research in practice

Practice Guidance

The inherent jurisdiction of the High Court

Dartington

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Introduction

This resource aims to support health and social care practitioners, including those who work in adult safeguarding to understand and identify the circumstances in which it might be appropriate to seek orders under the inherent jurisdiction. It is important to note that the inherent jurisdiction is not *only* used in adult safeguarding situations. As it is a generic power vested in the High Court, it can be used across a range of different scenarios; for example, in proceedings involving children. This resource, however, focuses only on situations where an adult is being abused or coerced.

The fluid nature of the High Court's inherent jurisdiction makes it difficult to discern general principles as to when it might apply. **This publication aims to support good quality decision-making in adult social care and safeguarding by answering the following questions:**

1. What is the inherent jurisdiction?
2. What types of scenarios might the inherent jurisdiction cover?
3. Who is 'vulnerable' for the purposes of the inherent jurisdiction?
4. What types of orders might be sought in an application under the inherent jurisdiction?
5. When will the court not use the inherent jurisdiction?
6. What steps should be taken before using the inherent jurisdiction?
7. What are the key practice and ethical challenges, and how might these be overcome?
   - What is the intersection between the inherent jurisdiction and other legislation, especially the ***Mental Capacity Act 2005*** (MCA)?
   - Can the inherent jurisdiction ever be used to authorise a deprivation of liberty?

Research in Practice monthly **Case Law and Legal Summaries** include case law relating to the inherent jurisdiction, and aim to support practitioners to keep up-to-date with how case law alters the way the inherent jurisdiction is, or may be used, in future.

The term 'vulnerable adult' is perceived by many, particularly people with lived experience, to be discriminatory (OPG, 2015), and much of the wider adult safeguarding legislation has moved away from using this term. Both the ***Care Act 2014*** and the ***Social Services and Well-Being (Wales) Act 2014*** instead refer to 'adults at risk'. However, in using the inherent jurisdiction, the High Court still uses the legal term 'vulnerable adult'. To avoid confusion this resource uses the legal terminology of the High Court.

1. What is the 'inherent jurisdiction'? History and context

The term 'inherent jurisdiction' describes a power that the High Court has to make orders and grant injunctions in particular circumstances. Any person or body with legal standing can bring an application to the court. This includes local authorities, NHS trusts and Clinical Commissioning Groups. It applies where there is no power to intervene in a statute. For example, if a person lacks mental capacity about an issue under the MCA, then a decision can be made in their best interests using that Act. However, a person may not lack mental capacity under the MCA, or the remedy may not be available under that Act, as in the following example:

XCC v AA [2012] EWHC 2183 (COP)

DD was a young woman with complex learning disabilities. She had been taken abroad for an arranged marriage in 2003, but was subsequently judged to lack capacity in relation to marriage under the MCA. The local authority sought an order that would declare that the marriage was not recognised in England and Wales (a non-recognition order). This order was not available to the judge using the MCA, but it was decided that it could be granted using the inherent jurisdiction.

It is for this reason that the inherent jurisdiction is often called the 'great safety net' – it allows the court to intervene where there is no other avenue.

Before the MCA, the inherent jurisdiction had been the usual legal route by which the courts had decided whether something was lawful in relation to an adult who lacked capacity and who could not give valid consent. At first, this extended only to medical treatment. However, from the late 1990s onwards, the courts extended the use of the inherent jurisdiction to cover different types of decisions for people who lacked mental capacity, such as contact, marriage, and residence. These decisions where a person lacks mental capacity are now covered by the MCA.

The second way in which the inherent jurisdiction developed was in relation to protecting adults who did not lack *mental* capacity, but who were, legally-speaking, 'vulnerable' because of some sort of abuse, neglect, undue influence, or coercion.

Re SA [2005] EWHC 2942 (Fam)

One of the key legal cases in relation to this is Re SA. In that case, Munby J held that, even if a person does not have any sort of cognitive impairment, the inherent jurisdiction could be used in relation to an adult who is unable to protect themselves from harm:

"...the inherent jurisdiction can be exercised in relation to a vulnerable adult who...is, or is reasonably believed to be, either

(i) under constraint or

(ii) subject to coercion or undue influence or

(iii) for some other reason deprived of the capacity

to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent" (para. 77).

It is also important to note that the inherent jurisdiction differs to other powers available to practitioners working in this area - such as being able to act in a person's best interests under the MCA, or the ability to launch a safeguarding enquiry under section 42 of the *Care Act 2014* – in one key respect.

