

Appendix 2. Legal Considerations

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1.0 INTRODUCTION

The law relating to the mistreatment of vulnerable people is fragmented and under-developed. The powers that do exist are more limited than those available to safeguard children, as the law generally assumes that an adult is responsible for his or her own actions. “No Secrets” Guidance published in March 2000 [LAC (2000) 7] did not propose any new legal measures to protect vulnerable adults so this guidance endeavours to provide a basic summary of the present legal framework.

It should be noted that the law is constantly changing whether by new Acts of Parliament, Regulations, Guidance Circulars or case law. It is essential that workers clarify with their agency’s legal advisers what the current law is in respect of a given situation, particularly where protective action is considered (NB Legal advice should only be shared with other agencies or service users where the legal adviser has consented to its release for specific purposes).

As a general principle, service users should always be advised of their right to independent advocacy and/or advice from an independent legal adviser. They should also be advised that they will be responsible for any fees charged, unless they are entitled to public funding following a means assessment.

Where a criminal offence is suspected, a referral to the Police MUST be made and no further action taken without consultation with them.

2.0 SUMMARY

The main areas of law which provide a legal framework for the protection of vulnerable adults are listed below. Very roughly, they are arranged according to the order in which they are likely to be invoked. Hence if a serious crime has been committed or is suspected then clearly the Police must be the lead agency.

Overlaying all of these is the Human Rights Act 1998 which provides that all public authorities must act in compliance with the European Convention of Human Rights. (See below)

Criminal Law – vulnerable adults are protected in the same way as any other person against criminal acts; so if a person commits theft, rape or assault against a vulnerable adult they should be dealt with through the criminal justice system, in the same way as situations involving any other victim.

Enabling Protective Intervention – for example, section 136 of the Mental Health Act 1983 provides that a Police Officer may remove a person from a public place to a place of safety if the officer considers the person is suffering from a mental disorder and is in need of immediate care and control.

Regulatory Law and Rights of Entry – for example the Care Standards Act 2000, which with its associated regulations, sets standards of adequacy and “fitness” for registration of residential care homes.

Civil Law – which includes family law and property law. For example, family law allows an individual to take out an injunction against a member of their household who is threatening their safety.

Anti-discriminatory Legislation and Compensation Law – for example, the Disability Discrimination Act 1995, Race Relations Act 1976, and the Sex Discrimination Act 1975 amongst others, ensure that people receive services on an equal footing. In addition the criminal injuries compensation scheme enables recompense upon application for criminal injury or damage.

Community Care and Housing Law - this section summarises some of the key statutory duties and powers of Social Services and Housing Authorities. It also makes reference to the issue of ordinary residence.

3.0 CRIMINAL LAW

Vulnerable adults are protected in the same way as any other person against criminal acts; so if a person commits theft, rape or assault against a vulnerable adult they should be dealt with through the criminal justice system in the same way as situations involving any other victim.

To prosecute under criminal law the Police and/or the Crown Prosecution Service will have to be satisfied that it is in the public interest to prosecute, and there is sufficient evidence to make a conviction likely. This will generally mean that corroborative evidence needs to be available which clearly supports the victims allegations.

It is not necessary in all situations for the vulnerable adult to make a formal complaint but it will usually be the case. It is the responsibility of the Police to gather evidence for and make a decision about, a prosecution. In the absence of any independent witnesses, the Police may be reluctant to pursue the matter. If they do, the vulnerable adult will have to be regarded as “competent” by the Judge to take the oath. It will be necessary for the individual to recall accurately the abuse and be able to answer questions under cross examination.

The accounts of the victim and any witnesses are likely to be crucial to a successful prosecution. Regrettably, vulnerable victims of crime are likely to find the criminal court process daunting. Cross-examination will take little account of their frailty and will in fact probably be used to discredit the evidence they give. Consequently there is a need to carefully consider the effect of the likely ordeal in court. This, in turn, may lead to cases not being prosecuted unless the evidence is strong and/or there is a high chance of a guilty plea.

Under the Youth Justice and Criminal Evidence Act 1999, witnesses (other than the defendant) will be eligible for “special measures” to help them with giving evidence in criminal proceedings if:

- they suffer from a mental disorder, or have a mental impairment or learning disability (which would include autistic spectrum disorders) that the Court considers significant enough to affect the quality of their evidence; or
- they have a physical disorder or disability (which would include deafness) that the Court considers likely to affect the quality of their evidence; or
- the Court is satisfied that the witnesses are likely, because of their own circumstances and the circumstances relating to the case, to suffer fear or distress in giving evidence to an extent that is expected to affect its quality.

Special measures may include, Evidence in Chief to be given on video, cross examination by live or pre-recorded video link or removal of wigs and gowns.

In some circumstances, it will be necessary for a vulnerable adult to have access to independent legal advice. This is to make sure that there is no conflict of interest between the individual and an Agency's responsibility as commissioner or provider of services, i.e. the Local Authority Social Services Department. This is particularly important as some allegations of abuse may lead to criminal proceedings. In such instances, the person should be advised to contact a solicitor or the Citizens Advice Bureau.

Domestic Violence Crime and Victims Act 2004

Section 5: Causing or Allowing the Death of a Child or Vulnerable Person

A person is guilty of an offence if:

- (a) A child (i.e. under 16) or Vulnerable Adult (victim) dies as the result of an unlawful act or omission of a person who:
 - (i) was a member of the same household as the victim, and
 - (ii) had frequent contact with him or her
- (b) At that time there was a significant risk of serious physical harm being caused to the victim
- (c) Either the defendant was the person who caused the victim's death, or
 - (i) was, or ought to have been aware of the risk mentioned in paragraph (b)
 - (ii) failed to take such steps as she/he could reasonably have been expected to take to protect the victim from the risk, and
 - (iii) the act occurred in circumstances of the kind that the defendant foresaw or ought to have foreseen

If the defendant is not the victim's mother or father she/he may not be charged with this offence if they were under 16 at the time of the unlawful act.

A person is to be regarded as a member of a household even if she/he does not live in it if she/he visits it often, and for such periods of time that it is reasonable to regard him/her as a member of it.

The offence and procedural changes form a package of measures which are intended to solve the problem that arises when a child or vulnerable adult suffers an unlawful death and it can be proved that one or more of a small group of people living in the same household as the victim caused the death, but not which of them. In such circumstances there may be no case to answer against any member of the household for murder/manslaughter. Until now this loophole in the law has enabled those co-accused of the death of a child or vulnerable adult to escape justice by remaining silent or by blaming each other. The new offence puts a legal responsibility on adult household members who could be charged with the offence even for example where there is no charge of murder/manslaughter or where evidence suggests that the defendant could not themselves have committed the criminal act which killed the victim.

Guidance on the offence and its investigation can be found in Home Office Circular 9/2005.

Physical Abuse

Common Assault - defined in Section 39 of the Criminal Justice Act 1988 as an intentional or reckless act which causes a person to apprehend immediate unlawful force or violence. It can include any physical contact without consent and includes acts or words involving threats of violence, without physical contact.

It is in the nature of “common” assault that it may leave no physical evidence. Carer’s and professionals should bear in mind that common assault does cover a wide range of language and behaviour. Any act or words involving a use or threat of violence towards someone will constitute such an assault.

There are separate and more serious offences under the Offences Against the Person Act 1861 if the assault results in injury:

Section 47 - Assault occasioning Actual Bodily Harm (‘ABH’). The vulnerable adult will be able to show physical signs of assault such as an area of marked skin or bruising.

Sections 18 and 20 - Assault occasioning Grievous Bodily Harm ‘GBH’. Wounding with intent to do grievous bodily harm includes assaults causing cuts, broken bones, damage to internal organs.

Restraint or threatened restraint can amount to an assault as can any practice involving physical compulsion, such as force-feeding. Acts of this nature can also possibly infringe the human rights of an individual.

Improper administration of medication - under Section 58 of the Medicines Act 1968 it is an offence to administer drugs that have been prescribed for someone else. Only authorised persons can administer the drugs.

