

Safeguards against Undue Influence and Conflicts of Interest



EssexAutonomyProject

EAP Three Jurisdictions Project

Briefing Document

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1. Introduction

This briefing document provides background materials for an Essex Autonomy Project Consultation Roundtable to be held at the Law Society of Scotland on 14 December, 2015. The purpose of the roundtable is to consider the phenomena of *undue influence* and *conflicts of interest* as regards mental capacity/adult incapacity legislation across the three jurisdictions of the UK. Its focus shall be the safeguarding responsibilities of states parties under Article 12(4) of the UN Convention on the Rights of Persons with Disabilities (CRPD).

CRPD Article 12(4) states the following:

States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests. (emphasis added)

To date, the attention of both the UN CRPD Committee and the academic literature on Art 12(4) has focused almost exclusively on its reference to "the rights, will and preferences of the person." Considerably less attention has been paid to the requirements of Art 12(4) for the provision of safeguards pertaining to conflicts of interest and undue influence. The aim of this briefing note is to consider what is meant by undue influence and conflict of interests, how the CRPD requirements regarding safeguards might be satisfied, and whether the current safeguards in the UK comply with this provision of the CRPD.

It is important in this context to be clear that *undue influence* and *conflict of interests* are discrete concepts. They are mentioned in the same clause of Art. 12(4), and they may often coincide in reality. But they are nonetheless conceptually discrete. To see the difference, consider the following perfectly mundane example:

A judge is assigned to adjudicate a financial dispute. Reviewing the preliminary court papers, she realises that one of the parties to the dispute is her own relative, and indeed that she herself is a likely beneficiary of the relative's will. The judge has a clear financial stake in the legal proceedings: the outcome could either benefit or harm her own personal financial situation. The judge follows court guidelines and immediately recuses herself from the proceedings, passing the case back to be reassigned to another judge.

It should be clear that the foregoing example presents us with a case of conflict of interest without undue influence. It is because of her conflict of interest in the case that the judge recuses herself. But precisely because of her recusal she exercises no influence (due or undue) on the parties at all. Perhaps she has no contact with them at all.

Conflict of interest without undue influence is common. The opposite situation (undue influence without conflict of interest) is perhaps less common, but it certainly

occurs. A particular individual P might unduly pressure another person, Q to perform some action (perhaps P intimidates Q with the result that Q engages in a risky behaviour that he would not otherwise have considered, or to do something that P perceives to be in Q's best interests but that Q does not want to do). If Q does not stand to benefit from P's action, then there would not seem to be a case of conflict of interest.

It follows that conflict of interest and undue influence are distinct phenomena. A full interpretation of Art 12(4) requires that we address them separately, while also being alive to the ways in which they may interact. The main body of this document is accordingly divided into two main sections, focusing in turn on undue influence and conflict of interests.

Of course Art 12(4) does not exist in isolation, and must be interpreted in light of the broader aims and purposes of Article 12 and of the Convention as a whole. This in itself presents a distinctive challenge, given that opinion is divided as to proper interpretation of the Convention, and of Art 12 in particular. A number of prominent academic commentators as well as the UN Committee on the Rights of Persons with Disabilities have argued that compliance with Article 12 requires states parties to abolish substitute decision-making and abandon the so-called "best interests paradigm."¹ Others, including the Essex Autonomy Project and members of the UK judiciary, have disputed this claim.² It is not the purpose of this Briefing Document to revisit this dispute. But we must nonetheless recognise that safeguards against undue influence and conflicts of interests may take rather different forms, depending on whether they are embedded in system which rely on substitute decision-making, or are embedded rather in a system which eschews substitute decision-making altogether.

¹ UN Committee on the Rights of Persons with Disabilities, 2014: *General Comment No 1, Article 12: Equal Recognition before the Law*, CRPD/C/GC/1. Hereafter: GC1

² W Martin, S Michalowski, M Burch and T Jütten, *Achieving CRPD Compliance: Is the Mental Capacity Act Compliant with the CRPD (and if not, what next?)*; a report submitted by the Essex Autonomy Project to the UK Ministry of Justice, 22 Sept, 2014. <http://autonomy.essex.ac.uk/uncrpd-report>; D. Lush, "The Academy of European Law's Conference on the Rights of Persons with Disabilities," *Elder Law Journal* 5:1 (2015), 38-44; see p. 42. ^[L]_[SEP]

2. Undue influence

The influence of one party upon another is a ubiquitous feature of human affairs. Unfortunately, no clear legal guidance exists to assist with answering a question of particular importance when designing and assessing safeguards in this domain: *what makes influence undue?* The legal relevance of the concept of undue influence, and accordingly approaches to its definition and appropriate safeguards to protect against it, have developed in a context-specific way, which further complicates the analysis. In what follows, a brief overview of the concept in the CRPD and selective areas of English and Welsh law will be provided to identify points for discussion of how CRPD compliant safeguards could be construed.

