Vulnerable Adults and the Inherent Jurisdiction of the High Court

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Before the implementation of the MCA, the means for the High Court to intervene in the life of a mentally incapacitated adult was founded upon the Court's inherent jurisdiction. The inherent jurisdiction is a doctrine of the English common law that a superior court has the jurisdiction to hear any matter that comes before it, unless a statute or rule limits that authority or grants exclusive jurisdiction to some other court or tribunal.

The extension of the High Court's inherent jurisdiction to the medical treatment of mentally incapacitated adults took place in **Re F (Mental Patient: Sterilization) [1990] 2 AC 1.**

The regulations of the MCA have replaced the inherent jurisdiction of the High Court in the case of mentally incapacitated people. However, the High Court **has gradually extended** the use of the inherent jurisdiction to the group of **vulnerable adults** – adults who possess capacity but still require protection for certain reasons.

The three core judgments are **Re G** (An Adult) [2004] EWHC 2222 (Fam); **Re SA** (Vulnerable Adult with Capacity: Marriage) [2006] 1 FLR 867 and **Re SK** [2005] 2 FLR 230.

The aim of the High Court in these cases is (most often) pre-emptive intervention; to prevent the circumstances within which an adult might not be able to exercise a free choice at some point in the future.[1]

A typical example here is the case of G. Although G was judged to have capacity to decide about having contact with her father, prior experience demonstrated that the contact led to significant deterioration in G's mental state, including G's mental capacity. Thus, pre-emptive intervention was justified to maintain her mental state.

Re G (An Adult) (Mental Capacity: Court's Jurisdiction) [2004] EWHC 2222 (Fam) (Bennett J)

G had a history of mental illness, including visual and auditory hallucinations, which required anti-psychotic medication. During her childhood her father had been violent towards her and her mother. Since 1993 she had lived in a supported living project and a residential care home. She had contact with both her parents but contact with the father appeared to worsen G's condition, causing her to lose mental capacity. The experts were of the opinion that G's mental health and mental capacity is strongly influenced by the contact with her father. In para. 86, Bennett J states that 'If the restrictions were lifted, [...] G's mental health

[1] Michael C Dunn, Isabel CH Clare, Anthony J Holland, 'To empower or to protect? Constructing the vulnerable adult in English law and public policy', 28 Legal Studies 234 (2008)

would deteriorate to such an extent that she would again become incapacitated to take decisions about the matters referred to. Such a reversion would be disastrous for G.'

As for the law, Bennett J relies on a set of authoritative decisions (primarily: Re F [2000] EWCA Civ 192) to extend the jurisdiction of the Court by extending the scope of the 'resurrected' common law doctrine of necessity. As Butler-Sloss LJ, Thorpe LJ and Sedley LJ (quoting Lord Goff) write in Re F [2000] EWCA Civ 192, respectively:

The jurisdiction of the High Court to grant relief by way of declarations is not therefore […] excluded by the present statutory regime under the 1983 Act.

These citations persuade me that the common law doctrine is not necessarily excluded.

I do not accept [the] submission that necessity is limited to medical and similar emergencies. Lord Goff […]said: The concept of necessity has its role to play in all branches of our law of obligations – in contract [...] in tort [...] in restitution [...] and in our criminal law. It is therefore a concept of great importance.

Accordingly, Bennett J writes in paras. 105, 106 and 111 in the case of G (bold emphasis added):

105. In my judgment the court **does have jurisdiction** in this matter. […] But for the court's intervention and orders the strong likelihood is that that incapacity would have continued. What was instrumental in reversing that situation was and is the court's protective framework, in particular in relation to the father. If the protective framework goes the probability is that G's mental health will regress and she will again become incapacitated.

106. It is, in my judgment, pertinent to ask oneself what would have been the situation of G if she had been a child at all material times instead of an adult? […]

111. **Why then should G, now an adult, be worse off than she would have been had the matters arisen if she was a child?** Why should the court be powerless where there is, as in the instant case, a justiciable issue? I repeat the words of Lord Donaldson MR in *Re. F (Mental Patient: Sterilization)* [1990] 2 AC 1, at page 13:

> It is because the common law is the great safety net which lies behind all statute law, and is capable of filling gaps left by that law, if and insofar as those gaps have to be filled in the interests of society as a whole. This process of using the common law to fill the gaps is one of the most important duties of the judges.