Affray - Section 3(1) of the Public Order Act 1986

A person is guilty of affray if he uses or threatens unlawful violence towards another and his/her conduct is such as would cause a person of “reasonable firmness” present at the scene to fear for his or her safety.

Fear or Provocation of Violence - section 4(1) of the Public Order Act 1986

A person is guilty of an offence if he/she:

- Uses towards another person threatening, abusive or insulting words or behaviour or:
- Distributes or displays to another person any writing, sign or other visible representation which is threatening, abusive or insulting with intent to cause that person to believe that immediate unlawful violence will be used against him/her or another person, or to provoke the immediate use of unlawful violence by that person or another, or where that person is likely to believe that such violence will be used or it is likely that such violence will be provoked.

This offence cannot be committed where the person using the words or behaviour and the victim are in a private dwelling.

Ill Treatment or Neglect of a Mentally Disordered Patient - Section 127 of the Mental Health Act 1983

It is an offence for any person who is an officer on the staff or otherwise employed in, or who is one of the managers of, a hospital or mental nursing home:

- a) To ill treat or wilfully neglect a patient for the time being receiving treatment for mental disorder as an in-patient at that hospital or home; or
- b) To ill treat or wilfully neglect, on the premises of which the hospital or home forms a part, a patient for the time being receiving such treatment there as an out-patient.

It is an offence for any individual to ill treat or wilfully to neglect a mentally disordered patient who is for the time being subject to Guardianship under the Mental Health Act or otherwise in his custody or care (whether by virtue of any legal or moral obligation or otherwise).

It is an offence for any individual to ill treat or wilfully to neglect a mentally disordered patient who is for the time being subject to after care under supervision.

Sexual Abuse

The following offences are particularly important to note in protecting vulnerable adults

Rape - Section 1 of the Sexual Offences Act 2003

A person (A) commits rape if:

- (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
- (b) B does not consent to the penetration
- (c) A does not reasonably believe that B consents

Assault by penetration – Section 2 Sexual Offences Act 2003

An offence is committed if A intentionally penetrates the vagina or anus of B with a part of his body or anything else and the penetration is sexual and B does not consent and A does not reasonably believe that B consents

Sexual Assault –Section 3 Sexual Offences Act 2003

An offence is committed if A intentionally touches B and the touching is sexual and B does not consent and A does not reasonably believe that B consents

Causing a person to engage in sexual activity without consent- Section 4 Sexual Offences Act 2003

An offence is committed if A intentionally causes B to engage in a sexual activity and B does not consent and A does not reasonably believe that B consents.

The “sexual activity” will involve penetration of B’s anus or vagina; penetration of B’s mouth with a person’s penis; penetration of a person’s anus or vagina with a part of B’s body or by B with anything else; or penetration of a person’s mouth with B’s penis.

In relation to Sections 1-4 ,whether a belief is reasonable is determined having regard to all the circumstances ,including any steps that A has taken to ascertain whether B consents and Sections 75 -76 of the Act set out the evidential and conclusive presumptions about consent ,including whether violence or intimidation were a factor ,whether there was unlawful detention, whether the complainant was asleep/unconscious/physically disabled/had been administered a substance, whether there was intentionally deception as to the nature/purpose of the act or inducement by impersonation.

Sections 30-37 Sexual Offences Act 2003 are offences relating to sexual activity (as defined above) with a person with a mental disorder which impedes their choice; or causing or inciting such activity; or engaging in such activity in the presence of a person with a mental disorder; or otherwise causing such a person to watch such an activity; or inducement, threat or deception to procure sexual activity with a person with a mental disorder; or causing a person with a mental disorder to engage in such activity by inducement, threat or deception ;or engaging in such activity in the presence, procured by inducement threat or deception, of a person with a mental disorder ;or causing a person with a mental disorder to watch a sexual act by inducement, threat or deception.

For the purposes of Sections 30-37, B is unable to refuse because of or for a reason related to a mental disorder and is unable to refuse because he lacks the capacity to choose whether to agree to engaging in the activity (whether because he lacks sufficient understanding of the nature of the activity or reasonably foreseeable consequences of what is being done, or for any other reason)

Section 38 –Sexual Offences Act 2003

An offence is committed if a care worker intentionally sexually touches B and B has a mental disorder.

Section 39- Sexual Offences Act 2003

Offence for a care worker to cause or incite person with mental disorder to engage in sexual activity.

Section 40 Sexual offences Act 2003

Offence for care worker to engage in sexual activity in the presence of a person with a mental disorder.

Section 41- Sexual Offences Act 2003

Offence for care worker to cause a person with mental disorder to watch a sexual act.

Section 42- Sexual Offences Act 2003

“Care worker” is defined as A being involved in the care of B if B is accommodated in a care home, community home voluntary home or children’s home and A has functions to perform which have brought him or are likely to bring him into regular face to face contact with B or similarly if B is a patient with an NHS body or independent medical agency/ clinic/hospital and A has functions to perform in such, as before.

Section 43 – offences under Sections 38-41 are not offences if B is over 16 and A and B are lawfully married.

Section 44 – offences under Sections 38-41 are not offences if, immediately before A became involved in B’s care in a way falling under Section 42, a sexual relationship existed between A and B, unless such relationship would have been unlawful and it is for the defendant to prove such a relationship existed at the time.

Sections 16- 24 Sexual Offences Act 2003

These sections make it an offence for a person aged 18 or over (A) to have sexual intercourse or engage in ,cause or incite other sexual activity with a person under that age (B) where A is in a position of trust in relation to B i.e. by caring for ,supervising ,or training/educating B. Similar exceptions in relation to marriage and pre existing relationships as above apply

General Issues

The physical evidence in cases of physical and sexual abuse may well be problematic. Evidence where physical abuse has been alleged may prove capable of supporting accidental as well as non-accidental scenarios. Sexual abuse in particular may leave little or no forensic evidence and it is rare for clinical evidence alone to identify the perpetrator. For these reasons early referral to the Police will be vital to the collection and preservation of evidence.

Psychological Abuse

Harassment - Section 2 Protection from Harassment Act 1997

A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him or her, is guilty of an offence. Conduct includes verbal abuse.

Although court proceedings can only be considered after the second offence the first incident should be reported to the Police. A civil remedy such as an injunction against harassment can also be obtained under the 1997 Act whether or not previous harassment has taken place, and whether or not a prosecution is brought by the Police.

Anti-social behaviour orders - Crime and Disorder Act 1998

This is a community-based order that can be applied for by the Police or District Council/Unitary after consultation with each other and in liaison with other relevant agencies. The order will be applied against one or more individuals (perhaps a family) whose behaviour is anti-social in that it causes alarm, distress or harassment to one or more people not living in the same household as the offender.

Financial Abuse

Theft - Section 2 Theft Act 1968

The dishonest appropriation of property belonging to another with the intention of permanently depriving the owner of it. Property means anything that can be owned, including pets and money. Theft does not necessarily involve physically moving the property - any assumption of the right of ownership can constitute theft.

It is a defence for the alleged perpetrator to show that he/she held the reasonable belief that the owner would have consented had he/she known.

Robbery - Section 8

Theft aggravated by the use of threat or force.

Offences involving deception:

- Obtaining property by deception (Section 15(1))
- Obtaining a money transfer by deception (Section 15A).
- Obtaining a pecuniary advantage by deception (Section 16(1)).

Vulnerable adults may be victims of deception by being induced to enter into contractual arrangements that are plainly prejudicial. The deception will normally invalidate the contract, and the other party 'may be guilty of obtaining property by deception "or obtaining a pecuniary advantage by deception"'.

Neglect

The Mental Capacity Act introduces two new criminal offences: ill treatment and wilful neglect of a person who lacks capacity. The offences may apply to:

- A person who has the care of a person who lacks capacity or is reasonably believed to lack capacity; or
- A person who is the attorney appointed under a LPA or Enduring Power of Attorney (EPA); or
- A person who is a deputy appointed for the person by the court.

