

LEGAL FRAMEWORK

Introduction

Adult protection work has always been made difficult by the fragmented legal structure and the issue of consent. This section is intended to provide an overview of the legal powers that may be available in the context of adult protection work, but staff must seek legal advice in pursuing remedies through the courts or seek a more detailed understanding of the legal framework outlined in this document. Should advice be required on any particular matter relating to the law on Adult Protection a solicitor in the Council's Legal Services Department should be consulted.

1. LEGISLATION UNDERPINNING SERVICES

National Assistance Act 1948

- Section 21 (1) - Local authorities have a duty to provide residential accommodation, including private and voluntary, 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.
- Section 29 - To promote the welfare of people with disabilities "the local authority is required to make arrangements for promoting the welfare of people:
 - With sensory impairments and communication difficulties
 - Who suffer from mental disorder of any description
 - Who are substantially and permanently disabled by illness, injury or congenital disabilities.

Chronically Sick and Disabled Persons Act 1970

- Section 2 - Places a duty on the local authority to inform themselves of the number of persons to whom *section 29 of the National Assistance Act 1948* applies and of the need for the making by the authority of arrangements under that section for such persons.

Health Services and Public Health Act 1968

- Section 45 - This Act places a duty on local authorities to promote the welfare of older people "in order to prevent or postpone personal or social deterioration or breakdown". Home meals and day centres are examples of services provided under this section.
- The approval of the Secretary of State must be sought, (who also directs the extent of the provision).

Housing Act 1996

- ❑ **Part VII** - This Act places a duty on local authorities to provide accommodation for homeless people with a priority need, i.e. people who are vulnerable because of old age and homelessness, mental illness or disability or physical disability or other special reason.

National Health Service Act 1977

- ❑ **Schedule 8** - 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 suffering from illness, care of expectant and nursing mothers (other than the provision of residential accommodation) and home help and laundry facilities.

Disabled Persons (Services Consultation and Representation) Act 1986

- ❑ States the entitlement of disabled people to a written assessment of need.
- ❑ Also gives disabled people the right to have a representative present at the time of their assessment.

Care Standards Act 2000

In relation to vulnerable adults this Act -

- ❑ Establishes, independent regulatory body for social care and private and voluntary healthcare services ("care services") in England, known as the National Care Standards Commission;
- ❑ Establishes independent Councils to register social care workers, set standards in social care work and regulate the education and training of social workers in England and Wales;
- ❑ Provides for the Secretary of State to maintain a list of individuals who are considered unsuitable to work with vulnerable adults.

Care services range from residential care homes and nursing homes, and domiciliary care agencies, through to private and voluntary healthcare services (including private hospitals and clinics and private primary care premises). Local authorities are required to meet the same standards as independent sector providers.

In England the Act provides for an independent National Care Standards Commission to undertake this regulatory function. These arrangements replace those set out in the Registered Homes Act 1984 (repealed in its entirety). Community homes are regulated.

General Social Care Council (GSCC) regulates the training of social workers and sets standards in social care through codes of conduct and practice and through other means. A register of social care staff is being developed and maintained by the Council.

The Act imposes a duty on the Secretary of State to maintain a list of individuals who are considered unsuitable to work with vulnerable adults.

Specified care providers (care homes and domiciliary care agencies which must register with the National Care Standards Commission and prescribed services within the NHS and independent health sector), and employment agencies and businesses which provide or supply individuals to work in care positions, will be under a duty to refer people to the list in certain circumstances.

Care providers also have to carry out checks of the list before offering employment to potential recruits in a care position working with vulnerable adults, and to refuse employment in such a position to any person included in the list. Provision is also made for registration authorities to make referrals to the list, and for referrals to be made as a result of certain inquiries.

The Act provides for a right of appeal against the decisions of the regulatory authorities and Councils established under the Act, decisions of HMCIS in England in connection decisions of the Secretary of State regarding the vulnerable adults protection list.

Protection Of Vulnerable Adult

Part VII introduces a list of persons who are considered unsuitable to work with vulnerable adults.

Definition Of Vulnerable Adults Within The Act . Three groups of adults are identified:

- those receiving accommodation and nursing or personal care in a care home;
- those receiving personal care in their own home through a domiciliary care agency;
- and
- those receiving certain services in healthcare settings, including private, voluntary and NHS establishments

Definition of the Providers of Services to Vulnerable Adults

- These are any person who is registered as carrying on a care home, a domiciliary care agency, or an independent healthcare establishment, independent medical agency or NHS body, which provides prescribed services.

Section 81 Duty of Secretary of State to keep list

- This places a duty on the Secretary of State to keep a list of individuals who are considered unsuitable to work with vulnerable adults. The list will be kept by the Secretary of State for Health

Section 82 Persons who provide care for vulnerable adults: duty to refer

- Sets out the duty on providers of care services for vulnerable adults to refer care workers to the Secretary of State for inclusion in the list under certain circumstances.
The circumstances, set out in *subsection (2)*, turn on a worker having placed a protected adult

Section 83 Employment agencies and businesses: duty to refer

- Employment agencies and businesses are similarly required to refer supply workers to the list under appropriate circumstances. An employment agency must make a referral where it has decided not to do any further business with the worker on the grounds of misconduct, which harmed a vulnerable adult or placed him or her at risk of harm; or where on those grounds has decided not to find them any further employment as a supply worker.
- An employment business must refer where it has dismissed a supply worker on the grounds of misconduct which harmed, etc, a vulnerable adult; where the supply worker has retired or resigned but otherwise the employment business would have dismissed or considered dismissing him on those grounds; or where on those grounds it has decided not to supply him for further work in a care position.

Section 84 Power of registration authority to refer

- Gives the registration authority the power to refer a worker to the Secretary of State that they consider guilty of misconduct. This section enables the registration authorities to make referrals when they come across evidence of misconduct in the course of their inspections that has not been referred to the Secretary of State by the employer. This power would be used in cases where employers have not fulfilled the responsibilities Part VII places on them to refer workers who have caused harm, or risked harm to vulnerable adults.

Section 85 Individuals named in the findings of certain inquiries

- This section provides for the Secretary of State to be able to consider for inclusion on the list individuals who have been named in the findings of certain inquiries. It also describes the process that the Secretary of State must use to determine whether a person so named should be included on the list.

Section 87 Applications for removal from the list

- Under this section, individuals are given a right to apply to have their name removed from the list once a period of ten years has elapsed. Applications will be made to the Tribunal and it will be for the Tribunal to determine whether the individual is still unsuitable to work with vulnerable adults.

Section 89 Effect of inclusion in list

- This section places a duty on providers of care services to vulnerable adults, including domiciliary care agencies, to check that prospective employees are not on the list before offering them employment in a care position. If they do find the person is on the list, they must not employ them in a care position. Where workers are being supplied by an employment agency or business, the provider may instead obtain written confirmation from the agency or business to the effect that they have checked that the individual is not on the list within the last twelve months.
- Should an employer discover that an employee is listed then they are obliged to stop employing them in a care position.
- It is an offence for a person confirmed on the list to apply for, accept or do any work in a care position.
- A person committing this offence would be liable on conviction in the Magistrate's Court to imprisonment for up to six months, and a fine of up to £5000 (level five on the standard scale); and in the Crown Court to imprisonment for up to five years and an unlimited fine. It will be a defence for a listed person charged with an offence to prove that they did not know, and could not reasonably be expected to know, that they were on the list.

Section 90 Searches of list under Part V of Police Act 1997

Amends section 113 and 115 of the Police Act 1997. These amendments enable the Criminal Records Bureau to supply an individual with a criminal record certificate or enhanced criminal record certificate, which states whether he is included on the list, and gives any details of the inclusion as may be required in regulations.

Public Health Act 1936 and Public Health Act 1961

- Sections 83-85 - Gives the power to enter and cleanse a premises.

National Health Service and Community Care Act 1990

- Section 47 - Provides a framework for all assessments of vulnerable adults. Allows provision for multi-agency assessment for complex situations. The lead agency for the co-ordination of assessments is the Social Services Department.
- Section 48 - The Secretary of State authorises persons to enter and inspect premises in which community care services are or are proposed to be provided by that local authority.
- The service user/resident of the premises may be interviewed in private for the purposes of investigating a complaint.

Carers (Recognition and Services) Act 1995

- Under this Act a carer is entitled to request an assessment in their own right if they are providing a substantial amount of care on a regular basis. The person being cared for must have been assessed under Section 4(T) of the NHS and Community Care Act (1990), the Children Act (1989) or Section 2 of the Chronically Sick and Disabled Act (1970). The results of the assessment should be taken into account when the local authority decides that services should be provided to the service user.

Community Care (Direct Payments Act 1996)

- The Act enables Local Authorities to make cash payments to adults aged 18 years and over who are eligible for Community Care Services, so that they can arrange their own care in lieu of receiving direct community care services organised by the Local Authority.

