



Practice Guidance: Safeguarding Adults: Legal Powers To Intervene

Version:	Version 1
Ratified by:	Leeds Safeguarding Adults Partnership Board
Date ratified:	October 2011
Author/Originator of title:	Policy, Protocols and Procedures Sub-group
Sub-group Chair:	Kieron Smith, Leeds Safeguarding Adult Partnership Support Unit
Date issued:	November 2011
Review date:	October 2013
Target audience:	Safeguarding coordinators / safeguarding professionals

< This page is intentionally blank >

Contents

1	Introduction	1
2	Common offences and legal responses associated with abuse	2
2.1	Physical Abuse	2
2.2	Sexual Abuse	5
2.3	Psychological/Emotional Abuse	5
2.4	Financial Abuse	7
2.5	Neglect (or acts of omission)	9
2.6	Discriminatory Abuse.....	11
2.7	Institutional Abuse	11
3	Mental Capacity Act 2005	12
3.1	Key Principles.....	12
3.2	Independent Mental Capacity Advocate (IMCA)	13
3.3	Deprivation of Liberty Safeguards (DoLS).....	14
4	Safe Employment Legislation	15
4.1	Criminal Records Bureau (CRB)	15
4.2	Safeguarding Vulnerable Groups Act 2006.....	16
4.2.1	ISA Vetting and Barring Scheme	17
5	Other relevant legislation/guidance.....	19
5.1	Public Interest Disclosure Act 1998 (Whistle-blowing)	19
5.2	Achieving Best Evidence	19
5.3	Information Sharing Legislation/Guidance	19
5.4	Health and Social Care Act 2008	20
5.5	General Police Powers	20
6	Version Control Record.....	20

Each contents heading is a hyperlink

1 Introduction

This practice guide is intended for use as a source of reference. It outlines common legislation and protective measures that can be used to safeguard adults experiencing or at risk of abuse. This focus of this guide is on criminal and civil protective measures, rather than the legislative basis by which services are provided.

This guide however will not be exhaustive. The range of circumstances within which a person may be subject to abuse are diverse and other legislation may be relevant. Furthermore the law is subject to continual change by means of new legislation and case law.

The purpose of this practice guide is to signpost the practitioner to the range of legislation that may be pertinent to a safeguarding adult concern and should not be used as a replacement for legal advice.

2 Common offences and legal responses associated with abuse

2.1 Physical Abuse

Criminal Justice Act 1988

The Act includes Common Assault - Section 39. This act is committed when a person either assaults another person or commits a battery. An assault or battery may leave no physical evidence. Any act or words involving the use or threat of immediate violence towards someone can constitute an assault.

Offences Against the Person Act 1861

Includes:

- Assault occasioning Actual Bodily Harm (ABH): Section 47 - the offence of assault that leaves physical injury.
- Assault occasioning Grievous Bodily Harm (GBH): Sections 18 and 20 – are more serious and are sometimes referred to respectively as ‘wounding with intent’ and ‘malicious wounding’

Each offence concerns the incurring of injury, intentionally or recklessly.

Public Order Act 1986

The Act includes Affray - Section 3. This act involves use or threats of unlawful violence towards another such that this would cause a person of reasonable firmness present to fear for his/her personal safety.

Mental Capacity Act 2005

The Act includes the offence ‘Ill-Treatment or Wilful Neglect’ – Section 44. This offence relates to the actions of any person who is responsible for the care of another person who lacks or is reasonably believed to lack mental capacity. The maximum sentence is 5 years in prison.

Ill-treatment involves deliberation or recklessness and it does not matter whether the behaviour was likely to cause, or actually caused, harm or damage to the victim’s health.

The meaning of wilful neglect varies with circumstances but would usually mean that a person had deliberately failed to do something he or she knew was a duty.

Mental Health Act 1983 (amended by the Mental Health Act 2007)

The Act includes the offence ‘Ill-treatment or Wilful Neglect of Patients’. The maximum sentence is 5 years in prison.

Section 127 (1) It is an offence for any person who is an officer on the staff of or otherwise employed in, or who is one of the managers of a hospital [including independent hospital or care home] to ill-treat or wilfully neglect a patient receiving treatment for mental disorder.

Section 127 (2) It shall be an offence for any individual to ill-treat or wilfully to neglect a mentally disordered patient who is subject to guardianship under the Act or otherwise in their custody or care (whether by virtue of any legal or moral obligation or otherwise)

False Imprisonment: is a common law offence involving the unlawful and intentional or reckless detention of a person.

Suicide Act 1961

A person commits an offence under section 2 of the Suicide Act 1961 if he or she does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and that act was intended to encourage or assist suicide or an attempt at suicide.

Domestic Violence, Crimes and Victims Act 2004

The Act includes the offence (Section 5) of causing or allowing the death of an adult at risk (i.e. failing to take reasonable steps to protect the victim). This applies to unlawful acts occurring within the household.

Restraint

The common law doctrine of necessity provides that restraint may be lawful in certain circumstances, for example the restraint is necessary, appropriate and proportionate.