Such individuals will be guilty of an offence if they ill-treat or wilfully neglect the person they have care of, or to whom the LPA, EPA or deputy appointment relates. The penalty for such an offence is a fine and/or a sentence of imprisonment of up to 5 years.

The ill treatment or neglect of a mental patient in a hospital or mental nursing home is an offence under section 127 of the Mental Health Act 1983.

4.0 LAW ENABLING PROTECTIVE INTERVENTION

Powers of Removal

Section 135 (1) Mental Health Act 1983

Allows an Approved Social Worker to make an application to a magistrate for a warrant authorising the Police to enter private premises, using force if necessary, to search for and remove adults to a place of safety where there is a reasonable cause to suspect that an adult believed to be suffering from a mental disorder has been, or is being, ill treated or neglected and not kept under proper control, or is unable to care for himself or herself and is living alone. The person concerned will not already be liable to detention under the Mental Health Act and to execute the Warrant the Police Officer must be accompanied by an ASW and a Registered Medical Practitioner.

Section 136

This section gives a Police Officer the power to remove a person from a public place to a place of safety if he/she considers that the person is suffering from mental disorder and is in immediate need of care and control. The power can be used whether or not the person has committed a criminal offence.

The person can be detained in a place of safety for up to 72 hours so that he/she can be examined by a doctor and interviewed by an approved social worker so that suitable arrangement can be made for treatment or care.

Section 47 The National Assistance Act 1948

Gives power to the District Councils and The Borough of Telford & Wrekin to apply to a Magistrates Court to remove a person from his/her home on the grounds:

- that the person is suffering from grave chronic disease or, being aged, infirm or physically incapacitated, is living in insanitary conditions; and
- is unable to devote to themselves, and is not receiving from other persons, proper care and attention; and
- in his/her interests or to prevent injury to the health of, or serious nuisance to other persons, it is necessary to remove him/her.

A certificate from the "proper officer" of the Council (who by agreement is any of the Consultants in Public Health Medicine, employed by Shropshire County or Telford & Wrekin Primary Care Trust), must support the application. A period of seven days notice is required and removal from the home can be for a period of up to three months.

In practice, this section of the National Assistance Act is rarely used. However, its use could be considered if there is no alternative and the risk is considered to be very grave. An order will last for up to three months and can be renewed by the magistrates court. An order under this section does not authorise compulsory medical treatment.

A modification of the Section 47 procedure is provided by the National Assistance (Amendment) Act 1951 to deal with situations in which it is necessary to remove the adult without delay. An order can be made which lasts for up to 21 days. A District Council or The Borough of Telford & Wrekin can apply, through its proper officer, to the Court immediately, without notice to the person, if the proper officer certifies that it is in the persons best interest that there be no delay, and this is supported by a registered medical practitioner.

Legal advice must be sought if action is being considered under this section.

Guardianship - Section 7 Mental Health Act 1983

Provides that a vulnerable adult can be received into Guardianship by the local authority if he or she is suffering from a mental disorder, being mental illness, severe mental impairment, psychopathic disorder or mental impairment and his mental disorder is of a nature or degree which warrants his reception into guardianship Severe Mental disorder is associated with abnormally aggressive or seriously irresponsible conduct. The guardianship must also be “necessary in the interests of the welfare of the adult or the protection of other persons”. The ‘welfare of the patient’ is interpreted broadly.

Guardianship gives three basic powers:

- To require the patient to reside at a specified place.
this does not provide legal authority to detain a patient physically or to remove him or her against his/her wishes, although s18(4) does enable the patient to be taken into custody and returned to the place he is required to live if he leaves without the guardian’s consent.
- To require the patient to attend somewhere for the purpose of medical treatment, occupation, education or training. If the patient refused to attend, the guardian is not authorised to use force to secure attendance (or medical treatment).
- Access to the patient at any place where the patient is residing.

Guardianship does not enable the Guardian to compel the person to have treatment, detain them physically or order their removal against their wishes. However, Hale J in *Cambridgeshire County Council v R* [1995] 1 FLR 50 noted that the person in control of the premises where the patient is required to reside has the power “under general law... to control who is allowed to be there and what circumstances”.

R v Kent County Council ex p Marston (CO1819/96)

This case concerned an individual with severe learning difficulties and behavioural problems who had no ability to make decisions for himself. His need for supervision, guidance and the protection from exploitation warranted a guardianship which had been in place since 1991.

The application had grown up with the patient and played a considerable part in his care as the latter had been fostered for most of his childhood with the applicant's mother. However, in May 1990 there had been an altercation leading to the Applicant leaving home and the patient being placed in residential care - thereafter they had not seen each other.

Owen J held at first instance (a Judgement upheld by the Court of Appeal in refusing leave to appeal) that there is an implied duty on guardians to promote a patient's welfare and accordingly Kent was entitled, on advice from Psychiatrists, not to disclose the patient's whereabouts to the applicant.

Section 287 - Public Health Act 1936

A District/Unitary Council has powers under public health legislation, which allows them to enter and cleanse premises, which constitute a public health risk. An authorised officer (Environment Health Officer) may enter after giving 24 hours notice, or if admission is refused or refusal is apprehended it is possible to obtain a warrant from a magistrate for entry into the premises, if need be by force.

Detention Under the Mental Health Act 1983

Section 2: Provides for compulsory admission for assessment in the interest of the person's own health and safety or with a view to the protection of others. The admission period lasts for 28 days.

Section 3: Compulsory admission for treatment for up to six months.

Section 4: Emergency admission/observation. Needs only one doctor to recommend. This section lasts for three days.

Declaratory Relief

Re F

Of considerable relevance to the protection of vulnerable adults is a case decided in 2000 by the Court of Appeal cited as Re F. The Court held that the High Court has jurisdiction to make Declarations in the best interests of adults without capacity, where there is a dispute about what is in the person's best interests. (Capacity means the ability of the person to understand and make informed decisions about a particular matter.)

Social Services Departments have power, under the doctrine of necessity, to provide care including residential care and, if necessary restraint (i.e. to control whom the person sees), in the interests of adults without capacity to decide such matters.

Article 8 of the European Convention on Human Rights is not a right to family life as such but to respect for it. Its purpose is to assure the entitlement of individuals "to the benefit of what is benign and positive in family life. It is not to allow other individuals, however closely related and well intentioned, to create or perpetuate situations which jeopardise their welfare". In fact, it suggested that Article 8 may involve positive obligations upon LAs to protect the safety and welfare of an adult at risk of harm.

In a situation where a Social Worker considers that this judgement might be relevant, i.e. there is no other possible legal action, such as guardianship, that can be taken to protect a person without capacity to make the decisions needed, the Social Worker must contact their Legal Services for an opinion as to whether there are grounds for the Department to apply to the relevant Court for a Declaration.

Social Security (Claims and Payments) Regulations 1987

These Regulations give the Department of Social Security power to appoint another person (the appointee) to act for the person where the person has a mental disorder as defined by the 1983 Mental Health Act and the person is incapable of managing their own Social Security benefits and a receiver has not been appointed by the Court of Protection.

The appointee is responsible for managing Social Security benefits on behalf of the person. They can receive payments and spend them to meet the person's needs in the person's best interests. The appointee does not have the authority to spend any other income or capital the person has or deal with any property.

It is the responsibility of the Department of Social Security to ensure, by interview or personal enquiry, that the person appointed is a fit and proper person.

An appointee is normally a close relative or friend or someone who is in regular contact with the adult. In addition, an officer of Social Services can be appointed. Some people have no one to whom they can turn when they need an appointee. The Benefits Agency Policy Unit considers that Social Services should assist in that event. Some adults are not capable of giving informed consent to the appointment of an Appointee. The Benefits Agency Policy Unit considers that an appointment can, in appropriate circumstances, still be made.

Council Tax Benefit (General) Regulations 1992 and Housing Benefit (General) Regulations 1987

These Regulations give District/Unitary Councils power to appoint another person (the appointee) to act for the person where the person has a mental disorder as defined by the 1983 Mental Health Act, and the person is incapable of managing their own Housing or/and Council Tax benefits, and a receiver has not been appointed by the Court of Protection.

