National Independent Safeguarding Board Wales

Bwrdd Diogelu Annibynnol Cenedlaethol Cymru

Ariennir gan Lywodraeth Cymru
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# A Practitioner's Guide

## Basic Legal Principles

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# Foreword

During 2016, Ruth Henke QC was instrumental in ensuring that her National Board colleagues grasped the basics of the Social Services and Well-being (Wales) Act 2014. Two years later, *Basic Legal Principles* reaches beyond this Act and gets to the heart of the law relating to safeguarding practice in Wales. Writing for non-lawyers, Abla O'Callaghan, Laura Shepherd and Ruth Henke's timely publication will be welcomed by all Regional Safeguarding Boards and practitioners.

**Margaret Flynn**
Chair of the NISB for Wales

# 1 Introduction

This guide is intended to be accessible to practitioners who work on the frontline. It is not statutory guidance nor is it a Code. It does not alter the law as it stands. It is not intended to be a substitute for taking advice from others. Whilst this Guide will give you the basic legal principles, it does not provide you with legal advice and should not be regarded as legal advice in relation to any particular case. What the Guide should do is enable the practitioner to have a basic understanding of some of the key areas of the law which may impact upon their practice. It is hoped that that will enable them to be more confident when making difficult decisions, alert them to when they may need to look a little deeper and empower them to know when they need to ask for assistance. Above all this guide is intended to give the practitioner access to the basic legal principles upon which their daily actions and decisions should be based. This guide recognises that no case is ever the same and the factual variations are infinite. The law as it stands applies to each of those variations. There is already statutory guidance which sets out what to do in relation to specific cases of abuse, neglect, harm and significant harm or the risk thereof e.g. Female Genital Mutilation, Modern Day Slavery, Child Sexual Exploitation[1]. This guide provides you with the basic legal principles which underpin that statutory guidance and which apply equally to all factual scenarios. Within this guide you will find the statutory definitions of some of the key terms you as a practitioner use each day in your professional life such as mentally disordered; lacking mental capacity; depriving someone of their liberty etc. You will also find the statutory definitions of harm, neglect, and abuse. These definitions are the bedrock of all we do. Their general nature means that they can be used in the many and various ever changing factual scenarios that a practitioner meets on a daily basis. After all, however we categorised it, abuse is abuse, neglect is neglect and harm is harm and we, the practitioner, need to be able to protect those who cannot protect themselves from that harm, abuse and neglect or the risk thereof in a lawful and effective manner.

The law as stated in this document is the law as at 16th September 2018. It will change over time. The Mental Capacity Act, for instance, is likely to be reformed in the near future.

16th September 2018
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1 *Working Together to Safeguard People- Handling Individual Cases to Protect Children at Risk and Handling Individual Cases to Protect Adults at Risk*

# 2 The Mental Capacity Act 2005 (hereafter the MCA)



**Key Materials :** -

- The Mental Capacity Act 2005
- The Mental Capacity Act Code of Practice
- The Deprivation of Liberty Safeguards Code of Practice.

## Who does the MCA apply to?

The MCA only applies to those who lack capacity.

Section 2 (1) of the MCA states:

*For the purposes of this Act, a person lacks the capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.*[2]

There is an assumption of capacity under the Act.[3] That assumption can be displaced if (a) the person in question has an impairment or disturbance in the functioning of the mind or brain (the **diagnostic test**[4]) **and** (b) the person is unable to make the decision in issue for himself (the **function test).**[5] Both the diagnostic test and the function test must be met before a person can be said to lack capacity within the meaning of the MCA.

A person making a capacity assessment must not allow any preconceptions and/or prejudicial assumptions to influence or have input into their assessment of capacity. There should be **equal consideration**[6] when undertaking an assessment of capacity so that no unjustified assumptions are made based for instance solely on the person's age, appearance, condition or behaviour.

2 S2(1) MCA 2005

3 S1(2) MCA 2005

4 S2(1) MCA 2005

5 S1 & 3 MCA 2005

6 S1(3)(a) MCA 2005

The range of conditions which can fulfil the **diagnostic test** include a psychiatric illness, learning disability, or a toxic confusional state if it has the effect on the functioning of the mind or brain leading to the individual being unable to make a decision.

The **function test** is fulfilled if a person is unable to make a decision for themselves because they cannot:

- Understand the information relevant to the decision[7]
- Retain the information long enough to make that decision [8]
- Use or weigh the information to make a choice [9]
- Communicate his/her decision (by any means whether by talking, sign language, or any residual ability such as blinking).[10]

In some cases the **function test** is met by one of the above factors. In others all four factors may be present.

**The MCA only applies to those over 16 years old**. Standard authorisations of deprivation of liberty are restricted to those over 18 who are placed in a care home or hospital. The jurisdiction of the Court of Protection does not extend to the vulnerable but capacitous 16+ year old or those who lack capacity but not by reason of an impairment or disturbance of their mind or brain.

## What is the material time?

The relevant period for assessing when a person lacks capacity is the particular time when the decision has to be made in relation to the specific issue to which the decision relates to. Loss of capacity can be partial, temporary and it can fluctuate.

## Capacity is issue specific

A person can lack capacity in relation to one decision but not another. A person can have the capacity to decide what to wear and what to eat but may not have the capacity to decide whether or not to have a medical operation or to decide where to live or who to have contact with. Some people have the capacity to decide to marry but do not have the capacity to decide who to have contact with and in what circumstances. Some issues that arise, such as capacity to consent to sexual relations, are vexed. Early legal advice is recommended when dealing with such complex and personal issues.

7 S3 (1)(a) MCA 2005

8 S3(1)(b) MCA 2005

9 S3(1)(C) MCA 2005

10 S3(1)(d) MCA 2005

## Making a decision

All decisions and/or steps taken on behalf of a person lacking capacity must be taken in that person's **best interests**.[11] A consideration of all the relevant circumstances[12] is necessary in order to determine what is in a person's best interests. The relevant circumstances are those of which the person making the decision is aware and that are reasonable to be regarded as relevant. The determination of best interests is an objective test rather than a subjective one of what the person would have wanted. All relevant circumstances must be balanced with no prioritisation. When making a **best interests decision,** you must:

- **Encourage** participation. You must do whatever is reasonably practicable to permit and encourage the person to take part, or to improve their ability to take part, in making the decision
- **Identify** all relevant circumstances. You must seek to identify all the things that the person who lacks capacity would take into account if they were making the decision or acting for themselves
- **Ascertain the person's views** You must seek to find out the views of the person who lacks capacity, including: – the person's past and present wishes and feelings. These may have been expressed verbally, in writing or through behaviour or habits. Their beliefs and values (e.g. religious, cultural, moral or political) that would be likely to influence the decision in question. Any other factors the person themselves would be likely to consider if they were making the decision or acting for themselves.
- **Avoid discrimination** You must not make assumptions about someone's best interests simply on the basis of the person's age, appearance, condition or behaviour.
- **Assess** whether the person might regain capacity. You need to consider whether the person is likely to regain capacity (e.g. after receiving medical treatment). If so, can the decision wait until then?
- **Don't assume** If the decision concerns life-sustaining treatment – you must not be motivated in any way by a desire to bring about the person's death. You should not make assumptions about the person's quality of life.



11 S1(5) MCA 2005

12 S4(2) MCA 2005

- **Consult others** If it is practical and appropriate to do so, consult other people for their views about the person's best interests and to see if they have any information about the person's wishes and feelings, beliefs and values. In particular, consult anyone previously named by the person as someone to be consulted on either the decision in question or on similar issues; anyone engaged in caring for the person; close relatives, friends or others who take an interest in the person's welfare; any attorney appointed under a Lasting Power of Attorney ("LPA") or Enduring Power of Attorney made by the person; and any deputy appointed by the Court of Protection to make decisions for the person. For decisions about major medical treatment or where the person should live and where there is no-one who fits into any of the above categories, an **Independent Mental Capacity Advocate (IMCA)** must be consulted. When consulting, remember that the person who lacks the capacity to make the decision or act for themselves still has a right to keep their affairs private. Unless it is necessary to do so, do not share every piece of information with everyone.

- **Avoid restricting the person's rights** See if there are other options that may be less restrictive of the person's rights.

## Who can make a best interests decision?

Under the MCA many different people may be required to make decisions or act on behalf of someone who lacks capacity to make decisions for themselves. For most day-to-day actions or decisions, the decision-maker will be the carer most directly involved with the person at the time. Where the decision involves the provision of medical treatment, the doctor or other member of healthcare staff responsible for carrying out the particular treatment or procedure is the decision-maker. Where nursing or paid care is provided, the nurse or paid carer will be the decision-maker. If a LPA (or Enduring Power of Attorney) has been made and registered, or a deputy has been appointed under a court order, the attorney or deputy will be the decision-maker, for decisions within the scope of their authority. Sometimes people will need to make decisions jointly e.g. when a person who lacks capacity needs healthcare and social care. No matter who is making the decision, the most important thing is that the decision-maker tries to work out what would be in the best interests of the person who lacks capacity.

## What to do if the decision makers do not agree?

If the decision makers cannot agree there are a variety of steps which can be taken to resolve that dispute. Those steps include:

- Getting a second opinion
- Holding a formal or informal 'best interests' case conference
- Attempting some form of mediation
- Making an application to the Court of Protection.

If you are in doubt about which route to take consult your line managers and, if necessary, seek legal advice.

## Protection from liability

Certain acts that are done in connection with care and treatment of another person are protected in that the carer would not be subject to civil or criminal proceedings in relation to them. These are often known as **section 5**[13] acts as they are governed by section 5 of the MCA. The key requirements of a section 5 act are as follows:

- The decision maker takes reasonable steps to establish whether a person lacks capacity in relation to the matter in question
- The decision maker acts in connection with the care or treatment of another person, **and**
- The decision maker has formed a reasonable belief in relation to that person's lack of capacity and best interests.

The test in relation to reasonable belief is an objective one.

Liability for negligence is unaffected by section 5 of the MCA as are Advance Decisions to refuse treatment. Further, nothing in the Act affects the law relating to murder or manslaughter or the operation of the law relating to assisted suicide under section 2 of the Suicide Act 1961.[14]

Importantly, section 5 of the MCA is purely protective of the person giving care or treatment. It does **not** give people caring for or treating someone the power to make any other decisions on behalf of those who lack capacity to make their own decisions. The power to make decisions on behalf of someone who lacks capacity can be granted through other parts of the Act (such as the powers granted to attorneys and deputies) and declarations under section 16 of the MCA.



13 S5 MCA 2005

14 S62 MCA 2005

## Advance Decisions

The principal characteristics of an advance decision are:

- At the time when the person has capacity to make the decision in question, he/she must be 18 or over
- The decision must specify the treatment that is being refused in lay terms or otherwise
- The decision must specify the particular circumstances within which the refusal will apply, in lay terms or otherwise.

**If the person has capacity, they can change or completely withdraw the decision** A withdrawal or a partial withdrawal does not need to be in writing and can be conveyed by any means. Similarly, an alteration does not need to be in writing unless it applies to an advance decision to refuse life-sustaining treatment wherein formalities need to be complied with.

## Advance Decisions to refuse life-sustaining treatment

In relation to life-sustaining treatment, an advance decision must comply with the following requirements to be applicable:

- The decision must be verified by a statement by the person in question indicating that it applies to that treatment even if life is at risk and
- The decision must be written, signed by that person or another person in their presence and by their direction, the signature made or acknowledged by the person in question in the presence of a witness, and the witness signs it or acknowledges his signature in that person's presence.

## Continuing Treatment whilst Awaiting Decision from the Court

If a decision in relation to a relevant issue is awaited from the Court, an apparent advance decision does not stop a person from providing life-sustaining treatment or doing an act which he reasonably believes is necessary to prevent a serious deterioration in a person's condition.

## Lasting Powers of Attorney

When an LPA is made an individual (i.e. the donor) confers on another individual's (i.e. the donee(s)) authority to make decisions about the donor's personal welfare and/or property and affairs or specified matters concerning those areas. This includes acting on decisions made where appropriate.

In order for an LPA to be valid, it must include authority to make decisions when the donor no longer has capacity to make those decisions himself. The donor must be over 18 and have capacity to execute a LPA.

## IMCAs

The IMCAs input relates to when certain decisions need to be taken in relation to particularly vulnerable people who lack capacity. Relevant decisions (for which the person lacks capacity) relate to long term changes in accommodation, serious medical treatment, care reviews, and the protection of adults at risk.

IMCAs should be independent of the person who is making the decision concerned as much as possible. The IMCA must be able to meet the person in question in private and see the relevant health, social services and care home records so that they can properly represent and support that person.

IMCAs have the authority to challenge decisions affecting persons who lack capacity.

## Criminal Offences

**Ill-treatment or neglect under section 44 MCA**

Certain people are guilty of an offence if they **ill-treat or wilfully neglect a person who lacks capacity**. A person may be convicted of such an offence if:

- He has the care of the person who lacks capacity or who he reasonably believes lacks capacity
- He is a donee of a LPA or an EPA created by the person who lacks capacity, or
- Is a deputy appointed by the Court for the person who lacks capacity.

**Note** that even if the victim has capacity, it will still be an offence under this section of the Act if the person who has the care of him/her reasonably believed he/she lacked capacity and ill-treated or neglected him/her. Reasonable belief means that, in all the circumstances, a reasonable person would believe that the victim lacked capacity.

**Regardless of whether a person has capacity or not** it is an offence under section 20 Criminal Justice and Courts Act 2015 for an individual who has the care of another individual by virtue of being a care worker to ill-treat or wilfully to neglect that individual. A care worker is an individual providing health or social care. A foster parent is included within the definition of a care worker for the purposes of this section.

**Neglect** may also amount to an offence pursuant to **section 127 Mental Health Act 1983**. This section may be considered where a person with a mental disorder has been the victim of ill-treatment or wilful neglect but does not lack capacity for the purposes of section 44 Mental Capacity Act 2005.