Re SA (Vulnerable Adult with Capacity: Marriage) [2006] 1 FLR 867 (Munby J)

The category of 'vulnerable adult' was elaborated in more details in the case of SA by Munby J.

SA is a deaf and mute young woman who has just attained her majority. She also has significant visual loss in one eye and has the intellectual level of a 13 or 14-year-old child.[2] According to the expert assessment, she has an overall non-verbal IQ of 75. She comes from a Pakistani Muslim family and lives at home with her father, mother, one older and two younger brothers. The communication between SA and her parents is very limited since SA communicates by British Sign Language (which neither of her parents understands) and she

[2] Paras. 3-6.

cannot understand, lip read or sign in Punjabi or Urdu, the main languages spoken in the family.

Local authorities were worried that the family of SA planned to arrange, or possibly even force her into, a marriage in Pakistan.[3] As for SA's own wishes, she was happy to have an arranged marriage but asserted that she would want to approve the husband chosen by her parents. She also wanted her future husband to speak English and be prepared to come and live in the UK, for she did not want to live in Pakistan.

A set of protective measures had been implemented (e.g. being made a ward of court; tipstaff passport order, injunctions to prevent removal from the jurisdiction, etc.) before SA's 18th birthday under the High Court's (Fam. Division) wardship jurisdiction in order to protect her from being forced into a marriage. However, these measures had to be discontinued after SA's 18th birthday.

SA was assessed to have capacity to marry. Munby J invokes the inherent jurisdiction of the Court to provide protection for SA as a vulnerable adult.

Munby J gives a description of the 'vulnerable adult' in para. 82:

[i]n the context of the inherent jurisdiction I would treat as a vulnerable adult someone who, **whether or not mentally incapacitated, and whether or not suffering from any mental illness, or mental disorder, is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation, or who is deaf, blind, or dumb, or who is substantially handicapped by illness, injury or congenital deformity.** This, I emphasise, is not and is not intended to be a definition. It is descriptive, not definitive; indicative rather than prescriptive. (Emphasis added).

In para. 77 Munby J writes:

[…] the inherent jurisdiction can be exercised 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 (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.

He further refines the category in para. 78 and summarizes it in para. 79 in the following way:

[…] A vulnerable adult who does not suffer from any kind of mental incapacity may nonetheless be entitled to the protection of the inherent jurisdiction if he is, or is reasonably believed to be, incapacitated from making the relevant decision by reason of such things as constraint, coercion, undue influence or other vitiating factors.

[3] Mary Welstead, Vulnerable Adults: The Inherent Jurisdiction and the Right to Marry, 19 Denning Law Journal 259 (2007) at p. 259.

In the cases of SA and G, it is inherent (i.e. internal) and situational (i.e. external) elements together that cause the vulnerability of the adult.

a. Inherent elements: enduring psychotic illness (Re G); borderline intellectual disability, deafness and muteness (Re SA)
b. Situational elements: contact with father likely to cause deterioration of mental state (Re G); forced marriage, likely to be taken to Pakistan against her wishes (Re SA)

In **Re SK** inherent elements were not taken into consideration. Vulnerability is constituted by situational elements **only**. In **Re SK**, the Court considered the possibility that SK who had travelled to Bangladesh and not returned to England as expected, was being held against her will and forced into a marriage arranged by relatives. See Michael C Dunn, Isabel CH Clare, Anthony J Holland (2008)

Munby J emphasises the proper limits of the protective jurisdiction. He claims that 'it is elementary that the court exercises its powers by reference to the incompetent adult's best interests' (para. 96). However, this does not warrant unlimited intervention to the private life of individuals:

[i]t is no part of the court's function [...] to decide whether it is in a person's best interests to marry. But that does not [...] mean that the court [...] is debarred from considering whether it is their best interests to be exposed to an ineffective betrothal or marriage. Nor does it prevent the court concluding that such events would ***not*** be in their best interests and therefore should be prevented. (para. 100, bold emphases added)

In relation to the facts of the present case, Munby J makes the following observations:

120. In my judgment SA is plainly a vulnerable adult. [Due to her disabilities,] she may well be unable to take care of herself and protect herself against significant harm or exploitation if placed in unfamiliar surroundings [...]
121 [...] I am satisfied that, even though SA has now reached her majority, she needs some element of continuing protection by the court in relation to the particular matter of marriage.

