

Legal Framework

INTRODUCTION

At present, the legal framework surrounding adult abuse is fragmented, but it should **NOT** be assumed that Social Services have no legal powers to intervene in a case of adult abuse. This section provides information about supportive legislation that has been built up over many years. It is suggested that staff seek advice from their respective legal departments when considering action in the following ways. Legal action may provide a solution to problems being encountered when working with vulnerable adults. The nature of that intervention will depend on the circumstances of each case and the type of abuse.

CRIMINAL LAW

Vulnerable adults may be the subject of criminal acts e.g. Physical assaults, theft, sexual offences. Where they are witnesses to crimes, many will fit the definitions in “Achieving Best Evidence in Criminal Proceedings” and may be offered special measures. These measures offer assistance to vulnerable witnesses giving evidence in court and include a screen between themselves and the accused; giving evidence by live link or by a recorded video; giving evidence in private; removal of wigs and gowns; the use of an intermediary (where available); a supporter in court and a range of communication aids. This can affect the course of the investigation and joint work with the Police becomes even more important. The Police have prime responsibility to investigate criminal offences and should lead criminal investigations but this does not preclude good multi-agency work. Evidence can be lost if referral to the Police is delayed and advice should be sought early. As potential witnesses to a crime, staff must make careful contemporaneous records.

Police Powers and Criminal Investigation

- In situations where legal action or separation of a person from their carer may be appropriate close co-operation with the police can be important.
- The police have general powers to keep the peace and safeguard the public, these include:
 - a. Powers of entry to a property for the purpose of saving life or limb or to prevent serious damage to property.
 - b. Powers of arrest where a person is suspected of committing or is about to commit an arrestable offence.
- The police should be informed of situations where a criminal investigation is warranted under criminal law. The standard of evidence required for a successful prosecution will be “proof beyond reasonable doubt”, therefore the police will need to obtain all possible evidence and include statements from both the victim and witnesses if available.
- The ultimate decision whether to prosecute lies with the Crown Prosecution Service. They will have to take into account the weight of the evidence and the potential for a prosecution going ahead.

The Police and Criminal Evidence Act 1984

Section 17: Allows a police officer to search and enter any premises without a warrant for the purpose of saving life or limb or preventing serious damage to property.

Section 24: Allows a police officer to arrest any person who is suspected of having committed, or is about to commit an arrestable offence.

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

Youth Justice and Criminal Evidence Act 1999

This Act gives the police and the courts the ability to offer 'Special Measures' to vulnerable victims and witnesses to crime.

The special measures are:

1. Video recorded evidence
2. Evidence presented to court by live link
3. Evidence in private
4. Screening witness from the accused
5. Removal of wigs and gowns
6. Aides to communication
7. Support from an intermediary

Sexual Offences Act 2003

www.legislation.hmsso.gov.uk

This Act repeals all previous legislation on sexual offences. Consent is a key issue in the Act and the freedom to make choices. The main sexual offences are rape (now including penile penetration of the mouth, anus or vagina), assault by penetration, and sexual assault by touching and causing sexual activity without consent. Sexual relations with certain adult relatives have been clarified. There are a set of offences in relation to mentally disordered adults where choice is impeded. This includes adults with mental health problems or learning disability. There is specific protection from the misuse of a position of trust. It is an offence for someone who is in a relationship of care to have a sexual relationship with the mentally disordered adult.

Protection from Harassment 1997

www.hmsso.gov.uk

This legislation can be used when matters fall short of a physical attack but the vulnerable adult is being intimidated or harassed by an abuser. Injunctions can be sought. This is a civil law but creates the offence of harassment.

Mental Capacity

The Issue of mental capacity is critical in deciding action in safeguarding adults. There is a presumption in English law that everyone has mental capacity until the contrary is proved. In undertaking investigations, capacity to consent is a key issue. There are two key capacity issues and the first is the capacity of the adult to consent to the sexual act or other act about which there is concern. If the adult has capacity and consented to the “abusive” act, it is unlikely that any prosecution can take place although the Police should still be consulted. A vulnerable adult’s capacity may fluctuate over time. This can be critical in determining whether an act is abusive or consensual.