The appointee is responsible for managing Housing and/or Council Tax benefits on behalf of the person. He/she can receive payments and spend them to meet the person's housing benefit and council tax needs.

The appointee does not have the authority to spend any other income or capital the person has or deal with any property. It is the responsibility of the local authority to ensure, by interview or personal enquiry, that the person appointed is a fit and proper person.

5.0 REGULATORY LAW AND RIGHTS OF ENTRY

Care Standards Act 2000

Section 14 enables the registration authority (currently CSCI) to cancel a home's registration when the registered person is no longer regarded as "fit" to carry on the home.

Section 20 enables the registration authority to obtain an order from the Magistrates Court cancelling or amending the registration of a private or voluntary residential care home, or adult placement scheme, if it appears there will be a serious risk to a person's life, health or well-being unless an order is made as a matter of urgency.

Part IV of the Care Standards Act 2000 establishes the General Social Care Council and makes provision for the registration, regulation and training of social care workers.

Powers of Inspection

Sections 31 and 32 of the Care Standards Act 2000

Gives the registration authorities CSCI and CHAI powers to enter and inspect, at any time, premises which are used or are believed to be used for the purpose of residential care, domiciliary care agencies, nurses agencies and independent hospitals, clinics and medical agencies .

Section 48 NHS and Community Care Act 1990

The Secretary of State authorises persons to enter and inspect premises, other than premises where a person is registered under the Care Standards Act 2000, in which community care services are or are proposed to be provided by a local authority.

The service user/resident of the premises may be interviewed in private for the purposes of investigating a complaint.

Section 115 Mental Health Act 1983

Allows an Approved Social Worker, at all reasonable times, to enter and inspect premises (not being a hospital) in which a mentally disordered adult is living, if she or he has reasonable cause to believe that the patient is not under proper care. This section does not allow an Approved Social Worker to force entry, although obstruction may be an offence under section 129, and the Approved Social Worker can apply for a warrant under Section 135. The adult need not be named in this warrant, so this allows for investigation of suspected mistreatment of people whose identity is unknown but whose whereabouts are known.

(NB Section 129 makes it an offence for a person, without reasonable cause, to refuse to allow access to, or obstruct, an approved social worker from interviewing any person in the course of his/her duties).

The Police and Criminal Evidence Act 1984

Section 17(1) (e) - Provides that a Police Officer may enter and search any premises for the purpose of saving life or limb or preventing serious damage to property.

Section 24 - Allows a Police Officer to arrest without warrant any person who is suspected of having committed, or is about to commit an arrestable offence.

Section 25 - Allows a Police Officer, where there are reasonable grounds, to make an arrest of someone to prevent them causing physical injury to another person, or to protect a child or other vulnerable person.

Sexual Offences Act 2003 Part 2

The purpose of this part of the Act is to require persons convicted of/cautioned for certain offences as detailed in Schedule 3 to the Act or found not guilty due to insanity or found to be under a disability in relation to those offences to become subject to notification requirements as “relevant offenders”, which enables the Police to assist in the protection of children and other vulnerable persons.

Information is kept on the Police National Computer and relevant offenders must notify the Police of current names, addresses, and changes to these. The duration of the requirement to register depends on the length of sentence. Failure to register is punishable on summary conviction by a fine and/or six months in prison or on indictment by imprisonment up to 5 years.

In Shropshire and Telford and Wrekin there are Multi Agency Public Protection Arrangements in place under Section 325 Criminal Justice Act 2003 and accompanying guidance issued with LASSL (2004)3 for the purpose of monitoring relevant sexual or violent offenders, as defined in Section 327, which includes those relevant offenders under the Sexual Offences Act 2003. The agencies involved are responsible for developing a multi-agency approach to managing the risk posed by these offenders

Sexual Offences Act 2003 Sections 104 – 113

Introduced the Sexual Offences Prevention Order (SOPO) , which enables the Court dealing with a offence or a Chief Officer of Police to lay a complaint in the magistrates court if a person has been previously convicted of an offence in Schedules 3 or 5 or found not guilty due to insanity or found to be under a disability ,or cautioned for such an offence and that person is acting in such a way to give reasonable cause for an order to be made to protect the public from serious sexual harm. The SOPO can prohibit a defendant from doing anything described in the order and has effect for not less than 5 years

Anti-Social Behaviour Orders - Section 1 Crime and Disorder Act 1998

A District/Unitary Authority or the Police, following consultation with one another, may apply to a Magistrates Court, acting in its civil capacity, for an anti-social behaviour order in respect of an individual, or several individuals, aged 10 years or over. Anti-social behaviour is that which caused, or was likely to cause, harassment, alarm or distress to one or more persons not in the same household as the offender.

The standard of proof is the balance of probabilities. In other words, it is not necessary for the applicant to prove the case to the criminal standard of “beyond reasonable doubt” but rather, to provide evidence to the court which is more persuasive than that provided by the defendant. It is not necessary for the victim to give evidence, a professional witness is acceptable.

The minimum duration of an order is two years. Breach of an order without reasonable excuse is a criminal offence with a maximum penalty of five years in prison.

6.0 CIVIL ACTION

The Law of Tort

This is a civil law which allows one person to sue another complaining about a wrong that the other person has committed for such acts as:

- Trespass to the person (assault and battery)'
- Negligence.

It is an implied contract for care services and under the common law that the person should be looked after to a reasonable standard, either at home or in a residential care or day care setting.

If care is consistently below the reasonable standard, the vulnerable adult may have a claim for breach of the implied term of the contract. The difficulty is that such care is often provided without direct payment or payment at all. In such cases there is no contract to enforce, but there may still be a duty to perform to a reasonable standard those tasks which are undertaken. The standard must be lower than would be expected of a reasonably skilled paid carer, but serious deficiencies might constitute actionable negligence, if the Court found there was a duty of care.

Part IV of the Family Law Act 1996

This deals with the right to occupy the matrimonial home, occupational orders and non-molestation orders. It brings together and strengthens previous legislation on injunctions and provides remedies available in civil courts within the family jurisdiction.

Occupation Orders

Sections 33 to 41 set out provisions for occupation orders. Such orders decide who is allowed to occupy the home and can direct another party to leave the home. The terms of the order and the factors to be considered will vary according to whether or not the applicant is entitled to occupy the property and their relationship to the other party or parties. If the applicant has the right to occupy the property, they can get an occupation order against anyone with who they are 'associated' not just spouses and cohabitants. The order might include other 'associated' persons such as relatives and joint tenants.

Non-molestation Orders (Section 42)

A non-molestation order can be in various forms but commonly provides that a particular individual “shall not by himself, his servants or agents, molest, assault, or otherwise interfere with” the vulnerable adult.

Molestation includes various activities causing distress to an individual such as, following them around, making persistent telephone calls or shouting at them.

A non-molestation order can be applied for by/against: a spouse/partner; an ex-spouse/partner; anyone living/lived in the same household, (unless an employee, tenant, lodger, boarder) certain relatives e.g. parents, grandparents, in laws, brothers, sisters; those who have agreed to marry whether or not that agreement has been terminated.

An application for either occupation or non-molestation orders has to be made by the person who has been abused. This means that the applicant has to be able to take the oath, and give reliable and consistent evidence, unless there is corroboration.

An initial application for an occupation order or a non-molestation order can be made on an ex-parte basis i.e. without the applicant or other party being present, but there then has to be a full hearing which the applicant must attend and notice given to the other party.

It is a civil application, so the Court's decision is based on the "balance of probabilities" rather than the criminal standard of "beyond reasonable doubt". The Court must make the order if it appears that the applicant is likely to suffer harm, attributable to the conduct of the respondent, if the order is not made, which is greater than the applicant is likely to suffer if the order is made.

7.0 ANTI-DISCRIMINATION AND COMPENSATORY LAW

Sex Discrimination Act 1975

Makes it unlawful to discriminate against a man or woman on the ground of his or her sex in the provision of goods, facilities or services.