The **improper use of restraint** may amount to a criminal offence of assault and/or false imprisonment and/or choking. It may also amount to a criminal offence as a breach of Regulation 24 or 25 under the Care Standards Act 2000. The MCA 2005 sets out a definition of restraint and the conditions which must be fulfilled if the person providing the restraint is to come within the protection of section 5 of the Act.

Restraint is the use or threat of force to undertake an act which the person resists, or the restriction of the person's liberty of movement, whether or not they resist. Restraint may only be used where it is necessary to protect the person from harm and is proportionate to the risk of harm.[15]

The Care Standards Act 2000 and associated Regulations such as the Care Homes Regulations 2001 and the Domiciliary Care Agencies Regulations 2002 refer to the use of restraint. For instance, Regulation 13(7)(a) of the Care Homes Regulations 2001 states: "*the registered person shall ensure that no service user is subject to physical restraint unless restraint of the kind employed is the only practicable means of securing the welfare of that or any other service user and there are exceptional circumstances.*" Further, Regulation 13(8) states *"on any occasion on which a service user is subject to physical restraint, the registered person shall record the circumstances, including the nature of the restraint.*"



15 See S6 MCA 2005

# 3 Deprivation of Liberty Safeguards

**Key Materials:** -

- **The Mental Capacity Act 2005**
- **The Mental Capacity Act Code of Practice**
- **The Deprivation of Liberty Safeguards Code of Practice.**

## When is a Person Deprived of their Liberty?

### Starting Principles: ECHR

The right to liberty is prescribed in the European Convention on Human Rights ("ECHR"), of which the UK is a "signatory state", meaning that the state is obliged to secure certain rights to persons within the jurisdiction. Article 5 protects the Right to Liberty.

As a signatory state the UK (and any organ of the state) is obliged to take measures providing effective protection of vulnerable persons. This includes reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge.[16]

The European Court of Human Rights ("ECtHR") provided a test with three elements.[17]

1. The objective element of confinement in a restricted space for a non-negligible period of time;
2. The subjective element that the person has not validly consented to that confinement; and
3. The detention being imputable to the state.

16 *Storck v Germany* [2005] ECHR 406 at [102]

17 *Ibid* at [74]

Imputable to the state means that **the state is in some way responsible**. This can occur in one of three ways:

1. The direct involvement of public authorities in the person's detention;
2. If the courts have failed to interpret the law governing any claim for compensation for unlawful deprivation of liberty "in the spirit of Article 5"; or
3. The state has breached its positive obligation to protect the person against interferences with his or her liberty by private persons.

## Domestic Law: Cheshire West

In 2014 the Supreme Court of England and Wales brought some clarity to the concept of a deprivation of liberty.[18]

The court held that the test for a deprivation of liberty is the same for everyone. It does not matter whether or not a person has a physical or mental disability, if someone is obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision, and unable to move away without permission even if such an opportunity becomes available, then that is a deprivation of liberty.[19] The 'acid test' for deprivation of liberty is whether the person is under continuous supervision and control and is not free to leave.

The fact that the living arrangements are comfortable and life is as enjoyable as it could possibly be makes no difference. **A gilded cage is still a cage**.[20]

Irrelevant factors in determining whether or not someone is deprived of their liberty include:

- Compliance or lack of objection;
- The relative normality of the placement;
- The reason or purpose for the placement.



18 *Cheshire West and Chester Council v P* [2014] UKSC 19; [2014] 2 W.L.R. 642

19 *Ibid* at [50]

20 *Ibid*

*Ibid* at [47]

The question is one of degree or intensity, not nature or substance.[21] However, the following questions are useful in determining whether or not there is a deprivation of liberty:

- Is the person free to leave?[22]
- Are they under continuous supervision and control?[23]
- What is the area and period of confinement?[24]

## When is it Permissible for the State to Deprive Someone of their Liberty?

### Starting Principles: ECHR

A deprivation of liberty can be justified for a person of "unsound mind"[25] as long as it is in accordance with a procedure prescribed by law.

### Mental Capacity Act 2005

In the UK the relevant legislation is the MCA. The Act provided three situations in which a person lacking capacity may be deprived of their liberty:

1. Where it is authorised by the Court;[26]
2. Where the deprivation is authorised under the procedures provided in Schedule A1 MCA;[27] or
3. Where it is necessary in order to give life-sustaining treatment or to carry out a vital act to prevent serious deterioration in the person's condition while a decision from the court is sought on any question as to whether he may lawfully be deprived of his or her liberty.[28]



21 *Guzzardi v Italy* (A/39) (1981) 3 EHRR 333

22 *Cheshire West and Chester Council v P* [2014] UKSC 19; [2014] 2 W.L.R. 642 at [49]

23 *Ibid*

24 *Ibid* at [63]

25 Article 5(1)(e) ECHR

26 S16(2)(a) MCA

27 These safeguards are limited to those detained in hospitals and care homes only

28 S4B MCA

## Deprivation of Liberty Safeguards

The Deprivation of Liberty Safeguards ("DoLS") are contained within Schedule A1 MCA. There are two types of authorisation: standard and urgent.

### Standard Authorisation

The managing authority (i.e. the manager of the residential care home or hospital) must make an application for a standard authorisation to the local authority or local health board (LHB). A managing authority must request a Standard Authorisation when it appears that sometime in the next 28 days someone will be accommodated in circumstances that amount to a deprivation of liberty. The timescale to complete the Standard Authorisation is 21 days from the date the assessors were instructed by the supervisory body.

There are standard forms and a procedure to be followed. A standard authorisation can authorise a deprivation of liberty for a period of twelve months.[29]

Six assessments must be carried out:[30]

1. The age requirement;
2. The mental health requirement;
3. The mental capacity requirement;
4. The best interests requirement;
5. The eligibility requirement; and
6. The no refusals requirement.

The age requirement requires that detained person, known as the relevant person, must be over the age of 18.[31]

The mental health requirement requires the relevant person to be suffering from a mental disorder, as defined in the MHA.

A person with a learning disability does not need to display seriously irresponsible conduct or abnormally aggressive behaviour in order to meet the requirement within the MCA, even though they might not fall within the definition in the MHA.[32]

29 Schedule A1, para 49 MCA

30 Schedule A1, Pt 3 MCA

31 Schedule A1, para 13 MCA

32 Schedule A1, para 14 MCA

The mental capacity requirement is that the relevant person lacks capacity to decide whether or not he or she should be accommodated in the relevant hospital or care home for the purpose of being given care or treatment.[33]

In order to satisfy the best interests requirement, four conditions must be met:[34]

1. The relevant person is, or is to be, a detained resident;
2. It is in the best interests of the relevant person for him or her to be a detained resident;
3. In order to prevent harm to the relevant person, it is necessary for him or her to be a detained resident;
4. It is a proportionate response to:

a. The likelihood of the relevant person suffering harm, and

b. the seriousness of that harm,

5. for him or her to be a detained resident.

The eligibility requirement is that the relevant person is not ineligible to be deprived of his or her liberty.[35] A person will be ineligible if they meet the criteria for detention under the MHA because the MHA has primacy over the MCA.[36]

The no refusals assessment will determine whether one of the following exists:

- A valid advance directive exists; or
- A decision made by a welfare deputy; or
- A decision made by a donee with LPA which would apply to some or all of the relevant treatment.[37]

This requirement must be assessed by a suitably qualified assessor and cannot be the same person who has also conducted the mental health assessment.[38] The assessor has a duty to consult and will review documentation and make recommendations as to the duration of the authorisation and any conditions to be attached to it.



33 Schedule A1, para 15 MCA

34 Schedule A1, para 16 MCA

35 Schedule A1, para 17 MCA

36 *J v Foundation Trust* [2009] EWHC 2972 (Fam)

37 Schedule A1, Paras 18-20 MCA

38 Schedule A,1 paras 38-45 MCA

The **key points** to bear in mind are:

- There MUST be at least two assessors
- Mental health and Best Interests Assessors MUST be different people
- The assessors MUST not be involved in the care or treatment of the person or in the decisions regarding their care
- The assessors MUST not have a financial interest in the case
- The assessors MUST not be a relative of the person being assessed
- The relevant person MUST satisfy the six eligibility assessments.

The Deprivation of Liberty Safeguards Code of Practice gives further guidance as to the authorisation process.

**Urgent Authorisation**

An urgent authorisation can be made straightaway to authorise a deprivation of liberty for a period of seven days.[39] It can only be made when a request for a standard authorisation has been or will be made but the need for the authorisation is so urgent that it is appropriate for the deprivation to begin before completion of the standard authorisation.

## Best Interests Decisions and Consultation

All actions done for or all decisions made on behalf of someone lacking capacity must be done in their best interests.[40]

If you are making a best interests decision you may refer to the previous chapter in which best interest decisions are considered.

Consulting others about best interest decisions is also considered in the previous chapter.



39 Schedule A1, Pt 5 MCA

40 Section 1(5) MCA

## Additional Factors for DoLS

The following additional factors apply to best interests decisions made in the context of DoLS:

- Whether the harm to the person could arise if the deprivation does not take place;
- What that harm would be;
- How likely that harm is to arise (i.e. the risk);
- What other care options there are which could avoid deprivation of liberty;
- If a deprivation of liberty is unavoidable what action could be taken to avoid it in the future.

## Challenging a Deprivation of Liberty

As well as setting out the procedure for a deprivation of liberty, DoLS provides a route of appealing the decision.

Schedule 1A sets out the provisions for the appointment of a relevant person's representative.[41] That person can seek a review of the authorisation and can appeal the decision so that it comes before the court.[42]

The Court of Protection has the power to determine any question relating to whether the qualifying requirements are met. It can also determine the period, purpose or conditions of a standard or urgent authorisation. An application for the court to exercise this power can be brought by the relevant person or the relevant person's representative, or any other person with the permission of the court.

## Reform of DoLS

The DoLS scheme is regarded by many as broken and has been the subject of Law Commission recommendations for change. Those changes are currently being considered by Parliament.



41 Schedule A1, Pt 10 MCA

42 Section 31A MCA

## What about People who are not in Care Homes/Hospitals?

The DoLS procedure applies only to those in a care home or hospital and not to those in a supported living arrangement such as in a small home setting catering for one or more residents. In such cases an application to authorise a deprivation of liberty must be made to the Court of Protection before the detention commences. The court will consider whether the proposed arrangements amount to a deprivation of liberty and if so whether this is in the best interests of the individual, before sanctioning the same.[43]

Where a deprivation of liberty is authorised in this way by an order of the court, this must remain subject to periodic review by the court.

## What if I Want to Protect Someone Who Does Have Capacity?

The MCA gives the Court of Protection powers exercisable only where a person lacks capacity. The court can exercise powers in relation to matters concerning their property and affairs or personal welfare.[44]

However, in certain circumstances the court can intervene to protect a person who has capacity.

## The Inherent Jurisdiction

Where the person has capacity but is **vulnerable**,[45] then the High Court has jurisdiction to make appropriate orders.[46] This power is invested in the High Court only and refers to a legal concept known as the Inherent **Jurisdiction**.

The inherent jurisdiction is there to give protection to individuals who, whilst strictly not lacking capacity in the sense of the MCA, are nevertheless vulnerable to abuse.[47]

43 ss.4, 4A and 16 MCA

44 Section 16(1)(b) MCA

45 *Re SA (Vulnerable adult with capacity: Marriage)* [2005] EWHC 2942; [2006] 1F.L.R. 867.

46 *Re SA (Vulnerable adult with capacity: Marriage)* [2005] EWHC 2942; [2006] 1F.L.R. 867.

47 *A Local Authority v DL* [2012] 3 All ER 1064

## Case Note:

*Re SA (Vulnerable adult with capacity: Marriage)* [2005] EWHC 2942

The applicant local authority applied to the court to invoke its inherent protective jurisdiction in respect of a vulnerable adult (S).

S had just attained her majority. She was deaf and unable to speak and communicated by British sign language. Communication within her family was limited as her parents spoke only Punjabi. S functioned at the intellectual level of a 13 or 14 year old. While S was still a child the court exercised its inherent jurisdiction to protect her from the risk of an unsuitable arranged marriage. The issue in the instant application was whether the court had jurisdiction to continue that protection now that S was an adult. Expert evidence was that S had capacity to marry, having an understanding of the concept of marriage, including a sexual relationship. However, S would have difficulty understanding a specific marriage contract to a specific individual involving a change in her country of residence. S did not want to live in Pakistan. The local authority argued that S needed the continuing protection of the court.

The court held that it had the jurisdiction to protect vulnerable adults which is not confined to cases where a vulnerable adult was disabled by mental incapacity. The inherent jurisdiction could be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder, was either under constraint, subject to coercion or undue influence or otherwise deprived of the capacity to make the relevant decision, disabled from making a free choice, or incapacitated from giving or expressing a real and genuine consent.



The MCA has diminished the need to invoke the inherent jurisdiction of the High Court in relation to a person who lacks capacity to make a decision. However, the inherent jurisdiction is still available in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either:

1. Under constraint;
2. Subject to coercion or undue influence; or
3. 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.[48]

48 *Re SA (Vulnerable adult with capacity: Marriage)* [2005] EWHC 2942 at [76]–[80]

## Case Note:

*A Local Authority v DL [2012] 3 All ER 1064*

*The local authority had sought to invoke the inherent jurisdiction of the High Court to obtain orders for the protection of two elderly parents, H and W. H and W were aged 85 and 90 respectively and lived with their son, D, who was in his 50s. They had mental capacity to make decisions and therefore did not fall under the MCA. The local authority was concerned about D's alleged conduct towards his parents. It was alleged that he physically assaulted them, threatened them, prevented them from leaving the house, and controlled who could visit them including health and social care professionals. It was also alleged that he was attempting to coerce H into transferring the house into his name, and sought to have W moved into a care home against her wishes. An independent social work expert found that H and W were unduly influenced by D so that their capacity to make balanced and considered decisions was compromised or prevented.*

*The court held that the MCA had not ousted the High Court's inherent jurisdiction to deal with cases which fell outside the Act, and protect vulnerable adults who were under constraint, subject to coercion or undue influence, or deprived of capacity for some other reason.*

However, the inherent jurisdiction of the court cannot be used to **impose** a decision on an adult with capacity. The inherent jurisdiction is a purely protective jurisdiction. The High Court may use its inherent jurisdiction to aid the process of decision-making by those who they have determined have capacity free of external pressure or physical restraint in making those decisions.[49] This allows a vulnerable adult to receive help free of coercion, and enable them decide freely what they wish to do.[50]

The court can only impose orders which are necessary and proportionate to the facts of the case.[51]

The use of the inherent jurisdiction is for cases where a person cannot give consent in "the true sense." The inherent jurisdiction is not to be invoked in cases where a person's acts are simply unwise.