He emphasises the autonomy-enhancing character of his intervention and **rejects any paternalistic implications**:

131 [...] In the final analysis, my concern must be to enable this vulnerable young woman to exercise her right to self determination, specifically her right to marry [...]

131 **By taking this course, far from depriving SA of her right to make decisions I am ensuring, as best I can, that she has the best possible chance of future happiness.** I am taking these steps to protect, support and enhance SA's capacity to control her own life and destiny in the way she would wish. (emphasis added)

Finally, Munby J orders in para. 136 that (inter alia) the parents of SA are prohibited (whether by themselves or by instructing or encouraging any other person) from (1) threatening, intimidating or harassing SA; (2) using violence on SA; or (3) preventing SA from communicating alone with her solicitor. They are also prohibited from (1) applying for any travel documents for SA; (2) removing or attempting to remove SA from the jurisdiction of

England and Wales; (3) from causing, making arrangements for, or permitting SA to be married without her express written consent.

These orders are not without any problems.[4] It is evident that SA will need the help of her parents in order to marry. However, the orders imposed on them may actually prevent them from arranging a marriage in Pakistan. The judgment can also be criticized for endorsing a status-specific (as opposed to a person specific) approach for assessing the capacity to marry (*cf*. the capacity to consent to sexual relations in D Borough Council v AB [2011] EWHC 101 – 'case of Alan').[5] Munby J was reluctant to extend the inherent jurisdiction further to encompass decision making with respect to whether a ***specific*** marriage was in a vulnerable person's best interests; he only deals with decision making capacity to marry in general terms.

A Local Authority v A [2010] EWHC 1549 (Fam) (COP) (Bodey J)

Most judgments invoking the inherent jurisdiction of the High Court in relation to vulnerable adults focus on issues relating to marriage, contact and residence.[6] The A Local Authority v A case was the first case invoking the inherent jurisdiction in relation to medical treatment (contraception).

'A' is a vulnerable 29 year old woman with severe learning difficulties and an assessed IQ of 53. She has already given birth to two children and both had been removed from her care after birth. She later met and married a man, also with learning difficulties. The local authorities were concerned that her husband was putting her under pressure to refuse contraception, and evidence was provided that 'A' had complained that her husband had hit her and that she did not wish to have a baby.

The judgment is the first detailed examination of the capacity to make contraceptive decisions. 'A' was found to lack capacity to make decisions in relation to contraception, not to a small extent due to her husband's negative influence on her decision-making capacity. As it is written in para. 51, in relation to one of the expert opinions:

Dr K states in his report that not only do Mrs A's cognitive limitations and social impairment interfere significantly with her capacity to decide whether to have contraception, but also [...] so do emotional factors. Thus her capacity to weigh information:

> 'is further impeded by her ambivalence (mixed feelings, 'confusion') about her husband and the pressure he seems to place on her to have a family. The latter [pressure] is contributed to (1) by Mrs A's personal characteristics, associated with both her learning disability and her personality, [...] and (2) by Mr A's personal characteristics, including a suspicious and hostile stance in relation to support services, leading to his giving Mrs A mixed messages about what is in her interests, thereby 'confusing her' more and therefore incapacitating her further.'

[4] Mary Welstead, Vulnerable Adults: The Inherent Jurisdiction and the Right to Marry, 19 Denning Law Journal 259 (2007) at pp. 268-69.
[5] Ibid. 269.
[6] For a collection of cases, see Kirsty Keywood: Safeguarding Reproductive Health? The Inherent Jurisdiction, Contraception and Mental Incapacity, 19 Medical Law Review 326 (2011) p. 326 and fn 5.

Thus, the influence of Mr A compromises the ability of Mrs A to use or weigh the necessary information. This factor could have eluded the examination of experts who focus mostly on cognitive capacities.

66 As to this, only the court has the full picture. Experts are neither able nor expected to form an overview. The question is whether the influence of Mr A over Mrs A has been so overpowering as to leave her unable to weigh up the information and take a decision of her free will.