The second key area where capacity is significant is consent to the process of the investigation – active involvement of the Police, interviews, and medical assessment. If the vulnerable adult lacks capacity for this function, it is inappropriate for their consent to the process to be sought. However, they should be engaged with the process in any way possible. If the adult has capacity and declines assistance and refuses an investigation, actions will be limited. Such situations should be discussed at a Safeguarding / Adult Protection Conference to ensure all agencies are aware of the risks and the danger signals.

In assessing capacity, it is important to distinguish between capacity to make the decision and the ability to communicate the decision. The Mental Capacity Act 2005 makes clear that a functional approach to capacity must be taken and the adult must be assessed in relation to their capacity for this specific decision, not a general assessment. The test is whether the person is capable of understanding the particular decision. If a particular decision is trivial, a low degree of understanding will suffice. The more complex the decision the greater understanding is needed.

If an adult lacks capacity, professionals involved need to act in the vulnerable adult’s best interests. Capacity must have been carefully assessed and recorded. Legal advice should be sought. In the context of medical decisions, best interests is defined as where medical treatment is: *“necessary to save life or prevent a deterioration or ensure an improvement in the patient’s physical or mental health; in accordance with a practice accepted at the time by a responsible body of medical opinion skilled in the particular form of treatment in question.”*
Code of Practice: Mental Health Act 1983

The Mental Capacity Act 2005

www.dca.gov.uk/capacity

This Act has set five key principles which make it clear that a person should be seen as having capacity unless proven otherwise. These are –

- A person must be assumed to have capacity unless it is established he lacks capacity.
- A person is not to be treated as unable to make decisions unless all practicable steps to help him to do so have been taken without success.
- A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done or made in his best interests.
- Before the act is done, or the decision made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person’s rights and freedom of action.

Someone is unable to make a decision for himself if he is unable

- To understand the information relevant to the decision

- To retain the information
- To use or weigh that information as part of the process of making the decision
- To communicate his decision by any means.

There is a best interests checklist for people acting on behalf of others. This includes the following-

- Consider whether it is likely that the person will at some time have capacity in relation to the matter in question and if so, when
- Must permit and encourage the person to participate as fully as possible in any act and decision
- Must consider the person's past and present wishes and feelings, the beliefs and values that would be likely to influence his decision if he had capacity and the other factors he would be likely to consider if he were able to do so.
- He must take account if it is practical and appropriate to consult them, the views of anyone named by the person for consultation, carers, donees of lasting power of attorney or court appointed deputies.

Restraint is only permitted if the person using it reasonably believes it is necessary to prevent harm to the incapacitated person and if the restraint is proportionate to the likelihood and seriousness of harm.

The Act has extended the Court of Protection's role to cover welfare matters not just financial matters. After implementation, a Lasting Power of Attorney will replace the Enduring Power of Attorney but can specify other decisions on wider welfare matters as well as finance. Most day to day informal decisions will be able to be taken without interference of the court with a general authority resting on the carer. The Court can appoint deputies who would help with welfare and financial decisions where the person lost capacity without appointing a Lasting Power of Attorney. This replaces the current system of receivership covering financial decision making and extends it to include health and welfare. There will be a new Public Guardian and a new style Court of Protection. The Act has created Independent Mental Capacity Advocates to support those lacking capacity who have no one else to speak for them when decisions are taken about serious medical treatment or long term residential care. See page 113.

The Mental Capacity Act creates new criminal offences of ill treatment or neglect of an adult who lacks mental capacity.

The Mental Capacity Act was partly implemented in April 2007, with the rest being implemented in October 2007.

Inherent Jurisdiction: The High Court may use its inherent jurisdiction to make a declaration as to whether action which is proposed to be taken is in the best interests for a person or is unlawful. The High Court can make decisions as to appropriate place of residence with someone who does not have capacity to make decisions by themselves and can also make injunctions to back up any residents and to stop removal.

