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# Law’s Legitimacy and Social Work Support in Safeguarding Adults at Risk of Abuse

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Introduction

English law has a complex legal framework regarding how public bodies should respond when abuse of ‘vulnerable’ adults is suspected. This includes the intersection between the Mental Capacity Act 2005 (MCA) and the Care Act 2014, as well as various other mechanisms and relevant guidance.[[1]](#footnote-1) Negotiating this framework of law is not an easy task for professionals who work with adults at risk of abuse, particularly in ways that prioritise *support* for decision-making rather than coercion. In this chapter, I argue that one way of achieving supported decision-making in practice in England is to develop the safeguarding adults legal framework with the aim of enhancing the role of social workers to better support, rather than resort to legal coercion of, adults at risk of abuse. That is not to say that legal coercion always or inevitably results from application to court, but that law *can coerce*, and when it does so, this merely reinforces its legitimacy.[[2]](#footnote-2) In making this argument I contrast perceptions of law’s legitimacy with understandings of the legitimacy of social work. By resorting to legal interventions, law’s legitimacy is reinforced in ways that undermine social workers’ support-based interventions, which impedes social workers from providing the kind of support which they are best placed to provide.

The legal framework for adult safeguarding in England centres on the Care Act 2014.[[3]](#footnote-3) The primary safeguarding duty is on local authorities who are required to protect 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.[[4]](#footnote-4) The Care Act safeguarding duties are, however, limited in scope. They require enquiries to be undertaken to investigate the presence of abuse. When abuse is identified following those enquires, the law is much less clear about how and in what ways to respond.[[5]](#footnote-5) However, the Care Act operates within a wider legislative framework, most importantly in relationship with the MCA.

The MCA deals with issues that arise in relation to adults who may be unable to make a decision for themselves because of a disturbance of impairment of the functioning of their mind or brain.[[6]](#footnote-6) What this means is that, where an adult subject to a safeguarding enquiry under the Care Act is also believed to lack the mental capacity to make a decision for themselves, the MCA can be used to respond to the abusive situation. This might include making a best interests decision that it is not in that person’s best interests to reside or have contact with their abuser. Conversely, where following a safeguarding enquiry a person is believed to have the mental capacity to make a particular decision, for example to have contact with their abuser, then the MCA cannot be invoked to protect that person. This stark dividing line between the two areas of law can often leave the adult vulnerable to abuse unprotected and these boundaries of mental capacity law have been subject to criticism.[[7]](#footnote-7)

In this chapter, I explore the ways that social workers can support the person to make her own decisions without resorting to the legal coercion permitted by the MCA. In developing my arguments about the supportive potential of social work, I draw on original qualitative research carried out into the use of mental capacity law in practice in England to provide an insight into the practice of how social workers understand and operationalise their role. I carried out eight in depth semi-structured interviews with social workers, each of whom had experience of working with the MCA. The interviews explored key themes and the focus of the interviews explored in this chapter is social workers’ experience of the Court of Protection (CoP) and questions around supported decision-making.[[8]](#footnote-8)

In the first half of this chapter I explore the role of legitimacy, contrasting the different claims to legitimacy made by social work and law, arguing that because social work interventions are perceived as less authoritative than legal interventions, social workers resort to the coercive potential of law in the most challenging, high-risk cases. Whilst social workers may benefit from the use of law, I raise concerns about law’s potential for coercion and argue that social workers need greater authority to intervene through support-based interventions. In the second half I focus on how the English legal framework on adult safeguarding should be amended to enable social workers to provide support-based interventions rather than resorting to legal coercion.

# Legitimacy, Authority and Coercion: The Resort to Law in High-Risk Cases

# The contrasting legitimacy of law and social work

In contrasting the differing legitimacy and authority of law and social work, I highlight the very different characterisations of the two disciplines. Law as enforceable and objective, contrasted with social work as support-based and subjective. Yet these differing legitimacy claims give law and social work quite different, and potentially conflicting, bases for their authority, which are merely reinforced when social workers resort to law in high-risk adult safeguarding cases.

Legitimacy is a form of social influence or power. If an institution is seen as legitimate then it is more likely to have authority as people feel that they ‘ought to obey’.[[9]](#footnote-9) In other words, it provides a ‘right to rule and the recognition by the ruled of that right’.[[10]](#footnote-10) That is why legitimacy is so central to law – without it, people may not obey, which would undermine the effectiveness and authority of the law and lead to civil disobedience. Law has long been theorised as a source of legitimate power,[[11]](#footnote-11) with the court being a key manifestation of that power, albeit the justification for law’s power varies between positivists, those who look more to the moral content of the law and various schools of thought in between.[[12]](#footnote-12) Irrespective of whether law *ought* to be viewed as legitimate for these reasons, so far as law is commonly depicted, its legitimacy stems from two key features – its perceived enforceability and objectivity of application. This is an analytical, rather than normative, jurisprudential claim based on an understanding of the historical development of the English common law;[[13]](#footnote-13) that is, that law is perceived as having legitimacy where it is enforceable and objectively applied in like for like cases.[[14]](#footnote-14) Whilst enforceability and objectivity are key facets underpinning law’s authority to act legitimately, people do of course comply with law for other reasons. For example, many comply for normative or moral reasons, including that they perceive the law, and those who make and enforce it, to be legitimate, that it is created and applied through fair processes and that they agree with the substantive content of the law.[[15]](#footnote-15) However, when the enforceable, and therefore coercive, power of law is evident, that merely serves to reinforce, rather than undermine, its authority. Law can be enforced through the courts, being the organs of the state with the authority to punish backed up by force. This power gives law a legitimate claim to authority, even where citizens perhaps disagree with the substantive moral content of the law.

