

Strategy

ABUSE OF OLDER AND VULNERABLE PEOPLE

What is abuse of older and vulnerable people? Recognising the signs of abuse and how to get help

This strategy document was created under our previous branding as SFE.



A safeguarding strategy
for recognising, preventing and dealing
with abuse of adults at risk

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Using this document:

This is a reference guide aimed at legal professionals, but may be useful for others working with adults at risk of abuse or neglect. It is not a definitive statement of the law relating to safeguarding adults at risk but aims to provide signposts for recognising, preventing, and dealing with abuse and neglect.

It has been written by Caroline Bielanska, for the benefit of members, the legal profession, and those interested in safeguarding the interests of adults at risk. Acknowledgement is given to Anne Edis for her past contribution. It may be freely reproduced, duplicated or copied provided that acknowledgement is given to Caroline Bielanska and Solicitors for the Elderly.

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1. What do we mean by abuse?

1.1 Abuse takes many forms- financial or material, physical, domestic, sexual, emotional, discriminatory, institutional, psychological, neglect, acts of omission, self-neglect, abandonment or isolation and modern slavery. Any of these forms of abuse may be perpetrated as the result of deliberate intent, negligence or ignorance.

1.2 The charity, Action on Elder Abuse defines abuse as:

‘A single or repeated act or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person.’

1.3 This definition has been adopted by the World Health Organisation and is promoted by the International Network for the Protection of Elder Abuse; however it excludes abuse by a stranger, who is unlikely to be in a position of trust.

1.4 Section 42(3) of the Care Act 2014, which is applicable to England provides that, ‘abuse’ includes financial abuse, which covers:

- (a) having money or other property stolen;
- (b) being defrauded;
- (c) being put under pressure in relation to money or other property; and
- (d) having money or other property misused.

1.5 In Wales, whilst adopting the same definition of financial abuse under s.197(1) of the Social Services and Well-being (Wales) Act 2014, extends the definition to cover physical, sexual, psychological, emotional or financial abuse (and includes abuse taking place in any setting, whether in a private dwelling, an institution or any other place).

1.6 The Commission on Equality and Human Rights defines the term as follows:

‘... Abuse may consist of a single or repeated act. It may be physical, verbal or psychological. It may be an act or omission of an act or may occur when a vulnerable person is persuaded to enter into a financial or sexual transaction to which he or she has not consented or cannot consent. Abuse can occur in any relationship and result in significant harm and exploitation of the person subjected to it.’

1.7 The lack of a clear definition can make it harder to identify whether a person is being abused, particularly when it is the result of poor decision making, poor practice or an omission, and consequently whether public bodies and/ or private individuals can take intervention and redress measures.

2. The risk factors for being abused

2.1 Abuse occurs for many reasons and the causes are not fully understood. The following risk factors have been identified as being associated with elder abuse, but could equally apply to abuse of any adult:-¹

¹ Elder abuse prevalence in community settings: a systematic review and meta-analysis. Yon Y, Mikton CR, Gassoumis ZD, Wilber KH. Lancet Glob Health 2017 Feb 5(2):e147-e156: <https://www.ncbi.nlm.nih.gov/pubmed/28104184>; The prevalence of elder abuse in institutional settings: a systematic review and meta-analysis. Yon Y, Ramiro-Gonzalez M, Mikton C, Huber M, Sethi D. European Journal of Public Health 2018: <https://www.ncbi.nlm.nih.gov/pubmed/29878101>.

