

# APPENDIX C - LEGAL FRAMEWORK

Financial Abuse Direct Payments



<b>Contents</b>	<b>Page</b>
<b>Introduction</b>	4
<b>Criminal Law</b>	4
Criminal Investigation	4
Police and Criminal Evidence Act 2004	5
Serious Organised Crime and Police Act 2004	5
Sexual Offences Act 2003	5
Domestic Violence Crime and Victims Act	6
Protection of Harassment 1997	6
Youth Justice and Criminal Evidence Act	7
<b>Civil Law</b>	7
The Mental Capacity Act 2005	7
Local Authority Adult Social Services	9
The Health Services and Public Health Act 1968	9
National Assistance Act 1948	9
The National Health Service and Community Care Act 1990	9
The Housing Act 1985 Part III (Homelessness)	9
Residential Care and the law	9
Health and Social Care Act 2008	9
Powers to Act without Consent	10
The National Assistance Act 1948, Section 47	10
Public Health Act 1936	11
<b>Financial Protection</b>	11
Appointee	11
Agent	11
<b>Mental Health</b>	12
The Mental Health Act (MHA) 1983	12
Human Rights Act 1998	13
<b>The Rights of the Adult at Risk</b>	13
Disability Discrimination Act 1995	13
<b>Principles for Disclosure of Personal Information</b>	14
Crime and Disorder Act 1998, Section 115	14
Data Protection Act 1998	14
Freedom of Information Act 2000	14
Public Interest Disclosure Act 1999	15
<b>Legislation relevant to Carers</b>	15
Carers Recognition and Services Act 1995	15

Carers and Disabled Children Act 2000	15
The Carers Act 2004	15
<b>Domestic Violence legislation</b>	15
Family Law Act 1996, Part 4	15
<b>Other Civil Remedies:</b>	16
The Law of Tort	16
Common Law	16
<b>Financial Abuse</b>	16
The Role of Assessment Commissioning and Inspection	17
Roles and Responsibilities:	17
Assessors	17
Commissioners and Contract Officers	18
Regulators / Inspectors (CQC and CHAI)	18
Safe Keeping and Banking	18
Record Keeping	20
Expenditure	20
Inventory of Personal Possessions	21
Personal Credit Cards	21
Joint Purchases	21
Monitoring and Periodic Professional Audit	22
Transparency and Information Sharing	22
<b>Direct Payments</b>	22

## **INTRODUCTION**

At present, the legal framework surrounding adult abuse is fragmented.

The Law on commissioning is currently reviewing legislation relating to adults and is due to report in April 2011. Any legal amendment will be made to these policies and procedures at that time. 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 adults at risk. The nature of that intervention will depend on the circumstances of each case and the type of abuse.

## **CRIMINAL LAW**

Adults at risk 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. 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 take careful contemporaneous records.

### **Criminal Investigation**

- In situations where legal action or separation of a person and 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 offence.

The police should be informed of situations where a criminal investigation is warranted under criminal law. The standard of evidence required for a prosecution will be “proof beyond reasonable doubt”. The police have the statutory duty to obtain evidence in criminal investigations; this will include statements from witnesses and the victim.

The ultimate decision whether to prosecute lies with the Crown Prosecution Service.

Adults at risk may be subject to criminal Acts such as Physical Assaults, Theft and Sexual offences which are subject to current legislation.

New legislation is in place which gives added protection to adults at risk, as follows:-

1. The Police and Criminal Evidence Act 1984
2. Serious Organised Crime and Police Act 2005
3. Sexual Offences Act 2003
4. Domestic Violence Crime and Victims Act 2004
5. Protection From Harassment Act 1997
6. Youth Justice and Criminal Evidence Act 1999

## **Police and Criminal Evidence Act 1984**

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

## **Serious Organise Crime and Police Act 2004**

Gives the police power to arrest for any offence in order to:-

1. Protect a Child or vulnerable person
2. Prevent injury to self or others
3. Prevent loss or damage to property
4. To ensure an effective and prompt investigation.

