

# 5. Legal Framework

## 5.1 Legal Powers to Intervene

### 5.1.1 All forms of abuse

There are reporting requirements under legislation for:

- Modern Slavery
- FGM
- Prevent

Further details can be found on the [www.rochdalesafeguarding.com](http://www.rochdalesafeguarding.com) website

### 5.1.2 Physical Abuse

1. Offences Against the Person Act 1861 - a criminal prosecution, this Act contains core criminal offences relating to assaults including, actual and grievous bodily harm, wounding with intent and unlawful wounding, including assaults causing cuts, serious damage to internal organs and broken bones, the administration of drugs or noxious substances so as to cause harm. (A prosecution would have to be brought by the Police.)
2. Civil action could be taken for assault, battery or false imprisonment. The client or their representative should take legal advice from either the Citizen's Advice Bureau or an independent solicitor.
3. Criminal Injuries Compensation claim via CICA.
4. Police and Criminal Evidence Act 1984, section 17 is a Police power to enter and save life.
5. Family Law Act 1996 - can be used to obtain injunctions against perpetrators; non-molestation and occupation orders.
6. Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. If there is a breach of Regulation 8 (Safeguarding people who use services from abuse), this is an offence under Regulation 22. A person convicted of an offence is liable, on summary conviction, to a fine.
7. Domestic Violence Crimes & Victims Act 2004 - creates an offence of causing or allowing the death of a child or adult, where they have died of an unlawful act. The household member must have failed to take reasonable steps to protect the victim and the victim must have been at serious risk of physical harm, demonstrated by a history of violence towards the vulnerable person.
8. Domestic Abuse Act 2021 gives police, local authorities, and the courts wider powers and greater accountability concerning protecting domestic abuse victims.
9. The Serious Crime Act 2015 creates a new offence of controlling or coercive behaviour in intimate or familial relationships.
10. The Modern Slavery Act 2015 is designed to combat slavery in the UK and consolidates previous offences relating to trafficking and slavery.

### 5.1.3 Sexual Abuse

1. Criminal prosecution - under the Sexual Offences Act 2003, as well as offences such as rape and sexual assault, there are specific offences against people with 'a mental disorder impeding choice'. Section 4 makes it an offence to not obtain consent. Sections 30-44 provide various offences against people who lack capacity, including specific offences for care workers. There is a defence to these offences if the individual did not know and had no reason to suspect that the person had a mental disorder.
2. Civil action could be taken by the individual, but they should take legal advice from either the Citizen's Advice Bureau or an independent solicitor.
3. Family Law Act 1996 - this could be considered for injunctions in the shape of non-molestation or occupation orders.
4. Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 If there is a breach of Regulation 8 (Safeguarding people who use services from abuse), this is an offence under Regulation 22. A person convicted of an offence is liable, on summary conviction, to a fine.

### 5.1.4 Psychological/Emotional Abuse

1. Protection from Harassment Act 1997 - can be used by Police or individual to obtain an injunction.
2. Anti-discrimination legislation (race, sex disability). If someone is being treated unfavourably on the grounds of their sex, race or disability.
3. Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 If there is a breach of Regulation 8 (Safeguarding people who use services from abuse), this is an offence under Regulation 22. A person convicted of an offence is liable, on summary conviction, to a fine.
4. The Domestic Abuse Act 2021 also encompasses emotional abuse.
5. Section 76 of the Serious Crime Act 2015 created a new offence of controlling or coercive behaviour in an intimate or family relationship

### 5.1.5 Neglect

1. Section 42 Care Act 2014 – local authority's duty to make enquiries where it has reasonable cause to suspect that an adult is experiencing, or is at risk of, abuse or neglect.
2. Offences of ill-treatment or wilful neglect under or section 44 of the Mental Capacity Act 2005 include intentional or deliberate omission or failure to carry out an act of care by someone who has care of a person who lacks capacity to care for themselves.