- poor physical and mental health of the victim
- in some cultures, where women have inferior social status, elderly women are at higher risk of neglect and financial abuse
- women are at higher risk of more persistent and severe forms of abuse and injury
- dependency on the older person for accommodation, financial and emotional support
- a long history of poor family relationships may worsen as a result of stress when the older person becomes more care dependent
- as more women enter the workforce and have less spare time, caring for older relatives becomes a greater burden, increasing the risk of abuse
- social isolation because of loss of physical or mental capacity, or through the loss of friends and family members
- ageist stereotypes where older adults are depicted as frail, weak and dependent
- erosion of the bonds between generations of a family
- systems of inheritance and land rights, affecting the distribution of power and material goods within families
- migration of young couples, leaving older parents alone in societies where older people were traditionally cared for by their offspring
- lack of funds to pay for care
- within institutions, abuse is more likely to occur where standards for health care, welfare services, and care facilities are low; staff are poorly trained, remunerated, and overworked; the physical environment is deficient; and policies operate in the interests of the institution rather than the residents.

3. Identifying abuse

3.1 In the 2007 UK study of abuse and neglect of older people, ‘Hidden Voices’ published by Action on Elder Abuse, based on reports to its helpline, it was estimated that 8.6 % of the population experienced some form of abuse, with 78% aged over 70; 67% were women; and 68% were a partner or family member. The most common form of abuse was neglect. In a systematic review of studies measuring the prevalence of elder abuse or neglect published by the British Geriatric Society’s journal, ‘Age and Aging’ in March 2008, the authors (Cooper, Selwood & Livingstone) concluded 25% of vulnerable elders are at risk of abuse, yet only a small proportion are detected. In a 2017 study based on the best available evidence from 52 studies in 28 countries from diverse regions, including 12 low- and middle-income countries, estimated that 15.7% of people aged 60 years and older were subjected to some form of abuse.² This is likely to be an underestimation, as only 1 in 24 cases of elder abuse is reported, in part because older people are often afraid to report cases of abuse to family, friends, or to the authorities.

3.2 The following factors create difficulties in identifying and dealing with abuse:

- fear of further abuse and the ramifications, such as dependence on the abuser and jeopardy of care
- fear they will not be believed
- the action is not always recognised as abuse
- trauma suffered as a result of the abuse
- embarrassment to admit abuse

² Elder abuse prevalence in community settings: a systematic review and meta-analysis. Yon Y, Mikton CR, Gassoumis ZD, Wilber KH. Lancet Glob Health. 2017 Feb; <https://www.ncbi.nlm.nih.gov/pubmed/28104184>

- secrecy of the perpetrator
- cultural and language barriers
- lack of knowledge and training by professionals involved in care, and so may fail to identify, report and act
- lack of reporting and recording incidents of abuse by the abused and those caring for them

3.3 The main types of abuse can be identified as follows: -

Physical abuse

Examples of physical abuse would include hitting, slapping, punching, kicking, hair-pulling, biting, pushing, rough handling, scalding and burning, physical punishments, inappropriate or unlawful use of restraint, making someone purposefully physically uncomfortable, involuntary isolation or confinement, over-sedation, force feeding or withholding food or physically restricting the person's movement.

Possible indicators of physical abuse

The individual may present one or more of the following: -

- Cuts, lacerations, puncture wounds, open wounds, bruises, welts, discoloration, black eyes, burns, loss of hair in clumps, fractures, broken bones and skull fractures, without an explanation or inconsistent with the account of what happened, or with the person's lifestyle
- Unexplained falls
- Untreated injuries in various stages of healing or not properly treated
- Poor skin condition or poor skin hygiene
- Dehydration and/or malnourished without illness or related cause
- Loss of weight
- Soiled clothing or bed
- Broken eyeglasses/frames, physical signs of being subjected to punishment or signs of being restrained
- Inappropriate use of medication, overdosing or under dosing
- Failure to seek medical treatment or frequent changes of GP
- Subdued or changed behaviour in the presence of a caregiver
- A person telling you they have been hit, slapped kicked or mistreated

Psychological or emotional abuse

The person may be subjected to behaviour, including emotional abuse, threats of harm or abandonment, deprivation of contact, humiliation, bullying, blaming, controlling, intimidation, coercion, harassment, verbal abuse, social isolation or withdrawal from services or supportive networks, including preventing someone from meeting their religious and cultural needs. Removing mobility or communication aids or intentionally leaving someone unattended when they need assistance, failing to respect the person's privacy, addressing a person in a patronising or infantilising way, preventing them from expressing choice and opinion and preventing stimulation, meaningful occupation or activities, can also amount to abuse.