Common law

In situations of high risk, in order to save life or avoid serious physical harm it is acceptable under Common Law to intervene and in some cases treat without consent. This is known as the Common Law Doctrine of Necessity.

The action must be reasonable and can only be professionally justified as immediately necessary for saving life or preventing serious injury. Not to act under such circumstances could amount to negligence.

In high risk situations involving both physical and mental disorder, the physical disorder takes priority.

The Human Rights Act 1998

Section 6 (1).

The Human Rights Act concerns Public Authorities such as local authority services, the NHS Education Service, Police etc.

“ It is unlawful for a public authority to act in a way that is incompatible with a convention right.”

It does not apply to private businesses and voluntary sector services. However, if the local authority were informed that a person’s human rights were being abused e.g. in a residential care home and failed to act appropriately, the local authority could be liable under the act.

Subsection (1) does not apply to an act if;

“As a result of one or more provisions of primary legislation, the authority could not have acted differently;

Or

In the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the convention rights, the authority was acting so as to give effect to or enforce those provisions”.

The Human Rights Act is always subject to the provisions of what is referred to as Primary Legislation;

The Sexual Offences Act 2003, Protection From Harassment Act 1997 and The Mental Health Act 1983 are all examples of Primary Legislation.

As long as actions are in accordance with the provisions of this legislation, human rights are not breached e.g. if a convicted sex offender has his movements restricted by a Risk of Sexual Harm Order, this is within the provisions of the Sexual Offences Act 2003 and therefore the subject’s Human Rights are not contravened.

The Act incorporates a number of articles that clearly establish a citizen's Human Rights. Article 2: Right to Life

- *Everyone's right to life shall be protected by law.*
- *No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by Law.*
- *Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary;*
 - *In defence of any person from unlawful violence;*
 - *In order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
 - *In action lawfully taken for the purpose of quelling a riot or insurrection.*

Article 3

No one shall be subjected to torture

Or

To inhuman or degrading treatment

Or

Punishment

Article 4

No one shall be held in slavery and forced labour.

No one shall be required to perform forced or compulsory labour.

Article 6

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair hearing within a reasonable time by an independent and impartial tribunal established by law.

Everyone charged with a criminal offence has the following minimum rights;
To be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.

To have adequate time and facilities for the preparation of his defence;
To defend himself in person or through legal assistance of his own choosing, or, if he has not sufficient means to pay for legal assistance, be given it free when the interests of justice so require.

To examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

To have free assistance of an interpreter if he cannot understand or speak the language.

Article 7 No Punishment Without Law

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.

Article 8

Everyone has the right to respect for his private and family life, his home and his correspondence

There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law

and

Is necessary in a democratic society in the interests of national security,
Public safety,

Or

The economic well being of the country.
For the prevention of disorder or crime;
For the protection of health or morals;

Or

For the protection of the rights and freedoms of others

Article 9 Freedom Of Thought, Conscience And Religion

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10 Freedom Of Expression

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 12 Right To Marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 14

- *The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as;*
 - **Sex**
 - **Race**
 - **Colour**
 - **Language**
 - **Religion**
 - **Political or other option**
 - **National or social origin**
 - **Association with a national minority**
 - **Property**
 - **Birth, or other status.**

THE FIRST PROTOCOL

Article 1 of the first protocol:

Every person is entitled to the peaceful enjoyment of his possessions and cannot be deprived of them unless there is a relevant lawful order e.g. for payment of a fine, confiscation due to a public nuisance or current investigation etc.

Article 3 of the first protocol:

Refers to the holding of free government elections and the right to a secret vote. A vulnerable adult has the right to vote unless there is lawful reason for that right being denied.

2. LEGISLATION RELATING TO MENTAL HEALTH

Current Mental Health legislation is sometimes viewed as being oppressive and associated only with the compulsory detention of people with a mental disorder in hospital. Indeed, it is true to say that the guiding principle of the Mental Health Act 1983 is Public Protection. However to only view it in this way would be a harsh oversimplification.

This section aims to give an overview of the key elements of the mental health Act and other related legislation. It is a complex piece of legislation and the following "guide" should be regarded as an index. Approved Social Workers (ASWs) in the Social Services Department have detailed knowledge of this piece of legislation and should be able to advise if you feel any of these Sections would be useful. ASWs are the only practitioners with the power to make applications for admission under this Act.

Mental Health Act 1983

- Section 131 (1) - Voluntary admission to hospital.
- Section 2 - Provides for compulsory admission for assessment in the interests of the person's own health and safety or with a view to the protection of others. There is no real definition of mental illness but dementia is included. 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.
- Sections 7-11 - Guardianship. The use of guardianship is intended to protect and enable a person to remain in the community. Lasts 6 months. Includes a requirement for access for doctors or social workers. Can require the person to reside at a particular place. Can require the person to attend places for purposes of medical treatment (no power to enforce), occupation, education or training. There is however no power to convey
- Section 13 (4) - Places a duty on Social Services to direct an approved social worker to consider making an application for admission under the Act if requested to do so by the nearest relative. (This power could be used if the nearest relative of a mentally disordered person complains of mistreatment/ abuse of that person by a third party).
- Section 115 - If a mentally ill person is not receiving proper care, this section allows the ASW entry and inspection. Entry by force is not permitted.
- Section 117 - Provides for after care responsibility by the local authority, jointly with the health authority for persons detained under Section 3, persons admitted to hospital in pursuance of a Court Order made under Section 37 (by order of a criminal court) and persons transferred to hospital from prison.

- Section 127 (2) - Provides that it is an offence for any staff member of a hospital or mental nursing home or for any person to ill treat or wilfully neglect a patient or person who is subject to his/her guardianship under this Act. It is also an offence for a guardian or other person who has the care of a mentally disordered person living in the community to ill treat or wilfully neglect that person.

N.B. this section would only apply to a 'patient' with a mental disorder under the terms and provisions of the mental health act. It would not apply to a vulnerable adult who does not have a mental disorder.

The wilful neglect or ill treatment of a vulnerable person becomes a criminal offence under the Mental Capacity Act 2005 as of April 2007 and it may therefore be the more appropriate piece of legislation and remedy.

- Section 129 (1) - Proceedings may be taken if a social worker is obstructed without reasonable cause.
- Section 135 - After presenting the case to a Magistrate, a warrant may be given which allows for the search and removal of a person to a place of safety for 72 hours. To be used in conjunction with Police (often a doctor also accompanies). The person should be suffering from "neglect, ill-treatment or not kept under proper control or who is living alone and unable to care for themselves".
- Section 136 - Gives the Police the power to remove to a place of safety a person suffering from a mental disorder in a public place.
- See also Criminal Law for criminal offences under the Mental Health Act.

National Health (Patients in the Community) Act 1995

- Section 25- Discharge Under Supervision: designed to support s117 (duty of after care) on the following basis:
 - That the patient has a specific form of mental disorder
 - That there is a substantial risk of serious harm
 - That there is a risk of serious exploitation
 - That there is a serious risk of harm to other persons
 - After-care under supervision is likely to help secure that he receives after-care services to be so provided.
- Requirements under s25(D)
 - a) That the patient reside at any specified place
 - b) That the patient attend places and times so specified for the purpose of medical treatment, occupation, education or training;
 - c) That access to the patient to be given, at any place where the patient is residing, to any registered medical practitioner, approved Social worker or to any other person so authorised by the supervisor.

□ **Enforcement Requirements**

- Refusal to permit access to a supervisor or other authorised person is an offence under s129 of the Mental Health Act and was amended by the Mental Health (Patients In the Community) Act 1995.
- If, for instance, a patient goes missing or absconds from a specified place of residence the Police may be asked to search for him and return him to the specified residence. This allows control of a patient's whereabouts to be managed which is not available under normal s117 after- care arrangements.

3. GENERAL NEGLECT

The National Assistance Act 1948

Section 47 – provides for general neglect; any person of any age may be compulsorily removed from their home under specific circumstances. The purpose for removal is to 'secure the necessary care and attention' if they:

- a) are suffering from (i) grave chronic illness or (ii) being aged, infirm, or physically incapacitated, (iii) are living in insanitary conditions (all three categories must apply); and
- b) are unable to devote to themselves, and are not receiving from other persons, proper care and attention.

Seven days notice is required.

Application is made by Social Services to the Magistrates Court and requires the medical recommendation of the community physician or G.P.

National Assistance (Amendment) Act 1951

- Section 1 – Makes it possible to use an emergency procedure that allows the law to be used in response to a situation that is getting gradually worse or where someone needs immediate care or hospital admission and is refusing.
- It enables a Section 47 (above) application to be made without 7 days notice and is for three weeks only, after which time the Section 47 procedure must be followed. Medical Officer of Health must certify with another Medical Practitioner for removal without delay.