## **Sexual Offences Act 2003**

The Sexual Offences act 2003 came into force in April 2004.

In Adult protection investigations the offences can be split into two categories

These are:

- non consensual offences
- those offences where the victim may have appeared to consent to the sexual activity due to a mental disorder.

### **NON CONSENSUAL OFFENCES**

These are cases in which the suspect engages in sexual activity without the consent of the victim

#### **1. RAPE**

SECTION 1 – makes it an offence for a person to intentionally penetrate the mouth, anus or vagina, with the penis, without that persons consent

#### **2. ASSAULT BY PENETRATION**

SECTION 2 – makes it an offence for a person to intentionally penetrate the vagina or anus of another with another part of the body or an object

#### **3. SEXUAL ASSAULT**

SECTION 3 – makes it an offence for a person to intentionally touch sexually another person, without that persons consent **CAUSING A PERSON TO ENGAGE IN SEXUAL ACTIVITY WITHOUT CONSENT**

SECTION 4 – makes it an offence for a person to intentionally cause another person to engage in sexual activity without their consent

### **OFFENCES AGAINST PERSONS WITH A MENTAL DISORDER**

There is now legislation that deals with offences against persons with a mental disorder.

These offences apply in cases where the victim is unable to agree to the sexual activity because of a mental disorder that impedes choice;

Or

It may appear that the person has agreed to the sexual activity because of a mental disorder that makes them vulnerable to threats, inducements or deception;

Or

Their consent could not be deemed to be freely given due to there being a relationship of care.

In these offences “mental disorder” is defined as mental illness, arrested or incomplete development of mind, and includes learning disability.

The sexual activity described in these offences includes:

1. Engaging in sexual activity with a person with a mental disorder
2. Engaging in sexual activity in the presence of someone with a mental disorder
3. Causing a person with a mental disorder to watch a sexual act.
4. A care worker engaging in sexual activity with a person with a mental disorder

It is important to note that where a person with a mental disorder is able to consent freely to sexual activity that they have the same rights to engage in sexual activity as anyone else.

### **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 an adult at risk.

#### **SECTION 5**

Creates the offence of causing or allowing the death of a child or an adult at risk by means of an unlawful act.

This offence will apply where the death is caused by a member of the household. It will apply to the person who caused the death and to other members of the household who stood by and did not take reasonable steps to protect the victim.

The offence carries a maximum penalty of 14 years imprisonment.

#### **UNLAWFUL ACT**

Includes a course of conduct and also includes omission.

#### **HOUSEHOLD**

This term will be given its ordinary meaning by the courts.

It is not likely to include care homes

A paid or voluntary domiciliary carer may fall under the offence.

Only those who are aged 16 years or over may be guilty of the offence unless they are the mother or father of the victim

### **Protection of Harassment Act 1997**

This legislation can be used when matters fall short of a physical attack but where the adult at risk is being intimidated or harassed by an abuser.

## **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 the 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. Intermediary

## **CIVIL LAW**

### **Mental Capacity Act 2005**

[www.justice.gov.uk/capacity](http://www.justice.gov.uk/capacity)

The Act sets out fundamental legal rules that apply to everyone working with and/or caring for adults who lack capacity, including family members, professionals and other carers. The rules also apply to people appointed in a formal capacity to act as an attorney or deputy for a person lacking capacity. The Act provides mechanisms for resolving disputes or difficulties which are important for all family members, carers and professionals using the Act, as well as for people who are considered to lack capacity themselves.

- 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 action is taken, or the decision made, regard must be given as 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 they are 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.

The following provides a summary of the key factors which should be taken into account in determining the best interests of a person lacking capacity.

- Don’t make assumptions about someone’s best interests merely on the basis of the person’s age or appearance, condition or aspect of his/her behaviour.