Unlike these powers, the inherent jurisdiction ***cannot*** be used by social care or safeguarding practitioners without a court order. The power to make orders under the inherent jurisdiction rests only with a High Court judge, so any practitioners looking to intervene using the inherent jurisdiction must ***always*** **seek a court order through an application to the High Court.**

2. What types of scenarios might the inherent jurisdiction cover?

In order to fully understand the types of situations that the inherent jurisdiction might cover, it is important to briefly outline the scope of the MCA first. The MCA applies where a person is unable to make a decision about a specific matter *because of* an 'impairment or disturbance in the functioning of the mind or the brain' (MCA, ss.2-3).

In effect, there must be a 'causative nexus' (***PC v City of York Council* [2013] EWCA Civ 478** at para. 58) between the inability to make the decision, and the 'disturbance in the functioning of the mind or brain'. However, in some situations there may be no such causative nexus, or no disturbance in the functioning of the mind or brain at all. In these situations, the person may be unable to make their own free choice *because of* some sort of abuse or coercion by another person, rather than because of a disturbance or impairment. As such, this situation does not fall within the remit of the MCA.

In recent years the inherent jurisdiction has been used most often as a **means of safeguarding** a 'vulnerable' adult in precisely these situations - where they are being **abused**, or subject to some sort of **coercion** or **undue influence**, but where they **do not lack mental capacity under the MCA**.

DL v A Local Authority [2012] EWCA Civ 253

Mr and Mrs L were an older married couple with a number of physical health needs, who lived with their son, DL. At the time that proceedings were commenced in the High Court, neither Mr nor Mrs L lacked mental capacity to make decisions about their care and support needs under the MCA. The local authority had involvement with the family for a number of years, and had documented a number of incidences of violent and abusive behaviour by DL towards his parents. These included physical assaults, verbal threats, controlling his parents' use of their house and who may visit them, including health and social care practitioners, as well as reports that DL had been trying to coerce his father into transferring the ownership of their house into DL's name, and pressuring his mother to move into a care home.

The Court of Appeal held that the inherent jurisdiction had survived for situations precisely like this. As Lord Justice McFarlane held:

"I do not accept that the jurisdiction...is extensive and all-encompassing, or one which may threaten the autonomy of every adult in the country. It is...targeted solely at those adults whose ability to make decisions for themselves has been compromised by matters other than those covered by the MCA 2005" (DL v A Local Authority, para. 53).

A recent application of this use of the inherent jurisdiction can be found in the case of ***Southend-on-Sea Borough Council v Meyers* [2019] EWHC 399 (Fam).** Douglas Meyers had diabetes, osteoarthritis, and was blind. For many years since his wife died, he had lived with his son, KF, who had exhibited challenging behaviour and had long-term problems with drug addiction and alcoholism.

The local authority was concerned that KF had been preventing Mr Meyers from receiving the necessary care he needed for his physical health, which had left him living in a poor environment at home. An original interim decision, later upheld by the Court of Appeal, held that it would be lawful to temporarily move Mr Meyers into a care home. The final decision of the Court was that Mr Meyers could return home but not to live with KF, his son.

The inherent jurisdiction should be used in situations where a person does not lack mental capacity under the MCA, but is 'vulnerable' because their decision-making is somehow impaired because of abuse, undue influence, or coercion by another person.

3. Who is 'vulnerable' for the purposes of the inherent jurisdiction?

The High Court has very clearly held that, **just because someone is disabled or has some sort of impairment, does not necessarily mean they are *automatically* considered 'vulnerable' for the purposes of deploying the inherent jurisdiction**.

In ***Southend on Sea Borough Council v Meyers,*** for example, it was not Mr Meyers' blindness that rendered him 'vulnerable', but the 'dysfunctional' relationship with his son (paras.33-34). This reflects an important message from many people with lived experience, which warns against making assumptions solely based on their impairments (Carr et al, 2019).

For an order under the inherent jurisdiction, what it is important to ascertain is whether the person's decision-making is being compromised by the undue influence, abuse, or coercion by another person; the 'inherent jurisdiction is only concerned with individuals who are vulnerable to influences that render them unable to make their own free choice.' ***(Wakefield Metropolitan District Council v DN* [2019] EWHC 2306 (Fam)** at para.45). It is this coercion, or abuse, that renders a person vulnerable.