Local Authority Adult Social Services

Local authorities have placed on them a number of statutory powers and duties to provide services for adults who need them. Some of the important powers and duties are covered in the legislation below –

The Health Services and Public Health Act 1968

Section 45 (1) allows local authorities with a Social Services responsibility to promote the welfare of old people (subject to the approvals and directions contained in Circular LAC (93) (10). This legislation is underpinned by Section 29 of the National Assistance Act 1948 (local authority provision of services other than residential accommodation for a defined class of disabled adult) as extended by Section 2 of the Chronically Sick and Disabled Persons Act 1970 (provision of welfare services).

The National Assistance Act 1948

Residential accommodation and other services may be provided under Sections 21, 24, 26 and 29 of the **National Assistance Act 1948**. Section 1 places a duty on local authorities to provide residential accommodation to those over 18 “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.” The relevant approvals and directions under those sections are contained in LAC (93) (10).

The National Health Service and Community Care Act 1990

Section 47 requires local authorities with a Social Services responsibility to carry out an assessment of need where people appear to them to be in need of community care services.

The Housing Act 1985 Part III (Homelessness)

Local authorities have a preventative duty (under Section 66) to take reasonable steps to ensure that accommodation does not cease to become available for people threatened with homelessness (para 10.1 Code of Guidance). The Code of Guidance stresses that much can be done to prevent homelessness. It mentions special reasons for considering people as a priority, one is “Men and women without children who have suffered violence at home or who are at risk of further violence if they return home”.

Section 72 of the Act says that a housing authority may seek help from another authority (Housing Association, Housing Authority or Social Services Department) to discharge their duties. The authority asked for help shall co-operate as is reasonable in the circumstances. This will help, for example, a woman fleeing violence who cannot be referred because of having a local connection with an area but feels she would not be safe living in the area.

RESIDENTIAL CARE AND THE LAW

Care Standards Act 2000

The Care Standards Act sets national minimum standards for care settings and set up new inspection arrangements. The Act requires homes providing personal care and accommodation to be registered and brought in registration and inspection requirements for domiciliary care, day care and nursing agencies. The Act created the General Social Care Council and the requirements for registration. The quality of residential provision is assured through this Act. The Care Standards Act requires people and organisations providing care to be registered as “fit”, running services according to regulations and standards. Regulation 13 (6) requires the

registered person to “make arrangements by training of staff or other measure to prevent service users being harmed or suffering abuse or being placed at risk of harm or abuse”. The standards state that homes must have robust procedures for responding to suspicion or evidence of abuse and neglect and ensure the safety and protection of service users. All allegations and incidents of abuse and action taken must be recorded. Section 31 of the Act empowers inspectors to enter a home at any time and interview the manager, staff or persons accommodated, to inspect and take copies of documents.

Regulation 13 (7) requires no physical restraint unless “restraint of the kind employed is the only practicable means of securing the welfare of that or any other service user and there are exceptional circumstances”

There are restrictions on acting for service users and Regulation 20 states a registered person cannot pay money belonging to a service user into a bank account unless the account is in the name of the service user. There is a requirement for a clear complaint policy and Regulation 37 requires the registered person to notify the Commission without delay of any event which adversely affects the well being of a service user and any allegation of misconduct by the registered person or staff. Failure to notify is an offence.

The Protection of Vulnerable Adults (POVA) list was set out in the Care Standards Act but implemented partially on 26 July 2004. Through referrals to and checks against the list, care workers who have harmed a vulnerable adult or placed a vulnerable adult at risk of harm will be banned from working in a care position with vulnerable adults. The scheme is currently implemented within care homes and domiciliary care but will be extended in the future. Employers and the Care Quality Commission can refer people to POVA and checks are made on it for relevant posts as part of CRB checks.