N.B. The *wilful* neglect or ill treatment of a vulnerable person becomes a criminal offence under the Mental Capacity Act 2005 and will be implemented in April 2007. It may therefore be appropriate to apply this legislation in conjunction with or instead of the National Assistance Act 1948.

4 FINANCIAL PROTECTION

Mental Health Act 1983 Court of Protection Rules 1994

- Part VII - If an adult is "incapable by reason of mental disorder of managing and administering his property and affairs" an application can be made to the Court of Protection. This application must be supported by appropriate medical evidence. There are two types of application:
 1. Receivership - which takes control and oversees the management of an estate (property and finances only, not welfare and care).
 2. Short Procedure Order - for estates of less than £5,000. The Court can authorise assets to be used in a certain way.

Powers of Attorney Act 1971

- The adult can, through a legal process, empower someone else to act on their behalf in relation to all their financial affairs. Unless any restrictions or conditions are placed on the Attorney this person will be able to do almost anything that the adult would have done, for example sign cheques, or withdraw money from savings accounts. The adult granting the Power of Attorney must be mentally capable at the time and can appoint almost anyone who is over 18 years of age. However, the Public Trustee does not act in this capacity. A Power of Attorney must be made in a prescribed form, which can be purchased from Legal Stationers. Anyone who is thinking of granting a Power of Attorney should consider making this an Enduring Power of Attorney.

An ordinary Power of Attorney lasts only so long as the person who grants it is mentally capable. In order for a Power of Attorney to be able to continue once a person has become incapable by reason of mental disorder, it should be an Enduring Power of Attorney and there are prescribed forms for this.

Enduring Powers of Attorney Act 1985

- An Enduring Power of Attorney is a Power of Attorney which continues after the adult becomes mentally incapable of managing their own affairs. When the Attorney believes that the adult is or is becoming mentally incapable, the Attorney must apply to register the Enduring Power of Attorney with the Court of Protection before they can act or continue to act under it.
- Powers of Attorney can in themselves be instruments of financial exploitation.

N.B. The rules governing the Court of Protection and Powers of Attorney / Enduring Powers of Attorney will change with the implementation of the Mental Capacity Act 2005 in April 2007.

Department of Social Security Benefits Agency - The claimant nominates someone to collect their benefit. This is an understanding between the claimant and the agent.

Appointeeship - The Benefits Agency can appoint someone else to receive an adult's benefits and to use that money to pay expenses such as household bills, food and personal items.

An appointee should be a close relative or friend or someone who is regularly in contact with the adult.

The person who is willing to act as the appointee must contact the local Benefits Agency office, and when there is no-one else available Social Services can assist in this capacity, who will arrange to interview the adult to decide whether they are mentally or physically incapable of acting on their own behalf.

The Appointee can give one month's notice of their intention to cease the arrangement and the Benefits Agency can end the arrangement at any time if it is not working satisfactorily.

Some adults unfortunately have no one to whom they can turn when they need an Appointee.

Some adults are not capable of giving an informed consent to the appointment of an Appointee. The Benefits Agency Policy Unit may consider that an appointment can, in appropriate circumstances, still be made.

Social Security (Claims and Payments) Regulations 1987 -

Regulations 33 and 34 - Department of Social Security must be satisfied of the claimant's inability to manage their benefits.

5 CRIMINAL LAW

Under Criminal Law the prosecution must prove the case 'beyond all reasonable doubt', the general principle being that if there is the slightest doubt as to the guilt of the person accused then they must be found 'not guilty'. It is therefore the responsibility of the prosecuting authority to gather evidence to satisfy this standard of proof prior to prosecution.

The criminal law is drafted in legislation which describes the necessary criteria which a person accused of an offence must fulfil before they can be prosecuted and convicted for that offence.

The following paragraphs give examples of Criminal Law relevant to Safeguarding Vulnerable Adults;

Financial Abuse.

'Financial or material abuse, including theft, fraud, exploitation, pressure in connection with wills, property or inheritance or financial transactions, or the misuse or misappropriation of property possessions or benefits'
(“No Secrets” Department of Health 2000).

The criminal offence of theft (Section 1 Theft Act 1968)

- Defined as the dishonest taking of property belonging to another without the consent of the owner and with the intention of keeping the property or disposing of it without the owners consent.

- There must be dishonesty involved and there must be a lack of consent on the part of the owner of the property. (Consent issues are addressed elsewhere within these guidelines.) This may prove difficult especially where the victim is vulnerable and therefore special care must be taken when gathering evidence to ensure the facts are recorded to establish any possible criminal offending behaviour.

The offence of Criminal Deception (Section 15 Theft Act 1968)

- Defined as the dishonest taking of property by deception. The obtaining of the property must be dishonest and with the intention of keeping the property or disposing of it without the consent of the owner. The main difference from theft is that the owner has consented to parting with the property but has been deceived in some way to part with the property. An element of this offence is proving that the owner would not have parted with the property had they known the true facts.

Physical Abuse.

'Physical abuse including hitting, slapping, pushing, kicking, misuse of medication, restraint, or inappropriate sanctions.'
(“No Secrets” Department of Health 2000).

The Criminal Law in relation to Physical Abuse is dealt with under the **Offences Against The Person Act 1861.**

- The general definition of an assault is the application of force against the person of another without consent.

- A 'minor' assault is referred to as a 'common assault' and is dealt with under the provisions of section 39 The Criminal Justice Act 1988. This offence relates to circumstances where there are no signs of an injury or the injury sustained is minor.

- Where the injury is more serious the offence of **Actual Bodily Harm** (section 47 Offences Against The Person Act 1861)
or
- **Grievous Bodily Harm** (section 20 Offences Against The Person Act 1861) would be more appropriate. Where there is evidence that the offender intended to cause the victim serious grievous bodily harm they commit an offence under section 18 Offences Against The Person Act 1861.

There would be a requirement to prove in all cases that the assault was intended and did not occur by accident or misfortune.

Sexual Abuse.

‘Sexual Abuse, including rape and sexual assault or sexual acts to which the vulnerable adult has not consented, or could not consent or was pressured into consenting.’

(“No Secrets” Department of Health 2000).

The Sexual Offences Act 2003 includes a number of offences related in particular to Vulnerable Adults. There are however other offences that apply to all victims of sexual offending, these are as follows;

Rape (Section 1 Sexual Offences Act 2003)

- Is committed where a male intentionally penetrates the vagina, anus or mouth of another person with his penis and the other person does not consent to the penetration and the perpetrator does not reasonably believe the other person consents.
- The issue of consent is described as ‘Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps the perpetrator has taken to ascertain whether the other person consents’. There is therefore a legal requirement within rape to prove consent was not given and that this lack of consent was known, or should have reasonably been known by the perpetrator.

Sexual Assault by Penetration (Section 2 Sexual Offences Act 2003).

- Is committed where a person (male or female) intentionally penetrates the vagina or anus of another person (male or female) with a part of their body or anything else, the penetration is sexual, the other person does not consent to the penetration, and the perpetrator does not reasonably believe the other person consents.
- The definition of consent is the same as within the offence of rape.

Sexual Assault (Section 3 Sexual Offences Act 2003).

- ❑ Is committed where a person intentionally touches another person, the touching is sexual, the other person does not consent to the touching, and the perpetrator does not reasonably believe the other person consents.
- ❑ The definition of consent is the same as within the offence of rape.

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

- ❑ Is committed where a person intentionally causes another person to engage in an activity which is sexual. The other person does not consent to engaging in the activity and the perpetrator does not reasonably believe that the other person consents.
- ❑ The definition of consent is the same as within the offence of rape.

Sexual Activity with a person with a mental disorder impeding choice. (Section 30 Sexual Offences Act 2003).

- ❑ This section includes penetration of the vagina, anus or mouth of the victim by the perpetrator's penis, the penetration of the victim's vagina or anus with a part of the perpetrator's body or anything else or sexual assault.
- ❑ The perpetrator knows or could reasonably be expected to know that the victim has a mental disorder and that because of it or for a reason related to it the victim is likely to be unable to refuse.
- ❑ The issue of capacity to consent is described as lacking the capacity to choose whether to agree to the sexual contact (whether because he lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason), or they are unable to communicate such a choice to the perpetrator.

Causing or inciting a person, with a mental disorder impeding choice, to engage in sexual activity. (Section 31 Sexual Offences Act 2003.)

- ❑ This offence is similar to Section 30 of the Sexual Offences Act 2003 in relation to the sexual activity involved.
- ❑ Section 31 however relates to the perpetrator causing or inciting another person to engage in the sexual activity.
- ❑ The issue of capacity is the same as stated within section 30.

Engaging in sexual activity in the presence of a person with a mental disorder impeding choice. (Section 32 Sexual Offences Act 2003).