- Try to identify all the issues and circumstances relating to the decision in question which are most relevant to the person who lacks capacity.
- Consider whether the person is likely to regain capacity (e.g. after receiving medical treatment). If so, can the decision wait until then?
- Do whatever is possible to permit and encourage the person to participate, or to improve his/her ability to participate as fully as possible in making the decision.
- If the decision concerns the provision or withdrawal of life-sustaining treatment, you must not be motivated by a desire to bring about the person's death. Don't make assumptions about the person's quality of life.
- Try to find out the views of the person lacking capacity, including:
  - The person's past and present wishes and feelings – both his/her current views and whether the person has expressed any relevant views in the past, either verbally, in writing or through behaviour or habits
  - Any beliefs and values (e.g. religious, cultural or moral) that would be likely to influence the decision in question
  - Any other factors the person would be likely to consider if able to do so
- Consult other people, if it is practicable and appropriate to do so, for their views about the person's wishes, feelings, beliefs or values. But be aware of the person's right to confidentiality – not everyone needs to know everything. In particular, try to consult:
  - Anyone previously named by the person lacking capacity as someone to be consulted
  - Carers, close relatives or friends who take an interest in the person's welfare
  - Any attorney of a Lasting Power of Attorney made by the person
  - Any deputy appointed by the Court of Protection to make decisions for the person
  - For decisions about major medical treatment or a change of residence and where there is no-one who fits into any of the above categories, an IMCA
- Weigh up all of the above factors in order to determine what decision or course of action is in the person's best interests.

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 will help with welfare and financial decisions where the person lost capacity without appointing a Lasting Power of Attorney. This replaces the 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.

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

## **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 older 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).

### **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 applications 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**

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

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 Health and Social Care 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.

From 12 October 2009, the ISA (Independent Safeguarding Authority) barred list replaced the Protection of Vulnerable Adults (PoVA) list. The ISA makes all decisions over who should be legally barred from working with vulnerable people. The ISA was introduced by the Safeguarding Vulnerable Groups Act 2006. Employers or organisations using volunteers working with adults at risk now have a legal duty to refer any concerns about their employees to the ISA. A referral must be made when an employee or volunteer is removed (even temporarily) because the employer thinks the person has harmed or may have harmed a child or adult at risk.

### **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 local district health authority 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.

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.

### **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 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 an Approved Social Worker should be contacted if it is considered detention under the Mental Health Act may be necessary.

### **Section 115: Powers of Entry and Inspection.**

An Adult Mental Health Professional 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 or 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 and 3: Admission to hospital.** These sections give power to an Approved Social Worker based on the recommendation of 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 4:** This requires one medical recommendation and can be used if there is an urgent need to admit someone into hospital.

**Section 7: Guardianship.** An adult at risk 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, or education;
- 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. If the nearest relative is the perpetrator of mistreatment then consideration should be given to whether the

circumstances would allow an application to be made to a County Court to displace the nearest relative.

**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.

### **Human Rights Act 1998**

All public authorities have to comply with the Act which give 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

### **THE RIGHTS IF THE ADULT AT RISK**

The adult at risk 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.

### **Disability Discrimination Act 1995**

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

## **PRINCIPLES FOR 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 adults at risk. 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 adult at risk 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 3<sup>rd</sup> party and where appropriate the adult at risk information relating to an individual if it genuinely and reasonably believes that it is desirable to protect adults at risk.
- 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 the allegation is true, the more pressing the need.
  - The level of involvement of the 3<sup>rd</sup> 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 the adult at risk, 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 and disclosure of information which in the reasonable belief of the worker tends to show one of the following has occurred or likely to occur:

- a criminal offence has been committed or
- 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 allows provision 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 cohabiters, spouses and persons who live together in the same household and relatives. It does not include employees, tenants, lodgers and boarders.

## **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.

## **FINANCIAL ABUSE**

Financial abuse as identified in 'No Secrets' includes 'theft, fraud, pressure around wills, property or inheritance, misuse or mis-appropriation of benefits'.

This guidance particularly focuses upon the abuse of adults at risks' personal funds (whether in their possession or held on their behalf), their savings and their possessions.