POWERS TO ACT WITHOUT CONSENT

A person with mental capacity is entitled to refuse the provision of services even though the professional opinion is that this will cause deterioration or abuse or neglect. In such situations, a multi-agency conference is recommended. There is one situation that allows for intervention without consent where the Mental Capacity Act and the Mental Health Act are not relevant or helpful.

The National Assistance Act 1948, Section 47

Whenever you consider the use of the above Section, seek legal advice as you will need to consider Article 5 of the European Convention of Human Rights, which states that "Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with the procedure prescribed by law: but also allows for

(e) “the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; ”.

Therefore, not only do you have to fulfil the requirements of Section 47 of the 1948 Act, you also have to fulfil the requirements of Article 5(e) of the Human Rights Act. This means you have to show that in some sense there is a risk of infectious disease, or the person is of unsound mind (this is not a medical definition but a broader legal definition), or an alcoholic or drug addict or vagrant within the broad meaning of those terms.

Section 47 of the 1948 Act gives power to a district council to apply to a Magistrates Court to remove a person from his/her home on the grounds:

- that the person is suffering from grave chronic disease or, being aged, infirm or physically incapacitated, is living in unsanitary conditions; **and**

- that the person is unable to devote to himself, and is not receiving from other persons, proper care and attention; **and**
- that his/her removal from home is necessary, either in his own interests or for preventing injury to the health of, or serious nuisance to, other persons.

In practice, this section of the National Assistance Act is rarely used. However, its use could be considered if there is no alternative and the risk is considered to be very grave. An order will last for up to three months depending on the circumstances in which it is obtained.

A modification of the Section 47 procedure is provided by the National Assistance (Amendment) Act 1951 to deal with situations in which it is necessary to remove the adult without delay. An order can be made which lasts for up to 21 days.

Public Health Act 1936

District councils have powers under this Act to give notice to owners or occupiers if those premises are “in such a filthy or unwholesome condition as to be prejudicial to health”. The notice can require the owner or occupier to clean the premises or the Council can carry out the work itself.

FINANCIAL PROTECTION

The prevention of financial abuse can be difficult, with evidence difficult to glean and issues about consent complex. It is important to remember that such abuse may be a crime and consult the Police. Many of the provisions below will change once the Mental Capacity Act is fully implemented.

Receivership

Where someone is incapable of managing their property and affairs, an application can currently be made to the Court of Protection for the appointment of a Receiver to manage the adult’s financial affairs. The person to be appointed can be a relative, a friend, an officer from the local authority, a solicitor, the Public Trustee or any other suitable person. Where the adult’s capital exceeds £5,000 or receives an occupational pension or the adult has an interest in a property then a Receivership application should be made. If however, the adult’s resources are limited it might be possible for the Court to issue a Short Order. All applications submitted to the Court must be accompanied by a statement confirming that the adult is currently “incapable by reason of mental disorder of managing and administering his property and affairs”. The medical certificate will have to be completed by the adult’s doctor or consultant, and must be in the approved Court of Protection form called a CP3. Legal advice should always be obtained. Social Services can make the application to the Court and in appropriate cases can be appointed as the receiver.

Power of Attorney

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. Anyone who is thinking of making 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 whereas an Enduring Power of Attorney allows for incapacity.

Enduring Power of Attorney

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.

Appointee

The Benefits Agency can appoint someone else to receive the 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, who will arrange to interview the adult to decide whether they are mentally or physically incapable of acting on their own behalf. Where an adult has no one who can take this on, it is technically possible for someone from the Council to do so but is not generally considered appropriate.

Agent

If the adult cannot go to the Post Office because of a physical disability or incapacity they could either fill in the back of the payment order or they could arrange for a suitable person to be made their Agent. The adult will need to contact the local Benefits Agency office and the adult can cancel this arrangement at any time they see fit. The Attorney and Agent assume that the adult is able to make the decision. An attorney is in fact under a legal duty not to misuse the power granted to them. If they do so, they can be sued in the Civil Courts.