73 In view of what I find to be the completely unequal dynamic in the relationship between Mr and Mrs A, I am satisfied that her decision not to continue taking contraception is not the product of her own free will. [...] For these reasons, I am in no doubt that **Mrs A presently lacks capacity to take a decision for herself about contraception.** (emphasis added)

The curiosity of the judgment is that it invokes the inherent protective jurisdiction even though it establishes the incapacity of the subject. This is probably due to the different (i.e. situational) source of incapacity which is handled in the framework of vulnerability (and not in the MCA):

79 It is established on the authorities that, notwithstanding the Mental Capacity Act 2005, the inherent jurisdiction is alive and well in circumstances where an individual, even if *not* incapacitated, is, per Munby J in In re SA (Vulnerable Adult with Capacity: Marriage) [2006] 1 FLR 867 , para 77: '**either under constraint, or subject to coercion or undue influence, or 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.'
Where such circumstances pertain, as I have held they do here (in fact, I have found Mrs A to be presently incapacitated as regards contraception) the court has a wide inherent jurisdiction to prevent conduct by the dominant party which coerces or unduly influences the vulnerable party from making free decisions. [...] **In respect of an incapacitated adult, I consider the same should apply, except that the aim of providing him or her with relief from the coercion is first to gain capacity and, if achieved, then to enable him or her to reach a free decision.** (emphasis added)

Accordingly, Bodey J makes the following judgment in relation to Mrs A in para. 80:

[...] Mr A expressed his willingness in the witness box to allow Mrs A to have free contact with those professionals who have the skills to advise her in an ability-appropriate way about contraceptive issues, [...]I do not therefore consider any injunction against Mr A is presently necessary to oblige him to permit Mrs A to attend meetings and so forth. [...] It seems to me better, in a spirit of co-operation in trying to enable Mrs A to gain contraception capacity, to rely on Mr A to honour his assurances given to the court. [...]

<u>Local Authority X v MM, KM [2007] EWHC 2003 (Fam) (Munby J)</u>

MM was a vulnerable adult who suffered from paranoid schizophrenia and had moderate learning disability with a full scale IQ of 56. MM's long-time partner was KM who had been diagnosed with psychopathic personality disorder and alcohol misuse. He was violent towards MM and is alleged to have used her benefit money to buy alcohol. He also encouraged MM to follow him to various addresses and to disengage from psychiatric services that resulted in the deterioration of MM's mental health. (paras. 2-4)

The local authority removed MM to a supported accommodation where she had only limited contact with KM. The local authority sought orders that MM lacked capacity to conduct litigation and to make decisions about her contact, residence, marriage and sexual relation. Munby J ruled that MM lacked capacity concerning litigation, residence and

contact but not concerning sexual relations. He also ruled that the stay of MM in a supported accommodation was in her best interests but only if the local authority granted adequate possibility for MM to contact (and to establish sexual relationship with) KM.

The role of the 'best interests' standard in relation to vulnerable adults becomes apparent in para. 99:

99. It is clear [...] that the court exercises in relation to vulnerable adults a welfare jurisdiction akin to that which it exercises in relation to wards of court and other children. MM's welfare is the paramount consideration. The focus must be on MM's best interests, and this involves a welfare appraisal in the widest sense [...] [T]he task of ascertaining where the individual's best interests truly lie will be assisted by preparation of a 'balance sheet' of the kind suggested by Thorpe LJ in Re A (Male Sterilisation) [2000] 1 FLR 549.

The inherent jurisdiction of the High Court, which carries the possibility of undue intervention in the private life of vulnerable adults, must be exercised in a manner which is compatible with the European Convention of Human Rights (para. 100). The interference with Art. 8 ECHR (right to private and family life) is particularly visible in this case. Munby J examines the relevant case law of the E.Crt.H.R. and comes to the conclusion that intervention based on the best interests standard is compatible with the ECHR:

107. Now in the case of a competent adult, the personal autonomy which is inherent in Article 8 means that it is for the individual to decide who is to be included in or excluded from the 'inner circle.' So if both X and Y are competent, it is for X to decide whether she wants a relationship with Y and for Y to decide whether he wants a relationship with X [...] But what if X lacks capacity? X may want to have a relationship with Y, and the wish may be mutual, but others concerned for X's welfare may take the view that it is X's best interests that she does not have a relationship with Y. [...]

108. In domestic law the governing consideration is the welfare of the child or vulnerable adult. **So it is under the Convention.** Strasbourg jurisprudence has long recognised [...] that the case may be one of **sufficiently pressing necessity** as to justify, in the interests of the child's welfare, the supercession and assumption by the State of parental rights and responsibilities. The answer can be no different where the child, although now an adult, remains unemancipated because mentally incapacitated. Parental rights and responsibilities, and the rights and responsibilities of partners or other carers, **have [...] to give way to the best interests of a vulnerable adult**. (emphasis added)

Despite the possibility of justified intervention, Munby J draws attention to the dangers of undue **paternalism** in relation to the inherent jurisdiction of the Court in paras. 116-120:

116 [...] We need to be careful not to embark upon **'social engineering'.** And we should not lightly interfere with family life. If the State [...] is to say that it is the more appropriate person to look after a mentally incapacitated adult than her own partner or family, it assumes, as it seems to me, the burden — not the legal burden but the practical and evidential burden — of establishing that this is indeed so.