Mayor and Burgesses of the London Borough of Croydon v KR and ST [2019] EWHC 2498 (Fam)

A 59-year-old man, KR, who had developed a brain injury some years earlier was deemed to have mental capacity under the MCA to make decisions about his residence and welfare. However, there were some safeguarding concerns about his physical wellbeing, and his living conditions at home, which he shared with his wife, ST.

The judge held that the fact that KR has physical impairments was not, of itself, enough to render KR 'vulnerable' and therefore deploy the inherent jurisdiction. Drawing similarities with the fact that under section 2(3) of the MCA assumptions cannot be made about a person's capacity simply on the basis of their age or disability, the judge concluded that neither should such assumptions be made under the inherent jurisdiction. In effect, the fact that someone has physical disabilities does not mean that there should be an assumption that they are vulnerable for the purposes of the inherent jurisdiction (para. 60).

As further evidence of this, the Court has held that someone without any physical or cognitive disability can also be unable to make or execute their own decisions because of the coercion or abuse of another person. ***Al-Jeffery v Al-Jeffery* [2016] EWHC 2151** involved allegations that a young woman, Amina, who had dual British and Saudi citizenship, was being kept in Saudi Arabia by her father, and that he was preventing her from returning to the UK. The Court used its inherent jurisdiction to grant orders requiring Amina's father to permit and facilitate Amina's return to the UK.

4. What types of orders might be sought in an application under the inherent jurisdiction?

If it has been established that the person is 'vulnerable' under the meaning outlined above, i.e. for some reason unable to make their own free choice as a result of abuse or coercion, then what *types* of order might the court grant using the inherent jurisdiction? The primary consideration should be whether the order sought is **necessary** and **proportionate**. This means that the measures sought must be reasonable and proportionate to the circumstances, and **not go beyond the minimum necessary** in order to safeguard the person being abused.

a. Against the abuser

The first question to ask is whether the order sought under the inherent jurisdiction can be directed towards the person or persons 'doing' the abusing or coercing, rather than the person being coerced. This is the approach envisaged by the Court of Appeal in DL: **"the aim of the jurisdiction should be facilitative, not dictatorial"** ***(DL v A Local Authority,*** at para. 67). In effect, for an order to be facilitative, where feasible to do so it should be directed towards the person doing the abusing or coercing.

This is important for two reasons. First, this is more likely to be better able to **promote the autonomy and empowerment of the person being abused.** These are important principles for adults who are at the centre of safeguarding (Carr et al., 2019; Lonby & Brandon, 2017) and now also underpin adult safeguarding in the ***Care and Support Statutory Guidance.*** As the Court of Appeal noted in ***DL v A Local Authority,*** 'Where the facts justify it, such individuals require and deserve the protection of the authorities and the law so that they may regain the very autonomy that the appellant rightly prizes' (para. 63). Second, this is likely to be a **less restrictive option** than an order directed towards the person being abused or coerced, and therefore more **proportionate.**

DL v A Local Authority [2011] EWHC 1022 (Fam)

The judgment of the High Court at first instance in DL provides an example of the kinds of injunctions that might be granted by the Court against the abuser. The facts of this case have been outlined previously. At the High Court, the Court used its inherent jurisdiction to issue injunctions against the son, which prevented him from:

i. assaulting or threatening to assault his parents
ii. preventing his parents from having contact with friends and family
iii. seeking to persuade or coerce his father into transferring the family home to him
iv. seeking to persuade or coerce his mother into moving into a care home
v. engaging in behaviour towards his parents that is otherwise degrading or coercive
vi. giving orders to carers
vii. interfering in the provision of care and support to his mother
viii. refusing access to health and social care practitioners
ix. behaving in an aggressive and/or confrontational manner to carers and management.

b. Against the person being abused

While consideration should first be given to orders that are directed towards the person doing the abusing or coercing, so as to allow the person being abused the space to make a decision themselves, there is no rule against applying for an order which is predominantly directed towards the person being abused.

In ***Southend-on-Sea Borough Council v Meyers***, for example, an urgent interim order was first granted to deprive Mr Meyers of his liberty in a care home for a short period of time to allow his physical health to stabilise, and enable him to make a decision without the direct influence of his son (***A Local Authority v BF*** **[2018] EWCA Civ 2962).** The final order that the court made was that Mr Meyers could be permitted to live at home as he had requested, but was not allowed to live with his son.