Possible indicators of psychological or emotional abuse

- Helplessness
- Hesitation to speak openly particularly when a certain person is present
- Implausible stories
- Confusion or disorientation
- Anger, aggression or tearfulness, without apparent cause
- Sudden changes in behaviour, including insomnia, weight gain or loss
- Emotionally upset, distressed or agitated
- Unusual behaviour (sucking, biting, or rocking)
- Unexplained fear
- Denial of a situation
- Extremely withdrawn and non-communicative or responsive
- A person telling you they are being verbally or emotionally abused

Financial or material abuse

The illegal or unauthorised use of a person's assets, which may include theft, fraud, false representation, internet scamming, exploitation, undue pressure, duress or undue influence in connection with loans, wills, powers of attorney, property, inheritance or financial transactions, or the misuse or misappropriation of property, possessions or benefits including by power of attorney, deputyship, appointeeship or other legal authority, are all forms of financial or material abuse. Preventing or denying a person from accessing their own money or assets or arranging less care than is needed to save money to maximise inheritance are also abusive actions.

Possible indicators of financial or material abuse

- Signatures on cheques, etc, that do not resemble the person's signature, or signed when the person cannot write
- Any sudden changes in bank accounts, including unexplained withdrawals of money by a person accompanying the holder of the account
- Unexplained withdrawals from a cash machine at a time when the account holder could not have accessed the account
- The sudden inclusion of additional names on the person's bank accounts.
- Abrupt changes to, or unexpected creation of a will
- Power of attorney or Lasting Power of Attorney being obtained after the person has ceased to have mental capacity to manage their own finances and property
- The sudden appearance of previously uninvolved relatives claiming their rights to the person's affairs and possessions
- Unusual concern or interest shown by family or others in the assets of the person and how money is being spent
- The unexplained sudden transfers of assets to a family member or someone outside the family
- Numerous unpaid bills, overdue rent, care home bills, public utilities bills etc when there is someone who is supposed to be paying the bills
- Change in living conditions, lack of heating, clothing or food or inability to pay bills/unexplained shortage of money
- Lack of amenities such as TV, personal grooming items, appropriate clothing items, that the person should be able to afford
- The person allocated to manage financial affairs is evasive or uncooperative
- The lack of financial records kept by a care home, care service, deputy, attorney or appointee
- The unexplained disappearance of funds or valuables such as art, silverware, jewellery or other personal possessions

- Deliberate isolation of the person from their friends and family, resulting in another person having total control

Sexual abuse

This may involve forcing or manipulating a person to take part in any sexual activity without their consent, irrespective of the relationship. It also includes, indecent exposure, sexual teasing or innuendo, sexual harassment, inappropriate looking or touching, sexual photography or recording, forced use of pornography or witnessing of sexual acts.

Possible indicators of sexual abuse

- Bruises particularly to the thighs, buttocks and upper arms and marks on the neck
- Bleeding, pain or itching in the genital area
- Unexplained vaginal or anal bleeding
- Torn, stained or bloody underclothing
- Unexplained venereal disease or genital infections
- Unexplained difficulties in walking or standing
- Incontinence not related to any medical diagnosis
- Marked changes in behaviour, such as self-harming, poor concentration, insomnia, withdrawal, excessive fear or apprehension, or reluctance to be alone with a known individual
- The uncharacteristic use of explicit sexual language or significant changes in sexual behaviour or attitude
- A person tells you that they have been sexually assaulted or raped

Neglect, acts of omission and self-neglect

This may be demonstrated by the ignoring of medical, emotional, religious, cultural, ethnic, social, recreational or physical care needs, failure to provide access to appropriate health, care and support, housing or educational services, the withholding of the necessities of life, such as shelter, food, clothing, medication, adequate nutrition and heating. Self-neglect can involve a wide range of behaviour, such as neglecting to care for one's personal hygiene, health or surroundings.