- This offence relates to a person intentionally engaging in a sexual activity and for the purposes of obtaining sexual gratification he engages in the sexual activity when another person is present or is in a place from which the perpetrator can be observed and knowing or believing that the victim is aware or intending that the victim should be aware that they are engaging in it.
- The victim is unable to refuse because of or for a reason related to a mental disorder and the perpetrator could reasonably be expected to know the victim has a mental disorder and that because of it or for a reason related to it the victim is likely to be unable to refuse.

Causing a person with a mental disorder impeding choice to watch a sexual act. (Section 33 Sexual Offences Act 2003.)

- This section relates to a person who for the purpose of obtaining sexual gratification intentionally causes a person to watch a third person engaging in a sexual activity or to look at an image of any person engaging in a sexual activity.
- The victim is unable to refuse because of or for a reason related to a mental disorder.
- The perpetrator knew or could reasonably be expected to know that the victim has a mental disorder and that because of it or for a reason related to it the victim is likely to be unable to refuse.

Inducement, threat or deception to procure sexual activity with a person with a mental disorder. (Section 34 Sexual Offences Act 2003).

- This offence is committed when a person, with the agreement of another person, intentionally touches that person.
- the touching is sexual.
- The perpetrator obtains the victim's agreement by means of an inducement offered or given, a threat made or a deception practiced by the perpetrator to engage the victim in that sexual touching.
- The victim has a mental disorder and the perpetrator knows or could reasonably be expected to know that the victim has a mental disorder.

Causing a person with a mental disorder to engage in or agree to engage in sexual activity by inducement, threat or deception. (Section 35 Sexual Offences Act 2003).

- This section is similar to the other sections above related to mental disorder and is designed to include the circumstances described in the title.

Engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with a mental disorder. (Section 36 Sexual Offences Act 2003.)

- This section is similar to other sections above related to mental disorder and is designed to include the circumstances described in the title.

Causing a person with a mental disorder to watch a sexual act by inducement, threat or deception. (Section 37 Sexual Offences Act 2003.)

- This section is similar to the other sections above related to mental disorder and is designed to include the circumstances described in the title.

The Sexual Offences Act 2003 introduced specific offences committed by persons classified as care workers for persons with a mental disorder.

Section 42 Sexual Offences Act 2003 describes circumstances under which offences are committed as;

- Where the victim of the offending behaviour is accommodated and cared for in a care home, community home, voluntary home or children's home and the perpetrator has functions to perform in the home in the course of employment which have brought them or are likely to bring them into regular face to face contact.

- Where the victim is a patient for whom services are provided by a National Health Service body or independent medical agency,

or

- Is in an independent clinic or an independent hospital and the perpetrator has functions to perform for the body or agency

or

- in the clinic or hospital in the course of employment which have brought them or are likely to bring them into regular face to face contact with the victim.
- This also applies where the perpetrator is or is not in the course of employment, but is a provider of care, assistance or services to the victim in connection with the victim's mental disorder and as such has had or is likely to have regular face to face contact with the victim.

The offences applicable to care workers are as follows;

Care workers: Sexual activity with a person with a mental disorder. (Section 38 Sexual Offences 2003).

- This section is similar to Section 30 described above in the nature of the sexually offending behaviour.
- The perpetrator is described as being involved in the victims care in a way that falls within the definition under Section 42 above.

Care workers: causing or inciting sexual activity. (Section 39 Sexual Offences Act 2003.)

- This section is similar to section 31 described above in the nature of the sexually offending behaviour.
- The perpetrator is described as being involved in the victims care in a way that falls within the definition under section 42 above.

Care workers: Sexual activity in the presence of a person with a mental disorder. (Section 40 Sexual Offences Act 2003.)

- This section is similar to section 32 described above in the nature of the sexually offending behaviour.
- The perpetrator is described as being involved in the victims care in a way that falls within the definition under section 42 above.

Care workers: Causing a person with a mental disorder to watch a sexual act. (Section 41 Sexual Offences Act 2003.)

- This section is similar to section 33 described above in the nature of the sexually offending behaviour.
- The perpetrator is described as being involved in the victims care in a way that falls within the definition under section 42 above.

Prostitution is a concern in relation to the protection of vulnerable adults. The Sexual Offences Act 2003 addresses these concerns with direct legislation dealing with prostitution and also legislation dealing with ‘trafficking’ individuals to engage in prostitution.

Causing or inciting prostitution for gain. (Section 52 Sexual Offences Act 2003.)

- It is an offence for a person to intentionally cause or incite another person to become a prostitute in any part of the world and that they do so for or in expectation of gain for themselves or third person.

Controlling prostitution for gain. (Section 53 Sexual Offences Act 2003.)

- It is an offence for a person to intentionally control any of the activities of another person relating to that person’s prostitution in any part of the world and that they do so in expectation of gain for themselves or a third person.

Keeping a Brothel used for prostitution. (Section 55 Sexual Offences Act 2003.)

- ❑ It is an offence for a person to keep, or manage, or act or assist in the management of, a brothel to which people resort for practices involving prostitution (whether or not also for other practices).
- ❑ Schedule 1 of the Sexual Offences Act 2003 states that offences relating to keeping a brothel include any prostitutes involved male or female.

Trafficking into the UK for sexual exploitation. (Section 57 Sexual Offences Act 2003.)

- ❑ It is an offence for a person to intentionally arrange or facilitate the arrival in the United Kingdom of another person for the purposes of sexual exploitation in any part of the world.

Trafficking within the UK for sexual exploitation. (Section 58 Sexual Offences Act 2003.)

- ❑ It is an offence for a person to intentionally arrange or facilitate travel within the United Kingdom of another person for the purposes of sexual exploitation in any part of the world.

Trafficking out of the UK for sexual exploitation. (Section 59 Sexual Offences Act 2003.)

- ❑ It is an offence for a person to intentionally arrange or facilitate the departure from the United Kingdom of another person for the purposes of sexual exploitation in any part of the world.

The use of substances to commit sexual offences is recognised within the Sexual Offences Act 2003.

- ❑ It is therefore essential that the protection of vulnerable adults takes account of this as a potential risk.

Administering a substance with intent. (Section 61 Sexual Offences Act 2003.)

- ❑ A person commits an offence if they intentionally administer a substance to, or causes a substance to be taken by, another person knowing that the other person does not consent and with the intention of stupefying or overpowering that other person so as to enable any person to engage in a sexual activity with that other person.

The Sexual Offences Act 2003 replaced the criminal legal offence of 'Incest' with a new definition. This is now referred to as 'Sex with an Adult Relative'. There are a number of sections dealing with this as follows;

Sex with an Adult Relative: Penetration (Section 64 Sexual Offences Act 2003.)

There are age implications in relation to this offence.

- ❑ The perpetrator must be aged 16 or over and the relative must be 18 or over. (The reason for the age definition is that there are similar child protection offences under the Sexual Offences Act 2003 relating to person's under 18.)
- ❑ This section refers to penetration of the vagina or anus by the penis or any other object or penetration of the mouth by the penis.
- ❑ The penetration is sexual and that the persons concerned are related and that the perpetrator knew or could reasonably be expected to have know that they are related to each other.
- ❑ The way in which they are related is as follows: parent, grandparent, child, grandchild, brother, sister, half-brother, half sister, uncle, aunt, nephew or niece.

Sex with an Adult Relative: Consenting to penetration (Section 65 Sexual Offences Act 2003).

This offence is based on the same lines as the one described above but relates to the other person engaging in the penetrative act which is sexual.

Indecent Exposure

- ❑ The offence of indecent exposure is dealt with by way of Section 66 Sexual Offences Act 2003. It is described as a person commits an offence if they intentionally expose their genitals intending that someone will see them and be caused alarm or distress.

Voyeurism

- ❑ This is a new offence under Section 67 Sexual Offences Act 2003 and may be relevant in circumstances involving vulnerable adults.
- ❑ The offence is committed when a person, for sexual gratification, observes another person doing a private act knowing that the other person does not consent to being observed for the sexual gratification of the offender.
- ❑ This offence includes the operation of equipment to enable the act of observing and also includes recording the act for the sexual gratification of the offender or any other persons without the consent of the person being observed or recorded.
- ❑ Voyeurism is described as a person doing a private act in a place and in circumstances which would reasonably be expected to provide privacy, and the person's genitals, buttocks or breasts are exposed or covered only with underwear, the person is using the lavatory or the person is doing a sexual act that is not of a kind ordinarily done in public.

Sexual activity in a public lavatory. (Section 71 Sexual Offences Act 2003.)

- ❑ A person commits this offence if they are in a lavatory to which the public or a section of the public has access and they intentionally engage in a sexual activity.
- ❑ This section describes an activity as being sexual if a reasonable person would in all the circumstances consider it to be sexual.