MENTAL HEALTH

The Mental Health Act (MHA) 1983

This Act provides for the detention and treatment of mentally disordered individuals and if use is being considered an Approved Social Worker should advise.

Section 115: Powers of Entry and Inspection.

An Approved Social Worker 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 under proper care.

Section 115 does not allow an approved social worker to force entry, although obstruction may be an offence under Section 129, and the approved social worker can apply for a warrant under Section 135. The adult need not be named in this warrant, so this allows for investigation of suspected mistreatment of people whose identity is unknown but whose whereabouts are known. The evidence used to obtain the warrant can be about mistreatment in the past and therefore allows for accumulation of evidence over a period of time.

Section 135 allows an Approved Social Worker to apply 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 and not kept under proper control, or is unable to care for himself or herself and is living alone.

Section 136 allows for a Police Officer to intervene if the adult is in a public place appears to be suffering a mental disorder and is in need of care and control.

Section 13 (4): Duty to consider making application for admission. This places a duty on the Social Services Department 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 adult complains of mistreatment by a third party, provided grounds exist under the MHA.

Section 2, 3 and 4: Admission to hospital. These sections give power to an Approved Social Worker based on the recommendation of one or two doctors 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 7: Guardianship. A vulnerable adult can be received into guardianship by the local authority if she/he has a mental illness, severe mental impairment or mental impairment associated with “abnormally aggressive or seriously irresponsible conduct” or a psychopathic disorder, which results in “abnormally aggressive or seriously irresponsible conduct”. The Guardianship must also be “necessary in the interests of the welfare of the adult or for the protection of other persons”. The “welfare of the patient” is interpreted broadly. Guardianship gives the guardian 3 basic powers: -

- Accommodation: to say where someone is to live;
- Attendance: to require the adult to attend somewhere for the purpose of medical treatment, occupation, education or housing;
- Access: to gain access to the patient at the place where they are living.

There is a necessity to consult the nearest relative when considering guardianship.

Consideration to displacing the requested relative should be given if any of the statutory grounds set out in Section 29(3) are met. Legal advice must be sought.

Section 127: Ill-treatment of patients. This section makes it an offence for an officer on the staff or otherwise an employee or a manager of a mental nursing home or hospital, to “ill-treat or wilfully neglect” a patient who is either:

- currently receiving treatment for mental disorder as an in-patient in that hospital or home;
- a patient receiving treatment as an out-patient.

Furthermore, under sub-section (2) “*It shall be an offence for any individual to ill-treat or wilfully neglect a mentally disordered patient who is for the time being subject to his guardianship under this Act or otherwise in his custody or care (whether by virtue of any legal or moral obligation or otherwise)*”. This sub-section has rarely been used but potentially could include the mistreatment of a mentally disordered adult by any carer-informal or otherwise.

THE RIGHTS OF THE VULNERABLE ADULT

The vulnerable adult who is being abused is very likely to have their own legal remedy and should seek their own legal advice where possible. The worker should support this.

Human Rights Act 1998

All public authorities have to comply with the Act which gives legal force to the rights enshrined in the European Convention of Human Rights. There is a positive duty on local authorities, approved social workers; health authorities, NHS, Primary Care Trusts and the Police to uphold these rights. It is not enough for public authorities not to go against these rights; they also have a positive duty for example, a duty to ensure that someone is not subject to torture or inhuman or degrading treatment. These rights can be limited but the limit on these rights must be proportional.

The main rights that apply include -

- Article 2 Right to Life
- Article 3 Prohibition of Torture and Inhuman or Degrading Treatment
- Article 5 Right to Liberty and Security
- Article 6 Right to a Fair Trial and Determination of Civil Rights
- Article 8 Right to Respect for Private and Family Life including home and correspondence

- Article 9 Freedom of Thought, Conscience and Religion
- Article 10 Freedom of Expression
- Article 11 Freedom of Assembly and Association
- Article 14 Prohibition of Discrimination (this only prevents discrimination in relation to the other rights and applies to grounds such as sex, race, colour, language, etc or other status)
- First Protocol Article 1 Protection of Property
- First Protocol Article 2 Right to Education

Disability Discrimination Act 1995

This Act provides positive protection for disabled people from discrimination in relation to services and employment.