It is important to note that the Court has given guidance about the types of things to consider if an injunction is being sought against the person being abused, and which will aid practitioners to demonstrate the order is both necessary and proportionate. In ***Redcar & Cleveland Borough Council v PR*** **[2019] EWHC 2305** (para. 46) the Court held that the body seeking the injunction should be able to show, and provide supporting evidence, that they have considered:

i) whether the person is likely to understand the purpose of the injunction

ii) whether the person will receive knowledge of the injunction

iii) whether the person will appreciate the effect of a breach of the injunction.

c. Orders that may involve a deprivation of liberty

The relationship between the inherent jurisdiction and a deprivation of liberty is complex. The jurisdiction has been used in recent years to authorise a deprivation of liberty in a limited range of circumstances where there has been a statutory gap between the MCA and the ***Mental Health Act 1983*** **(*An NHS Trust v Dr A* [2013] EWHC 2442 (Fam)**; ***Hertfordshire County Council v AB*** **[2018] EWHC 3103 (Fam)).**

It has also, as in the earlier interim judgment in **Mr Meyers' case,** even been used to authorise a short deprivation of liberty of a 'vulnerable but capacitated person' on a temporary basis. It is questionable, however, whether the Court would use the inherent jurisdiction to authorise any order requiring a 'vulnerable' adult to live in a particular location where they are subject to complete supervision and control and not free to leave **(*Cheshire West and Chester Council v P* [2014] UKSC 19)** on a more permanent basis. If it were to do so, in order to comply with Article 5(1)(e) of the **European Convention on Human Rights** there would still need to be evidence that the person being deprived was of 'unsound mind'.

Professionals may be faced with situations where a 'vulnerable' adult is living - or wants to live - with the person who is abusing or coercing them. In such circumstances the Court may grant an injunction against the person who is coercive (4a above). In ***DL v A Local Authority,*** for example, the injunctions were made against the son, who was abusing and coercing his parents. Otherwise, it may be possible to grant injunctions against the 'vulnerable' adult which restrict where, or with whom, they can live. This is deemed to be a **restriction on a person's liberty**, not a deprivation, and was the approach the Court took in ***Southend-on-Sea Borough Council v Meyers.*** It is likely that a full deprivation of a person's liberty in those circumstances would be deemed disproportionate.

Southend-on-Sea Borough Council v Meyers [2019] EWHC 399

Mr Meyers had been living at home with his son, who had been subjecting him to - among other things – undue influence, and neglectful conditions. The Court held that Mr Meyers could be allowed to return to his home, but was to be prevented from living with his son. The Court stated that this approach **would not amount to a deprivation of Mr Meyers' liberty.**

In contrast to the ***Cheshire West*** decision, to limit with whom he could live would only be a **restriction on his liberty** and would not constitute a deprivation of his liberty because Mr Meyers would not be living somewhere where he would be under complete supervision and control and not free to leave. As the European Court of Human Rights held in ***Guzzardi v Italy*** **[1980] ECHR 5,** 'the difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance' (para. 93).

5. When will the court not use the inherent jurisdiction?

There are a number of situations that arise where the Court will *not* use the inherent jurisdiction to intervene:

1. The inherent jurisdiction will not be used by the court **when a person is not 'vulnerable'**; i.e. a person is *not* in fact being subject to any sort of coercion or abuse. In ***Mayor and Burgesses of the London Borough of Croydon v KR and ST* [2019] EWHC 2498 (Fam)**, the Court held that the relationship that KR had with his wife, ST, did not meet this requirement: 'it is important to be careful to distinguish between the entirely natural and common influence that one close family member will have over another, and the **"undue influence"** or **"coercion"** identified in SA and DL. If a dysfunctional family relationship is to fall within these principles then the evidence has to show that the vulnerable individual is incapable of making their own decision' (para. 60).
2. The inherent jurisdiction is, as expressly stated by the court, unlikely to be used to deprive a capacitous person of their liberty on anything more than a temporary basis.

Wakefield Metropolitan District Council v DN [2019] EWHC 2306 (Fam)

DN had autism, anxiety, and evidence of emotionally unstable personality disorder. He had committed a number of criminal offences, and had been issued with a mental health treatment order under the ***Criminal Justice Act* (CJA) 2003.** This required him to live at a supported living facility, which effectively deprived him of his liberty. There was no power to deprive someone of their liberty under the CJA, and he did not lack capacity under the MCA. He would occasionally have 'meltdowns', characterised by aggressive and violent behaviour, usually in response to stress. The local authority sought an order under the inherent jurisdiction that would authorise care arrangements that effectively deprived him of his liberty given the lack of such a power in the CJA.