SEXUAL OFFENCES PREVENTION ORDERS

Section 104 Sexual Offences Act 2003.

If it appears to a Chief Officer of Police that the following conditions are fulfilled with respect to any person who resides in their Police area or is intending to come to their Police area;

- ❑ That the person is a qualifying offender and has acted in such a way as to give reasonable cause to believe that it is necessary for such an order to be made.
- ❑ The prohibitions which may be imposed by a sexual prevention order are those necessary for the purpose of protecting the public or any particular members of the public from serious sexual harm from the defendant.
- ❑ A sexual Offences Prevention order shall have effect for a fixed period not less than five years specified in the order or until a further order is made.

The applicant or the defendant may apply to the court that made the Sexual Offences Prevention Order for it to be varied or discharged.

Except with the consent of both parties no Sexual Offences Prevention Offender Order shall be discharged before the end of the period of five years beginning with the date of service of the order.

Sex Offender Registration - Sexual Offences Act 2003

- ❑ A person becomes subject to notification requirements described under Sections 80 - 81 of the Sexual Offences Act 2003 if;
 - Convicted of a sexual offence listed in schedule 3 of the act.
 - Found not guilty of such an offence by reason of insanity or disability.
 - S/He is found to be under a disability and to have done the act charged against them in respect of such an offence
 - Cautioned in England, Wales or Northern Ireland in respect of such an offence, which was admitted at the time of the caution.

- Period of registration.
 - Sentenced to imprisonment for life or for a term of 30 months or more; an indefinite period.
 - Admitted to a hospital and is subject to a restriction order in respect of the offence. An indefinite period.
 - Sentenced to imprisonment for a term of more than six months but less than 30 months. 10 years from the relevant date.
 - Sentenced to imprisonment for 6 months or less. 7 years from the relevant date admitted to a hospital without a restriction order. 7 years from the relevant date.
 - Convicted or cautioned with no term of imprisonment. 5 years from the relevant date.

- Registration requirement.
 - Registration must take place within 3 days and must include;
 - Name and other names used, Date of Birth, Address and any changes of these details and must be made in person.
 - His/Her National Insurance number
 - Failure to comply.
 - 5 years imprisonment of and/or a fine.
 - New requirement that an offender must notify the Police of his/her intention to leave the United Kingdom and of his/her return.

6 DOMESTIC VIOLENCE, HARASSMENT and STALKING

PROTECTION FROM HARASSMENT ACT 1997 *adapted from Home Office Police Guidance notes*

This piece of legislation has been referred to as 'anti-stalking legislation'. Whilst the Act itself has a wider scope than this it has a clear relevance to the Protection of vulnerable adults, especially in relation to domestic violence.

There are four specific recordable offences relating to the Protection from Harassment Act, 1997. These are:

- ❑ Section 2 (Harassment) HO Classification 195/94
- ❑ Section 3 (Breach of a civil injunction) HO Classification 8/29
- ❑ Section 4 (Putting people in fear of violence) HO Classification 8/30
- ❑ Section 5 (Breach of a restraining order) HO Classification 8/31.

The Key elements of the act are:

- ❑ The Offence of *Harassment* (ss 1 and 2)
- ❑ A civil remedy for harassment in cases of an anticipated breach of section 1(s3)
- ❑ An offence of *Putting People In Fear Of Violence* (s4)
- ❑ A power to enable courts to make restraining orders upon conviction (s5)
- ❑ Breaches of non harassment injunctions (s3) and Restraining Orders (s5) is a criminal offence

The offences and breaches of any injunctions or restraining orders are all arrestable under s24 PACE.

CAUSING HARASSMENT

Harassment is not actually defined in the Act.

Section 1(1)

A person must not pursue a course of conduct that amounts to harassment of another and which he knows or ought to know amounts to harassment of the other.

Section 2(1)

A person who pursues a course of conduct in breach of Section 1 is guilty of an offence.

This is an arrestable offence under Section 24(1) (c), Police and Criminal Evidence Act (PACE) and carries a maximum sentence of six months' imprisonment and/or a fine of £5,000.

CAUSING HARASSMENT

- ❑ Harassing a person includes causing alarm or causing distress.
- ❑ The person who is alarmed or distressed does not have to be the intended victim of the harassment. It is possible to be alarmed for the safety of another person or to be distressed by the way another person is treated.
- ❑ A course of conduct must be on at least two occasions (this is the absolute minimum and experience has shown a prosecution is more likely to succeed with evidence of more than two acts).

'Conduct' includes speech as well as actions.

There is no specific timescale, generally speaking. However, the longer the length of time between incidents, the less chance that they will constitute a course of conduct. Also be mindful that two acts with a short break in between, could be construed as only one act. Each case must be dealt with according to its particular facts (Lau v DPP, 2000).

The six-month limit for charging summary offences does apply and the last incident alleged must be less than six months before the date of charge/summons.

Breach of An Injunction Issued by The Civil Court

Section 3

An actual or apprehended breach of section 1 may be the subject of a claim in civil proceedings.

The person who is or may be the victim of this harassment may make a claim to a county court or to the High Court.

The claim may be for damages and/or for the granting of an injunction.

- ❑ Breaching such an injunction will be a criminal offence carrying a penalty of five years (on conviction on indictment) and is therefore an arrestable offence.
- ❑ Alternatively the court may issue a warrant of arrest for the breach. The warrant will be to bring the offender before the Civil Courts to be dealt with for contempt of court.
- ❑ It is important to note that no actual harassment needs have taken place. A person may make an application in respect of harassment, which is feared or anticipated, but in practice a Court will need some evidence to justify an injunction.
- ❑ The victim may instead wish to make a civil claim for damages or take out an injunction. They should be aware that they would be responsible for costs (unless legally aided) for such claims.
- ❑ The burden of proof in the Civil Courts is on the balance of probability against the 'beyond reasonable doubt' test in the Criminal Courts.

Putting People In Fear Of Violence

Section 4

A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him, is guilty of an offence if he knows or ought to know that this course of conduct would cause the other so to fear on each of these occasions.

This is an arrestable offence and carries a maximum penalty of six months' imprisonment and/or a fine of £5,000 on summary conviction. On indictment the maximum penalty is five years' imprisonment and/or a fine.

'Course of conduct' has the same meaning as for the offence of harassment.

- ❑ For the purposes of Sections 2 and 4 whether conduct amounts to harassment (S2) or causing fear (S4) is determined if a reasonable person in possession of the same information would think the course of conduct amounted to harassment or causing fear.
- ❑ No specific intent has to be proved and can be committed anywhere.

Defences For S2 And S4

If the perpetrator can show that the course of conduct:

- ❑ was for the purpose of preventing or detecting crime (police officers, Customs and Excise, Social Security, etc) (Sections 2 and 4); or
- ❑ was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment (utility services, gas, water, etc) (Sections 2 and 4); or
- ❑ that it was reasonable in the particular circumstances to pursue that course of conduct (Section 2 only); or
- ❑ that the course of conduct was reasonable for the protection of themselves or others or for the protection of their or others' property (Section 4 only).

Breach Of A Restraining Order

Section 5

Under the provisions of this section the court at the time of sentence or otherwise dealing with a person convicted of an offence under Section 2 or 4 may make a Restraining Order, in addition to any other sentence.

The Order seeks to protect the victim or any person named in the Order from any future harassment or fear of violence for a specified period or until further notice.

The prosecution, defendant or any person named in the Order may apply to the court to have it varied or discharged.

- If the Order is breached without reasonable excuse, it is an arrestable offence and carries up to five years' imprisonment and/or a fine.

Added Penalties

Racially Aggravated Offences

The Crime and Disorder Act, 1998 applies to the Protection from Harassment Act.

- Section 2 harassment is increased to a maximum of 2 years' imprisonment; and
- Section 4 putting people in fear of violence increases to 7 years' imprisonment.

An offence is racially aggravated if:

- At the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial group; or
- The offence is motivated (wholly or partly) by hostility towards members of a racial group based on their membership of that group.

The Protection from Harassment Act may not always be the most suitable Act under which to prosecute a stalker. Each case needs to be looked at in its own right.