49 Per Macur J in *LBL v RYJ* [2010] COPLR 795 at [62]. Approved by Court of Appeal in *A Local Authority v DL* [2012] 3 All ER 1064 at [67]. Also see *Re PB; NCC v PB* [2014] EWCOP 14 at [113–114] where Parker LJ suggests that it is possible to use the inherent jurisdiction to impose a protective regime on a capacitous person if it is the only way in which their interests can be safeguarded.

50 Per Bodey J in *A Local Authority v Mrs A [2010] EWHC 1549 (Fam)* at [79]

51 *A Local Authority v DL* [2012] 3 All ER 1064 at [66]

## Private Deprivations of Liberty

What if you come across a deprivation of liberty not imposed by the state but by a private individual, such as the relevant person's carer? Does the state have the power to intervene then?

The key to answering that question is **knowledge**.

The state has to take reasonable steps to prevent a deprivation of liberty of which it has or ought to have knowledge."[52] Where a public authority knows or ought to know that a child or adult is subject to restrictions on their liberty by a private individual, which may give rise to a deprivation of liberty, positive obligations are triggered.[53]

### Step 1: Investigate

The first stage is to investigate whether there is, in fact, a deprivation of liberty, applying the test in *Cheshire West*.

If there is no deprivation of liberty then the local authority will discharged its immediate responsibilities. In some cases it may be required to continue to monitor the situation.

### Step 2: Provide Support

In appropriate circumstances the local authority should provide support services to the relevant person and/or the carers. This may take the placement from being a deprivation of liberty, to one where the relevant person's right to liberty is protected. This means ensuring that inappropriate restrictions come to an end.

Again, some cases may require monitoring to make sure that the restrictions do not re-emerge.

### Step 3: Refer to the Court

If Step 2 fails because either the individual or family objects to the support provided by the local authority, or because it is simply not appropriate to bring the deprivation of liberty to an end, then the matter must be referred to the court.

The local authority can engage in an authorisation procedure as set out in the MCA, or challenge the legality of a placement.

52 *Storck v Germany* [2005] ECHR 406 at [102]

53 In *Re A (a child) (deprivation of liberty) Re C (vulnerable adult) (deprivation of liberty)* [2010] All ER (D) 50 (Aug)

You are a senior social worker responsible for a team of home carers who provide care and support to an elderly woman recently discharged from hospital. The home carers are delivering a package of care and support to her 4 times a day 7 days a week. One of the home carers reports to you that the elderly lady has an adult son who has a psychiatric condition controlled by medication. They tell you that his mother does not let him go out alone and locks him in his room when she is tired. She is tired frequently because of recent medical treatment. What should you do?

1. Investigate. Does the son lack capacity? Do you have reasonable grounds to believe he lacks capacity? Is the adult son supervised 24/7. Is he under continuous supervision and control? Is he deprived of his liberty?
2. Provide support. Will access to a community group for the son provide the elderly lady with the time she needs to recuperate and provide her son with opportunities to be himself away from supervision.
3. If the adult son lacks capacity within the meaning of the MCA and is being deprived of his liberty and you as an employee of the authority know that he is, what should you do? Answer:- refer his case to the Court of Protection.
4. If the adult son has capacity and his free will is not over borne, the MCA will not apply. His decisions are his own.

# 4 The Mental Health Act 1983 as amended (the MHA)



## Key materials:-

- **The MHA 1983 as amended**
- **The MHA 1983 Code of Practice for Wales**
- **The Mental Health Measure (Wales) 2010**
- **The Mental Health (Hospital, Guardianship, Community Treatment and Consent to Treatment) (Wales) Regulations**

## Removing a person to a place of safety under the MHA

Section 135 of the MHA allows a warrant to be obtained from a justice of the peace authorising the police to enter any place within the jurisdiction of the justice and remove any person suffering from a mental disorder, to a place of safety, if the police suspect the individual is unable to care for themselves or is being ill-treated or neglected.

This would be on the basis of information on oath by an approved mental health professional that there is reasonable cause to suspect that a person believed to be suffering from mental disorder has been or is being ill-treated, neglected or kept otherwise than under proper control or being unable to care for himself is living alone in any such place.

The removal would be with a view to the making of an application under Part II of MHA or for other arrangements for his treatment or care.

Under section 136 of the MHA a person can be removed to a place of safety or kept in a safe place without a warrant if he/she appears to a constable to be suffering from a mental disorder and to be in immediate need of care or control. The constable can remove the person if he considers it necessary to do so in the interests of that person or for the protection of other persons.

## Key definitions

A **mental disorder** is that of any disorder or disability of the mind.[54]

For most purposes (as set out in section 2B MHA), except for admission for assessment under section 2 of the MHA, a person with a learning disability shall not be considered by reason of that disability to be suffering from a mental disorder unless it is associated with (**the conditions**):-

- abnormally aggressive; or
- seriously irresponsible conduct.

Except where urgent action is required, a patient should not be diagnosed as meeting either of the above conditions without having been assessed by a consultant psychiatrist with special experience in learning disabilities and having received a formal psychological assessment.[55]

Although a person with a learning disability and no other form of mental disorder may not be detained for treatment unless their learning disability is associated with the conditions set out above, this does not apply to Autism Spectrum Disorder ("ASD") (including Asperger's syndrome). It is possible for someone with an ASD to meet the criteria for compulsory measures under the Act without having any other form of mental disorder, even if the ASD is not associated with abnormally aggressive or seriously irresponsible conduct.

A **learning disability** is defined as an "arrested or incomplete development of the mind which includes significant impairment of intelligence and social functioning."

A **disorder or disability of the mind** does not include dependence on alcohol or drugs.

## Admission for Assessment - Section 2

An application to admit a person for assessment may be made if the following grounds are fulfilled:

- The person is suffering from a mental disorder of a nature or degree which warrants the detention of the patient in a hospital for assessment, or for assessment followed by medical treatment for at least a limited period; and
- The person should be detained either in the interests of his own health or safety or with a view to the protection of other persons.

54 S1 MHA 1983

55 Code 34.11

In deciding whether the criteria under the MHA are met and whether compulsory admission is appropriate, the following matters should also be taken into account:

- the patient's past and present wishes and feelings, which includes the patient's view of their own needs
- the patient's cultural background and social and family circumstances
- the nature of the mental disorder and its likely course
- other forms of potential care or treatment
- the needs of the patient's carers, family and others with whom the patient lives
- the need for others to be protected from the patient
- the effect on the patient and those close to them of a decision to admit or not under the Act.[56]

This application must be based on the written recommendations of **two registered medical practitioners** in the prescribed form. The written recommendations must also include a statement that sets out that in the opinion of each practitioner that the grounds (as set out above) have been complied with.

A person must not be admitted for more than 28 days unless another application is made or the provisions of section 29(4) apply (as set out below). The period of 28 days begin to run on the day on which the patient is admitted to hospital. If a patient is to be detained longer than 28 days, he has to have become liable to be detained as a result of a subsequent application, order or direction under the Act **before** the expiry of the 28 days.

## Admission for Treatment – Section 3[57]

An application for admission for treatment can be made on the following grounds:

a. The person is suffering from a mental disorder of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital, **and**

b. It is necessary for the health and safety of the patient or for the protection of other persons that he should receive such treatment and it cannot be provided **unless** he is detained under section 3 MHA 1983, **and**

c. Appropriate medical treatment is available for him. Appropriate medical treatment is defined as appropriate medical treatment in the particular patient's case taking into account the nature and degree of the mental disorder and all the other circumstances of his case.

56 Code 2.22

57 S3 MHA 1983

Each recommendation from the medical practitioners must include the following:

i. Details of the basis of the opinion reached that the person is suffering from a mental disorder of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital, and that appropriate medical treatment is available for him.

ii. Reasons for the opinion reached that it is necessary for the health and safety of the patient or for the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained under section 3 MHA 1983. The opinion needs to also specify whether there are other methods of dealing with the patient and why they are not appropriate.

Both applications shall be signed on or before the date of the application. The practitioners must have either examined the patient together or separately. However, if they have examined the patient separately five days must not have elapsed between each examination. One of the practitioners should be approved by the Secretary of State as having special experience in the diagnosis or treatment of mental disorder or an approved clinician and therefore treated as such. The other practitioner must have been previously acquainted with the patient if the other practitioner is not if possible. (Section 12 MHA 1983)

## Emergency Application for Admission for Assessment[58]

Emergency Applications relate to applications for admission for assessment that are made in cases of urgent necessity. Given the urgency of the applications, different requirements need to be satisfied than in other applications for admission for assessment.

**Either** an approved medical health professional or the nearest relative of the patient may make an emergency application. The person making an application must have personally seen the person in the last 24 hours before the emergency application is made[59].

There has to be a statement within the application setting out that it is of urgent necessity for the patient to be admitted and that compliance with the provisions of section 2 of the Act would involve undesirable delay.

The application for admission must be addressed to the managers of the hospital where it is sought to admit the patient.[60]

58 S4 MHA 1983

59 S4(5) and 11(5) MHA 1983

60 S11(2) MHA 1983

## Emergency Applications for Assessment[61]

This is an application that can be made in any case of **urgent necessity**

It may be made by an **AMHP**, an Approved Mental Health Professional or the person's **nearest relative**.

Every application for emergency admission for assessment **MUST** include a statement that it is (1) of **urgent necessity** that the patient be admitted and detained under section 2 of the Act and (2) that compliance with the provisions relating to section 2 of the act would involve **undesirable delay**.

It is sufficient if an emergency application is based on **one** of the medical recommendations as set out in section 2 MHA (the requirements of an application for admission for assessment that is not an emergency application). If possible, this recommendation should be done by a medical practitioner who has previously met and is acquainted with the patient. The recommendation should include a statement of truth as set out above and must meet the following requirements:

- The first recommendation must have been signed before or at the time of the emergency application.
- The medical practitioner should be approved by the Secretary of State as having special experience in the diagnosis or treatment of mental disorder or is an approved clinician.

An emergency application will not have effect after 72 hours from the time the patient is admitted to the hospital unless the following conditions are met:

a. The second medical recommendation required in relation to an admission for assessment (as set out in section 2 of the Act) is given and received by the managers within that same 72 hours period.

b. The second recommendation and the initial one which was made in relation to the emergency application both comply with the following conditions:

i. The first recommendation must have been signed before or at the time of the emergency application. The second recommendation must be signed before it is given and received by the managers.

ii. Both practitioners must have examined the patient, and where this has been done separately, they should not have examined the patient more than five days apart.

iii. One of the practitioners should be approved by the Secretary of State as having special experience in the diagnosis or treatment of mental disorder or an approved clinician and therefore treated as such. Where practical the other practitioner must have been previously acquainted with the patient if the approved practitioner is not.

61 S4 MHA 1983

A medical recommendation cannot be given if there is a potential conflict of interest - See The Mental Health (Conflicts of Interest) (Wales) Regulations 2008.

## Detaining Informal Patients already in Hospital[62]

Section 5 of the MHA applies to informal patients. It enables informal patients already in hospital to be compulsorily detained under section 2 or 3 of the MHA.

Where a registered medical practitioner or approved clinician[63] considers an informal patient ought to be formally admitted under section 2 or 3 of the Act, that person can make a written report to the hospital managers making that recommendation. If such a report is made then the patient can be detained in hospital for up to 72 hours. This period is intended to be used to enable the necessary application detention under section 2 or 3 detention to be made. It is irrelevant to this application whether the patient is attempting to leave the hospital or not. It is sufficient that his or her detention under section 2 or 3 of the MHA is necessary.

Section 5 cannot be used to prolong the detention of a patient admitted under section 2 or 3 of the Act nor can it be used to provide time for an application to be made to displace the patient's nearest relative under section 29(4) of the Act when the period of admission for assessment under section 2 of the Act has expired.

Section 5(4) of the Act empowers a nurse of a prescribed class to detain an informal patient for up to six hours. The nurse's decision must be recorded in writing. The grounds upon which the prescribed nurse can detain an informal patient are:

- The patient is suffering from a mental disorder to such a degree that it is necessary for his health or safety or the protection of others for him to be immediately restrained from leaving the hospital; and
- It is not practicable to secure the immediate attendance of a registered medical practitioner or approved clinician for the purposes of making a section 5 report.

62 S5 MHA 1983

63 S5(2)-(3A)

## Civil Applications for Guardianship[64]

Applications for guardianship are made under section 7 of the MHA. These are sometimes known as civil applications for guardianship in order to distinguish them from orders made in the criminal courts.

They may be made in relation to patients who are over 16 years old.

They can be made by a local social services authority or any other person. The application can be made by the proposed guardian him/herself.

The proposed guardian can be a local social services authority or any person accepted by that social services authority to act as the patient's guardian. Any application for guardianship **must** be accompanied by a statement from the proposed guardian stating that they are willing to act. The applicant must have seen the patient within the previous 14 days.

A guardianship application can **only** be made on the following grounds:

- The patient is suffering from mental disorder of a nature or degree which warrants his reception into guardianship under this section; and
- It is necessary in the interests of the welfare of the patient or for the protection of other persons that the patient should be so received.

A guardianship application can **only** be founded on the basis of the written recommendations of two registered medical practitioners which includes statements that both of the necessary grounds (see above) are made out and their reasons for reaching that conclusion.

One of the registered medical practitioners making the recommendation for a guardianship order **must** have seen the patient within the preceding 14 days.