In contrast, adult social work’s legitimacy is characterised as entirely support-based and as being more subjective in nature.[[16]](#footnote-16) Law is therefore set up in stark contrast to adult social work, which does not possess these same core disciplinary claims. Historically, legitimacy developed as a result of jurisdictional claims of authority and ‘scientific and ethical superiority’.[[17]](#footnote-17) Other professions, such as medicine, have a similarly strong claim to possessing authority and legitimacy as law. Medical professionals no longer have absolute power to enforce their decisions on patients (notwithstanding some residual power in respect of those who lack capacity). In contrast, support-based professions such as social work, lack that same claim to objectivity and impartiality that law and medicine have long professed they possess.[[18]](#footnote-18) This can be seen in the characterisation of the social work profession, defined as:[[19]](#footnote-19)

…a practice-based profession and an academic discipline that promotes social change and development, social cohesion, and the empowerment and liberation of people… social workengages people and structures to address life challenges and enhance wellbeing.

The core elements of social work are that it: is ‘person-centred’, is ‘personally and socially contexted’, is ‘relationship-oriented’, ‘follows an integrated process’ and is ‘values based’.[[20]](#footnote-20) Being person-centred and focusing on empowerment suggests social workers do not have the power of enforcement. They cannot compel service users to act; in fact, attempts to do so would contradict the appropriate role of adult social workers. Adult social workers’ actions are most legitimate when they are carried out through support and their legitimacy therefore stems from a fact in stark contrast to this - that their decisions can be challenged. By this I mean that social workers’ legitimacy is based on their ability to develop a relationship of trust with their service user, to support them and to only intervene within clear statutory boundaries. Where a social worker is perceived to overstep that role, service users can challenge their decisions and this is central to the legitimacy of social work as a profession. To achieve change, then, social workers engage in an art of discursive persuasion and negotiation, as well as using material pressures to encourage the service user to act in a particular way.[[21]](#footnote-21) Yet ‘social work evidence is viewed in more subjective, experiential terms’[[22]](#footnote-22) and social workers’ interventions are not based on technical claims of expertise but instead on experiential knowledge and their ability to support a service user in multifaceted ways. It is, I suggest, precisely because social work as a discipline does not easily fit into the same parameters as law’s legitimacy, that results in the difficulty for social workers when operating in this area. This was evident in my empirical research. One social worker I spoke to was sensitive to the difficulties that can be caused by this process of ‘going to law’. For example, I asked Sarah[[23]](#footnote-23) whether she thought applying to the CoP would give her decisions more authority and she said:

I think it would help us, in a way and feel more confident that we were backed up by something that was authoritative, and definite and coming from that place. In another way I would worry that we would then have to… we’re committed to it and we’ve got to go with it… there’s no way back once we’ve gone down that road, that’s my worry…

This finality of a court decision reinforces its authority. However, a court decision commits the social worker to a particular course of, often coercive, action. In contrast the interventions of a social worker might be more fluid and changeable, seemingly making them less authoritative and less objective, which in turn is perceived to undermine their legitimacy. This highlights that framing law as the objective enforcer of legal rules also impacts on those professions, such as social work, which lack a similar rhetorical claim to legitimacy.

Given the possible tension between social worker and service user, and the lack of enforceability of social work interventions, it is unsurprising that social workers turn to law to legitimate their proposed interventions. Whilst this resort to law might be disempowering in certain ways, social workers do not always view it that way. In fact, resort to law can be seen as a useful tool where they believe that law can help them to achieve a particular result. This perception was clear from my interviews. For example, David[[24]](#footnote-24) told me:

There’s something to be said about decisions made in court, that people will, you know, respect and maintain it…

Similarly, Robert[[25]](#footnote-25) explained when asked about how he found the court process:

I think good that the full majesty of the law would be exerted on behalf of vulnerable people…

Even though social workers are seen to have limited legitimacy to intervene, they do not resort to law reluctantly. The social workers I spoke to were aware of the usefulness of law to legitimate their decisions, deflecting difficult matters away from social work judgement into the jurisdiction of law. For example, talking about his views on the MCA Robert told me that:

…from a personal view it was just terribly useful to have that framework so that if you did have a discussion… with a parent of a person with a learning disability… and they were saying are you telling me that I don’t get to make decisions for my son and it was very nice to have a freshly minted law to say no actually you don’t…

Furthermore, in many cases the local authority benefits from referring a case to the CoP. For example, if an individual was making a perceived ‘risky’ choice to stay within an abusive relationship, the local authority would be better served by having a court authorise their decision not to intervene because of the risk of harm. However, it means that, in doing so, social workers are reinforcing law’s coercive legitimacy and potentially undermining the benefits of support-based, non-coercive interventions.