<u>Offence</u>	<u>Act</u>	<u>Place</u>	<u>Other Conditions</u>
Sending letters or articles with intent to cause distress or anxiety	S1 Malicious Communications Act 1998	Anywhere	-Indecent or grossly offensive letter/article -Intent to cause distress/anxiety
Improper use of telecommunications system	S43 Telecommunications Act 1986	Must be via public telecommunications	Message or matter must be grossly offensive, indecent, obscene or menacing; or other false or persistent message for purpose of causing annoyance, inconvenience or needless anxiety
Fear or provocation of violence	S4 Public Order Act 1986	No offence if both parties in dwelling	Threatening, abusive, insulting words, behaviour, signs, etc Intent to cause person to believe immediate unlawful violence will be used or to provoke such violence or whereby violence is likely
Intentional harassment, alarm or distress	S4A Public Order Act 1986	No offence if both parties in dwelling	-Threatening, abusive, insulting words, behaviour, disorderly behaviour, signs, etc -Within hearing or sight of person likely to be caused harassment, alarm or distress
Common Assault	S39 Criminal Justice Act 1988	Anywhere	Actual battery or threat of immediate force
Threats to kill	S16 Offences Against the Person Act 1861	Anywhere	Making a threat to another intending the other would fear it would be carried out to kill any person
Actual or Grievous Bodily Harm	Ss 47 & 20 Offences Against the Person Act 1861	Anywhere	Need for bodily harm or good medical evidence of psychological injury

DOMESTIC VIOLENCE

Family Law Act 1996 Part IV

This act seeks to protect individuals from domestic violence. It deals with rights to occupy the matrimonial home, occupation orders and non-molestation (injunction) orders. These orders can be applied for at any stage through the divorce process or unconnected to any divorce. "Associated persons" can apply for these orders, but the list of "associated persons" who can apply for non-molestation orders does not include couples who have never lived together. There is a presumption in favour of powers of arrest, but not an automatic attachment to orders.

Domestic Violence, Crime And Victims Act 2004

The Act introduced reform to the civil and criminal law by criminalising the breach of non-molestation orders under the Family Law Act 1996; by extending the availability of restraining orders under the Protection from Harassment Act 1997; and by making common assault an arrestable offence.

This document will focus on the guidance relating to vulnerable adults although The Act seeks to protect children as well.

Part 1: Domestic Violence Etc.

Section 1: Breach of non-molestation order a criminal offence

- ❑ Part 4 of the Family Law Act 1996 empowers a court to make an order giving personal protection to the applicant from molestation by an associated person (a non-molestation order).
- ❑ The court can also make a non-molestation order if in any family proceedings to which the respondent is a party it considers that the order should be made for the benefit of any other party to the proceedings or any relevant child even though no application for an order has been made.
- ❑ Parties to the proceeding may be "associated" by virtue of:
 - marriage or former marriage;
 - cohabitation or former cohabitation;
 - living together or having lived together in the same household other than as employees, tenants, lodgers or boarders;
 - being related;
 - an agreement to marry;
 - being parents or having parental responsibility for a child;
 - being connected by adoption; or
 - being parties to the same family proceedings.

Until this Act, a breach of such an order has been punishable only as a civil contempt of court.

- ❑ **Section 1** inserts a new section 42A into the Family Law Act 1996, which makes breach of a non-molestation order a criminal offence. As the maximum penalty for the offence is 5 years' imprisonment, the offence will be arrestable under section 24(1) of the Police and Criminal Evidence Act 1984. This enables the police always to arrest for breach of a non-molestation order, without the need for the courts to attach a power of arrest, or for the victim to apply to the civil court for an arrest warrant.
- ❑ **Under section 42A(2)**, an individual would only be guilty of a criminal offence if he is aware of the existence of the order. If the victim does not want to pursue criminal proceedings, the option still remains for them to apply for an arrest warrant for breach of a non-molestation order in the civil court.
- ❑ **Sub-section (4A)** is inserted into section 42, which places a duty on the court to consider making a non-molestation order when it considers whether to make an occupation order.
- ❑ **Occupation orders** are orders regulating the occupation of a dwelling-house and may provide for
 - the exclusion of the respondent from the house
 - vicinity of the house
 - or prohibit, terminate or restrict the exercise of the respondent's occupation rights.
- ❑ **Breach of an occupation order is not a criminal offence** as history of violence or molestation is not a prerequisite for the grant of an order. However the new section 42(4A) is designed to ensure that adequate protection is always in place for those persons who need it.
- ❑ **Section 2: Additional considerations if parties are cohabitants or former cohabitants** :Section 36 permits the court to make an occupation order in favour of a cohabitant or former cohabitant with no existing right to occupy the property. The court must take into account the level of commitment involved in that relationship.
- ❑ **Section 3: "Cohabitants" in Part 4 of the Family Law Act 1996 include same-sex couples**: Same-sex couples may apply for non-molestation orders by virtue of living together in the same household, but not for occupation orders merely by virtue of being an associated person.
- ❑ They must also have been legally entitled to occupy the dwelling-house and the house must have been intended to be their home.

- ❑ **"Legal entitlement"** means to occupy the dwelling-house concerned by virtue of a beneficial estate or interest or contract or by virtue of any other enactment giving the right to remain.
- ❑ It will also enable them to apply for a non-molestation order by virtue of being a cohabitant, rather than by virtue of being part of the same household as the respondent.

Section 5: Causing or allowing the death of a child or vulnerable adult: The Offence

- ❑ **Subsection (1)** sets out the circumstances under which a person is guilty of an offence of causing or allowing the death of a vulnerable adult. It limits the offence to where the victim has died of an unlawful act, so it will not apply where the death was an accident.
- ❑ The offence only applies to members of the household who had frequent contact with the victim, and could therefore be reasonably expected both to be aware of any risk to the victim, and to have a duty to protect him from harm.
- ❑ The household member must have failed to take reasonable steps to protect the victim. What will constitute "reasonable steps" will depend on the circumstances of the person and their relationship to the victim.
- ❑ The victim must also have been at significant risk of serious physical harm. The risk is likely to be demonstrated by a history of violence towards the vulnerable person, or towards others in the household.
- ❑ The offence will not apply if the victim died of a single blow when there was no previous history of abuse, nor any reason to suspect a risk.
- ❑ Where there is no reason to suspect the victim is at risk, other members of the household cannot reasonably be expected to have taken steps to prevent the abuse. They will therefore not be guilty of the new offence, even where it is clear that one of them is guilty of a homicide offence.
- ❑ The effect of *subsection (2)* is that where, for example, there are two defendants and it is established that one must have caused the death and the other must have failed to take reasonable steps to prevent it, the prosecution does not have to prove which is which.
- ❑ *Subsection (3)* provides that only those who are 16 or over may be guilty of the offence, unless they are the mother or father of the victim.
- ❑ Members of the household under 16 will not have a duty of care or be expected to take steps to prevent a victim coming to harm. In particular, a child under 16 will have no duty to prevent their parents from harming a sibling.

- **Subsection (4)(a)** provides that a person who visits the household frequently and for long periods can be regarded as a member of the household for these purposes.
- This will apply whatever the formal relationship of the person to the victim. *Subsection (4)(b)* covers situations where the victim might have lived in different households at different times. Only the members of the household where the victim suffered fatal harm could be guilty of the offence.
- **Subsection (5)** makes it clear that a defendant can be charged with failing to take reasonable steps to protect the victim, even where the victim died as a result of the act of a person who lacks criminal responsibility.
- There is a safeguard to ensure that a person who lacks criminal responsibility cannot be charged with the criminal act of causing the death by virtue of the definition in this section if he could not otherwise be charged with an offence.

Subsection (6) provides further definitions for the purposes of the section.

PART 2: CRIMINAL JUSTICE

- **Section 10:** common assault is now an arrestable offence
 - Subsection (1) extends the list of arrestable offences in England and Wales by adding the offence of common assault to Schedule 1A to the Police and Criminal Evidence Act 1984.
 - The effect is to give the police the power to arrest an individual on suspicion of assault and/or battery without an arrest warrant.
- **Section 2 of the Protection from Harassment Act 1997** created a summary only offence of harassment;
- **Section 4** created an offence that is committed where a person's course of conduct causes another reasonably to fear on at least two occasions that violence will be used against him. **See above for details.**
- **Subsection (5)** introduces a new section, section - 5A - which provides for restraining orders on acquittal. Courts can consider making a restraining order when a person has been acquitted of an offence, where the court believes a restraining order is necessary to protect a person from harassment.

7. THE MENTAL CAPACITY ACT 2005 (IMPLEMENTATION APRIL 2007)

Who It Affects

Mental capacity issues potentially affect everyone. Over 2 million people in England and Wales lack mental capacity to make some decisions for themselves, for example, people with:

- dementia
- learning disabilities
- mental health problems
- Stroke and head injuries

The 5 Principles of the Act

1. Assume a person has capacity unless proved otherwise
2. Do not treat people as incapable of making a decision unless you have tried all practicable steps to help them
3. Do not treat someone as incapable of making a decision because their decision may seem unwise
4. Do things or, take decisions for people without capacity in their best interests
5. Before doing something to someone or making a decision on their behalf, consider whether you could achieve the outcome in a less restrictive way

Assumption of Capacity and Supported Decision Making

- Act sets out an assumption of capacity
- There is an obligation to take all practicable steps to help the person take his or her own decision
- The Act makes it clear that a person's age, appearance, condition or behaviour does not by itself establish a lack of mental capacity
- Information must be given in a clear and easy way to understand
- The person who lacks capacity to must be helped to communicate

Assessing Capacity

- Act sets out the best practice approach to determining capacity - whether an individual is able, at a particular time of making a particular decision
- It is Decision specific.
- Detail on what is involved in assessing capacity is covered in the Code of Practice.