### **General principles**

- Where an adult at risk is able to make informed decisions and is able to handle their own financial affairs they should be encouraged and supported in doing so. The financial assets and possessions belonging to adults at risk are for their benefit. Their use by others without the adult at risks' full knowledge and informed consent, or the knowledge and agreement of someone appointed to act on their behalf, can sometimes constitute financial abuse, e.g. theft or misappropriation of property and may well be a criminal act.
- The arrangements for providing support and assistance to an adult at risk in managing their financial resources must be open and transparent. However, adults at risk are also entitled to privacy about their financial circumstances.
- Health and social care workers must behave in a professional manner with any adult at risk for whom they provide care, support or treatment. All practitioners supporting adults at risk hold a position of trust and their actions in respect of the client's financial / material affairs must at all times be transparent.
- The need for an adult at risk to have assistance in managing their financial affairs should be identified during the assessment and review process. This should include assessment of the

service user's ability, risk and suggestibility to undue influence. The specific requirements should be clearly defined. They may, for example, be described generally in a service specification document and specifically in the adult at risks' care plan. They may vary according to need and could range from the need for assistance or advocacy to receivership. Even where an individual lacks capacity they should be engaged as much as possible in decisions about spending their money. Service users with mental capacity should be encouraged to consider planning ahead by seeking legal advice about, for example, making wills and/or to give Enduring Powers of Attorney.

- Accountability for the provision of such financial support and assistance must be specified i.e. clearly attributed to named individuals within agencies providing health and social care.
- Those who work with adults at risk have a duty to protect them from financial abuse and to report any concerns or irregularities. The ethos of care services should be both to prevent abuse and to encourage and enable open reporting ('whistle-blowing'). This includes the provision of effective support to whistle-blowers.

## **The Role of Assessment, Commissioning and Inspection**

### **Roles and Responsibilities**

Effective prevention and detection of financial abuse is the responsibility of all parts of the health and social care system. All staff, whether they are assessors, commissioners, regulators or providers have a part to play. Effective co-ordination and communication between each of these elements is essential to ensure that people at risk are as well protected as possible.

### **Assessors**

The NHS and Community Care Act 1990 states that a local authority must assess a person's needs for community care services if it appears to the authority that he/she may be in need of such services. The assessment of an adult at risk should include recognition of their present and likely future needs in respect of the management of their financial affairs, their money and other assets.

Adults at risk may, or may not, have mental capacity and their condition may be stable, improving or deteriorating. Depending on the person's capacity various options for managing a person's money or property exist. The assessor should ensure that responsibility for this function is addressed at the care planning stage.

The functions may be fulfilled by relatives, professionals, or statutory agencies and consideration of who should undertake this role should be part of the risk and wider assessment process. If an applicant for care has substantial financial assets, they or their representative should be advised to seek guidance from a professional advisor who is covered by the financial services authority.

Where legal provisions are already in place the assessor must see evidence of Power of Attorney, Enduring Power of Attorney or Receivership during the assessment. Provision of services to help with money management varies across districts and authorities. Where services are not provided in-house the local authority should at the very least advise the service user or his/her representative of how they can obtain appropriate advice and assistance. (See also: sec 29. National Assistance Act 1948).

The Secretary of State directed that local authorities provide such advice and support as may be needed to people [to whom sec 29 applies] in their own homes and elsewhere.

Where this advice includes advice on welfare benefits it should be provided by workers specially trained for such work and with direct access to up to date information on welfare benefits. The

review process provides an opportunity to see if safe arrangements have been made and, if not, if further action is required.

### **Commissioners and Contract Officers**

Commissioners should have regard to the need for appropriate services to be available to assist service users with the management of their money and other assets and of the need to prevent and protect service users from financial abuse.

Service specifications should set appropriate high standards for the safe keeping and management of service users' money and assets. For care homes and supported accommodation these should be at least in accordance with the National Minimum Standards for Care Services.