The Department of Health (2002) 'Guidance on physically restrictive interventions for people with learning disability and autistic spectrum disorder in health, education and social care settings' clarified that interventions are legally permissible in certain circumstances, such as to protect the individual or others. Interventions however should be the least restrictive necessary.

Section 6(4) of the Mental Capacity Act 2005 states that someone is using restraint if they:

- Use force – or threaten to use force – to make someone do something that they are resisting, or
- Restrict a person's freedom of movement, whether they are resisting or not.

Any action intended to restrain a person who lacks mental capacity will not attract protection from liability under Section 5 unless the following two conditions are met:

- The person taking action must reasonably believe that restraint is *necessary to prevent harm* to the person who lacks mental capacity, and
- The amount or type of restraint used and the amount of time it lasts must be a *proportionate response* to the likelihood and seriousness of harm.

In 2007 the Commission for Social Care Inspection published a report on the care of older people. The commission referred to restraint as including physical intervention, physical restraint, denial of practical resources to manage daily living, environmental restraint, chemical restraint, electronic surveillance, medical restraint, and forced care. It emphasised that restraint had to be justified in each case and might be if:

- consideration was given to the best interests of the individual and others
- there is a serious risk of harm to older persons or others
- other methods to control the situation, such as de-escalation, have been tried and found to be unsuitable or have failed
- the least practicable amount of force is used for the shortest time
- it is used according to agreed timescales, on the basis of a risk assessment and recorded decisions
- it is a last resort (CSI 2007, Rights Risks and Restraints)

Human Rights Act 1998

Article 5 – Right to Liberty and Security

A person has the right not to be deprived of their liberty - 'arrested or detained'- except in limited cases specified in the Article (e.g. where you are suspected or convicted of committing a crime) and/or where this is justified by a clear legal procedure.

Applications to the Court of Protection and for Deprivation of Liberty Safeguards (DoLS) may be required in certain circumstances where a person lacks mental capacity in relation to their care and treatment. The need for these actions to be considered is in order to ensure compliance with Article 5.

NB: DoLS applies only to care and treatment within hospitals and care home settings.

Forced Marriage Act (Civil Protection) Act 2007

This legislation provides for Forced Marriage Protection Orders (FMPO) to prevent forced marriages from occurring and to protect those who have already been forced into marriage. The order can include restrictions or requirements to protect a victim from a spouse, family member or anyone involved - and the order can relate to conduct either within or outside of England and Wales.

Applications can be made direct to the court by the person seeking protection and local authorities, which will be designated as relevant third parties under the Act.

Breach of an order made under the Forced Marriage (Civil Protection) Act 2007 is not a criminal offence. However, there is provision in the Act for a power of arrest to be attached to the order.

Further information about legislation and extensive guidance (including an advice line) in relation to Forced Marriage, can be obtained from Foreign and Commonwealth Website:

www.fco.gov.uk/forcedmarriage

Family Law Act 1996

Non-molestation order:

A person may seek a non-molestation order under Section 42, Family Law Act 1996. When such an order is granted it forbids the spouse or family member (inc. a person from same household or a person to whom the applicant has agreed to marry) from using violence or other behaviour amounting to harassment against the applicant. Such an order can also be sought in relation to a child of the family.

Even though non-molestation orders are civil court orders, breaching a non-molestation order issued after 1st July 2007 is a criminal offence for which perpetrators may be fined or sent to prison.

Occupation order:

A person may seek an occupation order against their spouse under Part IV of the Family Law Act 1996 thereby seeking the removal of that spouse from the home. The criteria for removal are stricter. The basis on which an order may be granted also depends upon the 'right to occupy'. It will be necessary to seek legal advice in order to ascertain whether it would be possible to obtain such an order.

Other legislation relevant to Psychological/Emotional Abuse

- Inherent Jurisdiction. See page 6.

2.2 Sexual Abuse

Sexual Offences Act 2003:

Includes offences of rape and sexual assault (Sections 1-4), the Act also include a range of offences specifically related to mental disorder:

Sections 30–33 concern offences that rely on the victim being unable, because of his or her mental disorder or for a reason related to it, to refuse the sexual activity.

Sections 34-37 concern sexual offences against persons with mental disorder by reason of inducements, threat or deception.

Sections 38-41 concern sexual offences by care workers

- Sexual activity with a person with a mental disorder (Section 38)
- Causing or inciting sexual activity (Section 39)
- Sexual activity in the presence of a person with a mental disorder (Section 40)
- Causing a person with a mental disorder to watch a sexual act (Section 41)

The offences exist regardless of the issue of consent, although the perpetrator must have reasonably expected to have known that the person had a mental disorder:

There are two exceptions to these Section 38-41 offences:

- Where the care worker and person with the mental disorder are spouses or civil partners, or
- Are in a sexual relationship which predates the care relationship

These exceptions do not preclude prosecution under other sections of the Act where they apply.