2.1 Undue influence under the UN CRPD

Art.12(4) CRPD requires that states have safeguards in place to ‘prevent abuse in accordance with international human rights law ... [and] ensure that measures relating to the exercise of legal capacity ... are free of conflict of interest and undue influence,’ without defining what these measures should consist of. In its General Comment of Article 12, the UN Committee on the Rights of Persons with Disabilities addressed this question as follows:

All people risk being subject to “undue influence”, yet this may be exacerbated for those who rely on the support of others to make decisions. Undue influence is characterized as occurring, where the quality of the interaction between the support person and the person being supported includes signs of fear, aggression, threat, deception or manipulation.³

Unfortunately, the Committee did not elaborate on what such safeguards could and need to look like, and how to strike the right balance between detecting and protecting from abuse, on the one hand, and non-interference in the support relationship, on the other. What ‘signs of fear, aggression, threat, deception or manipulation,’ and what degree of manipulation would justify intervention? Suppose, for example, that Q has invited P to visit for the Christmas holidays. P accepts the invitation, but later adds that she will only go through with the visit if Q cleans up the room where P will be staying. There is in this case a degree of manipulation of Q by P; indeed there is in

³ GC 1, Para.22. This passage in the General Comment did not appear in the original draft text, but was added following the comment period. The form of words used in the added passage closely echoes the language used by Lucy Series, in her comments on the Committee’s original draft. In particular, the list of features (fear, aggression, threat, deception, manipulation) is taken directly from Series’ submission. Notably, however Series did not herself did not propose this list in the context of a *definition* of “undue influence.” Series wrote: “It would be useful to have guidance on how to tell apart situations of undue influence and situations where a supporter merely has a very influential role in helping a person to make decisions, or interpreting or communicating them. Guidance on this issue might, for example, consider the quality of the interaction between the support person and the person being supported and look for signs of fear, aggression, threat, deception or manipulation.” Lucy Series, ‘Comments on Draft General Comment on Article 12 - the right to equal recognition before the law’ 21 February 2015.

the exchange an implicit threat: the visit will be cancelled unless a certain action is performed. If in fact Q would not have tidied the room without P's manipulation and threat, then we would seem to have a circumstance which meets the conditions set out in the first definition. But one might well think it an exaggeration to say that P's influence upon Q was undue. She set out the terms under which she was willing to go through with the visit, and Q made his decision in light of that information, but still had and exercised a choice in the matter.

In light of these uncertainties, a particular challenge, and point for discussion at the roundtable, might be that of how to formulate safeguards in a non-discriminatory way while acknowledging the risk of heightened vulnerability of those who are in need of specific support to exercise their legal capacity.

International human rights law outside of the CRPD provides very limited help with how to define and safeguard against undue influence. The only relevant reference to the undue influence appears in GC12 of the UN Committee on the Rights of the Child on the meaning of Article 12, the relevant part of which states that 'States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely':

"Freely" means that the child can express her or his views without pressure and can choose whether or not she or he wants to exercise her or his right to be heard. "Freely" also means that the child must not be manipulated or subjected to undue influence or pressure. "Freely" is further intrinsically related to the child's "own" perspective: the child has the right to express her or his own views and not the views of others.⁴

Here, the focus seems to be on measures that protect the free expression of the will of the child.

2.2 Undue influence under the law of England and Wales

In England and Wales, the question of undue influence in the context of personal welfare decisions has primarily arisen either in the context of the MCA or under the courts' inherent jurisdiction over vulnerable adults, and in the context of financial transactions and wills.

In the context of personal welfare decisions, undue influence has been discussed only in very exceptional circumstances. Here the leading concept has been "overbearing of the will."⁵ A landmark application of this UK approach can be found in *re T (Adult Refusal of Treatment) 1993*, where Lord Donaldson wrote:

⁴ GENERAL COMMENT No. 12 (2009) The right of the child to be heard CRC/C/GC/12 1 July 2009, para 22.

