforcement of their terms, then the statistics on their prevalence could be a misleading indicator of success. Burton, for example, found that the number of applications for non-molestation orders[75] under the Family Law Act 1996 fell following implementation of the legislation.[76] There may have been

[70] C Wing-Cheong, 'A review of civil protection orders in six jurisdictions' (2017) 38 *Statute Law Review* 1, 6.

[71] Family court statistics quarterly: October to December 2017, available at: www.gov.uk/government/statistics/family-court-statistics-quarterly-october-to-december-2017. The number of orders made is higher than the number of applications made. The reason for this is unclear in the statistics but may be due to the application being made in a different quarter from when the order is made (i.e. if the application is made in December, the order may not be granted until January).

[72] For an insight into these issues see C Humphreys and R K Thiara, 'Neither justice nor protection: Women's experiences of post-separation violence' (2003) 25 *Journal of Social Welfare and Family Law* 195, N Birdsall, S Kirby and M McManus, 'Police–victim engagement in building a victim empowerment approach to intimate partner violence cases' (2017) 18 *Police Practice and Research* 75.

[73] C Wing-Cheong above at n 70, 18.

[74] A Kewley, 'Pragmatism before principle: The limitations of civil law remedies for the victims of domestic violence' (1996) 18 *Journal of Social Welfare and Family Law* 1, S Edwards, 'Domestic violence and harassment: an assessment of the civil remedies' in J Taylor-Browne, (ed), *What works in reducing domestic violence? A comprehensive guide for professionals* (Whiting Birch, 2001), M Burton, 'Civil law remedies for domestic violence: why are applications for non-molestation orders declining?' (2009) 31 *Journal of Social Welfare and Family Law* 109.

[75] Examples of other remedies that can be sought are prohibited steps orders, which forbid a person from taking away your child and an occupation order, which prevents a perpetrator from staying in your home.

[76] *Ibid* M Burton.

a number of reasons for this, ranging from the increased use of criminal justice measures, the availability of legal advice and confusion about implementation, albeit it 'is unlikely that a reduction in domestic violence itself accounts for the fall, since the British Crime Survey data suggest that the prevalence of abuse has remained fairly stable'.[77] Despite falls following implementation, the numbers of applications made and orders granted has been steadily increasing in recent years. For example, in 2017, there were 20,259 applications for non-molestation orders, reaching an eight year high, and 25,661 non-molestation orders were made, reaching a 14 year high.[78]

Considering the role of protection orders in more detail, non-molestation orders require consent of the victim and they can currently only be initiated by the victim of abuse[79] who must be 'associated' to the perpetrator as either a partner (or former partner), relative, cohabitee or because they have a child together.[80] There are strong reasons underpinning this requirement for consent. Intervening without the consent of the victim is seen as further undermining their ability to make decisions and take control over their life. It is also potentially harmful to a victim's recovery to take the decision to leave an abusive partner out of their hands. It is therefore an important aspect of creating resilience post-abuse.[81] However, the reality is that very few adults with care and support needs will be able to make applications for protection orders themselves for the reasons identified earlier. Requiring the victim of abuse in the safeguarding context to initiate an application for a DAPO ignores the reality of abusive relationships and the difficulty many vulnerable adults will experience in resisting their abuser. This is particularly so for those adults whose abuser is also their care-giver for example - a problem for many disabled adults.[82]

The DAPOs, discussed earlier in this article, proposed that the 'opinion of the person for whose

[77] *Ibid*, 114.
[78] Family court statistics quarterly: October to December 2017, available at: www.gov.uk/government/statistics/family-court-statistics-quarterly-october-to-december-2017.
[79] Family Law Act 1996, s 42.
[80] Family Law Act 1996, s 62.
[81] K M Anderson, L M Renner and F S Danis, 'Recovery: resilience and growth in the aftermath of domestic violence' (2012) 18 *Violence Against Women* 1279.
[82] J Benedet and I Grant above at n 41, 143.

protection the order would be made'[83] should be considered, albeit that their explicit consent might not be required. This would be an important step forward for adult safeguarding too as the court would have to take the victim's opinion into account, without requiring the court to obtain the absolute consent of the victim. In relation to who should be able to apply for a DAPO following implementation of the Bill, the consultation found that 'a wide range of people should be able to apply for a DAPO, with 60% of you [respondents] choosing the victim, 62% choosing the police, 54% choosing relevant third parties and 44% choosing certain other persons with permission of the victim and/or court.'[84] Therefore it is possible that 'relevant third parties', such as local authority safeguarding or social care staff and probation services, will be able to apply for DAPOs.[85] However, the regulations are to be drafted and so it is not clear precisely who, if the Bill does eventually get enacted, would be able to apply beyond the individual herself or the Chief of Police.[86]