2.3 Psychological/Emotional Abuse

Protection from Harassment Act 1997:

Section 1 – Harassment

A person must not pursue a course of conduct that they know or ought to know amounts to harassment of another person. 'Harassment' includes alarming another person or causing him/her distress.

A civil remedy such as an injunction against harassment can be obtained whether or not previous harassment has taken place and whether or not a criminal prosecution is brought.

Section 4 - Putting People in Fear of Violence

A person must not pursue a course of conduct that they know or ought to know causes another to fear that violence will be used against him/her. This offence may be indicated where such conduct has occurred on at least two occasions.

A court has the power to issue a restraining order or injunction to provide protection from further harassment. Damages may also be claimed by the victim for example, for anxiety and financial loss caused by the harassment.

Domestic Violence, Crime and Victims Act 2004

Section 12 of the Domestic Violence, Crime and Victims Act 2004 (DVCVA 2004) amended section 5 of the Protection from Harassment Act 1997 (PHA 1997).

This change means that restraining orders can be made on conviction or acquittal for any criminal offence. These orders are intended to be preventative and protective. The guiding principle is that there must be a need for the order to protect a person or persons from conduct, which amounts to harassment or which will cause a fear of violence.

Public Order Act 1986

Section 4, 4a and 5 - Harassment, Alarm or Distress

A person commits an offence if they:

- use threatening, abusive or insulting words or behaviour, or disorderly behaviour;
- distribute or display to another person any writing, sign or other visible representation which is threatening, abusive or insulting

The offences apply where there was 'intent to cause that person to believe that immediate unlawful violence will be used against him or her' (section 4) or 'thereby causing that or another person harassment, alarm or distress' (section 4a) or displayed 'within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby' (Section 5).

These offences may apply to actions occurring in both a public and private place but do not apply when occurring between individuals within dwellings.

Anti-Social Behaviour Order (Crime and Disorder Act 1998)

Includes Section 1: Anti-Social Behaviour Order

An order may be granted where a person acts in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as him/herself; and such an order is necessary to protect relevant persons from further anti-social acts.

The order has the effect of prohibiting the defendant from doing anything described in the order.

Inherent Jurisdiction

The Mental Capacity Act 2005 means that decisions previously taken by the Family Division of the High Court under common law, will now be made by the Court of Protection. However, issues falling outside of the Mental Capacity Act may still be considered by the High Court.

The inherent jurisdiction of the High Court could extend to a "vulnerable adult who 'even if not incapacitated by mental disorder or mental illness, is or is reasonably believed to be, either (i) under constraint, or (ii) subject to coercion or under influence of (iii) for some other reason deprived of their capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing real or genuine consent'" (Safeguarding Vulnerable Adults and the Law, M. Mandlestam 2009, p.169-170).

In such circumstances the court could make orders in relation to the welfare and safety of a person with mental capacity. Legal advice would be required in relation to such situations.

Other legislation relevant to Psychological/Emotional Abuse

- Public Order Act 1986 – see page 2
- Criminal Justice Act 1988 – see page 2
- Forced Marriage (Civil Protection) Act 2007 – see page 4
- Family Law Act 1996 - see page 4

2.4 Financial Abuse

Undue Influence

In civil law, gifts and wills may be deemed invalid by the courts if the donor or testator was subject to 'undue influence'. Undue influence refers to circumstances where the individual concerned has capacity and are influenced into entering a transaction not of his or her own free, informed will, by either overt, improper pressure or coercion or an abuse of a relationship based on trust and confidence.

Gifts or wills can be set aside by the courts if the person (the donor or testator) is shown to have lacked mental capacity at the time they were made. Legal advice should be sought in bringing a case of undue influence.

Fraud Act 2006

The three main offences are fraud by false representation, by failure to disclose information or by abuse of position (Sections 1-4). Abuse of position is particularly relevant. It occurs where a person "(a) occupies a position in which he is expected to safeguard, not to act against, the financial interests of another person; (b) dishonestly abuses that position; and (c) intends, by means of the abuse of that position to make a gain for himself or another - or to cause a loss to another or to expose another to a risk of loss)" (Safeguarding Vulnerable Adults and the Law, M. Mandlestam 2009, p.240). Abuse can be an act of omission as well as commission

Mental Capacity Act 2005

One or more of the following provisions of the Mental Capacity Act may serve to safeguard an adult at risk from financial abuse (or risk of abuse).

- Lasting Power of Attorney –

The Mental Capacity Act replaced the Enduring Power of Attorney (EPA) with the Lasting Power of Attorney (LPA).

Lasting powers of attorney may be for property and affairs (including financial matters). LPA's enable a person to plan ahead and decide who can make decisions about their financial affairs when they are no longer able to make these decisions for themselves.

Refer to Chapter 7 of the Mental Capacity Act Code of Practice for further information.

- Enduring Power of Attorney

Enduring Powers of Attorney (EPA) enable a chosen person to make decisions about property and financial affairs even if the donor lacks mental capacity to manage their own affairs (Enduring Power of Attorney Act 1985). They were replaced by Lasting Powers of Attorney, but existing EPA's will continue to be valid.