The contract monitoring process should measure performance against these standards and any additional standards within the service contract.

### **Regulators/inspectors (CQC and C.H.A.I.)**

National minimum standards for all client groups were issued under the Health and Social Care Act 2008. These standards provide requirements to enable service users to control their own money except where they do not wish to or they lack capacity to do so. Providers are also required to protect service users from financial abuse.

### **Minimum Financial and Accounting Standards / Controls in Care Homes and Supported Living**

This section relates to personal funds and monies collected on behalf of, or held for the personal use of, service users who need assistance in administering their financial affairs and who live (or are temporarily resident) in care homes or supported living settings. The level and type of assistance provided should be proportionate to the needs and risk assessment of the individual. The term 'funds and monies' is wide ranging and includes sums payable by way of earnings, welfare benefits such as the personal allowance or disability living allowance (mobility element), donations, bequests and gifts from families, and any allowances paid by a local authority for the personal use only of individual service users.

Separate, detailed, records should be kept of all such sums received, collected or expended on behalf of the respective service user.

### **Safe Keeping and Banking**

A separate, designated, bank, building society or post office account should be maintained by or for each service user. Advice received from the British Banking Association (BBA) states that, although there is not yet an agreed common approach, a bank may generally base the decision on whether to accept the risk of a third party running an account without obtaining a Court of Protection Order on two factors. These are whether the third party is able to provide evidence of both:

1. vulnerability / incapacity and
2. their relationship to the person at risk.

BBA advice is that evidence of (i) vulnerability / incapacity might include:

- a letter addressed to the bank from the customer's medical practitioner clearly specifying that the customer is unable to manage their financial affairs;
- a letter from the court of protection, public guardianship office or solicitors acting for a proposed receiver / registered power of attorney advising the bank that an application to the court is being made;
- a letter from social services or the local authority advising that the customer is unable to manage their financial affairs.

Example of (ii) relationship to the person at risk might include:

if the third party has been granted the authority by the Department of Work and Pensions (DWP) to collect benefits on behalf of the vulnerable / incapacitated individual as evidenced by:

- a letter from the DWP
- a DWP form

BBA advice is that when opening a bank account on behalf of a mentally incapacitated person, both the third party and the individual for whom the account is being opened will need to be identified and verified according to the bank's usual procedures.

The practice of 'pooling' funds belonging to more than one service user, within one composite current account is not acceptable or prudent.

Neither is the resident's account to be used by the home in connection with the carrying on or management of the home.

Where the service user has accumulated large sums of cash in their current bank, building society or post office account(s), the service provider should formally notify the respective care manager/social worker of this situation (if the service user has capacity their permission should first be sought). Where a Receiver has been appointed by the Public Guardianship Office for a service user, it is imperative that the views of the Receiver be obtained at the earliest opportunity. What constitutes a large sum of money will depend on individual perspective and setting. For the purposes of this guidance a figure of £3000 is considered to be appropriate. Where service users have several accounts this figure should be cumulative.

The care manager / social worker, after discussion with the service provider about the service user's anticipated personal expenditure needs, should give consideration to the appropriateness of establishing a separate deposit account in the service user's name.

The signatories authorised to make payments by cheque, or withdraw cash from the bank, should be determined by a senior level of management in the service provider organisation.

In situations where the service provider organisation does not have different management tiers, e.g. a small home, the determination should be made by the owner/manager.

Maximum financial limits should be set regarding the amount of any single cash withdrawal; and the amount for which cheques may be issued by a single authorised signatory.

Cheque payments above the specified maximum limit should require two authorised signatories.

Particular vigilance should be exercised by all parties with an interest in, or responsibility for, protecting the service user, to ensure financial limits are not evaded by splitting a single transaction into two or more smaller amounts.

The practice of using pre-signed, blank cheques is extremely imprudent and should be forbidden.