Possible indicators of neglect, acts of omission or self-neglect

- Dirty, unhygienic, or other health and safety hazards in the person's living environment whether in their own home or in a care home
- Rashes, sores, ulcers, lice, inadequate clothing
- The person is malnourished or dehydrated
- The person has untreated injuries or medical problems
- Poor personal hygiene
- The withholding of medication or over medication
- Lack of assistance with eating and drinking
- Inconsistent or reluctant contact with health and social care organisations
- Accumulation of untaken medication
- Uncharacteristic failure to engage in social interaction
- Inappropriate or inadequate clothing
- A person tells you that they are not having their needs met

Caregiver abuse

A caregiver may be doing their best but cannot provide the level of care and support that is needed. However, there may also be signs that abuse or neglect is deliberate.

Indicators of caregiver abuse

- The cared for person may not be allowed to speak for themselves, or see others, without the presence of the caregiver and (suspected abuser) being present
- Attitudes of indifference or anger towards the cared for person, or the obvious absence of assistance
- The caregiver blames the cared for person (e.g. accusation that the incontinence is a deliberate act)
- Aggressive behaviour (threats, insults, harassment) by the caregiver towards the cared for person
- Previous history of abuse or exploitation by others
- Inappropriate display of affection by the caregiver to the cared for person
- Flirtations, coyness, etc, which might be indicators of inappropriate sexual relationships
- Social isolation from family, or isolation or restriction on the activity of the cared for person by the caregiver
- Conflicting accounts of incidents by family, supporters or the cared for person
- Inappropriate or unwarranted defensiveness by the caregiver
- Indications of unusual confinement (closed off in the room; tied to furniture; changing routine activity)
- Obvious absence of assistance or attendance
- Previous history of abusive behaviour

Stranger abuse

This can include distraction burglaries, bogus trades' people, exploitative 'cold calling' or street robbers who target vulnerable people.

Domestic or family violence

This may be a single incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse by someone who is or has been an intimate partner or family member regardless of gender or sexuality, and includes: psychological, physical, sexual, financial, emotional abuse; and so called 'honour' based violence, such as Female Genital Mutilation and forced marriage.

Modern slavery

This encompasses slavery, human trafficking, forced labour and domestic servitude. Traffickers and slave masters use whatever means they have at their disposal to coerce, deceive and force individuals into a life of abuse, servitude and inhumane treatment.³

³https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/328096/Modernslavery_booklet_v12_WEB__2_.pdf:
https://www.modernslaveryregistry.org/pages/reporting_guidance

Discriminatory abuse

Unequal treatment based on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex or sexual orientation (which are known as ‘protected characteristics’ under the Equality Act 2010) is unlawful. Verbal abuse, derogatory remarks or inappropriate use of language, harassment or deliberate exclusion, substandard service provision, denying basic rights to healthcare, education, employment and criminal justice, which are related to a protected characteristic is unlawful. It also extends to denying a person access to communication aids, not allowing access to an interpreter, signer or lip-reader because of a protected characteristic.

Organisational or institutional abuse

Organisation or institutional abuse, includes neglect and poor care practice within an institution or specific care setting such as a hospital or care home, for example, or in relation to care provided in one’s own home. This may range from one off incidents to on-going ill-treatment. It can be through neglect or poor professional practice as a result of the structure, policies, processes and practices within an organisation.