## 5.1.6 Financial Abuse

1. The Care Act 2014 Eligibility Regulations recognise that “financial wellbeing” is one of the nine wellbeing outcomes that are critical for people who have care and support needs. Whilst some may only need assistance with managing their financial interests others may not be able to manage their money at all and need someone to do so on their behalf.
2. **Appointeeship:** An Appointee is an individual, organisation or representative of an organisation who has been authorised by the DWP to claim, collect and use DWP benefits or State Pension on behalf of a claimant who lacks mental capacity, has a physical disability that prevents them from managing their own financial affairs, or a person who is subject to financial abuse.
3. **Lasting Powers of Attorney:** Lasting Powers of Attorney (LPA) were introduced by the Mental Capacity Act 2005. These replace the former Enduring Powers of Attorney (EPA) that, after 1 October 2007, can no longer be created (EPAs created before 01.10.2007 remain valid but they are required to be registered at the Office of the Public Guardian should the Donor be assessed as not having the mental capacity to manage their own affairs or if the Donor consents to the EPA becoming active). An LPA is a legal document that allows a person who currently has mental capacity (‘the Donor’) to appoint someone they trust (‘the Attorney’) to make decisions on their behalf.
4. There are two types of LPA:
  - Property and Financial Affairs LPA - allows the Donor to choose someone to make decisions about how to spend his or her money, including the management of his/her property and affairs;
  - Personal Welfare - allows the Donor to choose someone to make decisions about his or her healthcare and welfare. This includes decisions to refuse or consent to treatment on his or her behalf and deciding where to live.
5. The LPA must be registered with the Office of the Public Guardian in order to have legal standing. A registered LPA can be used at any time, whether the person making the LPA has the mental capacity to act for themselves or not. Once the LPA is registered it continues until the LPA is cancelled, relinquished or upon the death of the Donor or An Attorney. An LPA can also be cancelled by the Donor, provided s/he has the mental capacity to do so.
6. Deputyship; A Deputy is appointed by the Court of Protection to make decisions for someone who is unable to do so because they lack mental capacity (a person must lack mental capacity to be eligible to have a deputy).
7. There are two types of Deputies; those who look after property and financial affairs and those who look after a person’s health and welfare. It is possible for there to be more than one person appointed as a deputy to each type.
8. Referrals can be made to the Office of the Public Guardian if there is a concern about LPA/EPA or a Deputy that may not be acting in an individual's best interest. Concerns may be about the misuse of money or decisions that are not in the best interests of the person they are responsible for.
9. Note: a person given a power under an Enduring Power of Attorney (EPA) before 1 October 2007 can still use it and apply to have it registered.
10. Further information about LPAs can be found on the Gov.UK website.

11. The Mental Capacity Act 2005 provides for the Court of Protection to make decisions in relation to the property and affairs, healthcare and personal welfare of adults (and in certain cases, children) who lack capacity. The Court has the same rights, privileges and authority in relation to mental capacity matters as the High Court. The Court has the powers to:
  - Decide whether a person has capacity to make a particular decision for themselves;
  - Make declarations, decisions or orders on financial or welfare matter affecting people who lack capacity to make such decisions;
  - Appoint deputies to make decisions for people lacking capacity to make those decisions;
  - Decide whether an LPA or EPA is valid;
  - Remove deputies or attorneys who fail to carry out their duties; and
  - Hear cases concerning objections to register an LPA or EPA.
  - In reaching any decision, the Court must apply the statutory principles set out in the Mental Capacity Act. It must also make sure its decision is in the best interests of the person who lacks capacity.
12. Criminal Prosecution - the Police can consider whether a perpetrator of financial abuse may be prosecuted for theft under the Theft Act 1968 - or for fraud by virtue of abuse of position under the Fraud Act 2006

### 5.1.7 Support to Individual and Family

Duty to assess under the Care Act 2014, section 9 (assessment of an adult's needs for care and support) and section 10 (assessment of a carer's needs for support). The Local Authority may be able to help manage some adult protection concerns by completing a formal assessment and putting in a care package or higher support to the individual and/or family.

The Care Act 2014 states that some people are legally entitled to an independent advocate to support them. This can be to understand and participate in health and social care assessments, support plans, reviews or safeguarding enquiries. It can be for assessments for their care needs, or for their needs as a carer

### 5.1.8 Prosecution

1. Criminal law - statute and common law can be considered.
2. Investigation by Police and Crown Prosecution Service to prosecute perpetrators.

### 5.1.9 Removal of the person who is causing harm

1. Consider whether to involve the Police.
2. Consider Family Law Act 1996 injunctions; non-molestation and occupation orders.

3. Civil injunction - would need the individual to take legal advice from an independent solicitor or Citizen's Advice Bureau.
4. Mental Health Act 1983 - would apply if there is a mental disorder and would allow a person causing harm in certain circumstances to be removed for assessment and/or treatment.