At least once a month, a statement should be prepared reconciling the recorded balance(s) on each service user's Personal Cash and Bank Record with the Actual Total amounts held at the

service user's residence and at their bank. This reconciliation should be formally certified, as correct, by an officer responsible for administering service users' personal finances; and verified, at least quarterly, by a separate designated more senior manager.

In situations where no separate senior management level exist an appropriate alternative arrangement should be agreed as part of the commissioning and contracting process.

Cash or cheques held at the service user's residence should be kept under secure conditions.

This should involve a separate, lockable box for each service user's monies. Responsibility for the physical custody of, and access to such boxes should be specified by senior management.

## **Record Keeping**

It is important that all information is recorded clearly, concisely, accurately and promptly.

- An accounting record should be maintained of all transactions involving the service user's personal banking account including cheque payments made through the account together with any cash withdrawals from, or deposits into, the account. This personal banking record should also incorporate provision for a signature by the officer responsible for initiating transactions of any nature on the service user's bank account; and include balances brought/carried forward. These records should be verified against banking statements or pass-books.
- A separate basic accounting record (i.e. cash account) should be maintained for each service user recording all cash received, or spent, on their behalf. Each account should normally cover a period of one month and incorporate balances brought / carried forward to the next month.
- The format of the cash account should provide for, among other things, a clear 'audit trail' regarding cash paid into, or withdrawn from, the service user's bank account; and the signature of the officer responsible for initiating the respective transaction(s). This cash record should reflect a clear picture of monies spent / collected on behalf of the service user.
- Receipt and payment entries should be supported by relevant, verifiable, documentation. Minimum financial limits should be set above which invoices / expenditure vouchers must be obtained; and below which supporting documentation may not be considered practicable or of material financial significance.<sup>56</sup> | green May 2005 Safeguarding Adults guidance
- Manual deletion or erasure of entries on accounting records (including details on invoices supporting service user personal expenditure) should not be permitted, especially by use of tippex. All transaction entries on service users' financial records should be in ink. Where, occasionally, it might be necessary to alter or amend, for example, recorded totals (for instance on discovering an arithmetical error) the following approach should be adopted: a short line should be drawn through the incorrect figure; the correct figure written next to it; and the amending entry clearly initialed by the originating officer.
- Financial and accounting records relating to service users personal expenditure should be retained for the current financial year and the preceding five years (total six). This includes situations where the service user moves or dies. (NB This guidance should be cross referenced with local authority practice and procedures for when a service user dies).

## **Expenditure**

- Clear guidance should be issued by service providers regarding what they (and the service commissioner) consider proper professional practice where the personal funds of adults at

risk are being spent. This could comprise a list of 'dos' and 'don'ts'; and cover contentious areas (such as the costs and expenses of care staff accompanying service users on holiday) where monies might be removed from the service user's account to meet expenditure from which the service provider / staff may directly or indirectly benefit.

- Clear guidance should also be issued regarding the policy on care staff accepting (or otherwise) cash, personal gifts or hospitality from service users or from their families and friends.

### **Inventory of Personal Possessions**

A simple basic inventory should be constructed, and kept up to date, of valuable personal property belonging to each service user. By way of a non-exhaustive list for illustrative purposes only, this could include items such as portable TVs, cassette players, music centres, personal jewelry, and leather handbags. The inventory should be updated and certified as correct, at least 6 monthly, by an officer responsible for administering service users' financial affairs; and verified, annually, by a more senior manager. Any missing items should be fully investigated in accordance with local Safeguarding Adults procedures where necessary and a proper explanation recorded on the service user's personal file. The inventory should also be formally amended, as necessary, and a brief explanatory note added to the inventory (and cross referenced to the service user's personal file / records). Instances of suspected theft must be reported immediately in accordance with local Safeguarding Adults procedures.

### **Personal Credit Cards**

The use of staff members' personal credit, debit or loyalty card(s) to process the private expenditure of a service user should not be permitted.