Possible indicators of organisational or institutional abuse

- Lack of flexibility and choice for adults using the service
- Inadequate staffing levels
- People being hungry or dehydrated
- Poor standards of care
- Lack of personal clothing and possessions and communal use of personal items
- Lack of adequate procedures
- Poor record-keeping and missing documents
- Absence of visitors
- Few social, recreational and educational activities
- Public discussion of personal matters or unnecessary exposure during bathing or using the toilet
- Absence of individual care plans
- Lack of management overview and support

4. Abuse and human rights

4.1 Public bodies, such as local authorities and the NHS must follow the European Convention on Human Rights which is enshrined in UK law. In particular:

- Article 2 - *‘Everyone’s right to life shall be protected by law.’*
- Article 3 - *‘No one shall be subjected to ... inhuman or degrading treatment.’*
- Article 5 - *‘Everyone has the right to liberty and security of person’*: The *‘lawful detention of ... persons of unsound mind’* is allowed for but everyone who is deprived of his liberty by detention shall be entitled to have the lawfulness tested by a Court and to compensation if it was unlawful.
- Article 6 - *‘In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’*
- Article 8 - *‘Everyone has the right to the right to respect for his private and family life, his home and his correspondence.’*
- Article 1 First Protocol - *‘Every ... person is entitled to the peaceful enjoyment of his possessions.’*

- Article 14 - *‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race ... religion ... property, birth or other status.’*

4.2 The UK Courts increasingly have regard to The United Nations’ Convention on the Rights of Persons with Disabilities (‘CRPD’) when making decisions. Although it does not form part of domestic law, it has judicial interpretative influence, particularly in cases affecting the rights of a person with a disability.

4.3 Article 12.4 of the CRPD requires that:

‘States Parties ... shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, [and] are free of conflict of interest and undue influence.’

4.4 In its General Comment No 1 (2014), published on 11 April 2014, the Committee on the Rights of Persons with Disabilities stated, at paragraph 18, that:

‘All people risk being subject to ‘undue influence’ yet this may be exacerbated for those who rely on the supports of others to make decisions. Undue influence is characterized where the quality of the interaction between the support person and the person being supported includes signs of fear, aggression, threat, deception or manipulation. Safeguards for the exercise of legal capacity must include protection against undue influence - however the protection must also respect the rights, will and preferences of the person, including the right to take risks and make mistakes.’

4.5 The Commission on Equality and Human Rights extensively promote human rights and provide useful advice and guidance, which may assist advisers (see section 21 below).

5. A general overview of the perpetrator of abuse

5.1 The abuser may be an informal caregiver such as a relative, friend, associate or neighbour, or a person acting in a paid capacity, such as a professional involved in care in the person’s own home, in a care home or day centre or by the person’s professional adviser. The abuser could hold a position of trust, such as being an attorney or deputy. They could be a trade or service provider, sales’ person or a total stranger.

5.2 Abuse may have occurred due to neglect, an omission to act or as a deliberate and premeditated act. The deliberate abuser is one who sets out with intent to abuse the vulnerable adult and may have access to information, which opens up opportunities for abuse, such as bank accounts, correspondence and other personal information. Sometimes it may be the result of desperation due to lack of support from others, such as relatives, the NHS and/or social services, for example, where the caring role places undue pressure upon the caregiver who takes out their frustration on the cared for person. Abuse may also occur due to lack of understanding, poor decision making or poor practice. It is a common response for the perpetrator to attempt to justify their actions, as being reasonable, particularly as recompense for all they do for the person abused, or the lack of support they are given by others.

5.3 Vulnerable adults may themselves be the perpetrators of harm. For example, some people may exhibit challenging behaviour, as a symptom of their condition, including verbal or physical aggression.