Refer to Chapter 7 of the Mental Capacity Act Code of Practice for further information.

➤ Deputyship -

If a person lacks mental capacity to manage their property and affairs (including financial matters) and has not appointed an enduring or lasting power of attorney, the Court of Protection can appoint a deputy to make relevant decisions.

Refer to Chapter 8 of the Mental Capacity Act Code of Practice for further information.

➤ The Court of Protection -

The Court of Protection may make declarations, decisions and orders on financial issues affecting people who are without mental capacity in relation to the particular matter arising.

Refer to Chapter 8 of the Mental Capacity Act Code of Practice for further information.

Appointeeship (Department of Work and Pensions)

An appointee is a person appointed by the Department of Work and Pensions to receive and deal with the benefits of a person who lacks mental capacity to do this for themselves (Appointeeship – Regulations 33 and 34 of the Social Security (Claims and Payments) regulations 1987).

Misuse of appointeeship will be investigated and potentially revoked by the Department of Work and Pensions as detailed in their internal guidance: Agents, Appointees, Attorneys and Deputies Guide located at:

www.dwp.gov.uk/publications/specialist%2Dguides/agents%2Dappointees%2Dattorneys

Additional legal responses to financial abuse may include:

- Creating a Trust - Trusts are a way of looking after assets (money, investments, land or buildings) for people. A trust is a legal arrangement whereby one or more 'trustees' are made legally responsible for another person's assets. This may sometimes be a beneficial where a person is unable to manage their own finances.
- Third Party Mandate can be established to enable a trusted person to operate a bank account when a person is unable or at risk of abuse whilst accessing their account.
- Ordinary Power of Attorney – an Ordinary Power of Attorney is a legal document authorising another person to handle their financial affairs. It is only valid whilst the donor is able to give instructions.

Additional source of Information:

- Leaflet: “Arranging for someone to make decisions about your finance or welfare” produced by Age UK and located at www.ageuk.org.uk
- Leaflet: “Help with managing money. If you, or someone you care for lacks mental capacity” produced by the Money Advice Service and located at www.moneyadviceservice.org.uk
- Further Information on Lasting and Enduring Powers of Attorney, Deputies, Court of Protection can be located at www.direct.gov.uk
- Mental Capacity Act 2005: Code of Practice, which can be located at www.leedssafeguardingadult.org.uk

2.5 Neglect (or acts of omission)

Breach of Duty of Care

“Civil negligence cases can be brought for physical and sometimes psychological / emotional harm caused by neglect. The standard components which have to be shown are the existence of a duty of care, breach of that duty, and causation in the sense that the breach caused the reported harm”. A person should seek legal advice in relation to such actions (Safeguarding Vulnerable Adults and the Law, M. Mandlestam 2009, p.216).

National Assistance Act 1948

Section 47 concerns the removal to suitable premises of a person in need of care and attention where they:

- are suffering from grave chronic disease or, being aged, infirm or physically incapacitated, are living in insanitary conditions, and
- are unable to devote to themselves, and are not receiving from other persons, proper care and attention.

Mental Capacity Act 2005

The Act includes the offence ‘Ill-Treatment or Wilful Neglect’ – Section 44. This offence relates to the actions of any person who is responsible for the care of another person who lacks or is reasonably believed to lack mental capacity. The maximum sentence is 5 years in prison.

Ill-treatment involves deliberation or recklessness and it does not matter whether the behaviour was likely to cause, or actually caused, harm or damage to the victim’s health.

The meaning of wilful neglect varies with circumstances but would usually mean that a person had deliberately failed to do something he or she knew was a duty.

Mental Capacity Act 2005

One or more of the following provisions of the Mental Capacity Act may serve to safeguard an adult at risk from financial abuse (or risk of abuse).

➤ Lasting Power of Attorney –

The Mental Capacity Act replaced the Enduring Power of Attorney (EPA) with the Lasting Power of Attorney (LPA).

Lasting powers of attorney also cover personal welfare decisions (including healthcare and consent to medical treatment). LPA’s enable a person to plan ahead and decide who can make decisions about their personal welfare when they are no longer able to make these decisions for themselves.

Refer to Chapter 7 of the Mental Capacity Act Code of Practice for further information.

➤ Deputyship -

If a person lacks mental capacity in relation to decisions about their personal welfare (including healthcare) decisions, and they have not appointed an enduring or lasting power of attorney, the Court of Protection can appoint a deputy to make relevant decisions.

Refer to Chapter 8 of the Mental Capacity Act Code of Practice for further information.

➤ The Court of Protection -

The Court of Protection may make declarations, decisions and orders on healthcare and personal welfare issues affecting people who are without mental capacity in relation to the particular matter arising.

Refer to Chapter 8 of the Mental Capacity Act Code of Practice for further information.