### **Joint purchases**

- Whilst people in residential accommodation, who have full mental capacity, may opt for shared purchases / ownership e.g. purchase of a car with their disability living allowance, (mobility component), they should not be placed under any pressure to engage in joint purchases or partake in such arrangements. Providers and / or care managers/social workers should offer advice and support to ensure that any such agreements will facilitate proportionate benefit and be in the best interest of the service user and fit for purpose in the short, medium and long term.
- In the case of people who are assessed not to have mental capacity to manage their finance, consent to any proposed joint purchase on behalf of the service user should be obtained in writing from the person who holds Power of Attorney / Receivership. The best interest of the service user should be paramount and any purchases must be fit for purpose in the short, medium and long term facilitating proportionate benefit to the service users.
- Any such joint purchases should be confined to use by the service users and should not be available for use by staff only, without the service users. A written agreement should be provided to each service user, confirming their continuing ownership rights of any joint purchases. Staff must ensure the proper care and servicing of any (joint) property, such as a vehicle, which is used by staff for the benefit of service users.

## **Monitoring and Periodic Professional Audit**

Regular checks should be undertaken by both the service provider and service commissioner to ensure the service user's interests are being protected. These checks may be undertaken by, for example, a contract monitoring section or line management staff in either the service provider or local social services. Whatever types of monitoring mechanism are adopted, the checks conducted should, as a minimum, seek to verify that:

- expenditure is well documented
- it has been incurred for the service user's benefit, and
- the recorded balance of monies on the service user's cash account and personal bank record can be clearly corroborated by physical verification and independent documentation e.g. proper statements for the service user's bank, building society or post office account(s).
- Each care provider should also ensure that the personal funds of adults at risk for whom they have day-to-day responsibility are subjected to periodic, in-depth, professional audit at intervals not less than once every 4 years. If the service provider or care commissioner operates an established, suitably experienced, internal audit function the necessary review might, alternatively, be conducted through this mechanism.

## **Transparency and Information Sharing**

- Where a service user possesses capacity and does not wish details of their financial affairs to be disclosed to any other party (except those expressly authorised in law), the service user's wishes should be respected.
- Where, however, the service user does not possess the mental capacity and for example, there is a Public Guardianship Office appointed Receiver, then any such Receiver should be afforded full access to information concerning the service user's financial affairs. It is noted that some service providers already provide the facility of making such records available, on demand, to DWP inspectors, social services departments, health authorities and the advocate of the respective resident. Whilst it is impossible to prescribe for the circumstances surrounding every service user, transparency of practice should help minimise the possibility or risk of any misappropriation remaining undetected.

## **DIRECT PAYMENTS**

Helping direct payments scheme users to protect themselves from abuse.

The 'No Secrets' guidance for the protection of adults at risk from abuse includes specific instructions concerning the users of direct payments schemes, which recognises the possibility of increased risk of abuse that exists for these people:

“Anyone who is purchasing his or her own services through the direct payments system and the relatives of such a person should be made aware of the arrangements for the management of Safeguarding Adults in their area so that they may access help and advice through the appropriate channels. Care managers, who play a role in direct payments, could be asked to help users who are at risk of abuse.” (No Secrets DOH 2000:7.9)

Personal Assistants employed directly by service users through the Direct Payments scheme are not subject to regulation by the Care Quality Commission (CQC). As a result, the responsibility for monitoring care standards rests with the employer with the support of direct payment scheme staff and Care Manager. Direct payments recipients should be advised that the contracts they have with their own directly employed staff should include reference to the Plymouth Safeguarding Adults Policy and Protocols. Staff directly employed should be made aware of Safeguarding Adults

issues and that any issues of abuse will be reported to social services and / or to the police. Such conditions need to be proportionate to the risk involved and must not defeat the principal purpose of the direct payment, which is to give people more choice and control over services.

The following information identifies particular areas of risk and makes some suggestions about how these risks may be minimised.

E.g. when negotiating initial package, discuss with service user risks and reporting re abuse, recommend CRB on PA, discussion of risk enablement. Risk management is linked into a good personalised package. Service users need to be encouraged to see reporting abuse as a supportive system in which they will be fully involved in decision making. Self protection work for service users at risk of harm should always be considered.