Protection orders in the domestic abuse context are also targeted against the alleged perpetrator of abuse, rather than the victim. For example, non-molestation orders are used to prevent a perpetrator from contacting the victim, carrying out further abuse, intimidating, harassing or threatening the victim or from facilitating others to do so. This is in contrast to mental capacity interventions which restrict or control the adult who lacks capacity by, for example, moving them to a safe place. Protection orders can be useful legal mechanisms because the civil burden of proof is lower than in the criminal context, while still targeting the perpetrator, and therefore they may be easier to obtain than a criminal justice remedy. Furthermore, breach of a non-molestation order for example, can result in criminal sanctions or civil proceedings for contempt of court, providing a degree of flexibility in the remedy for breach. Using protection orders against perpetrators also has the benefit of keeping proceedings for breach within the civil courts. This bypasses the need for the victim to provide evidence in a criminal trial with all of the difficulties that entails.

[83] Domestic Abuse Bill, s 30(1)(b).
[84] Domestic Abuse Bill and consultation response above at n 18, 26.
[85] See Domestic Abuse consultation above at n 11.
[86] Domestic Abuse Bill, s 25 (2)(c).

Building on these important developments in the domestic abuse context, I argue that a Safeguarding Adults Protection Order (SAPO) provides a possible solution to the problems identified throughout this article. Giving local authorities the power to apply for a SAPO following completion of a section 42 Care Act 2014 safeguarding enquiry would facilitate intervention against perpetrators of abuse rather than focusing on controlling and restricting vulnerable victims through the use of mental capacity law. This would involve giving social workers the power to apply for a SAPO without the initiation of the victim of abuse, as per the new DAPO, though the individual's wishes should be taken into account. This is in keeping with the principles of adult safeguarding, particularly the principles of empowerment, proportionality and partnership,[87] because the adult must be involved in the safeguarding process and no coercive action should be authorised in relation to the vulnerable adult herself. Breach of a SAPO should be enforced through contempt of court or criminal proceedings, thus providing the same level of flexibility as DAPOs. However, if enforced through contempt proceedings, a power of arrest should be attached to any orders. This is important because a power of arrest cannot be ordered under the High Court's inherent jurisdiction or attached to non-molestation orders under the Family Law Act 1996.[88] This would differentiate SAPOs within the CoP and High Court and give the police the power to arrest the perpetrator swiftly for any breach.

While the SAPO proposal gives the state the power to intervene in the lives of disabled adults, there is an important distinction here between restricting the victim and the state taking legitimate action against perpetrators. This also makes the recommendation fundamentally different from the safeguarding powers of intervention that currently exist in other jurisdictions such as Scotland and those previously recommended by the Law Commission, which allow for some degree of coercion against the victim of abuse in the name of their own protection.[89] It is accepted in the criminal context

[87] Care and Support statutory guidance, Department of Health and Social Care above at n 1, chapter 14.13.
[88] *Re D (Vulnerable Adult) (Injunction: Power of Arrest)* [2016] EWHC 2358. Albeit the criminal offence of breaching a non-molestation order was introduced by Domestic Violence, Crime and Victims Act 2004, s 1.
[89] Law Commission (1995) *Mental incapacity*, Law Com No. 231; Adult Support and Protection (Scotland) Act 2007, s 1, which states "The general principle on intervention in an adult's affairs is that a person may intervene, or authorise an intervention, only if satisfied that the intervention— (a) will provide benefit to the adult which could not reasonably be provided without intervening in the adult's affairs, and (b) is, of the range of options

that the state can, and does, have a duty to intervene against the perpetrator even where the victim is reluctant or unable to give evidence.[90] The use of the civil law should not be any different. Therefore, the state should not compel victims to participate in civil law proceedings, nor should a SAPO authorise any action which restricts the victim's ability to live their life and make individual choices, even choices to see the perpetrator. Instead, SAPOs should be targeted against perpetrators of abuse. This is essential because failures of the state to intervene to prevent abuse merely perpetuate abuse against future victims because of the repetitive nature of domestic abuse.[91] Concerns about intervention by the state in the safeguarding context also ignore the fact that the CoP is currently doing what people are uneasy about; namely it routinely authorises wide-ranging interventions which use a person's incapacity for decisions about care or residence to restrict their interaction with abusive others, even where they have capacity. Interventions in the private lives of adults in the name of protection are already happening. The question is how the use of coercive interventions against victims of abuse can be reduced whilst not leaving people unprotected.