Mental Health Act 1983 (as amended by the Mental Health Act 2007)

➤ Section 127 - 'Ill-treatment or Wilful Neglect of Patients'

Section 127 (1) It is an offence for any person who is an officer on the staff of or otherwise employed in, or who is one of the managers of a hospital [including independent hospital or care home] to ill-treat or wilfully neglect a patient receiving treatment for mental disorder.

Section 127 (2) It shall be an offence for any individual to ill treat or wilfully to neglect a mentally disordered patient who is subject to guardianship under the Act or otherwise in their custody or care (whether by virtue of any legal or moral obligation or otherwise)

➤ Section 115 – Powers of entry and inspection

An approved mental health professional may at all reasonable times enter and inspect any premises (other than a hospital) in which an adult with a mental disorder is living, if s/he has reasonable cause to believe that the patient is not under proper care. Forcible entry is not permitted (a warrant will be required for this), but obstruction of an inspection is an offence under section 129.

➤ Section 135 - Warrant to Search For and Remove Patients

An application may be made to the magistrate's court for a warrant authorising the police to enter (forcibly, if necessary) any premises specified in the warrant and to remove a person suffering from mental disorder to a place of safety. The grounds for an application are that there is reasonable cause to suspect that such a person:

- has been, or is being, ill-treated, neglected or kept otherwise than under proper control, in any place within the court's jurisdiction; or
- being unable to care for him/herself, is living alone in any such place.

The purpose of such removal is with a view to making a further application under the Mental Health Act 1983 or other arrangements for the person's treatment or care.

➤ Section 136 - Mentally disordered persons found in public places

A person who appears to be suffering from mental disorder and in immediate need for care and control, can be removed by a police officer to a place of safety, if it is necessary to do so in the interests of that person or for the protection of other persons.

A person removed to a place of safety under this section may be detained there for a period not exceeding 72 hours for the purpose of enabling him/her to be examined by a registered medical practitioner, interviewed by an approved mental health professional and to make any necessary arrangements for his/her treatment or care.

➤ Section 7 – Guardianship

Guardianship is used to encourage people who live in the community to use services or to live in a particular place. The person must have a mental disorder of a nature and degree that merits guardianship. An application is usually made by an Approved Mental

Health Practitioner (AMHP) but it can also be made by a criminal court under Section 37 of the Act.

The guardian of a person with mental disorder has the power to require access to be given at any place where s/he is living, and to require their attendance at for example, outpatient appointments. This may assist where a third party is preventing access and or causing neglect to an adult at risk.

Human Rights Act 1998

Article 3 places an obligation on the state to ensure that no one suffers inhuman or degrading treatment

Other legislation relevant to Neglect

- See Section 2: Mental Capacity Act 2005

2.6 Discriminatory Abuse

Human Rights Act 1988

The Human Rights Act prohibits discrimination in respect of the conventions rights and freedoms.

Article 9 – Freedom of thought, conscience and religion states that a person is free to hold a broad range of views, beliefs and thoughts, as well as religious faith. Limitations are permitted only in specified circumstances.

Article 14 – Prohibition of Discrimination states that “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 opinion, national or social origin, association with a national minority, property, birth or other status”.

Equalities Act 2010

The equalities act brings together and extends previous legislation that relate to particular grounds for discrimination e.g. Race Relations Act 1976.

The Equalities Act addresses discrimination in relation to race, sex, sexual orientation, disability, religion or belief, being a transsexual person, having a baby or being pregnant, being married or in a civil partnership (in relation to work) or age (in relation to work).

Racial and Religious Hatred Act 2006

The Act creates offences involving the stirring up of hatred against persons on religious grounds. The offences may be caused by the use of words or behaviour.

2.7 Institutional Abuse

Corporate Manslaughter and Corporate Homicide Act 2007

Section 1 provides that organisations will be guilty of the offence of Corporate Manslaughter if the way its activities are managed or organised causes a death and there has been a gross breach of a duty of care to the deceased.

A substantial part of the breach must have been in the way activities were managed by senior management.

3 Mental Capacity Act 2005

3.1 Key Principles

The Mental Capacity Act 2005 is in itself a safeguard for adults at risk. Any application of the safeguarding adult procedures must be in accordance with this legislative requirement.

The Mental Capacity Act 2005 provides a statutory framework to empower and protect people who may lack mental capacity to make decisions for themselves and establishes a framework for making decisions on their behalf. This applies whether the decisions are life-changing events or everyday matters. All decisions taken within the safeguarding adult procedures must comply with the Act. The Act says that:

a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

Furthermore, a person is not able to make a decision if they are unable to:

- understand the information relevant to the decision
- retain that information (for as long as required to make the decision).
- use or weigh that information as part of the process of making the decision, or
- communicate their decision (whether by talking, using sign language or any other means).

Mental capacity is time- and decision- specific. This means that a person may be able to make some decisions but not others. A person's mental capacity to make a decision may also fluctuate over time.

Guiding Principles of the Mental Capacity Act

The Mental Capacity Act requires that five statutory principles should be adhered to in relation to every individual's ability to make decisions and choices.