DISCLOSURE OF PERSONAL INFORMATION

The Local Authority will hold a lot of personal information about individuals and some of that information will relate to risk posed to vulnerable adults. This may indicate the likely risk of abuse as a result of allegations made. It may include information of a sensitive nature about alleged and actual incidents of abuse. Legal advice should be sought if there is any uncertainty about the sharing of information. Generally, if consent is given by the vulnerable adult there is no difficulty. The challenges arise in situations where seeking consent would put the adult at increased risk of harm or where consent is not given.

Principles in information sharing

- The Local Authority Social Services Department has the power to disclose to a 3rd party and where appropriate the vulnerable adult information relating to an individual if it genuinely and reasonably believes that it is desirable to protect vulnerable adults.
- Each case must be decided on its own facts
- Disclosure without consent should only be made if there is a pressing need and should be the exception not the rule.
- In deciding whether there is a pressing need, the following factors will be considered –
 - The Local Authority's own belief about the truth of the allegations will be a factor. The greater the conviction that the allegation is true, the more pressing the need.
 - The level of involvement of the 3rd party to whom the information would be disclosed
 - The degree of risk posed if disclosure is not made – previous history of allegations, level of continuing contact with vulnerable adult, seriousness of alleged abuse.

Crime and Disorder Act 1998 Section 115

This legislation allows for the sharing of information between agencies to prevent a crime being committed. This is relevant to the many abuse situations which constitute a crime.

Data Protection Act 1998

The Data Protection Act sets up suitable safeguards in sharing information and these need to be abided by. E.g. fairly and lawfully processed, not kept longer than necessary, rights of access. However, there are specific conditions in relation to access and sharing of information where there are situations of serious risk of physical harm or to mental health. Information can be disclosed without consent if it is for the protection of the "vital interests of the subject" or prevention or detection of serious crime or for legal purposes. Where information is shared without consent, it is essential for advice to be sought and a careful recording of the reasons for this decision.

Freedom of Information Act 2000

This Act has changed the way public authorities approach openness and manage their records. The Information Commissioner is now responsible for implementation and enforcement of this Act and the Data Protection Act. The Freedom of Information Act only applies to public authorities. The Act establishes the right of any person making a request to a public authority to be informed in writing whether or not the authority holds the information sought and if so to be supplied with the information subject to certain exemptions.

Public Interest Disclosure Act 1999

This is the legal protection for the whistleblower. It sets out a clear and simple framework for raising concerns about malpractice guaranteeing full protection for the worker. The Act enables employees who make a protected disclosure to disclose information, confidential or otherwise, - internally, to prescribed regulators or to a wider audience. A “protected disclosure” is a disclosure of information which, in the reasonable belief of the worker, tends to show one of the following has occurred or is likely to occur –

- a criminal offence has been committed
- a person has failed to comply with a legal obligation
- a miscarriage of justice has occurred
- health or safety of an individual endangered
- environment has been damaged
- Information about any of these has been concealed.

LEGISLATION RELEVANT TO CARERS

Carers Recognition and Services Act 1995

Act places a duty on local authority Social Services Departments to assess, on request, the ability of a carer to provide and continue to provide care and a duty for them to take this into account when deciding which services to provide to the person in need of care.

Carers and Disabled Children Act 2000

This Act gives carers the right to services in their own right.

The Carers (Equal Opportunities) Act 2004

This Act aims to ensure that work, life-long learning and leisure are considered when a carer is assessed. It gives local authorities new powers to enlist the help of housing, health, education and other local authorities in providing support to carers. The Act aims to ensure carers are informed of their rights – with a duty to inform the carer they are entitled to an assessment.