⁵ See for example *Hirani and Hirani* [1982] 4 FLR 232, [1982] EWCA Civ 1: "The crucial question in these cases, particularly where a marriage is involved, is whether the threats, pressure, or whatever it is, is such as to destroy the reality of consent and overbears the will of the individual."

A special problem may arise if at the time the decision is made the patient has been subjected to the influence of some third party. This is by no means to say that the patient is not entitled to receive and indeed invite advice and assistance from others in reaching a decision, particularly from members of the family. But the doctors have to consider whether the decision is really that of the patient. It is wholly acceptable that the patient should have been persuaded by others of the merits of such a decision and have decided accordingly. It matters not how strong the persuasion was, so long as it did not *overbear the independence of the patient's decision*. The real question in each such case is "Does the patient really mean what he says or is he merely saying it for a quiet life, to satisfy someone else or because the advice and persuasion to which he has been subjected is such that he can no longer think and decide for himself?" In other words "Is it a decision expressed in form only, not in reality?"⁶

In his judgement, Donaldson echoed Staughton LJ:

every decision is made as a result of some influence: a patient's decision to consent to an operation will normally be influenced by the surgeon's advice as to what will happen if the operation does not take place. In order for an apparent consent or refusal of consent to be less than a true consent or refusal, there must be such a degree of external influence as to persuade the patient to depart from her own wishes, to an extent that the law regards it as undue. I can suggest no more precise test than that.⁷

On this approach, P's influence on Q is undue only if P overbears the independence of Q's will in reaching a decision. This is not the case if, despite being under severe pressure, the individual still retains a choice in the matter, even though the individual might dislike having to make such a choice.⁸

The problem, as the dictum from Staughton indicates, is that the core phenomenon of "overbearing the will" proves to be elusive and difficult to define precisely. Donaldson's ruling makes clear that the test for undue influence itself comes to turn on a question about the *authenticity* of the person's decision. *Is the decision really that of the patient?* Other judges frame the test so that question becomes one of whether the decision *reflects the person's free will*.⁹ Assessing for authenticity and genuine free will present notoriously difficult theoretical and practical problems and pose real difficulties for drawing with any precision the line between autonomy-enhancing and autonomy-overriding influence. The court nevertheless identified two factors as particularly relevant to the question of undue influence: the strength of will

⁶ *Re T (Adult: Refusal of Treatment)* [1993] Fam 95(CA), at 113 per Lord Donaldson, MR; emphasis added.

⁷ *Re T (Adult: Refusal of Treatment)* [1992] EWCA Civ 18, par 57.

⁸ *U v Centre of Reproductive Medicine* [2002] EWCA Civ. 565; *Hopkins v Hopkins* [2015] EWHC 812 (Fam), at 5.

⁹ See, for example, *Royal Bank of Scotland plc v. Etridge (No 2)* [2002] 2 AC 773 (HL).

of the person and the relationship between the decision-maker and the person exercising the influence.¹⁰

In the context of the law on wills and other financially relevant transactions, the courts also focused on the free will of the individual and held that:

The means used [to persuade the individual to enter into the transaction] is regarded as an exercise of improper or "undue" influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will.¹¹

This is the case where there are 'overt acts of improper pressure or coercion such as unlawful threats,'¹² or where someone takes unfair advantage of a measure of influence, or ascendancy arising out of a relationship of trust¹³ which induces a person to go along with the decisions of another in whom he 'places trust ... to look after his affairs and interests, and the latter betrays this trust by preferring his own interests. He abuses the influence he has acquired.'¹⁴ However, the court emphasised that the relationships in which this issue can arise are too varied to allow for drawing a definitive list.¹⁵ The Court moreover stressed that

[t]he principle is not confined to cases of abuse of trust and confidence. It also includes, for instance, cases where a vulnerable person has been exploited. Indeed, there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other.¹⁶

The concept of undue influence employed in the context of financial transactions might be of some use for determining the meaning of undue influence for CRPD compliance purposes, as we are here dealing, at least in part, with the law's attempt to protect vulnerable individual's from abuse of trust which might come close to the supported decision-making context.

2.3 Safeguarding Against Undue Influence

The challenges associated with undue influence are not simply definitional. The more concrete problem concerns the challenge of devising appropriate safeguards to cope

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¹¹ Ibid., at 7.

¹² Ibid., at 8.

¹³ Ibid., at 8.

¹⁴ Ibid., at 9.

¹⁵ Ibid., at 10.