The court found that DN was not 'vulnerable' in the sense that it is required by the inherent jurisdiction. He was not subject to coercion or undue influence and therefore unable to make his own decision. Second, the judge expressed the view that to use the inherent jurisdiction to authorise a deprivation of liberty of a capacitous person, such as DN, would be a potentially arbitrary use of the Court's power. The judge agreed, however, that on occasions – such as during his 'meltdowns' – DN did lack capacity under the MCA. As such, the court could make an anticipatory declaration authorising a deprivation of liberty for those occasions using the MCA.

3. Lastly, the court cannot use the inherent jurisdiction where it **explicitly conflicts** with an existing statute. Although involving a minor, in ***A City Council v LS* [2019] EWHC 1384** the Court held that it could not use the inherent jurisdiction to authorise the deprivation of liberty of a 17-year-old who was involved in gang activity because to do so would expressly conflict with the provisions in the ***Children Act* 1989**.

6. What steps should be taken before using the inherent jurisdiction?

Very often, the types of circumstances that lead to an application under the inherent jurisdiction will be as part of a safeguarding enquiry under the *Care Act 2014* or *Social Services and Wellbeing (Wales) Act 2014*. The use of the inherent jurisdiction is **seen as a last resort.** Before considering an application to the Court, practitioners should first consider whether all other avenues - which may be less restrictive, and therefore more proportionate - have been exhausted.

a) Considering the MCA

i. Is there any evidence that a mental capacity assessment is required on the facts? Would an interim order from the Court of Protection under s.48 of the MCA be appropriate? This may be used in urgent situations where there is reasonable suspicion that the person may lack capacity but a full assessment has not yet been carried out.

ii. If there is evidence that a mental capacity assessment under the MCA may be appropriate, then the question then arises as to what decision is being assessed. Under the MCA, the *decision* to be assessed is likely to be whether the person has capacity to decide on contact and residence with the individual subjecting them to undue influence, coercion, or abuse.

   An important consideration will be whether the person understands the fact that the other person is abusing or coercing them. If they cannot understand this, is this down to an 'impairment or disturbance in the functioning of the mind or brain' under section 2? If so, then the MCA may apply, rather than the inherent jurisdiction.

iii. In many situations there may be some sort of 'impairment or disturbance in the functioning of the mind or brain', *as well as* coercion or undue influence. In these situations, it may be difficult to ascertain whether the person's decision-making is compromised because of an impairment, or because of undue influence. In this case, it is appropriate to seek a decision from the Court of Protection for a final determination of mental capacity **(*Leicester City Council v MPZ* [2019] EWCOP 64).**

iv. If the person lacks capacity under the MCA then an order under the inherent jurisdiction is not appropriate. The MCA should instead be used, along with an application to the Court of Protection if necessary. **In these circumstances, given the restrictions practitioners will be seeking to impose on the individual who lacks capacity (stopping contact with another person) it is likely that a decision by the Court of Protection will be needed, especially where it goes against the wishes of the person who lacks capacity.**

b) Multi-agency working

Consider other informal and non-legal routes that might be beneficial in working with the person or family involved. Are there other agencies that could play a role in managing risk and safeguarding the person, such as colleagues in housing, the voluntary sector, healthcare (for example, GPs, mental health teams), or the police? Co-working between both statutory and non-statutory organisations is crucial to effective adult safeguarding. As such, it is important to develop supportive relationships with external agencies, and ensure there are clear joint policies in place to allow for effective collaboration and distribution of responsibilities (Norrie et al., 2018).

c) Advocacy:

Section 68 of the *Care Act 2014* requires an advocate to be appointed to represent and support anyone who is at the centre of a safeguarding enquiry if they experience substantial difficulty:

- understanding relevant information
- retaining that information
- using or weighing that information as part of the process of being involved
- communicating their views, wishes or feelings.

This is an important part of developing and supporting good working relationships between people with lived experience and professionals (Norrie et al., 2018; Lonby & Brandon, 2017).

d) Power of entry

Consider whether it is possible to access the property where the person being abused or coerced is living, and whether it is possible to speak with them alone. Being able to talk to the individual alone and in a confidential way is particularly important before using the inherent jurisdiction (Norrie et al., 2018).