1. An adult at risk has the right to make their own decisions and must be assumed to have mental capacity to make decisions about their own safety (unless it is assessed or determined otherwise).
2. Adults at risk must receive all practicable help and support to make decisions before anyone concludes that they cannot make their own decisions
3. An adult at risk has a right to make decisions that others might regard as unwise or eccentric and a person cannot be treated as lacking mental capacity for these reasons.
4. Actions taken or decisions made on behalf of a person who lacks mental capacity must be done in their 'best interests'
5. Before any act is undertaken or before any decision is made, on behalf of an adult at risk who lacks mental capacity, consideration must be given as to whether the same outcome can be achieved in a way that is less restrictive on the person's rights and freedom.

3.2 Independent Mental Capacity Advocate (IMCA)

The Mental Capacity Act 2005 introduced the role of the Independent Mental Capacity Advocate (IMCA).

The Independent Mental Capacity Advocate provides a form of statutory advocacy. The IMCA role was established in the Mental Capacity Act 2005 but extended by the Mental Capacity Act 2005 (Independent Mental Capacity Act Advocates) (Expansion of Role) Regulations. Only NHS bodies or the local authority can instruct an IMCA.

There is a legal duty to instruct and consult an IMCA when a person who is over the age of 16 (18 in respect of Deprivation of Liberty Safeguards), does not have the mental capacity in relation to the relevant decision, and has no-one else to support them (other than paid staff) and:

- an NHS body is proposing to provide serious medical treatment, or
- an NHS body or local authority is proposing to arrange accommodation (or change of accommodation) in a care home for a period which is likely to be longer than 8 weeks and or placement in hospital for a period that is likely to exceed 28 days), or
- an application for Deprivation of Liberty Safeguards (DoLS) is being made

The need for an IMCA must also be considered in relation to:

- care reviews - where there is no one else available to consult
- where 'protective measures' are proposed or undertaken within safeguarding adult procedures

Refer to the 'Advocacy, IMCA and Safeguarding Adult Policy' for details of when an IMCA (or other forms of advocacy) should be appointed to support a person within the safeguarding adult procedures. This Policy can be located at www.leedsafeguardingadults.org.uk

Further information:

For more detailed guidance on the Mental Capacity Act and its provisions, refer to:

- The Mental Capacity Act 2005 www.legislation.gov.uk
- The Mental Capacity Act 2005 Code of Practice www.leedssafeguardingadults.org.uk

3.3 Deprivation of Liberty Safeguards (DoLS)

The Deprivation of Liberty Safeguards (DoLS) exist to protect people who cannot make decisions about their care and treatment when they need to be cared for in a particularly restrictive way. They set out a standard process that **hospitals** and **care homes**¹ should follow if they think it will be necessary to deprive a person of their liberty to deliver a particular care plan that is in the person's best interests.

It is a serious issue to deprive someone of their liberty and every effort should be made to prevent a deprivation of liberty occurring. However, there are some circumstances in which depriving a person of their liberty is necessary to protect them from harm, and is in their best interests. To ensure that the deprivation of liberty is appropriate and in order to safeguard the person's rights, it is essential that any person deprived of their liberty within a hospital or care home is protected by the Deprivation of Liberty Safeguards.

'Whether a deprivation of liberty is occurring depends on the specific circumstances of each individual case. As a result, there is no single definition or a standard checklist that can be used to identify where people are being deprived of their liberty. However, a number of cases concerning deprivation of liberty have come before the European Court of Human Rights and the UK courts.

The following list is based on the judgments in several of these cases and indicates what circumstances have led to the courts deciding that a person may have been deprived of their liberty:

- restraint was used to admit a person to a hospital or care home when the person is resisting admission
- medication was given forcibly, against a patient's will
- staff exercised complete control over the care and movements of a person for a long period of time
- staff took all decisions on a person's behalf, including choices relating to assessments, treatments, visitors and where they can live
- hospital or care home staff took responsibility for deciding if a person can be released into the care of others or allowed to live elsewhere
- when carers requested that a person be discharged to their care, the hospital or care home staff refused
- the person was prevented from seeing friends or family because the hospital or care home has restricted access to them
- the person was unable to make choices about what they wanted to do and how they wanted to live, because hospital or care home staff exercised continuous supervision and control over them'

(Extract DH (2009) Deprivation of liberty safeguards: A guide for hospitals and care homes)

NB: The safeguards do not apply to people detained under the Mental Health Act 1983.

Further information on the deprivation of liberty safeguards, including the Code of Practice and the 'Practice Guidance: How to report an unauthorised deprivation of liberty and considerations in making a safeguarding adult referral' can be located at: www.leedssafeguardingadults.org.uk

In addition the Leeds DoLS Helpline: 01132952347 provides an advice service on DoLS (Mon – Fri: 09:00–16:30, except Bank Holidays)

¹ In the event that a person is residing within a supported tenancy arrangement with continual care, consider the need for legal advice as to whether a person could possibly be interpreted as residing in a care home.