¹⁶ Ibid., at 11.

with the problem. In surveying existing law and practice, four safeguarding mechanisms predominate:

The first, and most traditional safeguarding instrument with respect to undue influence is the potential for judicial invalidation of a contract or decisions such as the refusal of consent to medical treatment.

While any such invalidation can by definition take place only retrospectively, it nevertheless functions as a safeguard, as it protects the individual from having to assume the consequences of transactions that they did not enter into as an expression of their free will. Furthermore, invalidation has the potential of serving as a preventative measure, as it might deter the exercise of undue influence in the future.

In the context of capacity/adult incapacity legislation, a second safeguard might be considered substitute decision-making itself. In particular, where a person lacks capacity to make a particular decision at the material time, and is subject to undue influence, a remedy in existing law is to take the decision out of the hands of the person in question,¹⁷ instructing another person either to make a best interests decision (England and Wales, Northern Ireland) or to construct a decision on the individual's behalf (Scotland).

A third safeguard against undue influence is the so-called *Inherent Jurisdiction*. Historically, this is a tool that has been used to safeguard against undue influence where the individual in question is not lacking in decision-making capacity. Under the inherent jurisdiction, most courts see their role as adopting measures that remove the undue influence and reinstate the individual's capacity.¹⁸

The fourth safeguarding mechanism in current practice finds its centre of gravity in public officials such as Public Guardians. Public Guardians and their designees have a (limited) ability to investigate cases of suspected undue influence. Independent Mental Capacity Advocates (IMCAs) may also play a role in bringing instances of suspected undue influence to light. The simple fact of their presence in a decision-situation may itself play a role in disrupting undue influence by introducing a new dynamic in an asymmetrical relationship.

In the context of the Edinburgh Roundtable it would be useful to consider what further safeguards against undue influence may currently exist, and whether the safeguards enumerated above are sufficient for compliance with CRPD Art 12(4).

2.4 Some reflections on CRPD compliance and further research

The general principles underlying undue influence cases both under the MCA and the inherent jurisdiction, i.e., that individuals who are under another person's undue influence need protection, seem to be shared with the CRPD and GC1. In particular, the judicial statements in the context of the exercise of the inherent jurisdiction, that

¹⁷ *London Borough of Redbridge v G & Others (No 2)* [2014] EWHC 959 (COP); *NCC v PB and TB* [2014] EWCOP 14.

¹⁸ *LBL v RYJ* [2011] 1 FLR 1279, at.62; *In re L (Vulnerable Adults with Capacity: Court's Jurisdiction) (No 2)* [2012] EWCA Civ 253, at 66; *In re A (Capacity: Refusal of Contraception)* [2010] EWHC 1549 (Fam), at 79.

the main aim of legal protection in the context of undue influence should be to provide protection with the aim of reinstating the individual's ability to make his/her own decision, is presumably in line with the spirit of the CRPD, though potentially not with that of GC1, given that the approach under the law in England and Wales clearly relies on capacity and the restoration of capacity as the main guiding principles.

To date, there is very little academic discussion of what form the protection of the individual from undue influence can and should take in order to be CRPD and GC1 compliant. The most helpful analysis seems to be that of Lucy Series¹⁹ who recognises the problems with supported decision-making in the absence of procedures for 'monitoring the conduct of supporters and holding them accountable,' a problem which to some extent could be mitigated through the introduction of a formalised support framework. Nevertheless, she rightly points out that 'there will be "troubling" situations where a person's acts or choices place them at serious risk, risks that they do not understand,' and the acceptance of which might not be based on the individual's freely formed and/or expressed will and preferences.

Does the state's obligation to provide safeguards end with ensuring that the individual has the necessary support to understand the options open to him/her, but where the individual nevertheless chooses, freely or not, to stay in the situation that exposes him/her to the undue influence and ensuing risks, that decision must be respected?²⁰ Or do 'exceptional cases [require] stronger legal tools for intervention', such as the exercise of the courts' inherent jurisdiction 'to restrain the actions of others who might impede a person's autonomous choices'?²¹

It is perhaps surprising that the ill-defined inherent jurisdiction invoked by English courts over potentially competent adults is regarded by Series as a potential way forward to resolve the problem in a CRPD and GC1 compliant way. However, this might be the case because the inherent jurisdiction focuses on autonomy-enhancing measures. By applying to individuals whose vulnerability or inability to make a decision is not based on an impairment of or a disturbance in the functioning of the mind or brain (s.2(1) MCA), its exercise is, at least on the face of it, more clearly delinked from disability than the MCA. More research might be needed to analyse how to make such an approach both ECHR and CRPD compliant.