# Duty of care and vulnerability in high-risk cases

Given the contrast between the perceived legitimacy of law and social work, it is in cases of abuse where seeking legal approval through the CoP was most valuable to social workers. This is because they were concerned that they had a ‘duty of care’ towards the service user and needed to manage the high risks. Yet they felt constrained by the notion of empowerment underpinning the MCA; that is, that the MCA was passed to provide protection for those (inherently) vulnerable adults who were *unable* to make decisions, rather than to allow interventions in relation to *unwise* decisions.[[26]](#footnote-26) This is despite the MCA not specifically encompassing ‘vulnerable adults’. The social workers I spoke to said they found this balance challenging and this conflict is too often resolved through prioritising protection through application to the CoP.[[27]](#footnote-27)

The cases where controlling and coercive interventions through the CoP were used in the welfare context[[28]](#footnote-28) were those viewed as ‘risky’. This means that the social workers I spoke to were either seeking authorisation for coercive practices from the CoP, or, seeking CoP approval for ‘doing nothing’. For example, Sarah, an investigating worker on a safeguarding team, told me about a case she was working on that was her first experience of the CoP. I asked her what it was about this case that made her consider taking it to court, she said:

I think it was because we just felt that the risks were so high and we were just so worried about her… We just kinda kept coming back to thinking this is just so, risky, and that we just wouldn’t be happy just leaving it, we just couldn’t think of a plan that we would be happy with and thinking right we’ve put that place, ok, we can leave this now and just think, no. It just needed to go somewhere higher that was above us…

Not only does she reinforce the perceived legitimacy of the CoP but her comments highlight that concerns about risk were the reason for bringing the case to court. This risk discourse reinforces my finding that welfare interventions in mental capacity law are more likely to be used in cases of abuse.[[29]](#footnote-29) My interviews reinforced the pervasiveness of concerns about ‘duty of care’ and ‘risk’ that have been identified elsewhere.[[30]](#footnote-30) For example, Julia[[31]](#footnote-31) repeatedly explained that she had a duty of care towards her service users, Julia said:

we have had situations where people will come in and get the service user to try and sign something but I think the nursing staff are now alerted to the fact they should never let anyone sign anything they, that people coming in without having some- given some thought to whether that person’s got capacity, we have got a duty of care…

Similarly, I asked Andrea[[32]](#footnote-32) for her views on supported decision-making. As she had not come across the term I explained it to her and our dialogue is set out below:

Interviewer: So supported decision making under the MCA is just providing all practicable steps to allow the person to make the decision themselves before substituting a decision, but it can also have an interpretation as meaning only allowing that person to make the decision with support, so never substituting their decision with yours. So there’s two different interpretations, so I don’t know if you’ve come across either or neither?

Andrea: Well I’ve come across the first.

Interviewer: Which is providing as much support as you can. How do you find that works in practice?

Andrea: Erm, it depends on the person … what they can understand and take on really. Because sometimes it’s like you can really work with somebody over an hour or repeated visits to try and get them to understand the information, absorb it, and they may not absorb it then. But if you go several times over that period of time they may be able to absorb that then, and retain it …

Andrea then went on to focus on her concerns about risk and duty of care:

I feel really strongly about keeping, letting people have autonomy and things but I also deal with lots of risk… Maybe they’d rather die at home and fall down the stairs. It’s a real, it’s a real dilemma, it’s something that I struggle with in certain cases at certain times when people’s feelings are really strong, when they’re not so strong it tends not to worry you so much… But… people worry then about being negligent don’t they, I think that’s what you’d worry about not fulfilling your duty of care and being negligent...

I went on to ask if supported decision-making, in the substantive Article 12 CRPD sense of removing substituted decision-making, would be a big change in mindset, and she said:

Yeh it would… because I think you know we’ve got this duty of care always underlying everything so people don’t like to take risks… it’s really hard… I try to take risks but there’s certain pressures that can be applied at times.

As these comments highlight, it is when others make decisions to abuse or where individuals want to live in a risky environment, that social workers are most concerned about their duty of care. Therefore most concerns in the welfare context relate to the situation that the person finds herself in rather than being concerns about mental functioning. Sarah also highlighted this when she told me about her challenging case noted earlier. The case concerned a young learning disabled woman in her twenties who was married to a man of a similar age and with similar disabilities. The concern was that, on investigation, it became clear that this woman’s husband 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 was concerned about what might happen if the case went to the CoP. Sarah was concerned that a decision would be enforced that would separate the woman from her husband against her will. Whereas all Sarah wanted to show her service-user was that there is ‘a life kind of beyond her husband, that there is … there’s a better world’ and that she could have a different, better life if she had the support to leave him.

Whilst high-risk abuse cases dominate, this is predominantly where the adults in question are ‘non-compliant’ with social worker advice, rather than *all* high-risk cases. This included cases both where the person was non-compliant and where a family member was non-compliant because they disagreed with the decision. For example, seven of the 20 CoP case files reviewed concerned cases where the person at the heart of the decision was non-compliant in that she either challenged the decision or did not agree with it, in five cases the male partner of the person was non-compliant with the local authority decision, in at least two of the forced marriage cases the local authority decision to intervene was based on a concern that parents would take the person abroad for marriage against social work advice, and in two other forced marriage cases the local authority clearly disagreed with the person’s own non-compliant behaviour in respect of marriage describing her actions as ‘risky’.[[33]](#footnote-33) Those cases where the person did not have anyone to advocate on her behalf, or where she was compliant, were less likely to have court scrutiny. This is problematic because, in cases of abuse, the motives of those who challenge the local authority should be questioned, particularly if they are the abusive party. Therefore if challenge by the abuser is the primary reason that such cases are reaching court, this should be of concern because it means that the adult is in a no-win situation; she is faced with possible control by the court or control by the abuser.