Race Relations Act 1976

This Act makes it unlawful for a person to discriminate against another on racial grounds across a range of areas including employment, education, goods, facilities, services and premises. The Race Relations Amendment Act 2000 extends further the duty of public authorities to work towards the elimination of unlawful discrimination and promoting equality of opportunity and good relations between persons of different racial groups.

Crime and Disorder Act 1998

Introduces new assault, harassment and public order offences with significantly higher maximum penalties where it can be shown the offence was racially aggravated.

Disability Discrimination Act 1995

This Act is intended to promote equal treatment of people with disabilities in employment, and in the provision of, and access to, goods, facilities and services.

Part I of the Act defines a disabled person as someone with “a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities”.

Part II of the Act deals with discrimination in other areas including provision of goods, facilities and services. Section 19 of the Act makes it unlawful for a service provider to refuse unjustifiably to provide a service to a disabled person on the same terms as are available to other people. (This includes the provision of goods and facilities).

Service providers have to take reasonable steps to change practices, policies or procedures which make it impossible or unreasonably difficult; remove or alter physical features or provide a reasonable means of avoiding them or provide a reasonable alternative means of delivering the service; provide auxiliary aids or services where these would facilitate the use of the service by disabled people, e.g. provision of information on audio tape or Braille, or a sign language interpreter.

Equality Act 2006

This establishes in Great Britain the Commission for Equality and Human Rights (CEHR). The CEHR will have responsibility for the promotion of Human Rights as well as taking over the work of the existing Equalities Commissions.

The Act makes unlawful discrimination on the grounds of religion or belief in the provision of goods, facilities and services, education, the use and disposal of premises and the exercise of public functions.

It also enables provision to be made to prohibit discrimination on the basis of sexual orientation.

The Act also creates a duty on public authorities to promote equality of opportunity between men and women and to prohibit sex discrimination and harassment in the exercise of public functions.

The Gender Recognition Act 2004

This enables application to be made for a gender recognition certificate on the basis of having lived in the acquired gender for a period of two years and intending to do so until death, or having changed gender under the law of a country outside the United Kingdom. Where the certificate is issued the person's gender becomes for all purposes the acquired gender.

This does not affect the person's status as the father or mother of a child, or affect their succession under a will already made.

Criminal Injuries Compensation Scheme

The Criminal Injuries Compensation Authority may pay compensation to victims of crimes of violence, or the close relatives of any person who died as a result of a crime of violence. The definition of a crime of violence includes arson, poisoning, the deliberate use of an animal or motor vehicle as a weapon etc., as well as physical assault and sexual offences.

The threat of violence may, in some circumstances, be considered a crime of violence. It is not necessary to wait until someone is convicted of the offence before making the application although it is expected that the matter should have been reported to the Police and received a crime number. Applications will be accepted even if, for technical or practical reasons, no-one is to be prosecuted for the offence.

Workers should be aware of the scheme as they may know about situations in which adults would be eligible to apply for compensation. The worker's role should normally be limited to informing service users that the scheme exists, giving general information about what it provides, and advising them how to contact the Criminal Injuries Compensation Authority for information and a copy of its guide to the scheme. If any further advice is provided and the service user suffers a loss as a result of following that advice then the service user may be able to claim damages from the Department. There is a time limit of 2 years following the incident within which an application can be made, although this may be waived in exceptional circumstances.

Legal advice should be sought if it appears that a service user may be entitled to compensation under the Criminal Injuries Compensation Scheme. A supply of application forms is also generally kept by Local Authority Legal Services. The website for the CICA can be accessed at www.cica.gov.uk

Where this is not available, victims of physical and financial abuse may find compensation through a civil claim. The criminal courts may award compensation if they find the defendant guilty, but if there is no prosecution, a civil remedy may still be available, and the burden of proof is lower in civil claims.

A victim of assault may be able to claim compensation for pain, discomfort and "loss of amenity" resulting from an injury, or compensation for being deprived of assets or property. Independent legal advice should be sought.

8.0 COMMUNITY CARE AND HOUSING LAW

Duty to Assess - Section 47 NHS and Community Care Act 1990

Requires Social Services to assess for possible community care services anyone who “it appears... may be in need... of services”, and decide in light of that assessment what services (if any) to provide.

Residential Accommodation - Sections 21 and 26 National Assistance Act 1948

Local Authorities have a duty to provide residential accommodation for “people aged 18 or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them” and who are ordinarily resident in their area.

Welfare Services - Section 29 National Assistance Act 1948 and Section 2 Chronically Sick and Disabled Persons Act

To promote the welfare of people (aged 18 or over) with disabilities “the local authority shall make arrangements for promoting the welfare of persons blind, deaf or dumb who suffer from mental disorder of any description or who are substantially and permanently handicapped by illness, injury or congenital deformities or other disabilities”.

Assessment of a Disabled Person - Section 4 of the Disabled Persons (Services, Consultation and Representation) Act 1986

Places the local authority under a duty to assess the needs of disabled people when requested, and to assess the ability of carers to continue caring (under section 2 of the Chronically Sick and Disabled Persons Act 1970). The disabled person, their carer(s), or a representative of the disabled person can make the request for an assessment. This particular piece of legislation might prove helpful when either the disabled person or their carer(s) is seeking protection from mistreatment.

When requested to do, so a local authority has a clear duty to decide whether the needs of the disabled person call for the provision by the authority of any services, in accordance with section 2(1) of the Chronically Sick and Disabled Persons Act 1970.

Services to the Ill - Schedule 8 to the NHS Act 1977

Places a duty on local authorities to make arrangements to prevent illness, care for people who are suffering from illness and provide aftercare for people who are suffering from illness, care of expectant or nursing mothers (other than the provision of residential accommodation) and home help and laundry facilities.

Carers Assessment - Carers (Recognition and Services) Act 1995

This Act entitled a carer, who provides, or intends to provide a substantial amount of care on a regular basis, to an assessment.

The result of the carer's assessment should be taken into account when the local authority decides that services should be provided to the service user.

Carers (Equal Opportunities) Act 2004

The emphasis on carers rights is further developed in the above Act. It should be read in conjunction with the relevant parts of the Community Care Assessment Directions 2004 which require local authorities to involve carers in the assessment of the person for whom they are caring or to keep a written record of reasons for not doing so.

Ordinary Residence

The duty to assess for community care services under s.47 of the NHS and Community Care Act 1990 arises wherever a Local Authority has a power (rather than a duty) to provide or arrange services to an individual appearing to be in need of such services. Hence the duty to assess arises not as a result of whether or not the prospective service user is ordinarily resident in the particular area, but rather whether the individual appears to have community care needs.

If a vulnerable adult is ordinarily resident in either Shropshire or Telford and Wrekin when this procedure is invoked no issue will exist as to who is responsible. If the individual is ordinarily resident elsewhere than the area in which the concerns arise, it should be the responsibility of the "authority of the moment" (i.e. where the individual actually is) to undertake the immediate assessment.

As regards residential care, s.24(3) of the National Assistance Act 1948 provides that where a person in the area of a Local Authority is

- (a) a person with no settled residence, or
- (b) not being ordinarily resident in the area of the Local Authority,

is in urgent need of residential accommodation, the Local Authority can provide such accommodation as if the person was ordinarily resident in their area.

(The duties and powers to provide residential accommodation are set out in detail in Appendix 1 to LAC 93(10)).

Longer-term responsibility for an individual should be determined by reference to the standard procedures set out in Government Guidance LAC (93)7.

The responsibility to provide a “social work service and such advice and support as may be needed” to adults qualifying as disabled, rests with the LA in which individual is ordinarily resident”.

Homelessness

Guidance upon the special needs of homeless people has been given in LAC (93) 2. Housing Act 1996

Part VII of the Act places a duty on District/Unitary Councils to provide accommodation for homeless people with a priority need, i.e. people who are vulnerable because of old age, mental illness, handicap, physical disability, or other special reason.