64 S7 MHA 1983

A guardianship application **must** be made in the prescribed form. Form GU1 for a local authority applicant and GU2 for a Nearest Relative applicant. It must be made to the local authority named as guardian or the local authority in which the proposed guardian lives. The relevant local authority does **not** have to be that of the area in which the patient lives. In reality the function of receiving applications for guardianship is usually delegated to the Director of Adult Social Services of the relevant local authority who then identifies a suitable employee.

A person is received into guardianship when the local authority accept the application

## The Guardian's Powers

Once a local authority has accepted an application for guardianship, a Guardian has the power:

- To take a the patient to a specified place, using force if necessary;[65]
- To require the patient to reside at a place specified by the guardian;[66]
- To require a patient to return to a place specified by the guardian;[67]
- To prevent a patient leaving a specified place without the guardian's permission;[68]
- To require the patient to attend at places and times specified for the purpose of medical treatment, occupation, education or training;[69] and
- To require the patient to give access to a medical practitioner, AMHP or other specified person.[70]

The powers of a guardian are compatible with deprivations of liberty under the MCA. Guardianship of itself does not justify depriving a patient of his/her liberty.

If a patient lacks capacity under the MCA, it is necessary to consider whether a civil guardianship order is necessary in additions to DoLS.

65 S8(1) and 18(3) & (7) and S137

66 S8(1)(a) MHA 1983

67 S18 (3) and S137 MHA 1983

68 S8(1) and S18(3) MHA 1983

69 S8(1)(b) MHA 1983

70 S8(1)(C) MHA 1983

Joe is 22 years old. He is disinhibited and a risk taker. He is under constant supervision and control but takes every opportunity that presents itself to run away and hide. Despite vigilance he occasionally escapes and stays away from the care home where he resides.

A guardianship order can be used to require him to reside at the care home. The order can be used to compel his return to the home and keep him there.

What can you do?

Ask yourself does Joe have capacity under the MCA?

If Joe has capacity under the MCA, then the guardianship order stands alone.

If Joe lacks capacity under the MCA, is he being deprived of his liberty? If he is the DoLS procedure must be followed to authorise that deprivation of liberty.

The DoLS regime sits alongside the guardianship order. However, if his deprivation of liberty has been authorised, ask yourself is a civil guardianship order still needed. If so, consider why it is still necessary?

Record your decision and your decision making process in writing.

## Duration of Guardianship Orders

A person may be kept under guardianship for an initial period of six months from the day on which the application was accepted.[71] Thereafter it may be renewed for another six months and then for yearly periods.[72]

A person under guardianship may be admitted to hospital as an informal patient or for assessment under section 2 of the Act. If a person is admitted to hospital for treatment under section 3 of the act, the guardianship will cease to have effect.

A patient can be discharged from a civil guardianship order by the responsible clinician or the responsible local authority.[73]

71 S20(1) MHA 1983

72 S20(2) MHA 1983

73 S23 MHA 1983

## Nearest Relatives

### Who is the nearest relative?

**Relative** and **nearest relative** are defined under the act[74].
**A relative** is defined as:

a. Husband or wife or civil partner

b. Son or daughter

c. Father or mother

d. Brother or sister

e. Grandparent

f. Grandchild

g. Uncle or aunt

h. Nephew or niece

Relatives are ranked and the nearest relative is the one nearest the top of the list (see above).

In each category it is the eldest person within that category regardless of their sex who qualifies as the nearest relative e.g. if a patient has no surviving parent but three sisters and one brother who is younger than them all, then it will be his eldest sister who is his nearest relative.

In each category relatives of whole blood rank above relatives of half-blood.

Patients cannot choose their nearest relative.

## The Role of the Nearest Relative

Nearest relatives play an important role under the MHA. They may make an emergency application for admission for assessment,[75] an application of admission for assessment[76] and an application for admission for treatment.[77]

No application for admission or treatment may be made by an AMHP without first consulting the patient's nearest relative unless that consultation would cause unreasonable delay or is not reasonably practicable.

74 S26 MHA 1983

75 S4 MHA 1983

76 S2 MHA 1983

77 S3 MHA 1983

A nearest relative may order the discharge of a patient detained under sections 2 and 3 of the Act.[78] That power is limited when the responsible clinician certifies that the patient would, if released be likely to be a danger to himself and others.[79]

Before exercising a power to discharge, a nearest relative can appoint a medical practitioner to examine the patient and the appointed practitioner can require the production of records relating to the detention and treatment of the patient.[80]

A nearest relative may also make an application for discharge to a Tribunal[81] and may appoint a registered medical practitioner to visit and examine the patient.[82] The medical practitioner may require production of the patient's records of detention and treatment.[83]

## Court appointed nearest relatives

Under section 29 of the Act, the county court can appoint a nearest relative called an **acting nearest relative** instead of the person who has the role by reason of the statutory list (see above).

To be appointed as an acting nearest relative, the court must consider that person to be:

- A suitable person to act in that role
- A person who is willing to take the role.

An application for a person to be made an acting nearest relative can only be made on one of the following grounds:

- The patient has no nearest relative within the meaning of the act or it is not reasonably practicable to ascertain whether there is a nearest relative and who that person is; or
- The nearest relative of the patient is incapable of acting by reason of mental disorder or other illness; or
- The nearest relative unreasonably objects to the making of an application for admission for treatment or a guardianship application; or
- The nearest relative has exercised without due regard to the welfare of the patient or the interests of the public his power to discharge the patient or is likely to do so.

78 S23 MHA 1983

79 S25 MHA 1983

80 S24 MHA 1983

81 S66 MHA 1983

82 S76 MHA 1983

83 S77 MHA 1983

Whichever ground is relied upon it must be proved at the time the application is made **and** at the date the application is heard by the court.

## The effect of applying to court to appoint an acting nearest relative [84]

The order appointing an acting nearest relative displaces the nearest relative specified in the statutory list.

## Interim and Without Notice orders

Interim and without notice orders can be made appointing acting nearest relatives. [85]

## Concurrent and Subsequent applications

A Section 29 order can be applied for at the same time or subsequent to the making of an order under section 3 of the Act. An interim section 29 order will suffice for the making of an order under section 3 of the MHA.

## Extending Admissions for Assessment

An application to displace the nearest relative will extend a period of admission for assessment if immediately before the expiration of the period that the patient is liable to be detained, an application for an order is made to the Court. It is enough that the application is pending.

The period of extension lasts until the application has been finally disposed of. An application is treated as finally disposed of when the time allowed for appealing the decision of the Court has expired. If a notice of appeal has been given with that time, an application is treated as being finally disposed of when the appeal has either been heard or withdrawn.

84 S29 MHA 1983

85 S38 County Courts Act 1984

# 5 Section 117 MHA

Section 117 of the MHA applies to all patients within the meaning of the MHA of all ages.

It imposes an enforceable duty on LHBs and local authorities to provide after-care services to people who have been detained in hospital under the Act including those who have been admitted for treatment under the Act.

LHBs and local authorities must collaborate and plan together to arrange and provide these after-care services.

The duty under this section is free standing of any other legal duty.

The duty applies regardless of the patient's country of origin and immigration status.[86]

The services provided under this section must be provided free of charge.[87]

Psychiatric treatment is a service which can be provided under this section.



86 Not specified in Schedule 3 of the Nationality Immigration and Asylum Act 2002

87 *R v Manchester City Council ex p Stennett [2002] UKHL 34*

# 6 The Mental Health (Wales) Measure 2010

This is primary legislation.

The Measure makes provision in relation to primary mental health support services.

Under the Measure it is a legal requirement for LHBs and local authorities to work together to expand and strengthen mental health services at a primary care level across Wales for people of all ages.

The Measure requires LHBs and local authorities to take all reasonable steps to agree a scheme for a local authority area which (1) identifies the treatment which is to be made available for the purposes of local primary mental health treatment and (2) which identifies how such treatment is to be secured. The local mental health partners must provide local primary mental health support services in accordance with the scheme for their area as agreed. Whilst LHBs and local authorities remain ultimately responsible for ensuring that primary mental health services are being delivered properly, services may not always be delivered by them but by local partners. Services can include counselling, stress and anxiety management, advice and support for managing conditions such as dementia and eating disorders for example.

Section 5 of the Measure provides that mental health assessments must delivered as part of local primary mental health support services. Such assessments are comprehensive mental health assessments for individuals who have first been seen by a GP who the GP considers requires a more detailed assessment, or who are referred through secondary mental health services.

Under the Measure all individuals accepted into secondary mental health services in Wales **must** have a dedicated care coordinator and receive a care and treatment plan which is proportionate to their clinical need. Where local authorities are providing secondary mental health services they **must** appoint care coordinators for persons in receipt of those services.

Secondary mental health services exclude those in receipt of primary care from GPs. Secondary services are provided for the care and treatment of individuals suffering with more severe and/or enduring mental disorders where the level of need, risk and complexity requires the provision of specialist care. The services provided at secondary level will include services for individuals subject to the provisions of MHA 1983, inpatient hospital care, and community mental health teams for adults and older adults. Patients very often receive services from both their LHB and their local authority, therefore local authorities and LHBs are required to cooperate with each other to improve the effectiveness of mental health services to patients.

# 7 Social Services and Well-being (Wales) Act 2014 (the 2014 Act)



## Key materials:

- **The 2014 Act**
- **The regulations. See end note 1**
- **The Codes. See end note 2**
- **The Statutory Guidance. See end note 3**

This is a relatively new[88] and comprehensive statutory scheme replacing Part III of the Children Act (CA) 1989 and a whole host of community care legislation which has been repealed. This chapter contains an overview of the Act and the basic principles underlying it.

## Key Concepts under the Statutory Scheme

The 2014 Act and the scheme it introduces concentrates on the **well-being** of people who need care and support and carers who need support. It is about empowering people to have a new relationship with social services. It is about supporting people who deliver social services. It is about empowering those who deliver social services to **co-produce** solutions with people who need care and support and carers who need support – the Code to Part 2.

**Co-production** refers to a way of working whereby practitioners and people work together as **equal** partners to plan and deliver care and support.

The approach is not a question of doing all that we can when doing so may do more harm than good and raises hopes and expectations. Where an intervention is justified, it should always be a proportionate and timely approach which will support people who need care and support and carers who need support to achieve their personal well-being outcomes.

The concept of **well-being** underpins the whole system. It links through to the role early intervention and prevention can play in promoting well-being, to how people can be empowered by information, advice and assistance and being involved in the design and operation of services.

88 The majority of this scheme came into force in April 2016

Another key concept is **people**, the people centred approach – children, adults and carers, their families and communities are recognised as "rich assets" and are at the centre of the legal framework.

At the centre of the legislative scheme is also the concept that the individual should have a **strong voice and real control**. This optimises everyone's opportunity for well-being and an appropriate level of independence. The intention is that when people **co-produce** their personal **well-being** outcomes with social services and their partners, people can expect to achieve personal outcomes which reflect the national **well-being** outcome statements.

## The Key Definition

Section 2 (2) of the Act provides the definition of **well-being**.

**"Well-being"** in relation to a person means well-being in relation to any of the following-

a. Physical and mental health and emotional well-being;

b. Protection from abuse and neglect;

c. Education, training and recreation;

d. Domestic, family and personal relationships;

e. Contribution made to society;

f. Securing rights and entitlements;

g. Social and economic well-being;

h. Suitability of living accommodation.

**In relation to a child, "well-being"** by virtue of section 2 (3) of the Act also includes

a. Physical, intellectual, emotional, social and behavioural development;

b. "Welfare" as the word is interpreted for the purposes of the CA 1989.

**In relation to an adult, "well-being"** also includes according to section 2 (4)

a. control over day to day life;

b. Participation in work.

Note that in relation to children "well-being" includes welfare as defined by the CA 1989 but is not limited by that definition. Well-being is a much wider term.

In relation to adults, the definition is both wide-ranging and specific in what it encompasses.

The provisions of the Act apply to people of all ages unless specifically stated otherwise.

## Other definitions

An adult is defined within the Act as a person aged 18 or over.

A child is aged under 18.[89]

Section 4 of the Act defines the terms **care and support** which can be construed as care; support and both care and support.

A **carer** is a person who provides care for an adult or a disabled child unless he/she does so by virtue of a contract or voluntary work.[90] That definition is subject to section 3(8) of the Act which gives a local authority a discretion to treat a person as a carer depending on the purposes of the social service function and the relationship between carer and cared for person.

**Disabled** within the meaning of the Act has the same definition as under the Equality Act 2010. The 2010 Act generally defines a disabled person as a person with a disability. A person has a disability for the purposes of the 2010 Act if he or she has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. Such a definition includes, unless the regulations say otherwise, a person with a progressive condition such as HIV or cancer.

## The Overarching Duties

### The well-being duty

Section 5 of the Act imposes the **well-being duty**. It provides that "a person exercising functions under this Act must seek to promote the well-being of –

a. people who need care and support, and

b. carers who need support."

89 S3 (2) & (3) of the Act

90 S3(4) & (7) of the Act

## The Other Overarching Duties

Section 6 of the Act sets out **other overarching duties**. The duties apply to those exercising functions under the Act in relation to an individual who has need for care and support, carers who have need for care and support and those exercising functions in relation to those to whom Part 6 of the Act applies. The latter category includes looked after children and care leavers.

The other overarching duties are:

- In so far as is reasonably practicable, ascertain and have regard to the individual's views, wishes and feelings,
- Have regard to the importance of promoting and respecting the dignity of the individual,
- Have regard to the characteristics, culture and beliefs of the individual (including, for example, language), and
- Have regard to the importance of providing appropriate support to enable the individual to participate in decisions that affect him or her to the extent that is appropriate in the circumstances, particularly where the individual's ability to communicate is limited for any reason.

In **addition** a person exercising functions in relation to **an adult** who is in need of care and support, a carer or falls with Part 6 of the Act (for instance a care leaver) must have due regard to:

- The importance of beginning with the presumption that the adult is best placed to judge the adult's well-being; and
- The importance of promoting the adult's independence where possible.