In high-risk cases, social workers respond to their own lack of legitimacy by resorting to the CoP. This is reflected in case law too, with a number of decisions involving the CoP authorising coercive practices against the expressed wishes of the person and at the request of professionals such as social workers.[[34]](#footnote-34) Of course, the CoP is not only, or even predominantly, coercive in its judgments. There are many cases, particularly in the High Court, where judicial scrutiny of the issues works to provide best interests authorisation for ‘risky’ but desired activities on the part of the person,[[35]](#footnote-35) or in some cases even to find that the person has capacity to make the decision themselves, thereby upholding their autonomy.[[36]](#footnote-36) When social workers ‘go to law’ though, they ‘trade in’ some of their legitimacy and in return are shielded from having to make the final decision in what they perceive to be the most challenging cases. In seeking legal legitimation, social workers’ decisions are protected and reinforced whilst enabling them to deflect any resulting coercion on to the law. However, in doing so, social workers participate in the acceptance of coercive and controlling interventions against vulnerable adults. Yet the value of social work is precisely in its holistic and supportive approach. Therefore, by participating in this process, the value of social work may be further undermined as they reinforce the legitimacy of the court enforced, ‘objective’ intervention over more ‘subjective’ support-based approaches.

Safeguarding and Support for Decision-making with Adults at Risk of Abuse

Having identified the problem of social workers requiring legal legitimation of their decisions, I now turn to how the English safeguarding adults legal framework could be improved. I argue that a new framework is necessary to limit coercive interventions authorised by mental capacity law and empower social workers to intervene through support. I have argued elsewhere for there to be greater use of interventions which restrict perpetrators of abuse.[[37]](#footnote-37) Similarly, a support-based safeguarding framework would assist in deflecting attention away from mental capacity law because social workers could have the authority to intervene without the wide-ranging interventions that result from findings of incapacity. I suggest that any amended safeguarding framework should be guided by five core principles: support; accountability; applicable to all; partnership working; proportionate harm.[[38]](#footnote-38)

The provision of support

The first principle that must underpin any change is a focus on support. The need to support decision-making is enshrined in Article 12 of the CRPD and it is now widely accepted that support should be a cornerstone principle.[[39]](#footnote-39) However, what this means and how it should be implemented in practice is still subject to debate,[[40]](#footnote-40) for example with disagreements about the extent to which supported decision-making should replace substituted decision-making, something which others in this collection have similarly sought to consider. This debate becomes most complicated when thinking about ‘risky’ decisions, with the safeguarding domain considered to be the most challenging in which to fully implement supported decision-making. I argue that the provision of support for *all* decisions in relation to vulnerable adults is key, irrespective of whether that adult is ultimately found to lack the capacity to make a decision for themselves. That is not to say that the MCA ought to be repealed or is irrelevant, rather, that where safeguarding is the primary concern, then supported decision-making ought to be at the forefront of adult safeguarding practice.

As Bartlett and Schulze have emphasised, the focus on Article 12 has meant that discussions about Article 16 CRPD, the right to be free from exploitation, violence and abuse, have been less developed.[[41]](#footnote-41) They suggest, however, that Article 16 could be interpreted alongside other provisions to require that adults with disabilities are protected from abuse through *positive steps*. An important question therefore is *how* states take these positive steps to respond to abuse. Bartlett and Schulze argue that the CRPD does not only require an equality of approach between disabled people and others or an approach of non-interference, but that it could require giving *more protection* to people with disabilities who suffer abuse. However, the manner of that protection is key. Reading Article 16 alongside Article 12 means recognising that protection from abuse can also be achieved through supporting and empowering disabled adults to make their own decisions. A protection imperative enacted without support can lead to a return to over-protection.

A corollary of the focus on support is the need for social workers to be protected when taking risky decisions to support vulnerable adults where safeguarding concerns arise. This means that prioritising support means prioritising it in *all* cases, not solely in cases where the adult is making a seemingly ‘wise’ decision. This would be beneficial because of the real concern among social workers about their perceived ‘duty of care’. This is a central reason why social workers are reluctant to place adults at the heart of safeguarding investigations and instead try to persuade them about a particular course of action.[[42]](#footnote-42) One way that social workers can be legitimated to pursue support is through a legal protection for social workers (and potentially others) who allow ‘risky’ decisions to be taken *where the adult has capacity to make those decisions*. There are, of course, risks in providing legal protection for social workers here; it could provide a justification for cash-strapped local authorities to withdraw support altogether on the basis of individual choice. However, this will partly depend on the framing of the protection as well as the overall substance of the safeguarding framework. That is why I frame this protection as a corollary of the provision of support. The two only work together and cannot be separated without serious risk of leaving vulnerable adults unprotected.