Homelessness Emergency Accommodation

Anyone regardless of status or tenure, who is experiencing domestic violence or who fears domestic violence can apply as homeless. The Housing Act 1996 defines domestic violence in terms of the shared relationship between victim and perpetrator rather than a common address. This means that the victim need not necessarily reside with or have resided with the perpetrator. Section 177 specifically states that it is not reasonable to continue to occupy accommodation if it is probable that this will lead to domestic violence. Domestic violence here means violence (or threats of violence which are likely to be carried out) from an associated person.

The term “associated person” is defined in Section 178 and is similar to the Family Law Act 1996 and includes relatives, present and former spouses/cohabitees/fiancées, people who live or have lived in the same household and the parents of a child. However, it does not exclude employees, tenants, lodgers or boarders from this category of people who have lived in the same household, unlike the Family Law Act 1996.

Section 72 - Provides that a housing authority may seek help from any other authority.

Sections 145 and 149 - Provide a new ground for the grant of a possession order on the application of the local authority/housing association where a partner has left the dwelling house because of violence or threats of violence by the other partner and the Court is satisfied that the partner who has left is likely to return. A tenancy granted by a private landlord does not qualify.

9.0 HUMAN RIGHTS LAW

The Human Rights Act 1998 came into force on 2 October 2000 and incorporates the European Convention of Human Rights into UK law. This does not change people rights but means that claiming those rights is now easier and quicker as the UK Courts can be applied to rather than the European Court. Where primary UK legislation is found to be in conflict with Convention rights, there is a fast-track parliamentary procedure to bring UK legislation into line with Convention rights.

It is unlawful for a public authority to act in a way that is inconsistent with a Convention right. However, public authorities are also bound to follow the powers and duties required of them under primary legislation, until that legislation alters.

Any public authority action must be reasonable and “proportional”. This means that correct procedures must have been followed in accordance with current law and guidance, and that in carrying out a statutory duty or power any interference with a Convention right must be proportionate to the intended aims and objectives of their actions, i.e. the least possible interference to achieve those aims and objectives. Any interference must not be arbitrary or unfair.

In an adult protection investigation the rights that must be borne in mind are, for example:

Article 8 - The right to respect for private and family life e.g. preserving confidentiality, allowing an individual to express their view and consulting with them before a decision relevant to them is made, providing information to an individual on which they can make an informed decisions.

Article 5 - The right to liberty and security of the person e.g. unless a person comes within the exemptions to article 5, i.e. they are infectious or have a mental disorder, it is doubtful that a Section 47 Order under the National Assistance Act 1948 would be lawful. Any decisions or Court Orders under Mental Health Act 1983 need to be proportionate to the condition.

Article 3 - The right to be protected from inhumane and degrading treatment. For ill-treatment to be considered inhuman treatment, that treatment must amount to a “minimum level of severity”. The infliction of mental suffering may also be inhuman treatment. Treatment that is degrading is treatment that has the effect of causing gross humiliation or debases the individual. A court would take into account the individual’s degree of susceptibility and the circumstances. Under Article 3 extremely poor treatment is required before this right is infringed but restraint or security arrangements in residential homes could breach Article 3.

Article 6 - The right to a fair trial. This is about the “determination of (an individual’s) civil rights and obligations”. This applies for example to applications under the Mental Health Act 1983, and decision-making forums such as case conferences and strategy meetings, Mental Health Review Tribunals.

All decisions and the reasons for those decisions during an agency’s involvement with a service user must be clearly recorded upon files, so that there is a clear “audit trail” recording a public authority’s involvement with a particular service user.

Specific advice to Local Authorities was given in LGA Circular 510/00 “Deciding Rights - Applying the Human Rights Act to Good Practice in Local Authority Decision Making” dated 18 July 2000.

10.0 SAFEGUARDING VULNERABLE GROUPS ACT 2006 – THE VETTING AND BARRING SCHEME

The Act received Royal Assent on 8/11/06 and provides the legal framework for the new Vetting and Barring Scheme recommended by the Bichard Inquiry in 2004, following the Soham murders. The Scheme will centralise and remove inconsistencies in recruitment practice and replace List 99 and the POCA list (re children), the POVA list (re vulnerable adults) and the Disqualification Order Regime. As yet, no Regulations or Guidance have been issued for consultation by the DfES, DOH and Home Office and it is planned the Act will come into force in a phased roll out from Autumn 2008.

The Scheme will apply to paid and unpaid work and “regulated” and “controlled” activities. There will be 2 barred lists, the children’s barred list and the adults barred list, and there is to be an Independent Safeguarding Authority (ISA) which will maintain the lists and make decisions about a person’s inclusion upon the lists, with a right of appeal to the Care Standards Tribunal.

There are 3 ways of being included on the lists and referrals to the ISA will be made by the Secretary of State, employers, local authorities, professional bodies and supervisory authorities:

- 1) Automatic inclusion – upon conviction or caution for specified offences (which will be the most serious) and with no right to make representations or appeal, unlike 2) and 3) below;
- 2) Automatic inclusion – upon conviction or caution for certain other specified offences or by having met other specified criteria;
- 3) Discretionary bar – where relevant conduct/risk of harm – which leads to consideration for inclusion i.e. behaviour which harms a child or vulnerable adult or where there is evidence to suggest an individual may present a risk of harm to children or vulnerable adults.

It will be an offence for persons on the barred lists to engage in regulated activities, which will cover a range of specified activities that provide an opportunity for close contact with children or vulnerable adults and in key settings. It will also be an offence for employers to fail to refer relevant information without reasonable excuse to the Scheme where they are under a duty to do so (fine of up to £5000).

There are responsibilities upon employers to undertake checks upon individuals before permitting them to be engaged in regulated activities. CRB checks will in effect be an application by the individual concerned to the Secretary of State to become subject to monitoring. The Secretary of State checks the PNC and obtains other relevant information from police forces. If an individual meets the criteria for inclusion upon the lists, the Secretary of State will refer the individual to the ISA for consideration as to inclusion upon the lists. Checks will be repeated at appropriate intervals. An employer can register to be told when an employee ceases to be subject to monitoring and the employer will be informed by the Secretary of State, through the CRB. In addition, it is planned that subsequent employers will be able to check a persons status under the scheme on line free of charge.

There are also “controlled activities”, which will cover broader work in general health settings, FE settings and adult social care settings and posts where there is access to sensitive records about children and vulnerable adults, but from which a barred individual will not automatically be prevented from being engaged, but subject to employers putting in place appropriate safeguards to manage the risks.

11.0 MENTAL CAPACITY ACT 2005

The Mental Capacity Act 2005 (“the Act”) came into force, partly in April 2007 and in full from October 2007. It provides a framework for acting and making decisions on behalf of individuals aged 16 years and over who lack the mental capacity to act or make decisions for themselves as a result of an “impairment of, or a disturbance in the functioning of, the mind or brain”. It makes it clear who can take decisions in which situations and how they should go about this. It covers major decisions about someone’s property and affairs, healthcare treatment and where the person lives, as well as everyday decisions about personal care (such as what someone eats). The legal framework provided in the Act is supported by a Code of Practice, which provides guidance and information.

Key Principles

The whole Act is underpinned by a set of five key principles set out in Section 1 which apply to any act done or decision made under the Act:

- An assumption of capacity.
- Ensure all practicable steps are taken to assist someone to make and communicate their own decisions.
- A person should not be treated as incapable of making a decision just because their decision may seem unwise.
- Decisions should always be made in the best interests of the person without capacity and
- The least restrictive alternative must always be considered.

The Act enshrines in statute current best practice and common law principles concerning people who lack mental capacity and those who take decisions on their behalf. It replaces current statutory schemes for Enduring Powers of Attorney and Court of Protection receivers with reformed and updated schemes.

Assessment of Capacity

The Act deals with the assessment of a person’s capacity and acts by carers of those who lack capacity (these will all come into effect in October 2007). The Act sets out a single clear test for assessing whether a person lacks capacity to take a particular decision at a particular time. It is a “decision-specific” and time specific test. No one can be labelled ‘incapable’

simply by reference to their age or appearance or as a result of a particular medical condition or diagnosis.