4 Safe Employment Legislation

4.1 Criminal Records Bureau (CRB)

The Criminal Records Bureau (CRB), an Executive Agency of the Home Office, provides access to criminal record information through its checking service. This service enables organisations in the public, private and voluntary sectors to make safer recruitment decisions by identifying candidates who may be unsuitable for certain kinds of work, especially those that involve working with children or adults at risk. The CRB was established under Part V of the Police Act 1997 and was launched in March 2002.

The Criminal Records Bureau (CRB) acts as a 'one-stop-shop' for organisations, checking police records and, in relevant cases, information held by the Independent Safeguarding Authority (ISA). There are two levels of CRB check currently available; called Standard and Enhanced checks.

The two CRB checks are available in cases where an employer is entitled to ask exempted questions under the Exceptions Order to the Rehabilitation of Offenders Act (ROA) 1974. This includes any organisation whose staff or volunteers work with children or adults at risk. They are issued free to volunteers.

Standard CRB check

Is available for any position or licensing application listed in the Rehabilitation of Offenders Act 1974, (Exceptions) Order 1975. Standard CRB checks show current and spent convictions, cautions, reprimands and warnings held on the Police National Computer.

Enhanced CRB check

An Enhanced CRB check is available to anyone who works in what is known as a 'prescribed position'. These are the positions which are in the Rehabilitation of Offenders Act and have also been named in Police Act Regulations.

Enhanced CRB checks contain the same information as the Standard CRB checks but with the addition of;

- any relevant and proportionate information held by the local police forces
- a check of the barred lists (for working with children/vulnerable adults) where requested.

Employers have responsibilities to ensure that recruitment is undertaken in accordance with these regulations, minimising the risk that a person who is unsuitable to work with vulnerable adults is employed in a position of trust.

Service users receiving Direct Payments or Personal Budgets should be advised as to the opportunity to undertake checks when employing care workers. Support should be provided to access an 'umbrella' organisation in order to undertake CRB checks on their behalf.

For more information about Criminal Record Bureau (CRB) checks contact their helpline on 0870 9090 811 or access further information from the website:

www.direct.gov.uk

NB: Reviews of the Criminal Records Regime and Vetting and Barring Scheme (ISA) were released during February 2011. These propose significant changes to the way these schemes operate. Details of these proposed changes can be obtained from the Home Office website www.homeoffice.gov.uk.

4.2 Safeguarding Vulnerable Groups At 2006

The Independent Safeguarding Authority was established under Section 1 of the Safeguarding Vulnerable Groups Act 2006. The ISA has four statutory duties:

- To maintain a list of individuals barred from engaging in regulated activity with children
- To maintain a list of individuals barred from engaging in regulated activity with vulnerable adults
- To make well-informed and considered decisions about whether an individual should be included in one or both of the barred lists; and
- To reach decisions as to whether to remove an individual from a barred list

The Act also established regulated and controlled activity with associated legal responsibilities and provided for a vetting and barring scheme.

Regulated Activity

Regulated Activity is defined in Schedule 4 of the 2006 Act.

Such activities² include:

- any activity of a specified nature (i.e. teaching, training, instruction, care, supervision, advice, guidance, treatment, therapy or transport) which involves contact with children or vulnerable adults frequently, intensively, or overnight.
- any activity allowing contact with children or vulnerable adults that is in a specified place (e.g. residential or nursing homes) frequently or intensively or overnight.
- fostering and childcare.
- any activity that involves people in certain defined positions of responsibility.

An employer is required to check a person's status when employing a person to undertake regulated activity. The Act sets out legal sanctions in relation to barred a person engaging in regulated activity. These sanctions relate both to the barred person and to the individual knowingly allowing a barred person to engage in regulated activity.

Controlled Activity

Controlled Activity is set out in Sections 21-23 of the 2006 Act.

Controlled activities² include:

- ancillary support work in, for example healthcare and further education settings (e.g. caretakers, shop workers, catering staff, receptionists) which is frequent or intensive and gives the opportunity for contact with children or vulnerable adults.
- people working for or on behalf of specified organisations (e.g. local authorities or NHS bodies) frequently or intensively in roles which give them the opportunity for access to sensitive records about children and vulnerable adults.

² Refer to the 'ISA Referral Guidance' for fuller description located at: www.isa.homeoffice.gov.uk

An employer is required to check a person's status when employing a person to undertake a controlled activity. An employer can permit a barred person to work in a controlled activity as long as appropriate safeguards are put in place.

4.2.1 ISA Vetting and Barring Scheme

From October 12th 2009, a new duty to share information was introduced under the Vetting and Barring Scheme. From that date the following bodies have a statutory duty to refer any relevant information to the Independent Safeguarding Authority (ISA):

- Regulated activity providers,
- Personnel Suppliers
- Local Authorities
- Education and Library Boards
- Health and Social Care bodies
- Keepers of Registers named in the legislation; and
- Supervisory authorities named in the legislation

The purpose of the referral is to enable those that pose a threat to vulnerable groups to be identified and barred from working within relevant positions.