It can be seen that many questions regarding an approach to safeguards that protect the individual from undue influence, as required by the CRPD and GC1, are still unanswered and require further research, including the distinctive challenge of safeguarding against undue influence in the provision of support for the exercise of legal capacity, as required under CRPD Art 12(3).

¹⁹ Lucy Series, 'Relationships, autonomy and legal capacity: Mental capacity and support paradigms', (2015) *International Journal of Law and Psychiatry*.

²⁰ Anna Arstein-Kerslake, 'An empowering dependency: Exploring support for the exercise of legal capacity', *Scandinavian Journal of Disability Research*, p.11. <http://dx.doi.org/10.1080/15017419.2014.941926> (published online on 6 August 2014).

²¹ Lucy Series, 'Relationships, autonomy and legal capacity: Mental capacity and support paradigms', (2015) *International Journal of Law and Psychiatry*.

3. Conflicts of Interests

3.1 Conflicts of Interest in the Committee's General Comment on Art 12.

As we have seen, GC1 says relatively little about undue influence and the safeguards that are necessary in that respect. Conflicts of interest and how to deal with them receive even less attention. Indeed, the General Comment says *exactly nothing* about conflict of interests. The focus of our discussion will therefore be on how the law in the UK is dealing with this question, followed by some considerations on its compliance with the CRPD.

3.2 Definitions of conflicts of interests in selected UK laws and regulations

As we will see in further detail below, the relevant safeguarding measures regarding conflict on interest in the UK are diverse and disperse. But it will be useful to begin by considering a concrete example. For this purpose, we can turn to a Welsh statutory instrument regarding conflicts of interest in the context of mental health assessments under the Mental Health Act 1983.²² The explanatory note to the Welsh regulation describe their function as follows:

These Regulations set out the circumstances in which there is a potential conflict of interest such that an approved mental health professional cannot make an application mentioned in section 11(1) of the Mental Health Act 1983 (c.20), as amended by the Mental Health Act 2007 (c.12), or a registered medical practitioner cannot make a medical recommendation for the purposes of an application mentioned in section 12(1) for a person to be admitted under the Act.

There are a number of features of this description that merit comment. Notice first that the intention of the regulation is to define a *potential* conflict of interest, rather than a conflict of interest *simpliciter*. Note second that the regulatory definition is doubly specific: it specifies a particular group of medical professionals to whom it applies, and its definition pertains to a specific activity of those persons, when acting in their professional capacity. Finally, notice that the definition triggers a specific pragmatic effect: *recusal*. A person who meets the regulatory criteria is not authorised to carry out a function that they would otherwise have been eligible to perform – in this case: applying for a patient to be admitted or treated (or for a guardian to be appointed) under the Mental Health Act.²³ Taken together, these three

²² The Mental Health (Conflict of Interests) (Wales) Regulations 2008; Statutory Welsh Instruments 2008 No. 2440 (W.213). <http://www.legislation.gov.uk/wsi/2008/2440> .

²³ The requirement for recusal is not absolute. The particular regulations here allow for an “emergency provision” under which a mental health professional with a potential conflict of interest can nonetheless make the relevant application for admission or treatment. In a very different context, *The Executors Practitioners (Scotland) Regulations 1997* distinguish between actual and potential conflicts of interest. Where an executor discovers an actual or potential conflict of interest he can

features articulate a form or ‘grammar’ of definitions of conflict of interest that recurs in many different regulatory contexts.

Having noted the form of the definition, we can now consider its content. The basic structure of the definition is enumerative. That is, it enumerates a range of particular relationships that create a potential conflict of interest, and hence a presumptive case for recusal. The broad categories on the list are: professional, financial, business and personal. In each category there are specified forms of relationship either between the mental health professional and the patient, or between the mental health professional and others involved in making the application, that suffice to generate a presumptive case for recusal. The list is not worth reproducing in full here; some indicative examples can suffice. So, for example, a potential conflict of interest is deemed to obtain if the patient is employed by the mental health practitioner (or vice versa); if the two are members of the same clinical team; if the mental health practitioner stands to make financial gain depending on whether he or she decides to make an application; if the two are involved in the same business venture; if the two are related to one another either in the first or second degree, as half-siblings, as spouse, ex-spouse, civil partner or ex-civil partner, or as cohabitants.