The **additional duties to a child** who is in need of care and support, a carer or who falls within Part 6 of the Act are:[91]

- To have regard to the importance of promoting the upbringing of the child by the child's family, in so far as doing so is consistent with promoting the well-being of the child, and
- Where the child is under the age of 16, must ascertain and have regard to the views, wishes and feelings of the persons with parental responsibility for the child, in so far as doing so is

i. Consistent with promoting the well-being of the child, and

ii. Reasonably practicable.

91 S6(4) 2014 Act

Section 7 of the 2014 Act provides that a person exercising specified functions – to an adult in need of care and support or a carer – under the Act **must have due regard to the United Nations Principles for Older Persons**. Equally a person exercising functions under the Act in relation to a child in need of care and support, a carer or who falls within Part 6 of the Act – **must have due regard to the United Nations Convention on the Rights of the Child.** Although not specified in the primary legislation, the relevant Code states that when exercising social services functions in relation to **disabled people** (children and adults) who need care and support and disabled carers who need support, local authorities **must have due regard to the UN Convention on the Rights of Disabled People** – paragraph 63 of the Code under Part 2.

To ensure compliance with the overarching duties local authorities should, according to the Code, bear the following in mind when exercising functions in relation to individuals:

- A local authority should be able to demonstrate that they have complied with the overarching duties to have regard to the particular matters which are relevant to the decision at the time a particular decision is taken in relation to an individual who needs care and support;
- A local authority should keep an accurate record of the manner in which they have regard to those particular matters when making decisions about identifying an individual's needs and providing services to meet those needs;
- A local authority should give the weight that is appropriate in all the circumstances, balancing this against any other countervailing factors that are relevant to the decision is question.

It is implicit in the above that all decisions and the reasoning which underpins them should be **recorded in writing**.

Although the Code uses the generic term, the local authority, in reality this means the employees, its servants or agents. That translates as the social workers and officers of the local authority who exercise the functions of the local authority specified under the Act in relation to people who need care and support, carers who need support and children who are looked after or accommodated by the local authority.

## How do you assess whether a person needs care and support ?

### Assessing Need

Part 3 of the 2014 Act deals with assessing the needs of individuals (be they children or adults). It contains specific sections for the assessment of the care and support needs of adults and children. Section 19 of the Act relates to **adults** and mirrors the old duty under section 47 National Health Service and Community Care Act 1990. It includes a duty to consult a carer "so far as is feasible". The assessment of children in need of care and support is contained in section 21 of the Act. This section contains a specific duty.

### The Assessment – the Common Elements

Paragraph 11 of the Code to Part 3 states that:
"*The purpose of an assessment for care and support is to work with an individual, carer and family, and other relevant individuals to understand their needs, capacity, resources and outcomes that they need to achieve, and then to identify how they can best be supported to achieve them. At the core of this is a conversation about promoting independence and development by maximising people's control over their day to day lives and helping address difficulties or problems which are stopping them achieving this. It is essential that people are enabled to identify their own personal outcomes, and how they can achieve those outcomes.*"

The Care and Support (Assessment)(Wales) Regulations 2015 prescribe that a local authority carrying out an assessment under sections 19, 21 or 24 of the Act must ensure that there is a named individual whose function it is to co-ordinate the carrying out of the assessment.[92] That person will liaise with all relevant professionals and will draw in additional specialists as required – paragraph 41 of the Code to Part 3.

The person carrying out the assessment must have the necessary training, skills, knowledge and competence to carry out the assessment in question.[93] The appropriate level of qualification for undertaking assessments is set out in paragraph 43 of the Code to Part 3.

An assessment can be undertaken by a single practitioner where that practitioner would not need additional specialist advice or assessments to determine eligibility – paragraph 21 of the Code to Part 3. Where the single practitioner does not have the necessary specialist skills, knowledge and competency, they must involve someone who possesses the necessary specialism or skill – paragraph 30 of the Code to Part 3.

92 Regulation 2

93 Regulation 3

A **written record** which must be kept of the assessment, the details that must be recorded and when the assessment must be reviewed.

## The Process of Assessment

Regulation 4 of the Assessment regulations specifies that in carrying out an assessment, the local authority must:

a. assess and have regard to the person's circumstances;

b. have regard to the personal outcomes,

c. assess and have regard to any barriers to achieving those outcomes,

d. assess and have regard to any risks to the person or to other persons if those outcomes are not achieved, and

e. assess and have regard to the person's strengths and capabilities.

The assessment process is expected to be dynamic. It may conclude how immediate needs can be met before going on to consider a more comprehensive assessment of longer term needs. A comprehensive assessment may comprise a compendium of one or more assessments from a variety of sources. In addition, it may be necessary to consult other professionals without the need to secure an assessment from them.

The process of assessment should be based on the principles of co-production. A dedicated Code of Practice on advocacy under Part 10 of the 2014 Act sets out the functions when a local authority, in partnership with the individual, must reach a judgment on how advocacy could support the determination and delivery of an individual's personal outcomes; together with the circumstances when a local authority must arrange an independent professional advocate. Professionals and individuals must ensure that judgements about the need for advocacy are integral to the relevant duties under the Code to Part 3.

The people who should be involved in the assessment process are set out in paragraph 43 of the Code to Part 3.

## Common Principles for Assessment – adults & children

All local and specialist assessments must comply with the overarching duties set out in sections 6 and 7 of the 2014 Act.

In addition, all assessments must also consider all the principles set out in paragraph 53 of the Code to Part 3.

Assessments must as a minimum record the assessment in line with the national assessment and eligibility tool. The tool is the framework for assessment and eligibility. The tool is made up of the following:

- The national minimum core data set;
- An analysis structured around the five key elements of the assessment;
- The actions taken by the local authority and other persons to help the person achieve those outcomes (including actions to be taken by the person whose needs are being assessed and/or their carer);
- A statement of how the practitioner assesses the identified action will contribute to the achievement of the personal outcome or otherwise meet needs identified by the assessment. This applies to those needs which are to be met through the provision of care and support and those met through community based or prevention services, the provision of information, advice and assistance, or by any other means.

The **National Minimum Core Data Set** can be found at paragraph 59 of the Code to Part 3. It is only required to be met when the individual's needs are deemed to be eligible and a care and support plan or support plan in respect of a carer is required. Local authorities must put protocols and systems in place to ensure that the national minimum core data set for an individual is kept up to date and maintained so it can be referred to at a later date by or with other practitioners as well as for capturing performance management data.

The **five key elements of assessment** are:

i. Assess and have regard to a person's circumstances;
ii. Have regard to their personal outcomes;
iii. assess and have regard to any barriers to achieving those outcomes;
iv. assess and have regard to any risks to the person or to other persons if those outcomes are not achieved; and
v. Assess and have regard to the person's strengths and capabilities.

Guidance on the Five Elements of Assessment is given at Annex 1 of the Code to Part 3.

## Additional Considerations for Assessing the Needs of Adults

The assessment should begin with the presumption that the adult is best placed to judge their own well-being. An assessment should promote an adult's independence where possible.

## Additional Considerations for Assessing the Needs of Children

The duty under section 21(1) of the Act applies where it appears to a local authority that a child may need care and support in addition to, or instead of, the care and support provided by the child's family, the authority **must** assess-

a. Whether the child does need care and support of that kind, and

b. If the child does, what those needs are.

The assessment required under section 21 is much more specific than that which used to be required under section 17 CA 1989 which has now been repealed. Section 21(4) of the 2014 Act states that in carrying out a needs assessment under this section, the local authority must:

a. assess the developmental needs of the child

b. seek to identify the outcomes that-

i. the child wishes to achieve, to the extent it considers appropriate having regard to the child's age and understanding;

ii. the persons with parental responsibility for the child wish to achieve in relation to the child, to the extent it considers appropriate having regard to the need to promote the child's well-being, and

iii. persons specified in regulations (if any) wish to achieve in relation to the child.

c. assess whether, and if so, to what extent, the provision of

i. Care and support,

ii. Preventative services, or

iii. Information, advice and assistance

could contribute to the achievement of those outcomes or otherwise meet the needs identified by the assessment.

d. assess whether, and if so, to what extent, other matters could contribute to the achievement of those outcomes or otherwise meet those needs, and

e. take account of any other circumstances affecting the child's well-being.

The duty under section 21(1) applies regardless of the local authority's view of the level of the child's needs for care or support or the level of financial resources of the child or person with parental responsibility for that child.[94] A local authority in carrying out an assessment under section 21 must involve the child and any person with parental responsibility for the child.

The nature of the assessment of the child must be considered by the local authority to be proportionate to the circumstances.

A disabled child is presumed to need care and support in addition to or instead of that provided by his family.[95]

## Risk

Any assessment of the care and support needs of any individual regardless of their age must also include an assessment of risk. Safeguarding is a key component of assessing the care and support needs of any individual regardless of their age.

## Assessing Adults – Reasonable cause to Suspect?

A key part of the assessment of the care and support needs of any adult must be to establish whether there is a reasonable cause to suspect that an adult is at risk in that he/she is experiencing or is at risk of abuse or neglect or that the adult has needs for care and support and as a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of abuse or neglect. Where there is reasonable cause to suspect that an adult is at risk local authorities must act on this immediately and without delay.

Where the local authority suspect that an adult with needs for care and support is at risk of abuse or neglect they must make whatever enquiries are necessary to enable the authority to decide what action should be taken to protect that person from risk. See the notes on Part 7 of the Act below.

## Assessing Children – Reasonable Cause to Suspect?

A key part of the assessment of the care and support needs of a child must be to establish whether there is reasonable cause to suspect that a child is experiencing or is at risk of abuse, neglect or other kinds of harm and whether any emergency action is needed. Where there is such a risk, the local authority must investigate and make enquiries into that child – section 47 CA 1989: **The Duty to Make Enquiries.**

94 S21(3) 2014 Act

95 S21(7) 2014 Act

## Assessing Carers

Section 24 of the Act contains the duty to assess the needs of a carer for support.

An adult carer may refuse a needs assessment in the circumstances set out in section 25 of the Act. However, that refusal does not discharge the duty to assess placed upon the local authority if the carer falls with either of the categories specified in section 25(2) of the Act.

A carer aged 16 or 17 may refuse a needs assessment by virtue of section 26 of the Act. However. a refusal by a carer aged 16 or 17 does not discharge the local authority from their duty to assess if that carer falls within the definition of Case 1, Case 2 or Case 3 in section 26(3) of the Act.

The refusal of an assessment by a carer under the age of 16 is covered by section 27 of the Act. Where the carer is aged under 16, he or she can refuse such an assessment where the local authority is satisfied that the carer has sufficient understanding to make that informed decision.

A person with parental responsibility can refuse the assessment on the carer's behalf – section 27(2). However, the refusal of or on behalf of a carer under the age of 16 to agree to a needs assessment does not discharge the duty to assess which is placed upon the local authority if the carer falls within any of the categories set out as in Cases 1-3 in section 27(3) of the Act.

## Combining Assessments

The Act provides for assessments for a carer and a cared for person to be combined provided that the requirement for consent contained within section 28 is met.

The Act contemplates that a carer may also be a person in need of care and support in their own right and permits by virtue of section 29 those assessments to be combined.

Under section 29 (2) of the Act a local authority may carry out a needs assessment under the 2014 Act at the same time as any other body carries out any other statutory assessment.

## Meeting Assessed Need

Part 4 of the 2014 Act is headed "Meeting Needs" and sub headed "deciding what to do following a needs assessment." The Act provides for eligibility criteria to be detailed in regulations (see endnotes). There is also a Code in Part 4 which the practitioner should read.

## The Duty to Meet Needs

Section 32 of the 2014 Act states that if the eligibility criteria is met then a local authority must (a) consider what could be done to meet those needs; (b) consider whether it would impose a charge for doing those things, and, if so determine the amount of that charge. This duty applies to adults (section 35); children (section 37) and to carers whether they are adults (section 40) or a child (section 42).

## The Duty to Meet the Needs of adults

The duty to meet care and support needs of an **adult** arises if **conditions 1, 2 and 3** are met.

**Condition 1** is that the adult is— (a) ordinarily resident in the local authority's area, or (b) of no settled residence and within the authority's area.

**Condition 2** is that— (a) the needs meet the eligibility criteria, **or** (b) the local authority considers it necessary to meet the needs in order to protect the adult from abuse or neglect or a risk of abuse or neglect.

**Condition 3** is that— (a) there is no charge for the care and support needed to meet those needs, or (b) there is a charge for that care and support but— (i) the local authority is satisfied on the basis of a financial assessment that the adult's financial resources are at or below the financial limit, (ii) the local authority is satisfied on the basis of a financial assessment that the adult's financial resources are above the financial limit but the adult nonetheless asks the authority to meet his or her needs, or ((iii) the local authority is satisfied that the adult lacks capacity to arrange for the provision of care and MCA or otherwise in a position to do so on the adult's behalf.

## Duty to Meet the Needs of a Child

The duty to a **child** arises if that child is within the local authority's area and either the child meets the eligibility criteria or the local authority considers it necessary to meet the needs in order to protect the child from (i) abuse or neglect or a risk of abuse or neglect, or (ii) other harm or risk of harm.

## Definitions of abuse, harm and neglect

**Abuse** for the purposes of this act is defined in section 197 as physical, sexual, psychological, emotional or financial abuse (and includes abuse taking place in any setting, whether in a private dwelling, an institution or any other place).

**"Financial abuse"** includes— (a) having money or other property stolen; (b) being defrauded; (c) being put under pressure in relation to money or other property; (d) having money or other property misused.

**"Neglect"** means a failure to meet a person's basic physical, emotional, social and psychological needs, which is likely to result in an impairment of a person's well-being (for example, an impairment of the person's health or, in the case of a child, an impairment of the child's development).

**Harm** in relation to a child means abuse or the impairment of (a) physical or mental health or (b) physical intellectual, emotional, social or behavioural development and where the question of whether "harm' is significant turns on the child's health or development, the child's health or development is to be compared with that which could reasonably be expected of a similar child.

The definitions of abuse, financial abuse and neglect apply to both children and adults.