In Wales, section 127 of the *Social Services and Wellbeing (Wales) Act 2014* allows a magistrate to authorise access to a property in order to speak with the individual alone. However, there is no power of entry to a person's property available to social care professionals under the *Care Act 2014*.

Practitioners may need to consider whether they require recourse to other powers of access. These may be through working with other agencies such as the police, fire, or ambulance service, or through an application to a magistrate, or working with an Approved Mental Health Professional (AMHP). If these powers are appropriate, practitioners may need to provide information on the use of such powers and explain the fact that refusal of access to individuals might result in police involvement to the families (Norrie et al., 2018). Further guidance on powers of entry is available at:
www.scie.org.uk/safeguarding/adults/practice/gaining-access

Other powers of entry:

i. ***Mental Health Act 1983***
Section 115 of the *MHA* allows an AMHP to enter any property where a 'mentally disordered' person is living at all reasonable times. Section 135 also allows a magistrate to issue a warrant for a constable to enter a property and remove a person to a place of safety, if it is suspected they have a 'mental disorder' and are being 'ill-treated, neglected or kept otherwise than under proper control', or are unable to care for themselves.

ii. ***Police and Criminal Evidence Act 1984***
Section 17(1)(e) gives police the power to enter any premises in order to 'save life or limb or preventing serious damage to property'. This power cannot be exercised on the basis of a general welfare concern **(*Syed v DPP* [2010] EWHC 81),** but does cover saving a person from seriously harming himself or herself, and/or seriously harming third parties **(*Baker v CPS* [2009] EWHC 299).**

iii. **Common Law**
The police have a power at common law (i.e. not defined in any statute) to enter any premises in order to prevent a breach of the peace.

e) Consider other alternative substantive powers

Are there any other powers available to the person at risk of harm that you could support them to obtain against the person abusing or coercing them?

Powers available to the person being abused:

i. **Non-molestation orders**
These are available under section 42 of the ***Family Law Act* 1996.** However, only the person being abused can apply for them. Further information on these orders is available at:
www.gov.uk/injunction-domestic-violence/eligibility-non-molestation

ii. **Protection from harassment injunction**
These are available under section 3A of the ***Protection from Harassment Act 1997*** in relation to anyone who pursues a course of conduct which amounts to harassment. However, usually only the person experiencing the harassment can apply for an injunction under this legislation. Further information on this is available at:
www.cps.gov.uk/legal-guidance/stalking-and-harassment

Powers available to the police or via the courts:

i. **Criminal offence**
If it is suspected that a criminal offence has, or will be committed, has this been reported to the police? Of particular use here may be the relatively new offence of controlling or coercive behaviour in an intimate or family relationship under section 76 of the Serious Crime Act 2015. Further information on this is available at:
www.cps.gov.uk/legal-guidance/controlling-or-coercive-behaviour-intimate-or-family-relationship

ii. **Domestic Violence Protection Notice/Order:**
These may be issued by the police and Magistrates' Court under sections 24 or 27 of the Crime and Security Act 2010, if someone has been arrested on suspicion of domestic violence but not charged. Further information on these is available here:
www.gov.uk/government/publications/domestic-violence-protection-orders

If all other alternatives have been considered and it is felt that it may be appropriate to apply for an order under the inherent jurisdiction, practitioners will need to think about the following, in conjunction with their legal teams:

- Are the orders sought both **necessary** and **proportionate**? This is particularly important where orders against the person being abused or coerced are being sought.
- Are there any **less restrictive alternatives** available? In particular, might the order be made against other individuals such as the perpetrator of the abuse or coercion?
- What is the purpose of the order? If it is to deprive someone of their liberty then, given that the person has mental capacity, it is unlikely to be considered proportionate.
- If seeking orders or injunctions against the person being abused or coerced, can it be evidenced that the requirements in ***Redcar & Cleveland Borough Council v PR* [2019] EWHC 2305** have been considered (section 4b)?
- What evidence is there to support an application under the inherent jurisdiction, and have practitioners accessed the support available to them within their department to discuss this option? For example, have they discussed this option at team meetings, or with supervisors? Are records of any meetings or notable events, assessments, or safeguarding enquiries full and complete? Practitioners may also find it helpful to develop a chronology of events leading up to the application.
- Has sufficient information about the use of the inherent jurisdiction been given to the individual and families involved? Families with lived experience often stress the importance of being given information about the legal context surrounding professional decision-making (Norrie et al., 2018). Although such information may not always be appropriate, professionals should assess whether such information would be beneficial depending on the circumstances.
- For the adults and their families at the centre of adult safeguarding, maintaining supportive and professional relationships with practitioners is an important feature of safeguarding practice (Anka et al., 2017). Given that the use of the jurisdiction may be perceived and experienced by adults as intrusive, practitioners may want to consider whether a plan of action can be devised to enable effective working with the individual in question (and their family where appropriate) during, and beyond, an application under the inherent jurisdiction.