6. The local authority's safeguarding role

6.1 The definition of a 'vulnerable adult' is problematic, as it is the circumstances which make someone vulnerable. Legislation refers to such a person, as an 'adult at risk', rather than being a 'vulnerable adult'. Local authorities in England and Wales have particular duties towards 'adults at risk', which is defined as an adult who—

- (a) is experiencing, or is at risk of abuse or neglect; and
- (b) has needs for care and support (whether or not the authority is meeting any of those needs); and
- (c) as a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it.⁴

Duty to make enquiries

6.2 Where a local authority has reasonable cause to suspect that an adult in its area is or maybe an adult at risk, the local authority must make (or cause to be made) whatever enquiries it thinks necessary to enable it to decide whether any action should be taken in the adult's case and, if so, what and by whom. Each local authority has Adult Safeguarding Officers who may also be known as '(Vulnerable) Adult Protection Officers', with responsibility to involve multi agency teams and manage cases referred to them.⁵

Duty to assess care and support needs

6.3 The local authority must carry out an assessment of the care and support needs of an adult at risk, even if the person refuses to be assessed. The assessment may be multi agency. Entitlement to an assessment is not linked to the person's own financial resources or whether they are likely to be eligible for services. Provision will be made to those who are at risk of neglect or self-neglect without regard to the usual eligibility criteria. However, the individual may be financially assessed and have to contribute towards the cost of support services.⁶

Duty to work with safeguarding partners

6.4 There is a reciprocal duty to cooperate between the local authority and relevant partners, such as NHS providers, care and support providers, and private registered social housing providers in the exercise of its functions to protect adults at risk. Safeguarding Adults Boards are locally established, which include the local authority, NHS and police, which develop, share and implement a joint safeguarding strategy. The local authority leads the multi-agency local adult safeguarding system.⁷ In some areas, Multi Agency Safeguarding Hubs (MASH) exist, to bring key professionals together to facilitate early, better quality information sharing, analysis and decision-making, to safeguard vulnerable people more effectively. These operate in relation to children and young people, but in some areas have been extended to cover adults at risk.

⁴ s.42(1) Care Act 2014: s.126(1) Social Services & Well-being (Wales) Act 2014.

⁵ s.42(2) Care Act 2014: s.126(2) Social Services & Well-being (Wales) Act 2014.

⁶ s.9, s.10, s.11(2) Care Act 2014: s.19, s.24, s.20(2) Social Services & Well-being (Wales) Act 2014.

⁷ s.6 and s.43 Care Act 2014: ss.128-130, ss.132-140 Social Services & Well-being (Wales) Act 2014.

Duty to carry out safeguarding reviews

6.5 The local authority must carry out a Safeguarding Adults Review when someone with care and support needs dies or seriously suffers as a result of neglect or abuse and there is a concern that the local authority or its partners could have done more to protect them (referred to as ‘a serious case review’ in England or ‘adult practice review’ in Wales).⁸

Duty to protect movable property

6.6 The local authority is under a duty to take reasonable steps to prevent or mitigate loss or damage to the person’s movable property when they have been admitted to hospital or residential accommodation.⁹ The local authority can enter the premises to take steps to protect it. Any reasonable expenses incurred in doing such are recoverable from the person concerned.

6.7 Guidance on English local authorities safeguarding duties under the Care Act 2014 are contained in Chapter 14 of the Care and Support Statutory Guidance (CSSG). The Social Care Institute for Excellence has numerous resources on adult safeguarding.¹⁰ Safeguarding guidance for Wales is contained in Part 7 of the Social Services and Well-being (Wales) Act 2014 Statutory Code of Practice. Social Care Wales has also published a manual on the *Policy and Procedures for the Protection of Vulnerable Adults from Abuse* (January 2013) to guide the safeguarding work of all those concerned with the welfare of vulnerable adults employed in the statutory, third (voluntary) and private sectors, in health, social care, the police and other services.

Adult Protection and Support Orders (APSOs) (Wales only)

6.8 Welsh local authorities can obtain Adult Protection and Support Orders (APSOs) to authorise entry to premises (if necessary by force) for the purpose of enabling an authorised officer of a local authority to assess whether an adult is at risk of abuse or neglect and, if so, what to do about it.¹¹ No such power exists in England.