117 [...] If the State is to justify removing children from their parents or vulnerable adults from their relatives, partners, friends or carers it can only be on the basis that the State is going to provide a *better* quality of care than that which they have hitherto been receiving.

118. The fact is that in this type of case the court is exercising an essentially *protective* jurisdiction. [...] The court must be careful to ensure that in rescuing a vulnerable adult from one type of **abuse it does not expose her to the risk of treatment at the hands of the state which, however well-intentioned, can itself end up being abusive** of her dignity, her happiness and indeed of her human rights. That said, the law must always be astute to protect the weak and helpless, not least in circumstances where, as often happens in such cases, the very people they need to be protected from are their own relatives, partners or friends […]

119. [...] The court, as I have said, is entitled to intervene to protect a vulnerable adult from the risk of future harm — the risk of future abuse or future exploitation — so long as there is a **real possibility** [...] of such harm.

120. A great judge once said, 'all life is an experiment,' adding that **'every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge'** (see **Holmes** J in Abrams v United States (1919) 250 US 616 at pages 624, 630). The fact is that all life involves risk [...] But just as wise parents resist the temptation to keep their children metaphorically wrapped up in cotton wool, **so too we must avoid the temptation always to put the physical health and safety of the elderly and the vulnerable before everything else.** [...] Physical health and safety can sometimes be bought at too high a price in happiness and emotional welfare. The emphasis must be on sensible risk appraisal, not striving to avoid all risk [...] but [...] being willing to tolerate **manageable or acceptable risks as the price [...] to be paid in order to** achieve some other good – in particular **to achieve the vital good of the elderly or vulnerable person's *happiness***. **What good is it making someone safer, if it merely makes them miserable?** (bold emphasis added)

Thus, Munby J ruled that placing MM in a supported accommodation was in her best interests and was reconcilable with Art. 8 ECHR insofar as there was adequate possibility for MM to contact (and to establish sexual relationship with) KM:

But if the local authority seeks to interfere in — indeed, control — her life by saying where she must live, by placing her on her own somewhere where KM is not even allowed to visit her [...] [then] if a breach of Article 8 is to be avoided, the local authority must take certain positive steps — specifically, steps to enable MM to continue, in an appropriate and dignified way, her sexual relationship with KM. (para. 162)

Adult Safeguarding - Policy Developments

The issue of protecting vulnerable adults had already appeared in the Law Commission's consultation documents in the 1990ies.

Consultation Paper No 119 (1991) examined the existing legal framework (which basically consisted of limited emergency powers mainly under the National Assistance Act 1948 and the Mental Health Act 1983, e.g. to forcibly remove certain people from abusive home settings).

Law Commission Report No 231 on Mental Incapacity (1995)

The legislative reforms proposed in Consultation Paper No. 130 had been further refined in the 1995 Report on Mental Incapacity. The Report's recommendations were incorporated in Part II of the draft Mental Incapacity Bill that conferred wide-ranging powers on local authorities 'for the protection of vulnerable persons against significant harm or serious exploitation' (para. 36.1 of Draft Bill).

The proposed definition of vulnerability included everyone over 16 (with or without mental capacity) who (1) 'is or may be in need of community care services by reason of mental or other disability, age or illness and who (2) is or may be unable to take care of himself or herself, or unable to protect himself or herself against significant harm or serious exploitation' (para. 36.2). The following major powers/duties would have benn conferred on local authorities:

- Duty to investigate (duty to make enquiries in order to decide whether someone is suffering or likely to suffer serious harm or exploitation) (para. 37.1)

- Power to enter premises and interview a person (when the authorised officer of the local authority has reasonable cause to believe that the vulnerable person is at risk of harm at the given premise)
- Entry warrants (the court may authorise a constable, accompanied by an authorised officer of the local authority, to enter specified premises)
- Assessment orders (the court may issue an order authorising the local authority to carry out an assessment of the client)
- Temporary protection orders (the court may authorise the removal of the vulnerable person to protective accommodation for a maximum of 8 days)