Best Interests

An act done or decision made for or on behalf of a person who lacks capacity must be in that person's best interests. The Act provides a non-exhaustive checklist of factors that decision-makers must work through in deciding what is in a person's best interests. A person can put his/her wishes and feelings into a written statement if they so wish, which the person making the determination must consider. Also, people involved in caring for the person lacking capacity gain a right to be consulted concerning a person's best interests.

Statutory Protection

The Act provides statutory protection from liability where a person is performing an act in connection with the care or treatment of someone who lacks capacity providing:

- They have taken reasonable steps to assess capacity,
- They reasonably believe that the person lacks capacity and
- Reasonably believe that the decision is in their best interests.

This could cover actions that might otherwise attract criminal prosecution or civil liability if someone has to interfere with the person's body or property in the course of providing care or treatment.

There are some limitations to this by reference to the concept of "restraint" which the Act defines as the use or threat of force where a person who lacks capacity resists, and any restriction of liberty or movement whether or not the person resists. Restraint is only permitted if the person using it reasonably believes it is necessary to prevent harm to the person who lacks capacity, and if the restraint used is a proportionate response to the likelihood and seriousness of the harm.

This protection does not extend to deprivation of liberty within the meaning of Article 5(1) of the European Convention on Human Rights. The Code of Practice will provide additional safeguards (known as "Bournewood safeguards following the European Court of Human Rights judgement in HL v United Kingdom) for people who lack capacity and are deprived of their liberty but do not receive mental health legislation safeguards. [See separate paper headed "Bournewood Safeguards"]

Acting on Behalf of Someone Who Lacks Capacity

Lasting Powers of Attorney – the Act allows a person aged 18 or over to appoint an attorney to act on their behalf if they should lose capacity in the future, in relation to property and affairs (as with the current Enduring Power of Attorney) and also health and welfare decisions (which would include, for example, where someone was going to live). LPAs relating to decisions about property and financial affairs (referred to as ‘property and affairs LPAs’ or sometimes ‘financial LPAs’) can be used both before and after the donor loses capacity, according to the donor’s wishes. However, personal welfare LPAs (including those relating to healthcare decisions) can only be used when the donor lacks capacity to make a particular personal welfare decision.

To be valid, an LPA must be correctly executed in the prescribed form and it must be registered with the Public Guardian before it can be used. More detail can be found in Chapter 7 of the Code of Practice, including transitional arrangements for enduring powers of attorney in place at the time the Act comes into operation.

Court appointed deputies – the Act provides for a system of court appointed deputies to replace the current system of receivership in the existing Court of Protection. Deputies will be able to be appointed to take decisions on welfare, healthcare and financial matters as authorised by the new Court of Protection (see below) but will not be able to refuse consent to life-sustaining treatment. They will only be appointed if the Court cannot make a one-off decision to resolve the issues.

The court will consider whether the proposed deputy is reliable and trustworthy and has an appropriate level of skill and competence to carry out the necessary tasks. Different skills may be required according to whether the deputy is appointed to make welfare (including healthcare) decisions or financial decisions or both. Generally the Court will seek to make a single order, but examples given in the Code of circumstances which may require the appointment of a personal welfare deputy for a person lacking capacity are as follows:

- Where there is a history of acrimonious and serious family disputes which could have a detrimental effect on decisions about the person’s future care;
- Where the person’s best interests are best met by a deputy consulting with everyone concerned and having the final authority to make the necessary decisions;

- In exceptional cases where the person is felt to be at risk of serious harm if left in the care of family members, a local authority officer or other independent person could be appointed as deputy to make personal care decisions – this could, for example, be combined with a court order prohibiting those family members from having contact with the person;
- When a series of linked welfare decisions need to be made over time, for which single orders of the court are not appropriate - in such circumstances, it may be appropriate for a person (such as a family carer) who is close to someone with, for example, profound and multiple learning disabilities to apply for an order with a view to being appointed as a deputy with powers to make the required decisions which the individual concerned lacks the capacity to make.

The court will decide the extent of powers it wishes to confer on a deputy and the order of appointment will specify the particular decisions or actions the deputy is authorised to take, the powers available to him/her as deputy and the duration of the appointment. The court may appoint as a deputy someone who holds a specified office or position, such as a Director of Social Services, but where it does so, the Code states, at para 8.60 , that arrangements must be put in place to avoid possible conflicts of interest. For example where the person lacking capacity receives community care services from the local authority, the Court will wish to be satisfied that decisions about a person's finances will be made in the best interests of that person regardless of any implications for the services provided.

Deputies are accountable to the Court of Protection and the Court can cancel a deputy's appointment if it decides the appointment is no longer in the best interests of the person who lacks capacity.

The Office of Public Guardian (OPG) is responsible for supervising and supporting deputies. But it must also protect people lacking capacity from possible abuse or exploitation. Anybody who suspects that a deputy is abusing their position should contact the OPG. The OPG may instruct a Court of Protection Visitor to visit a deputy to investigate any matter of concern and it can also apply to the Court to cancel a deputy's appointment.

Court of Protection

The new Court will have jurisdiction relating to the whole Act. It will have its own procedures and nominated judges. The new court takes over the role and functions of the former Court of Protection in relation to the management of property and financial affairs of people lacking capacity.

It also deals with serious decisions affecting healthcare and personal welfare matters that were previously dealt with by the High Court under its inherent jurisdiction. This power to decide on the lawfulness of an Act is particularly relevant for major medical treatment cases where there is doubt or disagreement over whether the treatment would be in the person's best interests. Healthcare staff can still give life-sustaining treatment, or treatment which stops a person's condition getting seriously worse, while the Court is coming to a decision. It will be able to decide whether a person has capacity to make a particular decision for themselves, make declarations, decisions and orders affecting people who lack capacity and make decisions for or appoint deputies to make decisions on behalf of people lacking capacity. The court may revoke an LPA, if as a result of proceedings before it, the court decides the attorney has behaved, is behaving or proposes to behave, in a way that contravenes his/her authority or is not in the donor's best interests.

If social care staff are concerned about a decision that affects the welfare of a person who lacks capacity, the relevant Local Authority should make the application. Where it is suspected that a person lacking capacity is at risk of harm or abuse from a named individual, the court could be asked to make an order prohibiting that individual from having contact with the person who lacks capacity.

Independent Mental Capacity Advocate (IMCA)

An IMCA's purpose is to provide representation and support for someone who lacks capacity and who is particularly vulnerable (because they have no close relatives, friends or any other person to help protect their interests). An IMCA must be instructed, and then, consulted in the following situations:

- Decisions relating to providing, withholding or withdrawing "serious" medical treatment;
- Where it is proposed to move a person into long-term care in a hospital (likely to exceed 28 days) or care home (likely to exceed 8 weeks); or
- Where a long-term move to a different hospital (likely to exceed 28 days) or care home (likely to exceed 8 weeks) is proposed.

An IMCA may be instructed to support someone who lacks capacity to make decisions concerning:

- Care reviews, where no one else is available to be consulted,
- Adult protection cases, whether or not family, friends or others are involved.

The IMCA makes representations about the person's wishes, feelings, beliefs and values, at the same time as bringing to the attention of the decision-maker all factors that are relevant to the decision. The IMCA can challenge the decision-maker on behalf of the person lacking capacity if necessary.

The only situation in which the duty to instruct an IMCA to support and represent the person can be dispensed with is where the proposed placement or move needs to be made as a matter of urgency, for example an emergency admission to hospital, or where the person lacking capacity would be made homeless unless admitted immediately to a care home. Where the person concerned is to be detained in hospital or otherwise required to live in the accommodation in question under the Mental Health Act 1983, the IMCA does not need to be consulted, since the 1983 Act provides its own safeguards and rights of appeal.

The NHS body or local authority involved in the decision must take into account any information given or submissions made by the IMCA when determining what decision is in the best interests of the person lacking capacity. IMCAs have certain powers to enable them to carry out their functions under the Act. These include:

- The right to visit and have a private discussion with the person concerned;
- The right to examine, and take copies of, any records (such as clinical records, care plans or social care assessment documents) which the person holding the record considers are relevant to the IMCA's investigation.