DOMESTIC VIOLENCE LEGISLATION

Family Law Act 1996 Part 4

In domestic violence, there are several relevant parts of criminal law in relation to assaults. Generally the Police will take a proactive approach to domestic violence between partners and will sometimes arrest even where the victim has not decided to press charges. The Family Law Act provides for the making of non-molestation and occupation orders and these can include powers of arrest. These can be obtained against “associated persons” which includes cohabitants, spouses and persons who live together in the same household and relatives. It does not include employees, tenants, lodgers and boarders.

Domestic Violence, Crime and Victims Act 2004

This Act broadens the relationships covered by domestic violence legislation to include same sex and couples who have never lived together. It makes common assault an arrestable offence. There are significant new Police powers including making it an arrestable, criminal offence to breach a non-molestation order. There is stronger legal protection for victims by enabling courts to impose restraining orders when sentencing for any offence or on acquittal for any offence if it is necessary to protect the victim from harassment. The Act creates a new offence of causing or allowing the death of a child or vulnerable adult. This places a new criminal responsibility on members of a household where they know a child or vulnerable adult is at significant risk of serious harm. The Act set up an independent Commissioner for Victims to give them a voice nationally.

OTHER CIVIL REMEDIES

The Law of Tort

This is the civil law which allows one person to sue another complaining about a wrong that the other has committed vis-à-vis the complainant.

- Trespass to the person (assault and battery) and false imprisonment, i.e.: covering much of the same area as criminal law.
- Negligence -if a person is owed a duty of care by another, breach of that duty lays that other potentially open to a civil action. A person who takes on board the care of another owes her/him a duty of care. If the carer fails to act as a reasonable carer would have done, she/he has broken that duty of care. If this breach causes the injury of which the person is complaining, the negligence action has been established.

Common Law

Common Law allows for intervention, without consent, to save life or avoid serious physical harm based upon the principle that the action is reasonable and can be professionally justified as immediately necessary for the purpose of saving life or serious physical harm. Conversely, not to act under circumstances of the utmost gravity could be deemed negligent.

In high risk situations where both physical and mental disorders may be present (e.g.: drug overdose, serious injury), if there is doubt concerning which of the two takes precedence, then the Physical Disorder should be given priority. The relevant action would then be a Common Law intervention e.g.: removing the individual to a Casualty Department. When it is physically safe to do so, the adult should then be assessed for treatment/admission under the Mental Health Act 1983 with respect to Sections 135/136.

Declaratory relief is a common law remedy, which can be obtained in high court proceedings in the family division. It is a kind of wardship for adults who are mentally incapable of making or communicating a decision about specific issues. It results in a declaration that to do x, y or z in respect of an incapacitated person would not be lawful, since it has been found, on the evidence, by the judge, to be in the best interests of the person concerned. It derives from the jurisdiction which the courts have always claimed in respect of medical intervention, when

doctors or Trust Hospitals were uncomfortable, as to whether they could properly act or cease to treat someone, whose capacity or condition was such as to make their wishes or confirmed consent unclear.

The Court of Appeal in *Re F* (2000) removed any doubts as to the use of this jurisdiction by local authorities and emphasised that it may be the duty, and not merely the power, of the local authority, in some cases, to take the step of going to court. When considering whether to apply to the High Court for declaratory relief the following needs to be established:

That it is believed that the adult lacks mental capacity in relation to the particular decision at the particular time. (Wherever possible this should be supported by professional evidence).

The issue is of a "serious justifiable nature" relating to welfare e.g. sterilisation or placement and contact arrangements including supervised contact, where there are strong concerns/evidence of abuse, ill-treatment or neglect and lack of care.

What is in the adult's 'best interests' (as opposed to their carers, relatives etc.) which includes medical, emotional or all other welfare issues. This has to be determined by balancing all relevant factors and obtaining professional evidence e.g. consultant psychiatrist and social worker. (If in doubt the judge will decide).

That determined efforts have been made to agree what is in the best interests by working in partnership with relatives, carers and recording evidence of this on file.