The 'No Secrets' guidance (2000)[7]

In 1999, the Labour Government indicated that it would not give effect to the Law Commission's proposals to establish a statutory framework for adult safeguarding.[8] Accordingly, the Mental Capacity Bill did not contain any provisions relating to the protection of vulnerable adults. Instead, the Department of Health published the 'No Secrets' guidance in 2000 which mandated the creation of local processes and protocols for adult safeguarding.[9]

The 'No Secrets' guidance (and its Welsh equivalent, entitled In Safe Hands) define a 'vulnerable adult' as a person aged 18 years or over and who is or may be in need of community care services by reason of mental or other disability, age or illness; and who is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation.

Law Commission Report No 326 on Adult Social Care (2011)

The Report is based on the findings of previous Law Commission documents reflecting the results of the consultation process related to adult social care.[10] The Law Commission on page 109 (Part 9 – Adult Protection) of the Report remarks:

The existing legal framework for adult protection is 'neither systematic nor coordinated, reflecting the sporadic development of safeguarding policy over the last 25 years'.[11] Unlike in Scotland, there is no single or

[7] No Secrets: Guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse (2000)

[8] Kirsty Keywood: Safeguarding Reproductive Health? The Inherent Jurisdiction, Contraception and Mental Incapacity, 19 Medical Law Review 326 (2011) at p. 326.

[9] Ibid. The 'No Secrets' document has no full statutory force but local authorities shall comply with its guidance when creating and implementing adult safeguarding policies. As section 1.5 of the document explains: 'Local authority social services departments should play a co-ordinating role in developing the local policies and procedures for the protection of vulnerable adults from abuse. Social services departments should note that this guidance is issued under Section 7 of the Local Authority Social Services Act 1970, which requires local authorities in their social services functions to act under the general guidance of the Secretary of State. As such, this document does not have the full force of statute, but should be complied with unless local circumstances indicate exceptional reasons which justify a variation.'

[10] Adult Social Care: Scoping Report (Law Commission, 2008); Law Commission Consultation Paper on Adult Social Care No 192 (2010); Adult Social Care: Consultation Analysis (Law Commission, 2011)

[11] Quoting Commission for Social Care Inspection, *Raising Voices: Views on Safeguarding Adults* (2008) para. 2.1.

coherent statutory framework for adult protection in England and Wales. Instead, it must be discerned through reference to a wide range of law including general community care legislation and guidance, the Mental Health Act 1983, the Mental Capacity Act 2005, the Safeguarding Vulnerable Groups Act 2006, **the inherent jurisdiction of the High Court**, and the civil and criminal justice systems. (emphasis added)

As for the inherent jurisdiction of the High Court, the Report says:

The High Court may offer protection to 'vulnerable adults' under its inherent jurisdiction, including in some cases adults with capacity. However, the inherent jurisdiction cannot be used to compel a capacitated but *vulnerable* person to do or not do something which they have, after due consideration, decided to do or not to do; the jurisdiction acts to 'facilitate the process of unencumbered decision making' by those who have capacity 'free of external pressure or physical restraint in making those decisions'. (para. 9.80)

Without examining the recommendations of Part 9 in details, the following elements deserve further attention:

1. Vulnerable adult vs. adult at risk

The Report proposes to replace the term 'vulnerable adult' with 'adult at risk' because '*vulnerable adult* appears to locate the cause of abuse with the victim, rather than placing responsibility with the actions or omissions of others'. [Terminology taken from Scottish legislation]

2. The notion of vulnerability

The Report proposes an extended notion of vulnerability compared to the category of 'vulnerable adult' of the 'No Secrets' document.

Adults at risk (i.e. vulnerable adults with the new terminology) are those, who (1) have health or social care needs, including carers (irrespective of whether or not those needs are being met by services); (2) are at risk of harm [...]; and (3) are unable to safeguard themselves as a result of their health or social care needs [...].[12]

The notion of harm shall include, for instance, (1) ill treatment (including sexual abuse, exploitation and forms of ill treatment which are not physical); (2) the impairment of health (physical or mental) or development (physical, intellectual, emotional, social or behavioural); (3) self-harm and neglect; or (4) unlawful conduct which adversely affects property, rights or interests (for example, financial abuse).[13]

[12] Law Commission Report No 326 on Adult Social Care (2011) p. 120.
[13] Ibid.