Best Interests

- All decisions must be made in the best interests of the person who lacks capacity
- It is the key principle that governs all decisions made for people who lack capacity
- Same as the current common law
- Must consider all relevant circumstances

Act doesn't define best interests but does give a checklist:

- Must involve the person who lacks capacity
- Have regard for past and present wishes and feelings
- Consult with others who are involved in the care of the person
- There can be no discrimination

Planning Ahead

The act provides new and clearer defined ways of planning ahead for a time when a person may lack capacity. The key elements are:

1. Lasting powers of attorney
2. Advance decisions to refuse treatment
3. Making your wishes and feelings known

1. Lasting Powers of Attorney (LPA)

- Enables a person to appoint someone known and trusted by them to make decisions for on their behalf

There are two types of LPA

- *'Property and affairs' which replaces the current Enduring Power of Attorney*
- *'Personal welfare' which is a new way to appoint someone to make health and welfare decisions for the person*

These must be made while the person has capacity

- *The LPA Must be registered with the public guardian*
- *The chosen attorney can only make decisions for a person in their best interests*

N.B. Work underway to develop on the forms and processes (consultation in Spring 2006 - closed on 14 April 2006)

2. Advance Decisions to Refuse Treatment

- Allows a patient to refuse specified medical treatment in advance
- These are legally binding now but Act gives greater safeguards
- Must be made when the patient has capacity and comes into effect if they lack capacity
- Must be clear about which treatment it applies to and when and must be in writing and witnessed if it applies to life-sustaining treatment
- Doctors can provide treatment if they have any doubt that the advance decision is valid and applicable

3. Making Wishes and Feelings Known

- A person can help people make decisions for them in their best interests by letting them know any particular wishes and feelings they may have
- There is no formal process for this but written statements given to professionals, carers, family or friends are likely to carry weight
- Decision makers will have to consider a person's wishes and feelings when deciding what is in their best interests

What Happens If A Person Lacks Capacity

1. Provision of care and treatment:

- If there is no welfare LPA or advance decision to refuse treatment a person can still be provided with the care or treatment they need
- The person providing the care or treatment decides what is in the person's best interests
- The decision maker must follow the principles of the Act

2. If necessary - an application can be made to the Court of Protection (for both finance and health and welfare issues)

3. Independent Mental Capacity Advocate (IMCA) may be appointed.

2. Application to the Court of Protection

(A) Orders of the court - applications can be made to the court of protection for complex or difficult welfare decisions or simple one-off financial decisions

(B) Court appointed deputies - could be used when a series of decisions are needed and a single court order is insufficient

(A). Orders of the court

- Concern complex or difficult welfare decisions
- and
- Simple one-off financial decisions

(B). Court Appointed Deputies

- Court appointed deputies - could be used when a series of decisions are needed and a single court order is insufficient
- Court will decide if appointing a deputy is in the person's best interests
- OPG will carry out checks on the right person appointed
- Must still allow the person who lacks capacity to make whatever decisions they are able to and must make decisions in the person's best interests.

There are two types:

- One which will replace receivers
- One to deal with welfare issues.

3. The Independent Mental Capacity Advocate (IMCA)

- *This is an extra safeguard for particularly vulnerable people in specific situations*
- *It places a duty on Local Authorities or NHS bodies to provide this service where necessary*
- *It applies to people that have no-one to consult (other than paid carers)*
- *It applies When decisions are being made about serious medical treatment or significant changes of residence e.g. moving care homes or hospital*
- *The IMCA will represent and support the person who lacks capacity*
- *Consultation ended on 30th September 2005 on extending the service and the details of how it is to operate*

Research

- *The Act sets out new safeguards for many types of research involving people who lack capacity.*
- *It balances desire for people without capacity to benefit from properly conducted research with the need for strict safeguards.*
- *The Act says the interests of the person are more important than the interests of science and society.*

Research - Safeguards

- *Research must be approved by independent experts to say it is necessary, safe and is intended to help understand or treat the person's condition.*
- *Carers/family or an independent person must give permission and can say no at any time.*
- *Research must stop if the person shows signs of not wanting to be involved*

(N.B. There Will be consultation on guidance in Summer 2006)

1. Code of Practice

The Act sets out a broad framework - the Code will flesh that framework out

Code has legal force and the following must have regard to it:

- Those with formal powers (attorneys/deputies)
- Those acting in a professional capacity or who are being paid
- Those carrying out research under the act
- IMCA'S

(Draft Code already published and formal consultation on a revised version in Spring 2006 - closes 2 June 2006)

2. Office of the Public Guardian

- Is to build upon and replace the Public Guardianship Office
- Maintains a register of LPA's and deputies
- Will co-operate with other agencies to supervise deputies and investigate complaints
- Provides evidence to the court
- Provides information and guidance to the public

(Work now on processes and procedures that underpin the new organisation - Richard Brook, Public Guardian (designate) in post in January 2006)

3. Court of Protection

- *This is a single specialised court staffed by trained judiciary*
- *It Combines*
 - ✓ Current court of protection (property and affairs)
 - ✓ Current high court jurisdiction (welfare including healthcare)
- *It has a regional presence and informal style*

**(Work is being undertaken now on the rules that will govern the new court
Consultation in Summer 2006 on Court rules and fees)**

4. Criminal Offence

- *The Act introduces a new offence of ill treatment or neglect*

(Work underway with CPS, home office and police to implement the criminal offence)

N.B. Key dates / Action Points for the implementation of the MCA 2005)

- *Consultation on the draft Code in spring 2006 - closes on 2 June 2006*
- *Consultation on LPA in spring 2006 - closes on 14 April*
- *Consultation on research guidance in Summer 2006*
- *Consultation on the Court rules and fees in Summer 2006*

The outcome of these action points may then require amendment of this section of the policy and procedures document.

Confidentiality

The Public Interest Disclosure Act 1998

The Public Interest Disclosure Act sets out requirements for organisations to have procedures under which staff can raise, in confidence, any serious concerns they have and do not feel they can raise in another way.

The Act provides for the protection of individuals who make certain disclosures of information in the public interest. It allows such individuals to bring action in respect of victimisation, if this results from their whistle blowing.

Under the Act a protected disclosure means any disclosure of information made by the worker in reasonable belief that:

- A criminal offence has been committed, is being committed or is likely to be committed.*
- A person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.*
- A miscarriage of justice is occurring or is likely to occur.*
- The health or safety of an individual has been, is being or is likely to be endangered.*
- The environment is being or is likely to be damaged.*
- Information tending to show any matter falling within any one of the above is being or is likely to be deliberately concealed.*

Data Protection Act 1998

This Act imposes a duty on agencies to provide individuals with a right of access to personal information held on them in any form (including files and e-mails). The Act removes the absolute right to confidentiality of third party information. Permission should be sought from third parties prior to disclosure.

However information can be disclosed without their consent if this is considered "reasonable in the circumstances".

Individuals have rights not only to the information, which identifies them (name, address etc) but they are also entitled to see any opinions made about them or intentions towards them.

Access to records can only be refused if the disclosure would cause serious harm to the physical or mental health of the service user or another person identified in the records.

The Act lays down eight principles for the protection of personal data. These are:

1. The information to be contained in personal data shall be obtained and processed, fairly and lawfully.
2. Personal data shall be held only for one or more specified lawful purposes.
3. Personal data held for any purpose or purposes shall not be used or disclosed in any manner incompatible with the purpose for which it was originally collected.
4. Personal data held for any purpose or purposes shall be adequate, relevant and not excessive in relation to the purpose or purposes.
5. Personal data processed for any purpose(s) shall not be kept for longer than is necessary for any purpose(s).
6. Personal data shall be processed in accordance with the rights accorded by the Act.
7. Appropriate security measures shall be taken against unauthorised access to, or alteration, disclosure or destruction of, personal data and against accidental loss or destruction of personal data.
8. Personal data shall not be transferred to a country outside the EEC, unless the country ensures an adequate level of protection against accidental loss or destruction of, or damage to, personal data.

An individual shall be entitled at reasonable intervals and without undue delay or expense to be informed by any data user whether he holds personal data of which the individual is the subject and to have access to any such data held by a data user.

In addition where appropriate, they are also entitled to have such data corrected or erased.

There are specific statutory restrictions to passing on patient identifiable information of certain categories and of passing on information in connection with serious crime. Agencies should refer to their own protocols and the local protocol for section 116 of the Police and Criminal Evidence Act 1984

The Data Protection Act 1998 will apply to the personal information in connection with the protection of vulnerable adults.