Accountability

If social workers are to be protected when taking decisions to support, particularly decisions in the most high-risk cases, then accountability for those decisions is also fundamentally important. The decision-making processes of local authorities, and more specifically actions or omissions of individual social workers need to be subject to scrutiny. There are different mechanisms through which effective accountability can be achieved. I suggest here that a combination of professional ethics and legal review would be an appropriate starting point.

First, accountability can be promoted through rigorous professional ethics standards, which hold professions to a higher standard than the civil law. Placing ethics at the heart of social work may therefore be more effective in improving safeguarding practice than the resort to law. Montgomery makes a similar argument in relation to medicine.[[43]](#footnote-43) He emphasises the value of professional ethics to healthcare practice in contrast to what he described as the ‘amoral commitment to choice and consumerism’ facilitated by legal activity.[[44]](#footnote-44) Professional ethics therefore has an important role to play in maintaining standards. Regulation of social work has recently undergone a period of transition and Social Work England, the new regulator, has developed new professional standards for social work. Those standards include social work accountability for the quality of practice and decisions made by social workers as well as requiring social workers to work within legal and ethical frameworks.[[45]](#footnote-45) Promoting ethical practice in social work is especially important if social workers are to be given greater legitimacy to intervene and ensuring this accountability through ethics, rather than law, has been an important step forward in the context of other care professions.[[46]](#footnote-46)

There is, however, a role for law in ensuring social work accountability, particularly if they are given greater authority to allow risky decision-making. In this instance, additional review mechanisms may be warranted to ensure a public perception of fairness and accountability.[[47]](#footnote-47) One suggestion in the CoP context has been incorporating a clear review mechanism for cases where the person at the centre disagrees with a decision.[[48]](#footnote-48) A similar review mechanism could be contained within the amended safeguarding provisions such that the person affected by the decision has a clear route to challenge. This level of review would require an independent body and one option would be to make it part of the role of Safeguarding Adults Boards (SABs), created under Care Act 2014 s 43. They may be well placed to make such decisions given their statutory function to protect adults in their area, albeit their lack of independence from local authorities may be a concern.[[49]](#footnote-49) Of course, this power of review would most effectively work where positive action was taken to intervene in a person’s life (even in a non-coercive way). However, where a social worker takes a decision to support a risk decision, it should be possible for interested others within the vulnerable adult’s life to also request a review under the safeguarding framework. Overall, rigorous professional accountability for social workers will be a central part of any amended safeguarding legislation if there is to be an expansion of powers for social workers or legal protection for them where they support risky decision-making.

Applicable to all

I have argued elsewhere that there is a need for safeguarding laws to apply to all, effectively arguing for a removal of the requirement for support needs as is currently required under the Care Act.[[50]](#footnote-50) A non-discriminatory framework focused on safeguarding *all adults* vulnerable to abuse is likely to be more sensitive to the range of factors that make a person vulnerable. As Clough explains, the MCA creates a ‘stark dividing line between those who have a cognitive impairment, who can thus be capable of being deemed to lack capacity, and those without a cognitive impairment, who cannot’.[[51]](#footnote-51) This sharp distinction can lead to over-protection of those who have particular disabilities and under-protection of those who are seen as choosing to put themselves at risk, such as women in situations of domestic abuse with an intimate partner. A non-discriminatory framework would provide the opportunity for a more nuanced response to these issues which actually focuses on the situation and the facts that give rise to the safeguarding concern.

To some extent this is already the case, for example, Care Act s 42 (1) (a), makes clear that the safeguarding provisions apply even to those adults who are not receiving local authority support. Unlike the MCA therefore, the safeguarding provisions do not state that an impairment or disability is required for the safeguarding duty to be triggered. I do not suggest here that the MCA should be repealed or amended in this regard, although I do have some sympathy with that argument. My argument is, instead, that the safeguarding framework ought to be focused on protecting people who, for whatever reasons, are not in a position to be able to protect themselves. The Care Act currently frames this as related to support needs, but actually, there may be a much wider range of reasons as to why a person is unable to protect themselves. This would be an important way of encompassing those who might be vulnerable as a result of their disability, but it would not restrict safeguarding to that group.

Partnership working

Safeguarding processes must also be carried out in partnership with the person, taking into account their experiences and wishes, rather than as ‘organising objects’.[[52]](#footnote-52) Failing to hear and take into account the wishes and needs of the individual is less likely to result in a successful outcome, whatever the intervention. Furthermore, there is intrinsic value in involving the person; she is valued as an individual and is encouraged to develop the capacity to make decisions about her future based on her own values. This is, to some extent, captured in the approach known as ‘making safeguarding personal’.[[53]](#footnote-53) However, this rhetoric needs to be strengthened within the legal framework to ensure the individual is *always* consulted and involved at every stage about decisions which will affect her. Explicitly enshrining this principle in law strengthens the discursive pressure on local authorities to translate that into their practice and strengthens social work legitimacy if they are formulating interventions in cooperation with the adult.