## Meeting Needs and Safeguarding

Where a local authority determines it is necessary to meet the needs of the individual in order **to protect the person from abuse or neglect or the risk of abuse or neglect (and in the case of a child: harm or the risk of harm)** there is no need to consider or apply the determination of eligibility and the local authority **must not** apply that determination where to do so may prevent or delay the local authority from making a response designed to protect and safeguard the person concerned.

## Powers to Meet Need

In all cases where a person is ordinarily resident in their area or physically present, a local authority has the power to meet a need for care and support even if they do not have a duty to do so and even if that need has yet to be assessed.[96]

96 S36 & 38 2014 Act

## Ways in which needs for care and support can be met

Section 34 (2) provides a number of statutory examples of how needs for care and support can be met. They are:

a. accommodation in a care home, children's home or premises of some other type;

b. care and support at home or in the community;

c. services, goods and facilities;

d. information and advice;

e. counselling and advocacy;

f. social work;

g. payments (including direct payments);

h. aids and adaptations;

i. occupational therapy.

The examples given in the section are specifically stated to be non-exhaustive. In theory the provision of support and services can be infinite and imaginative as long as they meet the well-being outcomes of the person concerned.

## Care and Support Plans

Where a local authority is required to meet the needs of a child or adult or their carer, it must maintain a care and support plan.[97]

## Charging for Services

Part 5 of the Act deals with charging arrangements for the provision of care and support under the Act.

## Looked after and accommodated children.

### Part 6 of the Act

A looked after child is defined as a child who is in care or provided with accommodation (a continuous period of 24 hours or more) by a local authority under this Act[98]. By reason of section 75 of the 2014 Act a local authority must take steps that secure, so far as reasonably practicable, that the local authority is able to provide certain prescribed children, including looked after children, with accommodation that is (a) within the authority's area and (b) meets the needs of the children.

97 S54 2014 Act

98 S74 2014 Act

Section 76 of the Act places a duty on a local authority to provide accommodation for any child within its area who appears to the authority to require accommodation as a result of (a) there being no person who has parental responsibility for the child; (b) the child being lost or having been abandoned; or (c) the person who has been caring for the child being prevented (whether or not permanently, and for whatever reason) from providing the child with suitable accommodation or care.

In relation to those who have reached the age of 16, the local authority now has a duty to provide that child with accommodation if it considers that the "well-being" of that child is likely to be seriously prejudiced if it does not provide that accommodation.[99]

## The Principal Duty

The principal duty of a local authority in relation to looked after children is set out in section 78 of the 2014 Act. The duty is to safeguard and promote the well-being of a looked after child.[100] The duty includes, by way of statutory example[101] (a) a duty to promote the child's educational achievement; and (b) a duty (i) to assess from time to time whether the child has care and support needs which meet the eligibility criteria under section 32 and (ii) if the child has needs which meets the eligibility criteria, to at least meet those needs.

## General Duties

Sections 79 and 80 of the Act house the general duties to accommodate and maintain a looked after child .

## Placing Children

As long as it is consistent with a child's well-being and reasonably practicable, a local authority must make arrangements for a child to live with a parent or person who has parental responsibility for him.[102] Where such an arrangement cannot be made, the duty on the authority is to find the most appropriate placement available subject to section 81(11) of the Act.

99 S76(3) 2014 Act

100 S78(1) 2014 Act

101 S78(2) 2014 Act

102 S81(3) & (4) 2014 Act

## What is a Placement?

In this context a placement means a placement with a relative, friend or other person connected to the child and who is also a local authority foster parent, a foster parent, a children's home or some other form of accommodation yet to be prescribed by regulation. When determining which is the most appropriate placement the authority must give preference to a placement with a foster parent connected to the child and, in so far as it is reasonably practicable, allows the child to live within the authority's own area; allows the child to live near home; does not disrupt the child's education or training; enables siblings to live together and enables a disabled child to be placed in accommodation suitable to his/her needs.[103]

## Placing with Prospective Adopters

Section 81 (10) and (11) provide that where an authority is satisfied that a child ought to be placed for adoption and where an adoption agency has determined that that prospective adopter is suitable to adopt a child and the local authority is not authorised to place for adoption, the local authority must place the child with that prospective adopter unless it would be more appropriate for the child to live with a parent or someone who has parental responsibility, a connected person or a foster carer.

## Care and Support Plans of Looked After and Accommodated Children

Where a child is accommodated by a local authority and has a care and support plan already under section 54 of the Act, that plan must be reviewed and maintained.[104] Where a child becomes a looked after child and does not already have a care and support plan, then the authority must prepare and maintain a care and support plan for him.

## Regulations

Regulations made under the Act prescribe the circumstances in which a looked after child may live with his/her parent; when children can be placed out of area; conditions designed to avoid disruption to the child in care's education; regulations about the placement of children with foster parents and prospective adopters; regulations governing the functions of Independent Reviewing Officers (IROs) and the review of each looked after child's case.

103 S81(6)-(9) 2014 Act

104 S83 2014 Act

## Care Leavers

Section 103 of the Act creates a duty upon a local authority to advise, befriend and assist a child with a view to promoting the child's well-being when it ceases to be a looked after child.

The key materials when considering care leavers are:

- Sections 104 to 118 of the 2014 Act
- Care Planning, Placement and Case Review (Wales) Regulations 2015
- Care Leavers (Wales) Regulations 2015
- Code to Part 6.

The Act places "care leavers" or "young people who are entitled to support" as they are known into 6 categories. In relation to those 6 categories a responsible local authority has powers and duties to provide advice and support as set out in sections 105 to 115 of the Act. Those powers and duties include the duty to maintain a pathway plan for certain categories of young people.

## Key Requirements

The key duties and obligations to care leavers are:

- Young people in categories 1-4 must have a personal advisor.
- A local authority must safeguard and promote the well-being of young people in category 2 by making sure they have enough money to live on; have a suitable place to live and are supported in relation to education, training or employment.
- In relation to category 3 young people, the local authority must, as appropriate to their well-being, help with the cost of living near their place of employment or education or training, make a grant towards education or training costs, including a one-off higher education bursary, and help with university/higher education or college holiday accommodation.
- If a local authority considers that category 5 or 6 young person needs support, they must help with living expenses, the cost of living near their place of education or employment and help with education or training costs or they may provide accommodation and holiday accommodation.
- Regulations specify which local authority is responsible for providing services to category 5 and 6 young people – The Care Leavers (Wales) Regulations 2015. In a nutshell, for young people who were formerly looked after, the relevant authority is the one that last looked after them. For young people who qualify under any other provision, the relevant authority is the one in the area that the young person had asked for help.
- All qualifying young people who have previously been looked after must have an assessment of their needs to establish whether they require information, advice and support. A pathway plan should be developed for young people in categories 1-4. Specifically, but not exclusively, all category 2-4 care leavers must have a Pathway Plan based on an up-to date and thorough assessment of their needs.

## Secure Accommodation

The relevant primary statutory provision is dependent on the location of the secure accommodation in question. If it is in England, section 25 CA 1989 (CA 1989) is applicable. If it is in Wales section 119 of the 2014 Act applies. Both English and Welsh courts can make orders under either provision. The primary statutory provisions are in like terms and applications under them are often made in a single application. However, the duties and powers of a Welsh local authority when placing a child in secure accommodation regardless of whether that accommodation is located in England or in Wales are defined by The Children (Secure Accommodation) (Wales) Regulations 2015 as amended by The Children (Secure Accommodation) (Wales) (Amendment) Regulations 2016 and 2018. The most pertinent Code in relation to "secure accommodation" is the Code to Part 6 issued in 2018.

## Safeguarding

**Part 7**

## An adult at risk

S126 of the 2014 Act provides the definition of an **adult at risk**. An adult is at risk if that adult:

a. is experiencing or is at risk of abuse or neglect,

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

c. as a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it.

The definition refers to the person experiencing abuse or neglect or "at risk of doing so". The inclusion of the phrase 'at risk" is intended to enable early intervention.

## A duty to make Enquiries in relation to an Adult

A duty is imposed by reason of Section 126 (2) of the Act upon a local authority to make enquires **"if a local authority has reasonable cause to suspect that a person within its area (whether or not ordinarily resident there) is an adult at risk**." Presence within the authority's area is enough. There is no need to establish ordinary residence.

## Adult Protection and Support Orders

Section 127 of the 2014 Act enables an authorised officer to enter a premise to speak to a person in private; to ascertain whether that person is able to make decisions freely and to assess whether he/she is an adult at risk.

If the person is unable to make decisions freely and is at risk, then you may need to consider taking steps to protect that person.
If that person is mentally disordered within the meaning of the MHA, consider whether sections 2, 3, 4, or 7 can be used to safeguard the person at risk.

If the person lacks mental capacity or you have reasonable cause to suspect he/she does, you could apply to the Court of Protection for orders declaring where he/she should reside and who he/she has contact with as well as for injunctive relief to protect the person at risk from third parties.

If that person has capacity **but** is at risk and is unable to make decisions freely consider asking the High Court to use its Inherent Jurisdiction to protect that person.

## Duties to Report

Safeguarding is enhanced by the obligation placed on relevant partners of a local authority, such as health and the local police, to inform a local authority if it has reasonable cause to suspect that a person is an **adult at risk** and appears to be within the authority's area.[105]

Section 130 of the 2014 Act places a similar duty on relevant partners in relation to a child at risk. Within this context a **child at risk** is a child "who (a) is experiencing or is at risk of abuse, neglect or other kinds of harm, and (b) has needs for care and support (whether or not the authority is meeting those needs). Nothing within section 130 of this Act is intended to detract from section 47 CA 1989 which remains very much in force. The threshold in relation to S130 is lower than that required by section 47 CA 1989.

105 S126 and 162(4) 2014 Act

## Definition of abuse, harm and neglect

Section 197 of the 2014 Act provides the statutory definitions of abuse, harm and neglect. These are wide definitions and can be applied to a multitude of various and varying facts.

**"Abuse"** within the Act means physical, sexual, psychological, emotional or financial abuse (and includes abuse taking place in any setting, whether in a private dwelling, an institution or any other place), and **"financial abuse"** includes— (a) having money or other property stolen; (b) being defrauded; (c) being put under pressure in relation to money or other property; (d) having money or other property misused.

**"Harm"** in relation to a child, means abuse or the impairment of— (a) physical or mental health, or (b) physical, intellectual, emotional, social or behavioural development, and where the question of whether harm is significant turns on the child's health or development, the child's health or development is to be compared with that which could reasonably be expected of a similar child.

"**Neglect"** means a failure to meet a person's basic physical, emotional, social or psychological needs, which is likely to result in an impairment of the person's well-being (for example, an impairment of the person's health or, in the case of a child, an impairment of the child's development).

## Duties to Co-Operate

### Part 9

Duties have been placed on local authorities to make arrangements to promote co-operation with their relevant partners in relation to adults with needs for care and support and children. It also imposes duties on relevant partners to cooperate with local authorities for the purpose of their social services functions and making provision for the integration of care and support with the health services.

# 8 The Children Act

This chapter simply sets out the key sections of the CA 1989 which have specific relevance to child protection. They logically follow on from section 130 of the 2014 Act (see above), the duty to report a child at risk.

## Duty to make enquiries – section 47 CA 1989

Under section 47 of the CA 1989 where **one** of four pre-conditions are made out, a local authority has a duty to make or cause another to make such enquiries as they consider necessary to enable them to decide whether the local authority should take action to safeguard or promote a child's welfare.

## What those enquiries MUST include

Those enquiries **must**[106] include:

1. Whether the local authority should make an application to court under the CA 1989
2. Whether the local authority should exercise any of its powers under the Act
3. Whether the local authority should make a child safety order
4. Whether the local authority should exercise any of its powers under the 2014 Act
5. Whether a child subject to an emergency protection order ought by reason of his best interests to be in local authority accommodation
6. Whether when a child is in police protection the powers under section 46(7) of the Act should be exercised.

Where connected matters are known to the education department, enquiries should be made of that department.[107]

106 S47(3) CA 1989

107 S47(5) CA 1989

In so far as is reasonably practicable and consistent with the child's welfare, that child's wishes and feelings should be ascertained and, subject to his/her age and understanding, given due consideration.[108]

## The four pre-conditions

The four pre-conditions are:

1. The child is subject of an emergency protection order.[109] or
2. The child is in police protection.[110]or
3. The child has contravened a ban imposed by a curfew notice.[111] or
4. There is reasonable cause to suspect that a child who lives in or is found in their area is suffering or is likely to suffer significant harm.[112]

## The child must be seen

When making their enquiries under section 47 a local authority **must** obtain access to the child or ensure that someone else authorised by them has access to that child. The only exception to that duty is where the authority is satisfied it already has sufficient information in relation to that child.

If access to the child is denied or the whereabouts of the child are unknown the local authority must apply for an emergency protection order, assessment order, care or supervision order in relation to that child **unless that child's welfare can be satisfactorily safeguarded without any such court order**.[113]

## If a local authority decide not to apply for a court order

If a local authority decides at the conclusion of their enquiries under section 47 of the CA 1989 not to apply for an emergency protection order, an assessment order, a care or a supervision order in relation to the child concerned, then the local authority must consider whether it would be appropriate to review the case at a later date and, if it would be, determine the date of that review.[114]

108 S47(%A) CA 1989

109 S47(1)(a) CA 1989

110 S47(1)(a) CA 1989

111 S47 (1) (a) CA 1989

112 S47(1)(b) CA 1989

113 S47(6) CA 1989

114 S47(7) CA 1989

## Court orders – the Basics

### Seek legal advice

Before making any application to the court for a court order seek legal advice.

### Emergency Protection Orders

An emergency protection order is an order made under section 44 of CA 1989

### Who can apply for an order?

Any person can apply for an emergency protection order but it is usually the local authority who do so.

### Grounds for Making Emergency Protection orders

There are three grounds upon which emergency protection orders[115] can be made:-

1. There is **reasonable cause to believe that the child is likely to suffer significant harm** if he is not removed to accommodation provided by the local authority or if he does not remain in the place where he is being accommodated; or
2. **Enquiries** are being made under Section 47 of the CA 1989 **and** those enquiries are being frustrated by access to the child being **unreasonably refused** to a person authorised to seek access and the applicant has reason to believe access to the child is required as a matter of urgency; or
3. The applicant has **reasonable cause to suspect that a child is suffering or is likely to suffer significant harm <u>and</u>** the applicant is making **enquiries** into that child's welfare and those enquiries are being frustrated by that access being refused and the applicant has reasonable cause to believe that that access is required as a matter of urgency.