7. What are the key practice and ethical challenges, and how might these be overcome?

This section looks at some of the practice and ethical challenges that may arise in a situation where an order may be sought under the inherent jurisdiction. Practitioners reading this alongside relevant professional ethical codes or codes of conduct may find it useful to bear these points in mind when working with safeguarding situations where the inherent jurisdiction may be used.

The use of the inherent jurisdiction may be perceived by the person being abused or coerced as an unwanted interference. For this reason, the order sought should be:

- **necessary**
- **proportionate**
- **the least restrictive of the person's rights and freedoms.**

This is in keeping with a rights-based and person-centred approach to practice in this area, as promoted by professional standards and ethics. The ***Social Work Code of Ethics*** and ***Royal College of Occupational Therapy Standards and Ethics,*** for example, require professionals to use authority in line with human rights principles. This is also relevant in seeking an order under the inherent jurisdiction - an order which is necessary and proportionate will better promote that person's human rights than one that is disproportionate.

It is also important to ensure the person's voice is heard and, where possible, the orders sought work towards the outcomes that they want from the safeguarding process. This is a consistent key message from individuals who have been at the centre of safeguarding (Wallcraft, 2012) and is a core feature of the strengths-based approach to adult social care. The social work code of ethics, for example, recognises identifying and developing a person's strengths as one of the core principles of ethical social work. Similarly, the Royal College of Occupational Therapy standards and ethics require person-centred practice and the involvement of the person as a partner. This means working closely with that individual to ensure they are supported to make their own decision wherever possible.

In terms of working with an adult who may be at the centre of an inherent jurisdiction application, this is reflected in the importance of first considering orders which are directed towards their abuser in order to try and facilitate their own decision-making. This is also an important part of Making Safeguarding Personal and, as such, it will be important for practitioners considering the use of the inherent jurisdiction to think about the ways they can continue to maintain a good relationship with the individual they are looking to support. The **Making Safeguarding Personal Toolkit** is a good source of information.

The inherent jurisdiction exists to protect the decision-making of those whose ability to make decisions is compromised by undue influence or coercion. It may be difficult to know when a person's decision-making is, in fact, overborne by coercion, abuse, or undue influence. As such, practitioners need to work closely with the individuals in question to identify this. This is also part of ethical social work practice; recognising all aspects of a person's life, which includes situating that person within their family, community, societal, and natural environments. As Lieven J points out in **The *Mayor and Burgesses of the London Borough of Croydon,*** 'it is important to be careful to distinguish between the entirely natural and common influence that one close family member will have over another, and undue influence or coercion' (para. 60). The Research in Practice resources on **coercive control, risks, rights, values, and ethics,** and **appreciative inquiry in safeguarding,** may be useful in this regard.

Orders under the inherent jurisdiction generally only work when individuals are amenable to those orders and are, practically speaking, able to put them into effect. As well as being necessary and proportionate, the injunction or orders sought must be realistic, serve a useful purpose, and must actually be able to be enforced by the parties. In the first instance, the aim of the orders sought should be 'facilitative'. That is, support the person being coerced by providing them with space to make their own decisions. Orders which are more facilitative may be easier to enforce and for individuals to comply with.

Case study

The following case study aims to aid practitioners implement the content covered in this practice guidance. It is an example of a case where an application under the inherent jurisdiction *might* be appropriate, alongside some of the other steps outlined above in section 6.

Greta lives with her nephew, John, in her two bedroomed bungalow. She has **hypertension, diabetes and early stage dementia** and depends on John for much of her care. John had a history of drug use, and his mum – Greta's sister – had died ten years ago. Greta has been known to the local adult safeguarding team for a number of years. There had been concerns that John had been **emotionally abusive** towards his aunt, including trying to force her to move into a care home and transfer ownership of the bungalow to him. The police had also been called on a number of occasions after Greta's neighbours heard John shouting and loud bangs in the property.