No more harm than the adult was already living with

Finally, the principle that any safeguarding intervention should not result in more harm in the adult’s life than they were living with before the intervention must be maintained. This is important because many of the CoP interventions noted earlier in this chapter would not fulfil this test. Protecting the person by removing her from her home and restricting her liberty could be seen as putting her at greater risk and does little to empower her as a decision-maker. State intervention can create further harm and is something we must avoid in reforming the law.[[54]](#footnote-54) For example, in *In Re A (Capacity: Refusal of Contraception)*[[55]](#footnote-55) the court held that whilst it was in Mrs A’s best interests to receive contraception, it should not be forced on her without her consent. Not only would this undermine her autonomy but a forcible intervention against her wishes may actually have created more harm than the intervention was designed to protect her from, for example by having to use restraint or causing distrust in, and disengagement with, healthcare professionals. Of course, calculating and weighing harms will, in some cases, be challenging in practice. However, a similar approach is already taken in mental capacity law when, for example, weighing a person’s best interests.[[56]](#footnote-56) Evaluating harms in a person’s life is not intended to be an exact scientific measurement, rather, the requirement works to force social workers and other decision-makers to consider the nature of the intervention that they are putting forward and to carefully balance it against existing, and future, risks of harm.

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# Conclusion

In this chapter I have highlighted that where social workers refer welfare cases to the CoP, this can result in controlling interventions that protect the adult at risk of abuse, but it is a form of legal coercion rather than support. This is, perhaps, understandable in high-risk cases of abuse where social workers feel caught between their duty of care to protect and wanting to empower the vulnerable adult. However, it is likely further exacerbated by social workers’ limited legitimacy to intervene in supportive ways which may lack the enforceability and apparent objectivity of law’s legitimacy. In light of the difficulties with the resort to legal coercion, I have argued that social workers need the legitimacy to intervene in more supportive ways, protected and backed up by adult safeguarding legal frameworks. In the second half of the paper I suggested that this could be achieved through stronger safeguarding provisions, guided by five core principles. The aim of this change would be to facilitate a move away from the MCA and to provide social workers with the protection and legitimacy to support ‘risky’ decision-making. Whilst the interaction of the MCA and Care Act undoubtedly provides local authorities with some flexibility and provides court authorisation to legitimate decisions in what are no doubt challenging social work cases, resorting to law can also control vulnerable victims of abuse without empowering social workers to intervene through support-based responses.