One example of a recent CoP case where a protection order was used was *Dudley Metropolitan Borough Council v Shaun Hill*.[92] The case highlights the benefits of protection orders but also shows that there is a need for a more targeted approach that avoids the use of the MCA. The case concerned KJ, an 82 year old man described as having dementia.[93] KJ lived at home with support and the local authority were heavily involved. Contempt proceedings were brought in relation to Shaun Hill's (SH) alleged breach of injunctive orders in relation to KJ. The injunctive order in place prohibited

likely to fulfil the object of the intervention, the least restrictive to the adult's freedom." See also further discussion of the Scottish context by M Stevens, S Martineau, J Manthorpe and C Norrie, 'Social workers' power of entry in adult safeguarding concerns: debates over autonomy, privacy and protection', (2017) 19 *The Journal of Adult Protection* 312.

[90] For example, the use of 'victimless' prosecutions where prosecutions proceed without live evidence given by the complainant, see Crown Prosecution Service, Domestic Abuse Guidelines for Prosecutors available at: www.cps.gov.uk/legal-guidance/domestic-abuse-guidelines-prosecutors. Also consider prosecutions of offences such as murder where the victim obviously cannot give evidence.

[91] Recidivism rates vary but are thought to at least be in the region of approximately 20-40%, see J C Babcock, C E Green and C Robie, 'Does batterers' treatment work? A meta-analytic review of domestic violence treatment' (2004) 23 *Clinical Psychology Review* 1023.

[92] [2018] EWCOP 35.

[93] Although it is not stated clearly in respect of which domains he lacked capacity.

SH from contacting KJ either:

> directly or indirectly, from in any way obstructing the officers of the Local Authority or any other professional who provides care to KJ and in any way obstructing those officers or professionals from carrying out mental capacity assessments. A further injunction forbids Shaun Hill from coming within 100 metres of KJ's current residence.[94]

The judge found that SH was in breach in relation to attending KJ's home and that SH fraudulently purported to be KJ to obtain landline equipment and a mobile phone.[95] SH was found guilty of contempt in relation to these two breaches and sentenced to four months imprisonment, not suspended due to the contempt shown by SH for the Court, such as by refusing to attend the hearing. This approach represents an important and rare example in the CoP jurisprudence of the use and, more importantly, enforcement, of an order protecting the vulnerable adult. Such an approach needs to be expanded. However, specific legal provisions to give the power to those involved in safeguarding cases to intervene in these ways is also required. This would take the responsibility away from the victim, who may not be in a position to pursue a civil remedy and, facilitate a movement away from mental capacity proceedings as the mechanism through which the order is enforced. SAPOs have the potential to provide a quicker and less traumatic route to justice for vulnerable victims of abuse by learning from what has been achieved in the domestic abuse context and providing targeted protection for vulnerable adults.

F. CONCLUSION

[94] At [3].
[95] At [16-18].

This article has highlighted some of the complexities and challenges in safeguarding adults vulnerable to abuse. I have argued that some of these challenges arise because of gaps in the legal frameworks (such as the lack of mechanisms in the Care Act 2014 to address abuse) and some are cultural, stemming for example from attitudes towards disabled people and women, and cannot be resolved by legal change alone. In outlining these different challenges, I have shown how they translate into a paradox of both under-protection and over-protection, specifically at the intersection between mental capacity and adult safeguarding law and practice. I have suggested that the domestic abuse context provides a useful comparator from which the safeguarding jurisdiction can learn to provide more appropriate responses than through the use of wide-ranging mental capacity interventions.

More broadly, I have argued that the law's focus when it comes to adults at risk of domestic abuse needs to shift from restricting and controlling vulnerable victims towards tackling the perpetrators of abuse. The availability of targeted safeguarding remedies to enable action to be taken would be an important legal change, but it is one which may also feed into the broader cultural shift of viewing adults vulnerable to abuse differently. Instead of blaming them and viewing them as inherently vulnerable to abuse because of their disability, this shift will enable disabled adults to be seen as vulnerable because they are being abused. In effect, this focuses minds on tackling the abuse rather than controlling the victim. Given the current failure of the law to appropriately balance under and over-protection of vulnerable adults, a different approach is now needed.