In addition to this, Greta's social worker had noticed that during the last few visits the property was in a **poor state of repair,** as well as noticing dirty sheets on Greta's bed, and that Greta looked like she was wearing dirty clothing. The social worker also noticed that Greta had a bad infection on her legs and suspected that her **diabetes was not being well managed.**

An adult safeguarding enquiry was commenced under section 42 of the Care Act 2014. As part of this enquiry there were concerns that Greta's dementia might impact her ability to make a decision about contact with her son, her care and support needs, and her residence. A **comprehensive mental capacity assessment under the MCA was undertaken** by Greta's social worker. During the capacity assessment Greta explained that she understood that John did not always take the best care of her and this could lead to the infections from her diabetes, but that she had promised her sister that she would look after John after she died.

She was **adamantly opposed to being moved into a care home,** saying that she would 'lose the will to live' if this happened. She also said that, although she sometimes wished John did not live with her, **she could not go back on the promise she had made to her sister.** She was also worried about the impact on John's drug use if he was forced to move out. She revealed **he had often threatened to take his own life if this happened.** As a result of this capacity assessment, the social worker felt Greta had a good level of understanding about her situation, and she therefore **did not lack capacity** to make decisions about contact with John, her care and support, or about her residence.

Key learning points

1. The inherent jurisdiction is a tool used by the High Court to protect individuals who have capacity but are considered 'vulnerable' because their decision-making is compromised by some sort of abuse, undue influence, or coercion.

2. The aim of the jurisdiction is ordinarily to ensure that the person being coerced or abused has the space to make their decisions more freely.

3. In light of the above, the orders sought should be necessary and proportionate, which will very often require them to be directed towards the individual doing the abusing, or coercing, rather than the person being abused or coerced.

4. Orders against a person who is being abused are sometimes available. Where this is sought, practitioners should be able to demonstrate, and show evidence, that they have considered whether the person is likely to understand the purpose of the injunction, whether the person will be told about the injunction and whether they can appreciate the effect of breaching that injunction.

5. Before an order under the inherent jurisdiction is sought, other less restrictive alternative measures should be considered with the person being abused or coerced.

Questions for reflection

1. How might you work with an individual who is being abused or coerced to facilitate a decision that is free from coercion or abuse?
2. What types of things should you consider *before* thinking about applying for an order under the inherent jurisdiction?
3. How confident do you feel in being able to identify the types of situations in which the inherent jurisdiction may be used?
4. How can you identify whether someone may be 'vulnerable' for the purposes of the inherent jurisdiction?
5. How might you identify the distinction between a restriction of liberty, and a deprivation of liberty? How might the Court respond to an order for each under the inherent jurisdiction?
6. How might you take a facilitative approach when working with a person experiencing abuse, neglect, undue influence, or coercion?
7. What practical skills might you need to ensure you are working effectively with adults who may be, or may have been, subjected to an order under the inherent jurisdiction?

References and additional resources

Further reading

The following resources include some important cases, as well as useful readings on the inherent jurisdiction itself and where it is situated more broadly within adult safeguarding powers - including the ***Care Act* 2014** and the ***Mental Capacity Act* 2005.**

1. 39 Essex Chambers (March 2020)
   Guidance Note: Using the Inherent Jurisdiction in Relation to Adults
2. 39 Essex Chambers (June 2020)
   Carrying Out and Recording Capacity Assessments
3. Brammer, A., & Pritchard-Jones, L. (2019). *Safeguarding Adults (Focus on Social Work Law)* (2nd ed.). Red Globe Press.
4. Pugh, A. (2019). Emergencies and Equivocality Under the Inherent Jurisdiction: *A Local Authority v BF* [2018] EWCA CIV 2962 and S*outhend-On-Sea Borough Council v Meyers* [2019] EWHC 399 (FAM). *Medical Law Review*, 27(4), 675-686.
5. Kong, C., & Ruck Keene, A. (2018). *Overcoming Challenges in the Mental Capacity Act 2005: Practical Guidance for Working with Complex Issues*. London: Jessica Kingsley Publishers.
6. ***DL v A Local Authority* [2012] EWCA Civ 253**
7. ***Re SA* [2005] EWHC 2942**
8. ***Redcar & Cleveland Borough Council v PR* [2019] EWHC 2305**

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