It is worth reflecting on two discrete problems that arise out of the approach taken in the Welsh regulations (and other similar regulations). The first problem pertains to the identification/definition of conflict of interests. The second concerns the available responses to such conflicts. I take the two problems in turn.

A first problem with the Welsh approach is intrinsic to its enumerative form. It should be clear that neither the Welsh list, nor any list like it, could exhaust all possible relationships that could give rise to potential conflicts of interest. Human relationships are infinitely diverse, and the potential for conflict is in-denumerable. In effect, the list that is generated in the regulation picks out a canonical set of relationships that are *deemed* to be disqualifying for the particular purpose in question. But it will inevitably fail to identify some actual conflicts.

A second problem pertains to the presumptive response to a perceived conflict of interest under the Welsh regulations: recusal. In the particular context with which these particular Welsh regulations are concerned (applications for detention or treatment under the Mental Health Act), recusal may indeed be an appropriate response. But we also have to recognise that recusal is a pretty blunt instrument for dealing with potential conflicts of interest. The safeguards required under Art.12(4) CRPD pertain to any measures relating to the exercise of legal capacity. Applications under the Mental Health Act are certainly one such measure. But the class of measures that are relevant is very broad indeed. It would include, inter alia, the appointment of a guardian or deputy or the undertaking of a Lasting Power of Attorney, etc. It would also include measures introduced in order to support a person’s exercise of decision-making capacity, in keeping with the provisions of s.1(3) of the MCA or s.5 of the Northern Ireland Mental Capacity Bill. Suppose we were to generalise the approach of the Welsh regulation and presume that anyone from a similar list should be recused from any involvement in such measures. The

either (a) not act or cease to act on behalf of the client, or (b) notify the client in writing of the actual or potential conflict and continue to act as executor, if he considers it would be in the best interests of the client to do so. We return to this important detail below.

result could be catastrophic. A policy designed to safeguard against conflicts of interest could have the effect of excluding precisely those individuals who are best placed to support the disabled person in the exercise of legal capacity.

One solution to the first of these two problems can be found in non-enumerative definitions of “conflict of interest.” Consider a few examples. Section 7 of *The Public Services Pension Act* defines conflict of interest for the purposes of restricting membership on certain statutory bodies. Section 7(5) reads as follows:

In subsection (4) (a) “conflict of interest”, in relation to a person, means a financial or other interest which is likely to prejudice the person's exercise of functions as a member of the board (but does not include a financial or other interest arising merely by virtue of membership of the scheme or any connected scheme).

The *SRA Handbook*²⁴ defines conflicts of interest with regard to circumstances where a solicitor should consider recusal:

Conflicts of interests means any situation where [either]: [a] you owe separate duties to act in the best interests of two or more clients in relation to the same or related matters, and those duties conflict, or there is a significant risk that those duties may conflict (a 'client conflict'); or [b] your duty to act in the best interests of any client in relation to a matter conflicts, or there is a significant risk that it may conflict, with your own interests in relation to that or a related matter (an 'own interest conflict')

NHS Guidelines regarding conflict of interest in Clinical Commissioning Groups (CCGs) provide the following definition:

A conflict of interest occurs where an individual's ability to exercise judgement, or act in a role, is or could be impaired or otherwise influenced by his or her involvement in another role or relationship. The individual does not need to exploit his or her position or obtain an actual benefit, financial or otherwise, for a conflict of interest to occur.²⁵

There are two features common to these definitional approaches that are worth noting. Notice first that both avoid the enumerative approach that we encountered in the Welsh regulations. On these non-enumerative approaches to the specification of conflict of interest, the conflict is not confined to any specific form of relationship between two persons, nor does the existence of such a relation per se suffice to establish such a conflict. On the contrary, these definitions recognise (rightly, in our view) that conflicts of interest can be found anywhere in human affairs.

The second feature to note is that these non-denumerative definitions of conflicts of interest in each case appeal to something more than the simple fact of divergent interests. The PSP Act finds a conflict of interest where a board member's interests

²⁴ *The Solicitors Regulation Authority Handbook*. Version 14 (2015). <http://www.sra.org.uk/solicitors/handbook/welcome.page>

²⁵ *Managing Conflicts of Interest: Statutory Guidance For CCGs* (NHS England: 2014); para. 13.

are “likely to prejudice the person's exercise of functions as a member of the board.” The SRA Handbook finds an “own interests conflict” where the solicitor’s duty to act in the best interests of a client conflicts with his own self-interest. And in the NHS guidelines, the essential criterion is found where the ability to exercise judgement is impaired by other relationships.