Factors that increase the risk of abuse for adults at risk using Direct Payments Schemes, and how the risks may be minimised.

Area of Risk	Description of Risks	How to minimize the risks
<p><b>Access to the adult at risks' home and personal Telephone number by strangers</b></p>	<p>Adults at risk may be unable to protect themselves.</p> <p>The risk of abuse is likely to be increased through the recruitment and selection process, if this is carried out independently by the adult at risk. Non-bona fide strangers will have access to the adult at risks' home and personal telephone numbers.</p>	<p>Direct payments users are recommended not to carry out the recruitment and selection process from their home but to use a box number, dedicated telephone line for job applications and a room for the interviewing process, both of which, with sufficient notice, are available from Plymouth Social Services. Those who are unable or unwilling to use this facility are advised to be accompanied by a third party such as a friend, advocate, agent or direct payments support worker during the interviewing process.</p> <p>The direct payments support service advises service users to carefully scrutinize candidates' details and references.</p> <p>Direct payments users are informed that they can purchase services through home care agencies that vet their employees and are regulated by SCSl.</p>
<p><b>Unfamiliarity with the recruitment and selection process</b></p>	<p>Adults at risk may have little understanding of recruitment, selection and employment procedures. This could potentially result in the unwise selection of personal assistants.</p>	<p>The direct payments support service provides guidance and support to service users regarding employment issues. This decreases the risk of unwise selection of personal assistants.</p>
<p><b>The lack of requirement for police checks through the Criminal Record Bureau</b></p>	<p>Care workers employed by adults at risk through the Direct Payments Scheme are not required by law to be police checked through the Criminal Records Bureau. It is not possible for service users to undertake these checks</p>	<p>Service users are encouraged to ask social services to carry out enhanced CRB checks for personal assistants they have interviewed and wish to employ.</p>

Area of Risk	Description of Risks	How to minimize the risks
	themselves.	Service users are strongly recommended to await the outcome of the CRB check, wherever possible before employing a personal assistant.
<b>The lack of regulation</b>	<p>Care workers employed through Direct Payments Schemes are not subject to regulation by the CQC so there is no monitoring of care standards. This could increase the risk of abuse to the adult at risk during, for example, moving and handling operations, financial transactions or as a result of badly prepared or non nutritious meals.</p> <p>Direct abuse has been experienced or is suspected.</p>	<p>When carrying out care plan reviews, care managers enquire about the standard of care of care workers employed under the direct payments scheme. DP users are given information regarding risk, both at the outset of the process and at reviews, so that they may make informed decisions.</p> <p>Reviews of finances are also undertaken by the care manager as part of the review process.</p> <p>Care Managers should ensure that they have an opportunity to speak with the DP user on their own, in private. Users should contact their care manager or direct payment support staff if they have any concerns about the quality of the care or how it is being provided.</p> <p>Users or other concerned adults have access to advice and support through social services in all cases where abuse is suspected.</p>

Plymouth City Council will ensure that users of the Direct Payments Scheme and their relatives are made aware of the arrangements for the management of Safeguarding Adults and how to access help and advice by:

- Direct payments support service staff will give new users of the direct payments scheme a Safeguarding Adults Information leaflet with their direct payments information pack. This leaflet raises awareness of adult abuse and provides instructions for reporting concerns and accessing help and advice. It will be available on request in formats that makes it accessible to people with learning disabilities, to people with sensory impairments and to people for whom English is not their first language.
- All care managers and direct payments staff will receive training to raise and maintain their awareness of abuse and to understand and use Plymouth’s multi-agency Safeguarding Adults policy and protocols. Training will be made available to adults at risk using the scheme and to the care workers they employ.

The abuse of adults at risk will continue to be a challenge to professionals and to society in general. Raising awareness of issues that constitute abuse and responding appropriately when concerns about possible abuse are reported will give a message that it is not acceptable.