115 S44 CA (1) 189

## Powers under an Emergency Protection Order

Under an emergency protection order a person who is in a position to do so **must** produce the child to the applicant, usually the local authority.

Powers exist to compel a person to disclose the whereabouts of a child subject to an emergency protection order.[116]

An emergency protection order can authorise a person to enter a premises specified in the order and search for the child subject to the order. It may also authorise a person to search for any other child on that premises in relation to whom there is reasonable cause to suspect that an emergency protection order ought to be made.[117]

The order authorises the removal of a child to any accommodation provided by the applicant and it authorises the retention of the child at that accommodation provided that that power is only exercised to safeguard the child's welfare.

It prevents a child being removed from any hospital or other place in which he was being accommodated immediately before an order was made.

It gives the applicant parental responsibility for the child. The applicant must only exercise that parental responsibility.

Court directions can be made in relation to who the child shall have contact with and who the child shall not have contact with. Court directions can also be given for the medical or psychiatric treatment of the child or to the effect that there should be no medical or psychiatric treatment of a child.

An emergency protection order may include an order excluding[118] a person from a dwelling house in which the child lives if there is reasonable cause to believe that if that person is removed the child will not be likely to suffer significant harm and provided the conditions set out in section 44A CA 1989 are made out. A court can attach a power of arrest to an exclusion requirement.

116 S48 CA 1989

117 S48 CA 1989

118 See S44A CA 1989 in detail

## Duration of an Emergency Protection Order

An emergency protection order can be made initially for up to eight days. It can be extended for a further seven days if section 45 of the CA 1989 is complied with. An emergency protection order can only be extended once.

## Child Assessment Orders

These are court orders made under section 43 of the CA 1989.

They can be applied for by a local authority or authorised person but in reality are usually applied for by local authorities.

## The grounds for making an order

A child assessment order can only be made if:

1. The applicant has reasonable cause to suspect that the child is suffering or is likely to suffer significant harm;
2. An assessment of the state of the child's health or development or the way in which he /she has been treated is required to enable the applicant to determine whether or not the child is suffering or is likely to suffer significant harm; and
3. It is unlikely that such an assessment will be made or be satisfactory in the absence of an order under this section.

A child assessment order **must** not be made if there are grounds for making an emergency protection order in relation to the child and that order ought to be made rather than a child assessment order.

## Powers under a Child Assessment order

A person who is in a position to do so is required to produce the child to any person named in the order and to comply with any specified direction given in relation to the assessment.

A child can be kept away from home for the purpose of the assessment but only if that action has been authorised in the court order and is necessary for the purposes of assessment. The period the child is to be kept away from home must be specified in the court order.

## Care orders and Supervision Orders

The applicant can be a local authority or any authorised person. It is usually the local authority.

## Interim orders

In any proceedings where the application is for a care or supervision order, the court can make interim orders. An interim order is an order made pending any final hearing of the application.

## The Interim Threshold Conditions

Neither an interim care order nor an interim supervision order can be made unless the interim threshold criteria are met.

The interim threshold criteria must be established on credible evidence.

The interim criteria are that the court is satisfied that there are reasonable grounds for believing that the child concerned is suffering or is likely to suffer significant harm; and that harm or likelihood of harm is attributable to:

a. The care given to the child or likely to be given to the child if the order were not made, not being what it would be reasonable to expect a parent to give to him; or

b. The child is beyond parental control.[119]

## If the Interim Threshold Criteria is made out

If and only if the interim threshold criteria are made out will the court go on to consider two issues:

1. Is an order in the best interests of the child? The court will apply section 1 CA 1989 when making that determination;
2. Is an order necessary and proportionate to the risk posed to the child.

Under an interim care order, if it is proportionate to do so and if it is in the child's best interests, a child can be removed from his/her home. However, subject to the relevant regulations,[120] a child can remain at home under an interim care order.

An exclusion requirement can be attached to an interim care order requiring a third party to leave the dwelling home in which the child resides.[121] A power of arrest can be attached to the exclusion requirement.

119 S31 & 38 CA 1989

120 see- The Care Planning, Placement and Case Review (Wales) Regulations 2015

121 S38A CA 1989

## Final Care and Supervision orders

Neither a care order nor a supervision order can be made **unless** the threshold criteria are met.

## The Threshold Criteria

The threshold criteria are set out in section 31 CA 1989. They are gateway criteria. If they are **not** met, an order cannot be made.

In order to make a care or supervision order, the court must be satisfied on the balance of probabilities that there are reasonable grounds for believing that the child concerned is suffering or is likely to suffer significant harm; and that harm or likelihood of harm is attributable to:

a. The care given to the child or likely to be given to the child if the order were not made, not being what it would be reasonable to expect a parent to give to him; or

b. The child is beyond parental control.[122]

## If the threshold criteria are met

If the threshold criteria are made out will the court go on to consider three issues:

1. Is an order in the best interests of the child? The court will apply section 1 CA 1989 when making that determination;
2. Is an order necessary and proportionate to the risk posed to the child.
3. A child can but need not be removed from home under a care order.[123]



122 S31 CA 1989

123 See - The Care Planning, Placement and Case Review (Wales) Regulations 2015

## The Effect of Making an Interim or final care order

The effect of a care order is set out in section 33 of the CA 1989:

1. Where a care order is made with respect to a child it shall be the duty of the local authority designated by the order to receive the child into their care and to keep him in their care while the order remains in force.
2. […]
3. Where a care order is in force with respect to a child, the local authority designated by the order shall-
   a. Have parental responsibility for the child; and
   b. Have the power (subject to the following provisions of this section) to determine the extent to which-
      i. a parent, guardian or special guardian of the child; or
      ii. a person who by virtue of section 4A has parental responsibility for the child,

   may meet his parental responsibility for him.
4. The authority may not exercise the power in subsection (3)(b) unless they are satisfied that it is necessary to do so in order to safeguard or promote the child's welfare.

A child who is the subject of an interim care order or a final care order is a looked after child to whom Part 6 of the 2014 Act applies.

## The Effect of Making a Supervision Order

The effect of a supervision order is set out in the statute at section 35 of CA 1989.

It is that:

1. While a supervision order is in force it shall be the duty of the supervisor-
    a. to advise, assist and befriend the supervised child;
    b. to take such steps as are reasonably necessary to give effect to the order; and
    c. where-

i. (i) the order is not wholly complied with; or

ii. (ii) the supervisor considers that the order may no longer be necessary,

to consider whether or not to apply to the court for its variation or discharge.

2. Parts I and II of Schedule 3 make further provision with respect to supervision orders.

Schedule 3 of the Act gives very limited powers to a court to impose requirements (for example on the person with parental responsibility or with whom the child is living but only if that person consents) and grants powers to supervisors to give directions to the supervised child. A supervision order does not confer parental responsibility on a local authority. Paragraph 11(1) of Schedule 3 confers a power in the Secretary of State to make regulations relating to the exercise by a local authority of their functions under a supervision order but these have never been made. Paragraph 6 of Part II of Schedule 3 provides that a supervision order shall cease to have effect after one year unless an application is made to extend the order up to the end of a maximum period of three years.

Children who are the subject of supervision orders are not looked after children unless they are for some reason provided with accommodation by the local authority under S76 of the 2014 Act. They do not benefit from the duties imposed on local authorities by Part 6 of the 2014 Act or Part II of Schedule 2 of the CA 1989. The regulatory scheme for care planning, placement and review does not apply to them. In the absence of supervision order regulations, there is no equivalent regulatory safety net for the exercise of the local authority functions in relation to them including those exercised by Independent Reviewing Officers (IROs). By section 35(1)(b) CA 1989 the duty that is imposed upon the supervisor is "to take such steps as are reasonably necessary to give effect to the order."

## Key definitions

**"Harm"** has a statutory definition in the CA 1989.[124] It means ill-treatment or the impairment of health or development. It includes impairment suffered from seeing or hearing the ill-treatment of another.

"**Development**" means physical, intellectual, emotional, social or behavioural development.

"**Health**" means physical or mental health.

**"Ill-treatment**" includes sexual abuse and forms of ill-treatment which are not physical.

**"Significant"** has no statutory definition. However, section 31(10) of the CA 1989 states that where the question is whether the harm suffered by the child is significant turns on the child's health or development, his/her health or development must be compared to that which could be reasonably be expected of a similar child.

*In Re MA* [2009] EWCA Civ 853 the Court of appeal concluded that there is a dividing line between harm and significant harm. It is the latter which must be established for the threshold criteria to be crossed. According to Ward LJ the harm must be significant enough to justify the intervention of the State and disturb the autonomy of parents to bring up their children by themselves in a way they chose. It must be significant enough to enable the court to make a care order or a supervision order if the welfare of the child demands it. Art 8, he said, informs the meaning of significant and serves to emphasise that there must be a relevant and sufficient reason for crossing the threshold.



124 See S31 CA 1989

# 9 Data Protection and Information Sharing

Myths and legends abound about what information can and cannot be retained and what information can and cannot be shared. This chapter is designed to dispel them.

## Key Definitions

It is useful to get to grips with some key definitions

**"Personal data" is any information relating to an identifiable natural person.**[125] In other words, if a person can be identified from the information you have about them, that information is personal data. A person can be identified in all sorts of ways: by name, identification number, location, online identifier, or even by their physical, genetic, mental, cultural or social identity. Even if that person is given a pseudonym, nickname or code, they may still be "identifiable" depending on how easy or difficult it is to identify them from the information held.

However, not all personal data is considered equal. There are two different categories, **'personal data'** and **'sensitive personal data.'** Examples of personal data are a person's name, address, phone number, email address, driver's licence number, and financial details.

**"Sensitive personal data"** is personal data revealing information such as: racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, genetic data, biometric data, or data concerning a natural person's sex life or sexual orientation.[126]

The above definition is not an exhaustive list. In the **main sensitive personal data** can expose an individual to discrimination or considerably heightened levels of distress or anxiety should the data be involved in a data breach.

**"Data subject"** is the person to which the data relates.[127]

125 Article 4(1) GPDR

126 Article 9(1) GPDR

127 Article 4(1) GPDR

**"Processing"** is any operation performed on personal data (e.g. collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction).[128]

The definition of processing is extremely wide, and it is almost impossible to think of something you could do with information or data that would not be considered processing. It is most helpful to assume that almost anything you do with information or data will be considered processing.

**"Controller"** is the person or body that determines the purposes and means of processing personal data.[129]

**"Processor"** is the person or body responsible for processing personal data on behalf of a controller.[130]

### Example in practice:

A nurse ("the processor") works for a Hospital ("the controller"). He holds the results from his patient's ("the data subject") blood tests ("sensitive personal data"). These need to be stored ("processed") on the computer system at the hospital so that anyone treating his patient knows the results.



128 Article 4(2) GPDR

129 Article 4(7) GPDR

130 Article 4(8) GPDR

## What are your obligations?

If you work for an organisation and have access to personal data, you have certain responsibilities. There are six fundamental principles:[131]

1. Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.
2. Personal data may only be collected for specified, explicit and legitimate purposes and must not be further processed in a manner that is incompatible with those purposes.
3. Personal data must be adequate, relevant and limited to what is necessary in relation to the purposes for which those data are processed.
4. Personal data must be accurate and, where necessary, kept up to date. Every reasonable step must be taken to ensure that personal data that are inaccurate are either erased or rectified without delay
5. Personal data must be kept in a form that permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed.
6. Personal data must be processed in a manner that ensures appropriate security of those data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures.

### Example in practice:

A social worker knows the address of a child's foster carer. She is going on holiday in two weeks' time and needs to pass this information on to the social worker covering for her whilst she is on leave. She can share this information by sending an email to her colleague, but not by putting a post-it note on a "general discussion" board accessible by the whole office.

She decides to leave a post-it note in her colleague's diary. Her colleague can keep that post-it note in their diary, but only for as long as is necessary. The local authority and its social workers must make sure that the address is recorded accurately, and only stored for as long as is necessary for them to carry out their duties.

131 Article 5 GDPR

## When is it lawful to process data?

You must have a valid lawful basis in order to process personal data. There are six available lawful bases for processing. At least one of the lawful basis must exist if you are going to process information.

The six lawful bases available to you are:[132]

1. **Consent:** The data subject has consented to the processing.
2. **Contract:** the processing is necessary for a contract you have with the individual, or because they have asked you to take specific steps before entering into a contract.
3. **Legal obligation:** the processing is necessary for you to comply with the law.
4. **Vital interests:** the processing is necessary to protect someone's life.
5. **Public task:** the processing is necessary for administering justice, or for exercising statutory, governmental, or other public functions.
6. **Legitimate interests:** the processing is necessary for your legitimate interests or the legitimate interests of a third party unless there is a good reason to protect the individual's personal data which overrides those legitimate interests. (This cannot apply if you are a public authority processing data to perform your official tasks.)

### Example in practice:

A school that wants to process personal data may have a variety of lawful bases depending on what it wants to do with the data. Schools are likely to be classified as public authorities, so the public task basis is likely to apply most of the time.

However, if the processing is separate from their tasks as a public authority, then the school may instead wish to consider whether consent or legitimate interests are appropriate in the particular circumstances. For example, a school might rely on public task for processing personal data for teaching; but a mixture of legitimate interests and consent for taking pictures, advertising and fundraising purposes.

132 Article 6 GPDR

Each organisation, sole trader, partnership, company, government body etc., which are data controllers must have a scheme in place which protects personal data. This Guide is not intended to be a guidance note on GPDR compliance. It is recommended that you acquaint yourself with your organisation's processes which exist to comply with the legislation. This includes activity such as documenting decisions made, privacy notices for example.

