

# 4. Legal Framework for Safeguarding Adults

There are many areas of the law that cover different aspects of safeguarding; some of the most important legal routes and remedies are outlined here. However, it must be noted that the law is constantly changing and being updated. Before relying on any aspect of the law, advice should be sought from the respective legal section of the various organisations.

At present the supporting legislation is a patchwork and there are various Acts that give powers in different situations. However, it is important to remember that, when using the law, we need to strike a balance between empowerment and protection. When working with adults there is an assumption that we will work with them rather than compelling them to do something which is against their expressed wishes. Even when the law allows us to override a person's choices (for example, when deciding what is in someone's 'best interests' under the Mental Capacity Act 2005) compulsion should always be a last resort.

## 4.1 Choosing different legal options

Safeguarding cuts across many areas of life and therefore engages with various aspects of the law. When considering a response to a safeguarding situation it is likely that there may be more than one legal avenue. So if one option is not available (for example, because it may put the person at further risk) it may be that another may be available.

This was demonstrated in the case of Fiona Pilkington who killed herself and her daughter, Francesca. She had been in despair at the constant harassment she had received over a period of many years but, when asked, had chosen not to support a criminal prosecution. At the serious case review, several other alternatives were identified. Anti-social behaviour legislation could have been used leading to voluntary good behaviour contracts or court injunctions; disability hate crime could have been explored; or possession proceedings taken against the perpetrators.

## 4.2 The Human Rights Act

Abuse is a violation of a person's individual and civil rights. Human Rights are contained within the European Convention on Human Rights which was integrated into UK law under the Human Rights Act 1998.

Obligations under the Human Rights Act are imposed on public bodies such as Local Authorities or the NHS. The Act also applies to bodies carrying out functions of a public nature, such as a private hospital treating patients under the Mental Health Act 1983. Following the Health and Social Care Act 2008, the government has made it clear that independent care homes also perform public functions in respect of residents placed there by the Local Authority.

A consideration of human rights is vital when the services are intervening in a person's life, for example when overriding their expressed wishes to live in a certain place. The principle of proportionality reminds us that safeguarding is not just about protecting people, but also about respecting their autonomy and choices.

The most relevant parts of the Act in relation to safeguarding are:

- Article 2: the right to life;
- Article 3: the right not to be subjected to inhuman or degrading treatment or punishment;
- Article 5: the right not to be arbitrarily deprived of liberty;
- Article 6: the right to a fair hearing and
- Article 8: the right to respect for home, private and family life.

## 4.3 The Mental Capacity Act 2005

Issues relating to capacity run throughout safeguarding and a thorough understanding of the Mental Capacity Act 2005 (MCA) is essential.

The MCA provides a statutory framework to promote the right of individuals to make their own decisions whenever possible. It also protects people who are not able to make their own decisions by defining who can take decisions, in which situations, and how they should go about this. It also enables people to plan ahead for a time when they may lose capacity.

The key principles of the MCA are:

- People should be assumed to have capacity unless proved otherwise;
- Every effort should be made to support a person to make a decision before it is decided that they lack capacity to do so;
- Unwise decisions do not necessarily mean that the person lacks capacity;
- Any decision taken in respect of a person who lacks capacity must be taken in their best interests;
- In making a best interest decision, the least restrictive option should be chosen.

There is a 'two-stage test' of capacity which must be followed:

1. Is the person is unable to make this particular decision at the time it needs to be made - because they cannot understand, retain, use or weigh-up relevant information relating to the decision, or cannot communicate their decision in any way?
2. If so, does the person have some kind of impairment or disturbance in the functioning of the mind or brain that is directly related to their inability to make the decision at the time it needs to be made?