One lesson to draw here is that the term, “conflict of interests” is potentially misleading. What we should be concerned with, under these definitions, is not a conflict between divergent interests, but a conflict (broadly speaking) between an interest and a duty. On this approach, the canonical form of a conflict of interest is to be found where a person’s interest interferes with (or has the potential to interfere with) the exercise of his/her duties and role obligations.²⁶

These non-enumerative definitions of “conflict of interest” help us with the first of the two problems identified above. But they still leave us to struggle with the “blunt instrument” problem. Indeed, if anything, they make the blunt instrument problem worse. For under these non-denumerative definitions of “conflict of interest,” such conflicts can crop up anywhere. If recusal is our one recourse, then our safeguards will be very clumsy instruments indeed.

3.3 Constructing CRPD Article 12(4)

On a superficial reading, it might be tempting to suppose that Art 12(4) CRPD is intended to eliminate conflicts of interest in matters pertaining to the exercise of legal capacity. After all, the language of the article speaks specifically of being “free of conflicts of interest.” If this were indeed the meaning of the provision, then its enforcement could indeed be catastrophic, for the reasons specified above. But a closer reading steers us away from this interpretation. Art 12(4) does not require the elimination of conflicts of interests (whatever that would mean); what it requires is provision of safeguards that will prevent abuse arising from conflicts of interest.

This understanding of the force of this subsection puts the whole matter in quite a different light. Although professionals in various quarters may sometimes talk about the avoidance of conflicts of interest (or even more strongly: the avoidance of even the appearance of conflict of interest), that is not the standard that is being proposed here. In effect the CRPD is recognising that there will be conflicts of interests; what it requires is that states parties recognise such conflicts and institute safeguards for coping with them.

To sum up this line of interpretation: we should not be looking to eliminate conflicts of interest; we should be looking for safeguards to manage conflicts of interest – and to design safeguards so as to prevent abuse arising therefrom.

Nevertheless, residual difficulties remain. In particular, note that Art 12(4) requires the adoption of *effective* safeguards to prevent abuse. The question naturally arises: exactly how effective do such safeguards need to be? Should the aim be to eliminate all abuse arising from conflicts of interest? If not, how much abuse should state parties tolerate before concluding that further safeguards are required?

²⁶ This observation about the definitional matter is made forcefully in Thomas Carson, “Conflicts of Interest,” *Journal of Business Ethics* 13:5 (1994), 387-404.

It is safe to say that the text of the CRPD does not give a definite answer to this question, which is one that might well be answered differently in different cultural and legal circumstances. But the CRPD does provide a framework for addressing the question in particular situations. Much of that framework is in fact provided within Art 12(4) itself. Here we need attend in particular to two features of the subsection:

Notice first that the safeguards relating to conflict of interest and undue influence are not the only safeguards required by Art 12(4). The same subsection (indeed, the very same sentence!) also requires safeguards to ensure respect for the “rights, will and preferences” of disabled persons. It should be clear that circumstances often arise where these two objectives conflict. A disabled person may, for example, have a strong preference for a particular individual to serve as his deputy, despite the fact that that individual has a conflict of interests that could potentially interfere with the exercise of the associated duties. So in assessing the adequacy of a particular set of safeguards, one step must be to seek a reasonable balance between these potentially divergent considerations.

The second relevant detail of the language comes in the final sentence of the subsection, which requires that the safeguards be “proportional to the degree to which such measures affect the person’s rights and interests.” The requirement of proportionality is familiar in the adjudication of human rights claims.²⁷ In the present context, the proportionality requirement at the end of Art 12(4) in effect serves as a counterweight to the requirement of effectiveness at the beginning of Art 12(4). In sum, the requisite safeguarding provisions must be effective without being disproportionate. Or more fully: they must be effective in preventing abuse without being disproportionate in their impact on the rights and interests of the individuals involved, which would particularly be the case where abuse could be prevented through less intrusive means. This of itself does not tell us exactly *how* effective a set of safeguards needs to be, but it does establish the boundary conditions within that question must be addressed.