**What happens if the lawful basis changes?**

You must determine your lawful basis before starting to process personal data. If you find at a later date that your chosen basis was inappropriate, it will be difficult to swap to a different one, particularly if the original basis was consent.[133] Remember that an individual can withdraw their consent at any time after they have given it. And if they withdraw their consent, processing must stop.

The best way of avoiding this problem is to only rely on the consent condition as a last resort and rely on the other conditions if you can.

In all other cases where the original lawful basis is not consent, if there is a genuine change in circumstances which means there is a good reason to review your lawful basis, you need to inform the individual and document the change. You may not need a new lawful basis as long as your new purpose is compatible with the original purpose.[134]

As a general rule, if the new purpose is very different from the original purpose, it is unlikely to be compatible with your original purpose for collecting the data. You need to identify and document a new lawful basis to process the data for that new purpose.



133 Article 7(3) GDPR

134 Recital 50 GDPR

### What about sensitive data?

If you are processing **sensitive data**, there's an extra step that needs to be taken. You need to do everything that you would do with normal personal data, but there is an extra hurdle that must be surmounted before processing. In order for **sensitive data** to be processed, one of the following conditions must exist (as well as one of the lawful bases):[135]

1. The individual whom the sensitive personal data is about has given explicit consent to the processing.
2. The processing is necessary so that you can comply with employment law.
3. The individual has deliberately made the information public.
4. The processing is necessary in relation to legal proceedings; for obtaining legal advice; or otherwise for establishing, exercising or defending legal rights.
5. The processing is necessary for administering justice, or for exercising statutory or governmental functions.
6. The processing is necessary for monitoring equality of opportunity, and is carried out with appropriate safeguards for the rights of individuals.

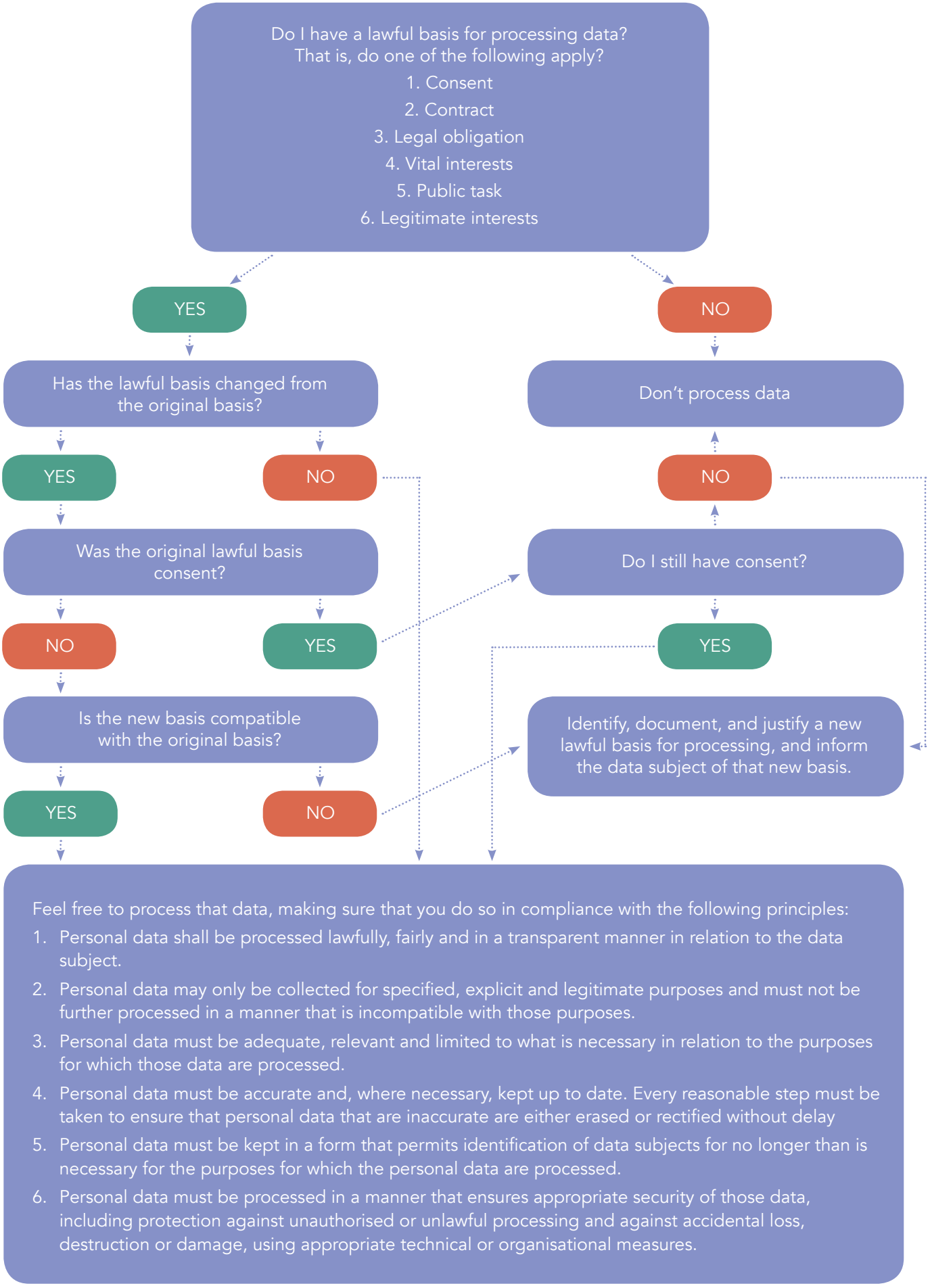
### What if I don't have consent?

It is a common misconception that an individual must **consent** to having their data processed. However, that is not always the case, consent is just one of six possible conditions. In fact, consent should be a last resort when choosing a lawful basis to process data, because if the consent is withdrawn, processing must stop.

In order to determine if you need that person's consent, ask yourself the following questions:



135 Article 9(2) GDPR


Do I have a lawful basis for processing data?
That is, do one of the following apply?
1. Consent
2. Contract
3. Legal obligation
4. Vital interests
5. Public task
6. Legitimate interests
YES
NO
Has the lawful basis changed from the original basis?
Don't process data
YES
NO
NO
Was the original lawful basis consent?
Do I still have consent?
NO
YES
YES
Is the new basis compatible with the original basis?
Identify, document, and justify a new lawful basis for processing, and inform the data subject of that new basis.
YES
NO
Feel free to process that data, making sure that you do so in compliance with the following principles:
1. Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.
2. Personal data may only be collected for specified, explicit and legitimate purposes and must not be further processed in a manner that is incompatible with those purposes.
3. Personal data must be adequate, relevant and limited to what is necessary in relation to the purposes for which those data are processed.
4. Personal data must be accurate and, where necessary, kept up to date. Every reasonable step must be taken to ensure that personal data that are inaccurate are either erased or rectified without delay
5. Personal data must be kept in a form that permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed.
6. Personal data must be processed in a manner that ensures appropriate security of those data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures.

## Example in Practice

On her first day, a health visitor checks in on a new mum to see how she and the baby are getting on. The young mother is a part of a very conservative religion where some members believe that women should be subservient and beaten if they do not comply with their husband's wishes. If a woman speaks out about these practices she will be rejected by the community. The young mother tells the health visitor that the bruises on her arms were caused by her husband when she burnt his dinner. She then begs the health visitor not to tell anyone about this abuse because it is accepted and endorsed by her community. She is terrified of what he and the rest of the community will do if this gets out.

The Health Visitor asks herself whether or not she should share this information with anyone; she does not have the mother's consent. She uses the above flowchart and comes to the following conclusions:

- The LHB she works for has determined that the lawful basis for processing personal data is the "public task" condition.
- She is not sure whether sharing the mother's allegation is directly relevant to her public task as she has never had to deal with this situation before.
- She realises that she has a legal duty to protect and safeguard this vulnerable individual, and her newly born child.
- She knows that the "legal obligation" condition will apply but the LHB has not explicitly used this condition. She needs to change lawful basis in order to process the data.
- The "legal obligation" condition and "public interest" are compatible.
- She tells the young mother that she is obligated to pass this information on.
- She makes a contemporaneous note in her notebook of the decisions she has taken.
- When she returns back to the office she passes on this information to children's services.

The above example is premised on the idea that the Health Visitor knew her legal obligations to report allegations made by vulnerable people and her duty to share information in relation to children who may be at risk of abuse.

# Endnotes

The Care and Support (Population Assessments) (Wales) Regulations 2015

The Care and Support (Partnership Arrangements for Population Assessments) (Wales) Regulations 2015

The Social Services and Well-being (Wales) Act 2014 (Social Enterprise, Co-operative and Third Sector) (Wales) Regulations 2015

The Care and Support (Assessment) (Wales) Regulations 2015

The Care and Support (Eligibility) (Wales) Regulations 2015

The Care and Support (Care Planning) (Wales) Regulations 2015

The Care and Support (Direct Payments) (Wales) Regulations 2015

The Care and Support (Choice of Accommodation) (Wales) Regulations 2015

The Care and Support (Provision of Health Services) (Wales) Regulations 2015

The Care Planning and Case Review (Miscellaneous Amendments) (Wales) Regulations 2017 (came into force on 23 July 2017)

The Care and Support (Financial Assessment) (Wales) Regulations 2015

The Care and Support (Charging) (Wales) Regulations 2015

The Care and Support (Review of Charging Decisions and Determinations) (Wales) Regulations 2015

The Care and Support (Deferred Payments) (Wales) Regulations 2015

The Care and Support (Choice of Accommodation, Charging and Financial Assessment) (Miscellaneous Amendments) (Wales) Regulations 2017 (came into force on 10 April 2017)

The Care and Support (Charging) (Wales) (Amendment) Regulations 2018 (came into force on 9 April 2018)

The Children (Secure Accommodation) (Wales) Regulations 2015

The Care Planning, Placement and Case Review (Wales) Regulations 2015

The Care Leavers (Wales) Regulations 2015

The Visits to Children in Detention (Wales) Regulations 2015

The Children (Secure Accommodation) (Wales) (Amendment) Regulations 2016

The Children And Family Court Advisory and Support Service (Reviewed Case Referral) (Amendment) Regulations 2018 (came into force 12 February 2018)

The Care Planning, Placement and Case Review (Wales) (Amendment) Regulations 2018 (came into force 2 April 2018)

The Children (Secure Accommodation) (Wales) (Amendment) Regulations 2018 (came into force 2 April 2018)

The Adult Protection and Support Orders (Authorised Officer) (Wales) Regulations 2015

The Safeguarding Boards (Functions and Procedures) (Wales) Regulations 2015

The Safeguarding Boards (General) (Wales) Regulations 2015

The National Independent Safeguarding Board (Wales) (No.2) Regulations 2015 (came into force on 25 November 2015)

The Safeguarding Boards (General) (Wales) (Amendment) Regulations 2018 (came into force 25 May 2018)

The Local Authority Social Services Annual Reports (Prescribed Form) (Wales) Regulations 2017

The Partnership Arrangements (Wales) Regulations 2015

The Care and Support (Area Planning) (Wales) Regulations 2017(came into force on 1 April 2017)

The Partnership Arrangements (Amendments) (Wales) Regulations 2017 (came into force on 1 April 2017)

The Care and Support (Ordinary Residence) (Specified Accommodation) (Wales) Regulations 2015

The Care and Support (Disputes about Ordinary Residence, etc.) (Wales) Regulations 2015

The Care and Support (Business Failure) (Wales) Regulations 2015

The Social Services and Well-being (Wales) Act 2014 (Consequential Amendments) Regulations 2016

The Social Services and Well-being (Wales) Act 2014 (Consequential Amendments) (Secondary Legislation) Regulations 2016

The Social Services and Well-being (Wales) Act 2014 (Consequential Amendments) and Care Planning, Placement and Case Review (Miscellaneous Amendments) (Wales) Regulations 2016

The Social Services and Well-being (Wales) Act 2014 (Consequential Amendments) (Secondary Legislation) (Amendment) Regulations 2016 (came into force 5 April 2016)

The Social Services and Well-being (Wales) Act 2014 (Consequential Amendments) Regulations 2017

Part 2 Code of Practice (General Functions)

Part 3 Code of Practice (Assessing the Needs of Individuals)

Part 4 Code of Practice (Meeting Needs)

Part 4 and 5 Code of Practice (Charging and Financial Assessment) – this revised code came into effect on 9 April 2018.

Part 6 Code of Practice (Looked After and Accommodated Children)- this revised code came into effect on 2 April 2018

Part 8 Code of Practice on the Role of the Director of Social Services (Social Services Functions)

Part 10 Code of Practice (Advocacy)

Part 11 Code of Practice (Miscellaneous and General)

Working Together to Safeguard People: Volume 1 – Introduction and Overview

Working Together to Safeguard People: Volume 2 – Child Practice Reviews

Working Together to Safeguard People: Volume 3 – Adult Practice Reviews

Working Together to Safeguard People: Volume 4 – Adult Protection and Support Orders

Working Together to Safeguard People: Volume 5 - Handling Individual Cases to Protect Children at Risk

Working Together to Safeguard People: Volume 6 - Handling Individual Cases to Protect Adults at Risk

Parts 3 and 4 of the National Assistance Act 1948

Section 3 of the Disabled Persons (Employment) Act 1958

Section 45 of the Health Services and Public Health Act 1968

Sections 1, 2 and 28A of the Chronically Sick and Disabled Persons Act 1970

Section 17 of the Health and Social Services and Social Security Adjudications Act 1983

Sections 3, 4 and 8 of the Disabled Persons (Services, Consultation and Representation) Act 1986

Section 46 of the National Health Service and Community Care Act 1990

Carers (Recognition and Services) Act 1995

Carers and Disabled Children Act 2000

Sections 49, 50, 54, 56 and 57 of the Health and Social Care Act 2001

Section 16 of the Community Care (Delayed Discharges etc) Act 2003

Carers (Equal Opportunities) Act 2004

Section 192 of and Schedule 15 to the National Health Service (Wales) Act 2006

Personal Care at Home Act 2010

Social Care Charges (Wales) Measure 2010

Carers Strategies (Wales) Measure 2010

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