A person is unable to make a decision if they are unable to:

- Understand the relevant information • Retain the information • Use or weigh that information as part of making the decision
- Communicate the decision (by any means) The MCA creates two situations where a designated decision maker can act on behalf of someone who lacks capacity:
- Lasting Power of Attorney (LPA)
- Court appointed deputies

The three further provisions in the Act to protect vulnerable people are:

- Independent Mental Capacity Advocate (IMCA) – an independent consultant will be provided for a person lacking capacity that has no one to speak for them. An IMCA must be instructed when the decision concerns serious medical treatment or a change in accommodation.
  - Advance decisions to refuse treatment – Statutory rules with clear safeguards confirm that people make a decision in advance to refuse treatment if they should lose capacity in the future. The Act sets out the circumstances in which advance decisions may be followed by doctors.
  - Two new criminal offences of mistreatment or wilful neglect of a person who lacks capacity.
- Deprivation of Liberty Safeguards

## 4.4 Deprivation of Liberty Safeguards (DoLS)

The Deprivation of Liberty Safeguards were created as an amendment to the MCA and came into force on 1st April 2009. If it is thought that the care and support plan for an individual is such that it amounts to a deprivation of liberty, the care home or hospital must apply for 'deprivation of liberty safeguards'. If a person is deprived of their liberty without these legal safeguards, then his or her human rights will be breached (see Article 5 of the European Convention on Human Rights.)

Deprivation of liberty has no clear definition. Many people in hospitals and care homes may have their liberty restricted but not all will be deprived of their liberty. The following factors need to be considered:

- Whether professionals have complete and effective control over assessment, care, treatment, contacts, movement and residence
- Whether the person will be under constant supervision and control and not free to leave
- Whether restraint is used including sedation
- Whether the person would be prevented from leaving if they attempted to do so
- Whether a request from carers for the person to be discharged into their care is likely to be agreed
- Whether the person can maintain social contacts
- Whether the person has choice about their life within the home or hospital

The safeguards apply to anyone:

- aged 16 and over
- Who suffers from a mental disorder or disability of the mind – such as dementia or a profound learning disability?
- Who lacks the capacity to give informed consent to the arrangements made for their care and / or treatment and
- For whom deprivation of liberty (within the meaning of Article 5 of the ECHR) is considered after an independent assessment to be necessary in their best interests to protect them from harm.

For more information go to:

[www.tameside.gov.uk/socialcare/mentalhealth/capacityact/deprivationoflibertysafeguards](http://www.tameside.gov.uk/socialcare/mentalhealth/capacityact/deprivationoflibertysafeguards)

## 4.5 Mental Health Act (MHA) 1983

The primary purpose of the MHA is to ensure that people suffering from a mental disorder receive access to appropriate assessment and treatment but are unable to consent to a hospital admission informally (by nature and degree of the symptoms they may be experiencing at that point in time) it may be an essential way of safeguarding an individual if less formal attempts have failed or are not appropriate.

Relevant parts of the Act include:

- Section 2, 3 and 4: Admission to hospital. These sections give power to an approved mental health practitioner (AMHP) and 1 or 2 approved Section 12 Doctors as appropriate to authorise the admission to hospital of a mentally disordered adult, if she/he is satisfied the criteria for compulsory admission are met as per the provisions of the MHA.
- Section 115: Powers of Entry and Inspection. An AMHP may at all reasonable times enter and inspect any premises in which a mentally disordered adult is living, if she/he has reasonable cause to believe that the patient is not receiving appropriate care. The adult that there are concerns about must consent to entry by the AMHP. If consent is not given the capacity of the patient to consent to entry must be reconsidered in light of the circumstances known to the AMHP
- Section 135 allows an AMHP to apply to local magistrates for a warrant to search for and remove adults where there is a reasonable cause to suspect that an adult believed to be suffering from a mental disorder has been, or is being, ill-treated or neglected or not kept under proper control or is unable to care for himself or herself and is living alone.

## 4.6 Care Act 2014

The Care Act requires that each Local Authority must make enquiries, or cause others to do so, if it believes an adult is experiencing, or is at risk of abuse or neglect. This policy and procedure responds to this Act and provides the guidance for all partner organisations to co-operate with each of its relevant partners in order to protect the adult.

[www.legislation.gov.uk/ukpga/2014/23/contents](http://www.legislation.gov.uk/ukpga/2014/23/contents)

## 4.7 Regulation of Health and social Care Providers

Providers of health and social care are subject to regulation and registration under the Health and social Care Act 2008. The Care Quality Commission (CQC) is the body responsible for enforcing this system of regulation.

## 4.8 Whistleblowing

The Public Interest Disclosure Act (1998) Offers protection to people in the workplace who report abuse or alleged abuse within their organisations.