3.4 Are Existing Conflict of Interests Safeguards CRPD-Compliant?

With this interpretation of Art 12(4) CRPD in hand, we can now turn to consider existing safeguarding provisions in the UK to prevent abuse due to conflict of interest. There is not one unified set of such safeguards; there are many, and they are spread across a very large terrain of law and administrative practice. Consider a few examples:

S.59(4)(c) Adult With Incapacity Act Scotland (AWI) specifies that, in determining who should be appointed as a guardian, a sheriff should have regard to whether there is likely to be a conflict of interest.

²⁷ The recent Carter case in Canada is a pertinent example of this requirement at work. The Canadian court in that case found that a particular safeguarding provision (the blanket ban on physician-assisted suicide) was a disproportionate means for achieving the legitimate aim of protecting vulnerable persons from being pressured into taking their own life.

The Code of Practice of the MCA (para 4.53) indicates that, where there is a conflict of interest in the context of a capacity assessment, it may be appropriate to seek professional involvement.

Para 5.69 of the MCA Code of Practice directs IMCAs to be on the lookout for conflicts of interests when the sale of a family home is being considered.

The Public Guardian (Scotland) requires regular reports from court appointed guardians, regularly reviews accounts of such persons, and has the power to order “forensic accounting” when necessary.

The Court of Protection (England and Wales) regularly adjudicates cases where conflicts of interest are alleged.²⁸

The Scottish Keeper of Registers operates with guidelines which provide for an alert to be given to the Public Guardian when a guardian or appointee undertakes to sell a residential property belonging to the person whose affairs he manages. Such an alert does not preclude such a sale, which in many instances may indeed be to the benefit of the relevant adult. But it does create a mechanism for review of such transactions in order to determine whether the intrinsic conflict of interest at work in many such transactions is producing a form of financial abuse.

The foregoing list is anything but complete. Indeed it is difficult to imagine what a complete list would look like. The key lessons to draw are:

- The existing safeguards are diverse.
- They are dispersed across a wide variety of different public bodies.
- They do not seek to eliminate conflicts of interests.
- They do not in every instance result in recusal.
- They instead seek to manage conflicts of interest with the aim of preventing abuse where possible.

The preliminary notes contained in this document do not suffice to determine whether existing safeguards in the UK satisfy the requirements of Art.12(4) CRPD. Certainly there can be no doubt that abuse of persons with disabilities persists, despite existing safeguards, and that some of that abuse – particularly financial abuse -- arises from conflicts of interest. There is evidence to suggest that the scale of financial abuse of persons with dementia, for example, is vast. But we should hesitate before concluding on this basis that the UK lacks sufficient safeguards to prevent such abuse. Existing safeguards may or may not be sufficient. In order to determine their sufficiency, we would need to consider whether and how existing safeguarding measures might be reformed or replaced by a successor regime that would be more effective in preventing abuse while remaining proportionate with respect to the affected persons’ rights and interests. This is a matter on which further research – including comparative research across culturally similar jurisdictions – is undoubtedly required.

3.5 Conflicts of Interests in the Funding of IMCAs

²⁸ For a very recent example, see *Re JW* [2015] EWCOP 82.

As indicated above (§2.2), one safeguarding mechanism under existing law in the UK finds its focus in the role of independent advocates such as IMCAs. In England and Wales, the recent Law Commission Report considers the possibility of considerably expanding the role of such advocates. It is, however, worth drawing attention to a potential conflict of interest that arises under existing funding mechanisms for these advocacy services. In many instances, independent advocates are employed by independent agencies that are in turn contracted by a variety of Local Authorities and/or so-called “Clinical Commission Groups” (CCGs) in the NHS. These contracts are characteristically for relatively short fixed terms.

There is a risk of conflict of interest in such an funding arrangement. The role of the independent advocate is in part to provide a safeguard against, inter alia, undue influence and conflicts of interest that may arise, e.g., when decisions need to be made about medical discharge or place-of-residence. In order to play this role effectively, advocates need to feel confident in referring cases of potential undue influence or conflict of interest to court authorities. But any such referral is likely to be costly to the local authority or CCG. Anecdotal information indicates that organisations providing advocacy services have sometimes themselves been subjected to undue influence in making a decision about whether to refer a problematic case to court. The threat, which may be more or less explicit, is that the organisation’s advocacy contract may be put at risk if the court costs associated with their activities rise too high.

One matter that merits discussion at the consultation roundtable is whether an alternate funding arrangement for advocacy services – for example, by having contracts administered centrally through the Offices of the Public Guardian, would provide greater integrity, and safeguards against conflicts of interests, in the provision of vital advocacy services.

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