1. For example, see Department of Health and Social Care (2020), *Care Act Statutory Guidance*, <[www.gov.uk/government/publications/care-act-statutory-guidance/care-and-support-statutory-guidance](http://www.gov.uk/government/publications/care-act-statutory-guidance/care-and-support-statutory-guidance)> accessed 9 December 2020. For an overview, see J Herring, *Vulnerable Adults and the Law* (Oxford University Press 2016). [↑](#footnote-ref-1)
2. For further analysis of the coercive power of mental capacity law in the CoP, see J Lindsey, (2020b) ‘Protecting vulnerable adults from abuse: Under-protection and over-protection in adult safeguarding and mental capacity law’ 32 Child and Family Law Quarterly 157. [↑](#footnote-ref-2)
3. Ibid. The legal framework for Wales is different for safeguarding, albeit the Mental Capacity Act 2005 does apply in England and Wales. [↑](#footnote-ref-3)
4. Care Act 2014, s 42 (1). [↑](#footnote-ref-4)
5. J Lindsey, ‘Developing Vulnerability: A Situational Response to the Abuse of Women with Mental Disabilities’ (2016) 24 Feminist Legal Studies 295; J Lindsey (n2). [↑](#footnote-ref-5)
6. MCA, s 2. [↑](#footnote-ref-6)
7. J Lindsey (n2); B Clough, ‘New Legal Landscapes: (Re) Constructing the Boundaries of Mental Capacity Law’ (2018) 26 Medical Law Review246. [↑](#footnote-ref-7)
8. As part of this research, I also carried out observational research at the CoP, including observing eight cases over 11 hearings, data which are analysed in more detail elsewhere and include findings that the subject of proceedings rarely participates in CoP proceedings, that there is a hierarchy of professional evidence in mental capacity law and that CoP interventions can be used to over-protect adults vulnerable to abuse, see J Lindsey, ‘Testimonial Injustice and Vulnerability: A Qualitative Analysis of Participation in the Court of Protection’ (2019) 28 Social & Legal Studies 450; J Lindsey, ‘Competing Professional Knowledge Claims About Mental Capacity in the Court of Protection’ (2020a) 28 Medical Law Review 1; J Lindsey (n2). The research was approved by the University of Birmingham Research Ethics Committee and any data referred to in this paper is anonymised and does not refer to the actual names of any of those involved in the research. [↑](#footnote-ref-8)
9. TR Tyler, ‘Psychological Perspectives on Legitimacy and Legitimation’ (2006a) 57 Annual Review of Psychology 375, 377. [↑](#footnote-ref-9)
10. J Jackson, B Bradford, M Hough, A Myhill, P Quinton and TR Tyler, ‘Why do People Comply with the Law?: Legitimacy and the Influence of Legal Institutions’ (2012) 52 British Journal of Criminology 1051, 1051. [↑](#footnote-ref-10)
11. M Foucault, *Discipline and Punish: The Birth of the Prison* (Peregrine 1979); C Smart, *Feminism and the Power of Law* (Routledge 1989). [↑](#footnote-ref-11)
12. See H. L. A. Hart, *The Concept of Law* (Clarendon Press 1994); R Dworkin, *Taking Rights Seriously*, (Harvard University Press 1978); R Dworkin, *Law’s Empire* (Harvard University Press 1986). For an overview of this topic also see M Freeman, Lloyd’s Introduction to Jurisprudence (Sweet and Maxwell 2014). [↑](#footnote-ref-12)
13. Founded upon foundational arguments made by H. L. A. Hart, ibid. [↑](#footnote-ref-13)
14. This is despite challenges from anti-positivists that it is law’s moral content that confers legitimacy, for further discussion see R Dworkin (n12). [↑](#footnote-ref-14)
15. TR Tyler, *Why People Obey the Law* (Princeton University Press 2006b). [↑](#footnote-ref-15)
16. See Lindsey (n8) for a full justification of the argument that mental capacity law characterizes social work as a subjective knowledge claim. [↑](#footnote-ref-16)
17. M Thomson, ‘Abortion Law and Professional Boundaries’(2013) 22 Social & Legal Studies 191, 194. [↑](#footnote-ref-17)
18. See the comparison between medical professionals and social work, J Lindsey (2020a) (n8). [↑](#footnote-ref-18)
19. International Federation of Social Workers (2014) *Global Definition of Social Work*, <[www.ifsw.org/policies/definition-of-social-work](http://www.ifsw.org/policies/definition-of-social-work)> accessed 9 December 2020. [↑](#footnote-ref-19)
20. C Whittington, ‘The Promised Liberation of Adult Social Work under England’s 2014 Care Act: Genuine Prospect or False Prospectus?’ (2016) 46 British Journal of Social Work 1942, 1953. [↑](#footnote-ref-20)
21. See P Trevithick, *Social Work Skills: A Practice Handbook* (Open University Press 2005); C Whittington, ‘The Promised Liberation of Adult Social Work under England’s 2014 Care Act: Genuine Prospect or False Prospectus?’ (2016) 46 British Journal of Social Work 1942; 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. [↑](#footnote-ref-21)
22. J Lindsey (2020b) (n8), 2. [↑](#footnote-ref-22)
23. Sarah: qualified social worker. Experience in an adult safeguarding enquiry team for four years. [↑](#footnote-ref-23)
24. David: qualified social worker since 2009 with experience of working primarily with older adults with mental health needs. [↑](#footnote-ref-24)
25. Robert: qualified social worker. 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. [↑](#footnote-ref-25)
26. Albeit that some have rightly questioned where this ‘empowering ethos’ came from given what the MCA actually does is to allow courts to intervene and make decisions on a person’s behalf, even against their wishes, see L Series, (2015) ‘Power and the Mental Capacity Act’, *The Small Places*, <[www.thesmallplaces.wordpress.com/2015/02/18/power-and-the-mental-capacity-act](http://www.thesmallplaces.wordpress.com/2015/02/18/power-and-the-mental-capacity-act)> accessed 9 December 2020. [↑](#footnote-ref-26)
27. E Cave, (2015) ‘Determining Capacity to Make Medical Treatment Decisions: Problems Implementing the Mental Capacity Act 2005’ 36 Statute Law Review 86. [↑](#footnote-ref-27)
28. Excluding property and affairs and medical treatment decisions as different considerations apply. [↑](#footnote-ref-28)
29. J Lindsey (2020b) (n2). [↑](#footnote-ref-29)
30. T Jingree, ‘Duty of Care, Safety, Normalisation and the Mental Capacity Act: A Discourse Analysis of Staff Arguments about Facilitating Choices for People with Learning Disabilities in UK Services’ (2015) 25 Journal of Community & Applied Social Psychology 138. [↑](#footnote-ref-30)