Managers must make it clear that there will be no recriminations for “whistle blowing” and that staff concerns will be dealt with fairly and justly. Managers should recognise that staff might be scared of taking action when they suspect that abuse is occurring. It is common to react to distressing situations by denying reality or by feeling guilty or de-skilled.

All members of staff have a moral obligation, a right and a duty to raise with their employer:-

- Any instance of malpractice, negligence or unprofessional behaviour;
- Any matter of concern relating to delivery of services, which are detrimental to service users' and carers' interests.

In practice this means that all employees are responsible for being alert to abuse and for doing the right thing.

Being alert to abuse means:

- Identifying behaviour that is not acceptable
- Listening to clients/patients who disclose abuse;
- Acknowledging hints or signals, which are verbally or non-verbally displayed

Doing the right thing means:

- Reporting concerns to the line manager;
- Ensuring that an enquiry/assessment takes place;
- Not working in isolation;
- Receiving regular supervision;
- Receiving training.

The Public Interest Disclosure Act 1998 offers protection for staff who 'whistle blow.'  
Allegations against staff

- Any allegation of abuse towards a member of staff will be investigated. Staff in this situation, will be supported by their own organisations grievance and disciplinary procedures.

The Care Quality Commission has guidance on whistleblowing.

## 4.9 Safeguarding individuals from financial abuse

- **Lasting Power of Attorney:** Under the Mental Capacity Act 2005 a person can, through a legal process, bestow their rights over their financial affairs to a relative, friend or professional. That person is then legally entitled to act for them by the 'Power of Attorney.'
- **Deputyship:** The Court of Protection may appoint a 'deputy' to look after the financial affairs of a person who lacks capacity to manage them him or herself.
- **Appointee:** A person can approach the Benefits Agency (BA) and appoint a relative, friend or professional to deal with their financial affairs. Forms are available from the BA. If the Benefits Agency is alerted to concerns by any professionals the procedure is to interview the person and proposed appointee before making a decision. The agency is also willing to put a stop on Benefit but only if contacted by a professional who has the consent of the claimant. This can be useful in cases where someone has taken possession of a Benefits book and the vulnerable person is not receiving their rightful money. The BA will then investigate the circumstances and the vulnerable person will be asked if there is anyone else who could be made an appointee.
- **Agent:** A vulnerable person can authorise another person to collect their state benefit for them by signing the back of the pension benefit form.

## 4.10 Criminal Law and the Police

Many abusive acts or omissions may constitute a criminal offence. If it is thought that a criminal offence may have been committed, the police should always be contacted for advice. The Crown Prosecution Service has issued advice linking types of abusive behaviour with criminal offences. Some examples are given below:

- Hitting, slapping, pushing, and kicking: common assault under Section 39 of the Criminal Justice Act 1988.
- Misuse of medication to manage behaviour: assault, unlawfully administering medication under Section 58 of the Medicines Act 1968, failure to comply with conditions for medication under the Care Standards Act 2000 (now, the Health and Social Care Act 2008).
- Inappropriate restraint: false imprisonment, common assault, aggravated or grievous bodily harm under the OAPA 1861.

## 4.11 Sexual offences: Sexual Offences Act 2003.

- Threats of harm or abandonment: threats to kill under Section 16 of the OAPA 1861, blackmail under Section 21 of the Theft Act 1968, common assault, ill treatment/ wilful neglect under Section 44 of Mental Capacity Act 2005 or Section 127 of the Mental Health Act 1983.
- Humiliation, intimidation, and emotional blackmail, verbal abuse: being shouted or sworn at: fear of violence under Section 4 of the Public Order Act (POA) 198, course of conduct amounting to harassment/ causing another to fear under Sections 1 and 4 of the Protection from Harassment Act 1997.
- Theft, fraud, exploitation, pressure in connection with wills, powers of attorney, financial transactions, or the misuse or misappropriation of property, benefits or possessions: theft or robbery under Sections 1 and 8 of the Theft Act 1968, blackmail under Section 21 of the Theft Act, fraud under the Fraud Act 2006, forgery under Section 25 of Identity Cards Act 2006 and Forgery and Counterfeiting Act 1981.
- Actions resulting in death: murder, manslaughter, corporate manslaughter, causing or allowing death of a vulnerable person in a domestic setting under the Domestic Violence, Victims and Crime Act 2004, aiding or abetting suicide under
- Section 2 of the Suicide Act 1961, breach of care standards regulations (CPS, 2008, Annex a, cited in Mandelstam 2011).