#### 5.1.10 Removal of Subject

1. Section 42 Care Act 2014 - local authority's duty to make enquiries where it has reasonable cause to suspect that an adult is experiencing, or is at risk of, Abuse or Neglect.
2. Mental Health Act 1983 - removal for assessment and/or treatment.

**Note** – Expert legal advice can be sought from your organisation's legal team where necessary.

## 5.2 Safeguarding Adults and Human Rights

Under the European Convention on Human Rights (ECHR), everyone has a number of rights, which the Human Rights Act 1998 makes directly enforceable in the UK Courts. The following are particularly relevant to safeguarding adults from abuse.

Article 8 ECHR provides: 'Everyone has the right to respect for (their) private and family life, (their) home and correspondence'. Public authorities may only interfere with this right where this is '...in accordance with the law and is necessary in a democratic society in the interests of public safety; the prevention of disorder or crime; the protection of health or morals, or the protection of the rights and freedoms of others. The interference must be proportionate to the risk or other reason for acting.

Article 3 provides: 'No-one shall be subjected to torture, or inhuman or degrading treatment or punishment'. Unlike Article 8, this is an absolute right: inhuman or degrading treatment is unlawful, whatever the situation.

Treatment may be degrading if it 'humiliates or debases an individual showing a lack of respect for, or diminishing his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance'

Duty to protect: Public authorities have a proactive duty towards Adults at Risk to take "reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge". Public authorities may be considered to be responsible for the harm and therefore will be in breach of Article 3 even where they have merely failed to prevent degrading treatment, rather than caused it. People whose disabilities make them critically dependent on the help of others are entitled to enhanced protection.

Article 5: Right to liberty and security. Everyone has the right to liberty and security of person. No one should be deprived of their liberty apart from circumstances of lawful arrest and detention in accordance with legislation.

Article 14 prohibits discrimination on any ground in the way that people access their rights under the Convention.

Under Section 6 of the Human Rights Act 1998, it is unlawful for a public authority to act in a way which is incompatible with any right under the European Convention. A public authority includes any local authority, the police and Crown Prosecution Service, and any person "exercising a public function".

### 5.3 Health and Social Care Act 2008

The Health and Social Care Act 2008 (HSCA 2008):

- Established the Care Quality Commission (CQC) as the new integrated regulator for health and adult social care, with tough powers to ensure safe and high quality of services. It requires the CQC to inspect, investigate and intervene where care providers are failing to meet safety and quality requirements, including hygiene standards;
- Reformed professional regulation to give patients and the public more confidence in the care they receive from health professionals, including the creation of a new adjudicator to make independent decisions about whether individual health professionals should remain in practice;
- Strengthened the protection of vulnerable people using residential care by ensuring that any independent sector care home that provides accommodation together with nursing or personal care on behalf of a local authority is subject to the Human Rights Act.

The HSCA 2008 also extended direct payments to include people who lack capacity to give their consents to direct payments. It allows a direct payment to be made to a 'suitable person' who can receive and manage the payment on behalf of a person who lacks capacity.

### 5.4 Health and Social Care Act 2008 (Regulated Activities) Regulations 2010

Since 2010, all health and adult social care providers are required to be registered with the Care Quality Commission (CQC) if they provide Regulated Activities. In addition, some providers that were not required to be registered under the Care Standards Act 2000 now need to register under these regulations if they provide Regulated Activities.

It is a criminal offence for a barred individual to take part in Regulated Activity, or for an employer/voluntary organisation knowingly to employ a barred person in a Regulated Activity role.

## 5.5 Disclosure and Barring Scheme

Please also see your own organisation's Managing Allegations procedures and the RBSAB Allegations Management protocol, available at [www.rochdalesafeguarding.com](http://www.rochdalesafeguarding.com)

Safeguarding regulations under disclosure and barring were revised under the Freedom of Protections Act in 2012. But the aims is still to ensure that unsuitable people do not work with Adults at Risk, whether in paid employment or on a voluntary basis.

Measures in place include:

- A person who is barred from working with children or Adults at Risk will be breaking the law if they work or volunteer, or try to work or volunteer with those groups;
- An organisation which knowingly employs someone who is barred to work with those groups will also be breaking the law.

If your organisation works with children or adults and you dismiss a member of staff or a volunteer because they have harmed a child or adult, or you would have done so if they had not left, you must inform the Disclosure and Barring Service (DBS).