Duty to refer to criteria

A referral must be made to the ISA when a regulated activity provider....

1. Withdraws permission³ for an individual to engage in regulated or controlled activity, or would have done so had that individual not resigned, retired, been made redundant or been transferred to a position which is not regulated or controlled activity

because

2. They think that the individual has:
 - Engaged in 'relevant conduct'³
 - Satisfied the Harm Test³; or
 - Have received a caution for a relevant offence³

If conditions 1 and 2 have both been met then information must be referred to the ISA

The referral should be made to the ISA when the regulated activity provider has gathered sufficient evidence as part of their investigations to support their reasons for withdrawing permission³ to engage in regulated or controlled activity.

Referral where a duty does not apply

The ISA will consider all information referred to it from any source in relation to whether an individual should be included in a barred list. For example:

- Regulated activity providers and other groups may provide information where following an internal investigation there is insufficient evidence to show relevant conduct occurred, but they still have concerns about that individual; or

³ Terms defined within 'ISA Referral Guidance', located at www.isa.homeoffice.gov.uk

- Where an employer may have concerns about an individual who has left their employ and they know or think that the individual works in regulated or controlled activity in another setting.
- It is important to ensure that you are satisfied that any referral made, in the absence of a legal duty to refer, complies with relevant legal requirements e.g. The Data Protection Act and employment laws.

It is important that in deciding whether to make a ISA referral, reference is made to the published guidance: 'ISA Referral Guidance' located at www.isa.homeoffice.gov.uk and or advice sought from the ISA advice/information service (telephone 0300 123 1111 or email HOSPPUEnquiries@homeoffice.gsi.gov.uk)

NB: Reviews of the Criminal Records Regime and Vetting and Barring Scheme (ISA) were released during February 2011. These propose significant changes to the way these schemes operate. Details of these proposed changes can be obtained from the Home Office website www.isa.homeoffice.gov.uk

5 Other relevant legislation/guidance

5.1 Public Interest Disclosure Act 1998 (Whistle-blowing)

Where employees have serious concerns about matters at work, they are protected if, in certain circumstances they 'whistle-blow'. This protection comes under the Employment Rights Act 1996, as amended by the Public Interest Disclosure Act 1998. In addition to consulting their employers policy, an employee may also seek advice from Public Concern at Work (PCaW) independent authority on public interest whistle-blowing.

Free Helpline: 020 3117 2520 / 020 7404 6609 (9am – 6pm, Monday to Friday)

Email on helpline@pcaw.co.uk

Website: www.pcaw.co.uk

5.2 Achieving Best Evidence

Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures: March 2011

The purpose of this guidance is to assist those responsible for conducting video recorded interviews and vulnerable, intimidated and significant witnesses, as well as those tasked with preparing and supporting witnesses during the criminal justice process. Achieving Best Evidence guidance has been produced to support the implementation of the Youth Justice and Criminal evidence Act 1999

Specifically, the guidance addressed the following key issues:

- Planning and conducting interviews with vulnerable and intimidated witnesses
- Witness support and preparation
- Supporting vulnerable witnesses in court.

This guidance can be obtained from the following website:

www.justice.gov.uk/guidance/docs/achieving-best-evidence-criminal-proceedings.pdf

5.3 Information Sharing Legislation/Guidance

Sharing of information decisions need to be based within statutory frameworks. These include the Data Protection Act 1998, Human Rights Act 1998, Common Law Duty of Confidence and Caldicott principles. In addition to consulting your organisation's information sharing lead, the following guidance is available:

- Leeds Safeguarding Adult Partnership Information Sharing Agreement www.leedssafeguardingadults.org.uk
- Leeds Interagency Protocol for Sharing Information www.leeds.gov.uk
- HM Government (2008) - Information sharing – guidance for practitioners and managers www.education.gov.uk
- Information Commissioner's Office www.ico.gov.uk

5.4 Health and Social Care Act 2008

Section 20 provides for the imposition of the regulations/standards necessary to ensure that regulated activity is of an appropriate quality, and in order to secure the health, safety and welfare of persons for whom any such service is provided.

The Care Quality Commission 'Essential standards of quality and safety' detail the requirements placed upon regulated care providers, and upon which they will be inspected by the commission. For more information go to www.cqc.org.uk

5.5 General Police Powers

The Police and Criminal Evidence Act 1984 includes:

Section 17 – gives powers to the police to enter and search premises without a warrant for the purpose of saving life or limb.

Section 24 – allows a police officer to arrest any person who is suspected of having committed an offence. It also allows the police officer to arrest a person about to commit an offence, if they have reasonable grounds, such as it being necessary 'to protect a child or other vulnerable person from the person in question'.

6 Version Control Record

Version	Version or document being superseded	Changes from previous version (record origins of document if new)
1	No previously established Practice Guidance Supersedes: Appendix B: Legal Powers to Intervene in Part 3 Appendices: Leeds Safeguarding Adult Partnership Multi Agency Policy and Procedures 2009	Version 1 includes a more comprehensive and updated summary of legislation