The Police and Criminal Evidence Act 1984:

- Section 17: Outlines powers to enter and search premises without a warrant for the purpose of saving life and limb.
- Section 25: Allows a police officer, where there are reasonable grounds, to make an arrest of someone to prevent them causing physical injury to another person, or to protect a child or other vulnerable person.
- Section 66: In order to actively facilitate communication an "appropriate adult" should be appointed if a vulnerable person is arrested or if they are a witness to abuse.

## 4.12 Housing and Community Safety

In some circumstances the perpetrator of abuse may, by their actions, be in breach of the conditions of their tenancy. The housing provider should explore all options before seeking possession of the person's home; these include Anti-Social Behaviour Orders, acceptable behaviour contracts and court action to enforce tenancy conditions. Under the Housing Act 1996, some landlords can seek Anti-Social Behaviour Injunctions in an attempt to prevent behaviour causing a nuisance to other neighbours. The court can attach a power of arrest to an injunction if the conduct involves the use or threat of violence.

## 4.13 Protection from violence, harassment and molestation

A number of civil remedies can be employed to protect vulnerable adults in situations where they are being threatened, harassed or forced into marriage.

Family Law Act (FLA) 1996 Act unifies the law and procedure with respect of domestic violence and repeals certain earlier statutes covering that field of work. The two relevant Orders are:

- The Non-Molestation Order: Prohibits a person from molesting another person who is associated with them. The definition of 'associated person' is contained in Section 62(3) FLA 1996 and is wide enough to include married couples, co-habitees or people living in the same household otherwise than in a relationship of employee, tenant, lodger or boarder. Relatives are also included. Power of Arrest can be attached to a Non-Molestation Order or an undertaking can be given not to repeat the type of behaviour the Court is concerned with.
- Occupation Orders: Section 30 to 32 FLA 1996 deals with the rights to occupy a family home. Sections 33 to 41 deal with the Orders that the Court can make to regulate those rights and they are known as 'Occupation Orders'.
- The Protection from Harassment Act (1997): This Act provides both civil and criminal remedies for protection from harassment. No association need be proved between the victim and perpetrator for the purposes of this Act (as is required by the Family Law Act).

## 4.14 Modern slavery

Modern slavery is a serious crime. It encompasses slavery, servitude, and forced or compulsory labour and human trafficking. Modern slavery victims can often face more than one type of abuse and slavery, for example if they are sold to another trafficker and then forced into another form of exploitation. A person is trafficked if they are brought to (or moved around) a country by others who threaten, frighten, hurt and force them to do work or other things they don't want to do. For further information refer to your organisations local procedures and visit:

[www.gov.uk/government/collections/modern-slavery](http://www.gov.uk/government/collections/modern-slavery)



## 4.15 Prevent

The Prevent Duty under the Counter-Terrorism and Security Act 2015 requires all specified authorities to have “due regard to the need to prevent people from being drawn into terrorism”; local authorities and their partners therefore have a core role to play in countering terrorism at a local level and helping to safeguard individuals at risk of radicalisation.

For further information refer to your organisations local procedures and visit [www.gov.uk/government/publications/channel-and-prevent-multi-agency-panel-pmap-guidance](http://www.gov.uk/government/publications/channel-and-prevent-multi-agency-panel-pmap-guidance)

## 4.16 Channel

Channel is part of the Prevent strategy. The process is a multi-agency approach to identify and provide support to individuals who are at risk of being drawn into terrorism.

For further information refer to your organisations local procedures and visit: [www.gov.uk/government/publications/channel-guidance](http://www.gov.uk/government/publications/channel-guidance)

Further information regarding the law around safeguarding can be found in: ‘Safeguarding Adults at Risk of Harm: a Legal Guide for Practitioners’ Madelstam 2011 available on the Social Care Institute for Excellence website.