## 5.6 Protection for Vulnerable Witnesses and Complainants

One of the most daunting barriers for adults seeking the protection of the criminal courts has been the court rules and conventions about the way in which the accounts of witnesses and victims are presented in court. Witnesses may be treated as 'vulnerable' and may qualify for 'special measures' if the quality of their evidence is likely to be diminished by mental illness, learning or physical disability, or intimidation.

The 'special measures' which the court has power to put in place can include, the use of screens so the person reported to be responsible and witness cannot see each other, giving evidence by video link, giving evidence in private, the removal by lawyers and judges of wigs and gowns, intermediaries and communication aids. It will be a matter for the trial Judge to decide in individual cases which if any special measures to adopt. This relies on carers and families explaining the reasons for the vulnerability of the witness or victim. Achieving Best Evidence in Criminal Proceedings is Home Office guidance on identifying witnesses who may be vulnerable, and planning and conducting interviews so as to maximise the likelihood that they will be able to give information which is reliable as evidence. This includes

offering support while being careful to avoid "putting words into" the mouth of the witness or otherwise tainting the account they may be able to give the court.

## 5.7 Protecting the Rights of Vulnerable Suspects and the Appropriate Adult

The Police and Criminal Evidence Act 1984 (PACE) and the Codes of Practice issued under it give suspects who are "mentally vulnerable" a number of safeguards in any police investigation. A mentally vulnerable suspect is someone whose mental state or capacity means they may not understand the significance of questions or replies. If there is any doubt, the suspect should be treated as mentally vulnerable and an Appropriate Adult should be called.

It is the role of the Appropriate Adult to:

- Advise and support the person being interviewed;
- Observe whether the interview is being properly and fairly conducted, and intervene if they think it is not; and
- Facilitate communication between the interviewer and the suspect.

Mentally vulnerable suspects should not be interviewed without an Appropriate Adult being present unless the resulting delay would cause harm to the evidence, or people or property.

## 5.8 The Care Act 2014

The Care Act 2014 includes:

- Putting Safeguarding Adults Boards on a statutory footing;
- Requiring local authorities to make enquiries, or to ask others to make enquiries, where they reasonably suspect that an adult in their area with care and support needs is at risk of abuse or neglect. The purpose of the enquiry is to establish what, if any, action is required in relation to the case;
- Putting Safeguarding Adults Reviews on a statutory footing, to take place in certain circumstances, where an adult dies or there is concern about how one of the members of the Safeguarding Adults Board conducted itself in the case;
- Creating a single, clear duty on local authorities to carry out assessments in order to determine whether an adult has needs for care and support. After conducting the needs assessment, the local authority will then be required to determine whether the person has eligible needs, using the eligibility framework which will be set out in regulations. These regulations will set out a national threshold for eligibility which is to be consistent across all areas in England;
- Creating a single duty for local authorities to undertake a 'carer's assessment', removing the requirement that the carer must be providing 'a substantial amount of care on a regular basis'. This will mean more carers are able to access an assessment, and that the duty is comparable to that for the people they support;



- If the local authority thinks that the adult's needs might call for a type of care and support for which it charges, it must then carry out a financial assessment of the adult to determine whether or not they can afford to pay the charge. The rules on financial assessments, including how to calculate a person's income and capital will be set out in regulations. These regulations will also set a financial limit on care home costs.

## **Summary of Legislation**

### **Care Act 2014**

### **NHS and Community Care Act 1990**

### **Carers (Recognition and Services) Act 1995**

### **General Data Protection Regulations 2018**

### **Human Rights Act 1998**

### **Carers and Disabled Children Act 2000**

### **Freedom of Information Act 2000**

### **Carers (Equal Opportunities) Act 2004**

### **Disability Discrimination Act 2005**

### **Mental Capacity Act 2005**

### **Mental Capacity Act 2005 - Code of Practice**

### **Mental Capacity Deprivation of Liberty Safeguards - Supplementary Code of Practice IMCA**

### **Health and Social Care Act 2012**

### **Modern Slavery Act 2015**

### **Public interest Disclosure Act 1998**

### **ADASS Guidance Out of Area Safeguarding Arrangements 2016**

### **Dignity in Care, SCIE, 2010**

### **Assessment: Financial Crime Against Vulnerable Adults, SCIE, 2011**

### **Protecting Adults at Risk: Good Practice Resource, SCIE, 2012**