Information may be shared in the best interests of the protection of vulnerable adult(s).

It is important that at an early stage permission should be sought from the vulnerable adult to the collection and use of the relevant personal information. Where it is planned to share the information the vulnerable adult needs to give consent and a record should be kept of the information to be shared.

The nature of adult protection may mean that it is in the best interests of the individual that action is commenced before permission is obtained to the sharing of relevant information. Where this has been necessary, a record should be made.

Consent should then be sought and action taken to inform and share with the vulnerable adult, information that empowers them and enables them to make decisions for themselves.

The vulnerable adult may have access to their personal data and agencies should have in place procedures to facilitate this.

Achieving Best Evidence: Vulnerable and Intimidated Witnesses (*adapted from **Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses, Including Children***)

Categories Of Vulnerable Witnesses

The principal areas, which require attention if the needs of vulnerable, adult witnesses, are to be met, are:

- The recognition and subsequent reporting of crime;
- The identification of vulnerabilities; and
- Putting effective measures to address these into place during investigation,
- Pre-trial preparation and during and after any criminal trial.

Four other types of vulnerable witnesses are identified in the Youth Justice & Criminal Evidence Act 1999. These are:

- Witnesses suffering from a mental disorder as detailed under the Mental Health Act, 1983 (Mental disorder is defined in Section 1 (2) of the Mental Health Act 1983).
- Witnesses significantly impaired in relation to intelligence and social functioning (Learning disabled witnesses).
- Physically disabled witnesses.
- Witnesses suffering from fear or distress in relation to testifying in the case.
- Intimidated witnesses.

Intimidated witnesses

Research suggests that sexual offences, assaults, and those offences where the victim knew the offender are particularly likely to lead to intimidation of witnesses.

It seems likely that crimes which involved repeated victimisation such as stalking and racial harassment are also particularly likely to lead to intimidation.

In addition, some witnesses to other crimes may be under fear and distress and may require safeguarding and support in order to give their best evidence.

While the legislation distinguishes between vulnerable and intimidated witnesses, in respect of the criteria for their eligibility for Special Measures, it is important to recognise that:

- • Some witnesses may be vulnerable as well as intimidated (e.g. an elderly victim of vandalism).
- • Others may be vulnerable but not subject to intimidation (e.g. a learning disabled person who witnesses a robbery in the street).
- • Others again may not be vulnerable but be subject to possible intimidation (e.g. a young woman who fears violence from her current or former partner or
- someone who has been the subject of a racial attack).

While these examples provide illustrations of the application of the legislation, it is important not to attempt to categorise witnesses too rigidly.

Special Measures

It has long been recognised that many persons who are the victims or witnesses to crimes experience the ensuing process of investigation and justice as stressful and fear inducing, to such an extent that the interests of justice in preventing and detecting crime and the needs of witnesses are not adequately met.

Certain classes of witness have particular difficulties, either because of age, personal circumstances or because of their fear of intimidation, or because of special needs.

Stress affects the quantity and quality of the communication of vulnerable witnesses of all ages. The 1999 Youth Justice and Criminal Evidence Act has introduced a range of measures which can be used to facilitate the gathering and giving of evidence by vulnerable and intimidated witnesses.

Vulnerable or intimidated witnesses can receive social support at all stages of the investigation. Three distinct roles for witness support have been identified and it is unlikely to be appropriate for the same person to be involved in all three. They are:

- **Interview support** -provided by someone independent of the police, who is not a party to the case being investigated who sits in on the original investigative interview; he or she may be a friend or relative, but not necessarily so.

Social support at interview

- It may often be helpful for a support person who is known to the interviewee to be present during the interview to provide emotional support (the 'interview supporter').
- An interpreter or an intermediary may be present but must be distinct from
- The supporter and these different functions should not be vested in one person.

The use of intermediaries

- **The role of the intermediary is to assist the witness to understand the interviewer, and the interviewer to understand the witness.**
 - **The legislation requires the courts to approve the use of an intermediary, although this can be done retrospectively when used at the investigation stage to assist with the video recorded interview when an application is made for the recording to be admitted as the witness' evidence in chief.**
- **Pre-trial support** -provided to the witness in the period between the interview and the start of any trial. Appendix J sets out National Standards for Young Witness Preparation.
 - **Court witness support** -a person who may be known to the witness, but who is not a party to the proceedings and has no detailed knowledge of the case and may have assisted in preparing the witness for their court appearance.

Consent And Competence

It is a general principle that all witnesses should freely consent to be interviewed and to have the interview recorded on videotape. Where communication of consent is in doubt, a decision may be taken to go ahead with the interview if it is perceived to be in the best interests of the witness.

Appendix F sets out National Standards for the Court Witness supporter in the CCTV link room. It extends the existing provision for the videotaping of evidence in chief and the use of the Live Link facility to adult vulnerable or intimidated witnesses and introduces a range of new provisions (termed 'Special Measures') to facilitate the giving of best evidence.

These are all subject to the discretion of the court, although different presumptions apply to different categories of witness.

9 COURT PROCEEDINGS AND REMEDIES

Special Measures Available To Vulnerable And Intimidated Witnesses With The Agreement Of The Court

- ❑ **Section 23:** Screens may be made available to shield the witness from the defendant.
- ❑ **Section 24:** The live link will enable the witness to give evidence during the trial from outside the court through a televised link to the courtroom. The witness may be either accommodated within the court building or in a suitable location outside the court.
- ❑ **Section 25:** Evidence given in private. Exclusion from the Court of members of the public and the press (except for one named person to represent the press) will be considered in cases involving sexual offences or intimidation.
- ❑ **Section 26:** Removal of wigs and gowns by judges and barristers.
- ❑ **Section 27:** A video recorded interview with the vulnerable witness before the trial may be admitted by the court as the witness' evidence in chief. The court can, however, exclude a recording if there is insufficient information about where it was made, or if the recording contains serious violations of the rules of evidence.
- ❑ **Section 28:** Video recorded cross-examination is also to be considered admissible if the witness has already been permitted to give their evidence in chief on video prior to the court case. As with evidence-in-chief, the recording can be excluded if any rules have not been complied with.

- ❑ **Section 29:** Examination of the witness through an Intermediary, who may be appointed by the court to assist the witness to give their evidence at court. This measure is available only to witnesses who are eligible for Special Measures on grounds of age or incapacity.
- ❑ **Section 30:** Aids to communication will be permitted to enable the witness to give best evidence whether through a communicator or interpreter, or through a communication aid or technique, provided that the communication can be independently verified and understood by the court. Again, this measure is only available to witnesses who are eligible for Special Measures on grounds of age or incapacity.
- ❑ **Sections 34 and 35:** Mandatory protection of witness from cross-examination by the accused in person. An exception has been created which prohibits the un-represented defendant from cross-examining vulnerable child and adult victims in certain classes of cases involving sexual offences.
- ❑ **Section 36:** Discretionary protection of witness from cross-examination by the accused in person. In other types of offence, the court has discretion to prohibit an un-represented defendant from cross-examining the victim in person.
- ❑ **Section 41:** Restrictions on evidence and questions about complainant's sexual behaviour. The Act restricts the circumstances in which the defence can bring evidence about the sexual behaviour of a complainant in cases of rape and other sexual offences.

Civil Action

Evidence available may not meet the criminal standard of proof, i.e. that of beyond reasonable doubt but may meet the standard of proof for civil action i.e. **on the balance of probabilities**. Compensation may be sought through the criminal injuries compensation board.

The Criminal Injuries Compensation Authority

This Compensates people who have been physically injured or suffered psychological trauma as a result of "a crime of violence".

- ❑ Applications for compensation must be made within a year of the incident in question
- ❑ Compensation is assessed on a tariff according to the severity of the injury or trauma.

- Legal advice should be sought if it appears that a client may be entitled under the Criminal Injuries Compensation Scheme. 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.
- A victim of an assault might be able to claim compensation for pain, discomfort and "loss of amenity" flowing from the injury. Someone able to prove that they have been deprived of assets or property may be able to claim compensation ("damages") from the wrongdoer.

Law of Tort

Refers to civil law concerning claims in respect of a wrong or injury arising out of the act of someone else or someone's failure to act (negligence) for which an action for damages can be brought. Injunctions may be available for trespass to the person (assault and battery), nuisance, false imprisonment and trespass.

Contracts

- It is an implied term of any contract for care services 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 that 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 that are undertaken. The standard might be lower than would be expected of a paid carer, but serious deficiencies might constitute actionable negligence, if the court found there was a duty of care.

Inherent jurisdiction

The High Court may use its inherent jurisdiction to make a declaration as to whether proposed action is in the best interest of a person or is lawful.

For more information or to request further copies of this manual please contact the Adult Protection Manager on 01296 383387.

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