The IMCA is not the decision-maker. It is ultimately the responsibility of the person proposing an action or decision to decide what is in the best interests of the person lacking capacity to make the decision or to act, but the decision maker has a duty to take account of the information given by the IMCA.

Chapter 10 of the Code provides more detailed guidance.

Advance Decisions to Refuse Treatment

The Act allows people to make a decision in advance to refuse treatment if they should lack capacity in the future. Where an advance decision concerns treatment that is necessary to sustain life, strict formalities must be complied with in order for the advance decision to be applicable. These formalities are that the decision must be in writing, signed and witnessed. In addition, there must be an express statement that the decision stands "even if life is at risk" which must also be in writing, signed and witnessed. Please refer to Chapter 9 of the Code for full details.

Protection and Supervision

Chapter 14 of the Code explains how professionals and people acting with formal powers under the Act (i.e. attorneys and deputies) are expected to interact with the relevant agencies responsible for the protection of adults lacking capacity. The Act provides for the supervision, via the Office of the Public Guardian (OPG), of court-appointed deputies in co-operation with other relevant bodies (such as NHS bodies, social services and CSCI). The OPG also has the function of dealing with concerns about the way in which deputies or attorneys are carrying out their duties and responsibilities. Court of Protection Visitors are individuals who have been appointed by the Lord Chancellor to provide independent advice to the court and the Public Guardian on matters relating to the exercise of powers under the Act.

The Visitors will have an important part to play in investigating possible abuse, but their role is much wider than this and their visits will also enable them, for example, to check on the general wellbeing of the person lacking capacity, and to give help and support to attorneys and deputies.

The OPG may itself investigate cases where there are allegations of financial abuse on the part of the attorney or the deputy. Where the concerns relate to personal welfare LPAs or personal welfare deputies, the Public Guardian will refer them to the relevant health or social care agency, and in certain circumstances the police will be alerted. In such cases the OPG will ensure that it is kept informed of the action taken by the relevant agency as well as ensuring that the court has all the information it needs in order to take possible action against the attorney or deputy. For example, the court might discharge a deputy or revoke an LPA.

Decisions not covered by the Act

Sections 27-29 and 62 of the Act set out the specific decisions which can never be made or acts which can never be done under the Act, whether by family members, carers, attorneys or the Court of Protection. These include:

- family relationships - including consent to marriage or civil partnership, sexual relationships, placing a child for adoption;
- to give, or to consent to, treatment for mental disorder of people who are liable for detention and treatment under the Mental Health Act 1983;
- voting or casting a vote at an election or a referendum on behalf of a person lacking capacity to vote.

(NB Nothing in the Act has an effect on the law concerning unlawful killing or assisting suicide).

Code of Practice

There is a statutory Code of Practice to accompany the Act. The Code will provide guidance to all those working with and/or caring for adults who lack capacity, including family members, professionals and carers. It describes their responsibilities when acting or making decisions with, or on behalf of, individuals who lack the capacity to do these things themselves. Those who will have a duty of care to a person lacking capacity, such as attorneys, deputies, IMCAs, professionals and paid carers must have regard to the Code. It is very important that professionals do not rely upon this summary but refer to the detailed guidance contained within the Code and references below to paragraph numbers are to the relevant parts of the Code.

Relationship between the Mental Capacity Act and the Mental Health Act 1983

The Mental Health Act 1983 exists primarily to provide a framework in which care and treatment can be given without consent to people who suffer from a serious mental disorder, which puts them, or other people at risk. People who are subject to the 1983 Act do not necessarily lack capacity, and most people who lack capacity will never be affected by the provisions of that Act. However, there will be some people who are subject to the 1983 Act and who also lack capacity in relation to some decisions, and who will therefore inevitably be affected both by the Acts.

Professionals may need to think about using the MHA to detain and treat somebody who lacks capacity to consent to treatment (rather than use the MCA), if:

- It is not possible to give the person the care or treatment they need without doing something that might deprive them of their liberty
- The person needs treatment that cannot be given under the MCA (for example, because the person has made a valid and applicable advance decision to refuse an essential part of treatment)
- The person may need to be restrained in a way that is not allowed under the MCA
- It is not possible to assess or treat the person safely or effectively without treatment being compulsory (perhaps because the person is expected to regain capacity to consent, but might then refuse to give consent)
- The person lacks capacity to decide on some elements of the treatment but has capacity to refuse a vital part of it – and they have done so, or

- There is some other reason why the person might not get treatment, and they or somebody else might suffer harm as a result

Before making an application under the MHA, decision-makers should consider whether they could achieve their aims safely and effectively by using the MCA instead

Compulsory treatment under the MHA is not an option if:

- The patient's mental disorder does not justify detention in hospital, or
- The patient needs treatment only for a physical illness or disability.

The MCA applies to people subject to the MHA in the same way as it applies to anyone else, with four exceptions:

- If someone is detained under the MHA, decision-makers cannot normally rely on the MCA to give treatment for mental disorder or make decisions about that treatment on that person's behalf
- If somebody can be treated for their mental disorder without their consent because they are detained under the MHA, healthcare staff can treat them even if it goes against an advance decision to refuse that treatment
- If a person is subject to guardianship, the guardian has the exclusive right to take certain decisions, including where the person is to live, and
- Independent Mental Capacity Advocates do not have to be involved in decisions about serious medical treatment or accommodation, if those decisions are made under the MHA

Healthcare staff cannot give psychosurgery (i.e. neurosurgery for mental disorder) to a person who lacks capacity to agree to it. This applies whether or not the person is otherwise subject to the MHA.

Chapter 13 of the Code provides more guidance on guardianship, supervised after-care and the implications of the Act on patients subject to the Mental Health Act.

[Given the Mental Health Bill it is likely the Code will be revised to take account of the new legislation in due course].

Resolving Disputes

Chapter 15 of the Code provides guidance for resolving disputes under the Act. While the Act establishes a new, dedicated Court of Protection to settle serious and complex disputes, it may often be more appropriate to explore alternative solutions to solving problems. Moreover, in some cases it would be inappropriate to take the matter to court, as there are more appropriate mechanisms specifically available for the type of situation.

The following mechanisms may assist:

- Independent advocacy on behalf of and in the interests of a person who has difficulty speaking up for him/herself. The advocate will be independent of any statutory agency or other party involved with the person.
- Mediation. This is a well established process for resolving disagreements where people in dispute are assisted by a mediator to come to a mutually acceptable outcome. Mediation can help to prevent problems becoming worse through early settlement and offers a wider range of outcomes than the court can provide. The mediator is a third party, who has no stake in the outcome of the process, does not make decisions or impose a solution. The parties control both the decision to settle as well as the terms of the settlement. Mediation will be most suitable when the dispute is between individuals who are failing to communicate with each other or to understand each other's point of view. It can help to forge better relationships between the parties and avoid future disputes so it is a good option when it is in the person's interests for those involved to maintain a relationship in the future.
- Complaints about social care (See the Council's complaints procedure). If someone is unhappy with care provided by a private or local authority care home, they should first use the care home's own complaints procedure (required under the Care Homes Regulations 2001). If they are dissatisfied with either the complaints procedure, or the response to their complaint, they may approach the Commission for Social Care Inspection (CSCI). If the person was placed in the home by the local authority, it might be more appropriate to use the social services complaints procedure if the concern is with that placement and the authority's assessment of the person's needs, rather than the services provided by the home.
- Disputes about the finances of a person who lacks capacity should usually be referred to the Office of the Public Guardian.

- The Court of Protection. Although the court will be relatively accessible and informal, the alternative methods of solving problems outlined above will generally be more appropriate, simpler, faster, cheaper and less distressing for all parties. However, before the Act came into force, the courts decided that some decisions relating to the provision of medical treatment were so serious that in each case, an application should be made for a court declaration that the proposed action was lawful before that action was taken. (See chapter 8 of the Code).