31. Julia: qualified social worker. Experience as a local authority social worker with families where there was a child with a disability and role at time of interview was as a social worker at secure unit with inpatient and outpatient adults with mental health difficulties. [↑](#footnote-ref-31)
32. Alice: qualified social worker. Experience in an adult safeguarding team for four to five years. [↑](#footnote-ref-32)
33. For further detail on the cases see J Lindsey, Protecting and Empowering Vulnerable Adults: Mental Capacity Law in Practice, <<https://etheses.bham.ac.uk/id/eprint/8527/>> accessed 9 December 2020. [↑](#footnote-ref-33)
34. See J Lindsey (2020b) (n2) for justification of this argument. In addition, see a broad selection of cases across the spectrum of health and welfare decision-making which, although in some cases I would agree that the outcome may well have been the right one on the facts, all highlight the coercive nature of the law in this area, in that they compel or prevent the person from doing something that they may otherwise wish to pursue in the absence of court intervention: *The London Borough of Tower Hamlets v TB and SA* [2014] EWCOP 53; *Re AG* [2015] EWCOP 78, *Re CA* [2016] EWCOP 47; *Southend on Sea Borough Council v Meyers* [2019] EWHC 399 (Fam); *A Local Authority v JB* [2020] EWCA Civ 735. [↑](#footnote-ref-34)
35. See for example *Re GC* [2008] EWHC 3402 (Fam) and *Wye Valley NHS Trust v B* [2015] EWCOP 60 as well as a number of cases arising from the Covid-19 pandemic where individuals who lack capacity have been permitted to return home or see loved ones where local authorities or other institutions might otherwise have been reluctant to permit such contact: *BP v Surrey County Council & RP* [2020] EWCOP 20 and *VE v AO, The Royal borough of Greenwich and South East London CCG* [2020] EWCOP 23, *Michelle Davies (by her Litigation Friend John Davies) v (1) Wigan Council and (2) NHS Wigan Clinical Commissioning Group* [2020] EWCOP 60. [↑](#footnote-ref-35)
36. See for example *WBC v Z* [2016] EWCOP 4 and *Re CH (by his Litigation Friend, the Official Solicitor)* v *A Metropolitan Council* [2017] EWCOP 12. For an important overview of case law relating to capacity disputes see A Ruck Keene, NB Kane, SYH Kim and GS Owen ‘Taking capacity seriously? Ten years of mental capacity disputes before England's Court of Protection’ (2019) 62 International Journal of Law and Psychiatry 56. [↑](#footnote-ref-36)
37. J Lindsey (n2, n5). [↑](#footnote-ref-37)
38. These criteria are different from but influenced by those set out in C Mackenzie, ‘The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability’ in C Mackenzie, W Rogers, W and S Dodds, (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press, 2014). The criteria also take into account the principles set out in similar Scottish legislation, see 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 likely to fulfil the object of the intervention, the least restrictive to the adult's freedom.’ However, the principles I set out here are narrower and focused on responding to abuse rather than incorporating what is, essentially, a proportionality approach which risks overriding the wishes of the adult and coercing her in cases where the risks are sufficiently high. [↑](#footnote-ref-38)
39. P Gooding, ‘Supported Decision-Making: A Rights-Based Disability Concept and its Implications for Mental Health Law’ (2013) 20 Psychiatry, Psychology and Law 431; E Flynn and A Arstein-Kerslake, ‘Legislating personhood: realising the right to support in exercising legal capacity’ (2014) 10 International Journal of Law in Context 81; 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; R Harding and E Tascioglu, Everyday decisions project report: supporting legal capacity through care, support and empowerment (University of Birmingham 2019). [↑](#footnote-ref-39)
40. A Dhanda, ‘Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?’ (2006) 34 Syracuse Journal of International Law and Commerce 429; P Bartlett, ‘The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law’ (2012) 75 Modern Law Review 752; E Flynn and A Arstein-Kerslake, ibid; R Harding and E Tascioglu, ibid; A Keeling (n21). [↑](#footnote-ref-40)
41. P Bartlett and M Schulze (2017) (n39). [↑](#footnote-ref-41)
42. A Keeling (n21). [↑](#footnote-ref-42)
43. J Montgomery, ‘Law and the Demoralisation of Medicine’ (2006) 26 Legal Studies 185. [↑](#footnote-ref-43)
44. Ibid, 186. [↑](#footnote-ref-44)
45. See Social Work England (2019), *Professional Standards*, <[www.socialworkengland.org.uk/media/1640/1227\_socialworkengland\_standards\_prof\_standards\_final-aw.pdf](http://www.socialworkengland.org.uk/media/1640/1227_socialworkengland_standards_prof_standards_final-aw.pdf)> accessed 9 December 2020. [↑](#footnote-ref-45)
46. Such as medicine, see J Montgomery (n43). [↑](#footnote-ref-46)
47. D Platt, ‘Care or Control? The Effects of Investigations and Initial Assessments on the Social Worker–Parent Relationship’ (2008) 22 Journal of Social Work Practice 301, 304. [↑](#footnote-ref-47)
48. L Series, P Fennell, J Doughty and A Mercer (2017), *Welfare Cases in the Court of Protection: A Statistical Overview*, <[www.sites.cardiff.ac.uk/wccop/new-research-an-overview-of-welfare-cases-in-the-court-of-protection/](http://www.sites.cardiff.ac.uk/wccop/new-research-an-overview-of-welfare-cases-in-the-court-of-protection/)> accessed 9 December 2020. [↑](#footnote-ref-48)
49. Sch 2 Care Act 2014. [↑](#footnote-ref-49)
50. J Lindsey (2016) (n5). [↑](#footnote-ref-50)
51. Ibid, 476. [↑](#footnote-ref-51)
52. A Keeling (n21). [↑](#footnote-ref-52)
53. Making safeguarding personal is a Local Government Association initiative which brings together various local authorities to agree on an approach which, in essence, ensures that safeguarding is done with the person rather than following a procedural approach. See Association of Directors of Adult Social Services (2017) *Making Safeguarding Personal*, <[www.adass.org.uk/making-safeguarding-personal-publications](http://www.adass.org.uk/making-safeguarding-personal-publications)> accessed 9 December 2020. [↑](#footnote-ref-53)
54. J Lindsey (2016) (n5). [↑](#footnote-ref-54)
55. [2010] EWHC 1549. [↑](#footnote-ref-55)
56. C Kong, J Coggon, M Dunn and A Ruck Keene, (Forthcoming) ‘An Aide Memoire for a Balancing Act? Critiquing the ‘Balance Sheet’ Approach to Best Interests Decision-Making’ *Medical Law Review.* [↑](#footnote-ref-56)