6.9 Part 7 of the Welsh Code of Practice provides a single point of reference on APSOs for local authorities. It provides comprehensive information regarding the seeking, making and enforcement of an APSO, which are used to enable an authorised officer, and any other person specified in the order, to speak to an adult suspected of being at risk of abuse or neglect in private, to establish whether the adult can make decisions freely, to assess whether the person is an adult at risk and to establish if any action should be taken.

Appointment of an advocate

6.10 Section 67 of the Care Act 2014 expressly requires that an English local authority consider whether to appoint an independent advocate to represent and support an adult who is the subject of a safeguarding enquiry or Safeguarding Adult Review where the adult has ‘substantial difficulty’ in being involved in the process and where there is no other suitable person to represent and support them. In Wales, this requirement is contained in Part 10 of the Social Services & Well-being (Wales) Act 2014 Code of Practice.

Principles for safeguarding

⁸ s.44 Care Act 2014: Safeguarding Boards (Functions and Procedures) (Wales) Regulations 2015.

⁹ s.47 Care Act 2014: s.58 Social Services and Well-being (Wales) Act 2014.

¹⁰ <https://www.scie.org.uk/safeguarding/adults>.

¹¹ s.127, Social Services & Well-being (Wales) Act 2014.

6.11 Public assistance and intervention is based on the principle of proportionality and least intrusiveness. That is, the extent, nature and degree of a response should be commensurate with the extent, nature and degree of the risks in question. This may mean that the adviser has to manage the expectations of those interested in the adult at risk's welfare, as intervention may not always occur or to the extent they expect it should.

6.12 In May 2011, the Department of Health published the government's policy¹² on safeguarding vulnerable adults. It includes a statement of principles which should inform the way in which all sectors and settings including care and support services, further education colleges, commissioning, regulation and provision of health and care services, social work, healthcare, welfare benefits, housing, wider local authority functions and the criminal justice system work with adults at risk. This has been adopted in the CSSG:

- **Empowerment** - People being supported and encouraged to make their own decisions and informed consent.

"I am asked what I want as the outcomes from the safeguarding process and these directly inform what happens."

- **Prevention** - It is better to take action before harm occurs.

"I receive clear and simple information about what abuse is, how to recognise the signs and what I can do to seek help."

- **Proportionality** - The least intrusive response appropriate to the risk presented.

"I am sure that the professionals will work in my interest, as I see them, and they will only get involved as much as needed."

- **Protection** - Support and representation for those in greatest need.

"I get help and support to report abuse and neglect. I get help so that I am able to take part in the safeguarding process to the extent to which I want."

- **Partnership** - Local solutions through services working with their communities. Communities have a part to play in preventing, detecting and reporting neglect and abuse.

"I know that staff treat any personal and sensitive information in confidence, only sharing what is helpful and necessary. I am confident that professionals will work together and with me to get the best result for me."

- **Accountability** - Accountability and transparency in delivering safeguarding.

"I understand the role of everyone involved in my life and so do they."

6.13 The aims of adult safeguarding are to:

- stop abuse or neglect wherever possible;
- prevent harm and reduce the risk of abuse or neglect to adults with care and support needs;

¹² Gateway reference 16072.

- safeguard adults in a way that supports them in making choices and having control about how they want to live;
- promote an approach that concentrates on improving life for the adults concerned;
- raise public awareness so that communities as a whole, alongside professionals, play their part in preventing, identifying and responding to abuse and neglect;
- provide information and support in accessible ways to help people understand the different types of abuse, how to stay safe and what to do to raise a concern about the safety or well-being of an adult; and
- address what has caused the abuse or neglect.¹³

6.14 The Welsh Code of Practice sets out the following principles for an effective safeguarding systems, which are those where:

- the individual's personal outcomes are known, and they are able to communicate them effectively;
- the needs of the individual are put first, so that the adult receives the care and support they need before a problem escalates;
- all professionals who come into contact with adults at risk are trained and alert to their needs including any potential or suspected abuse or risk of abuse or neglect;
- all professionals share appropriate information in a timely way, and have direct access to advice to discuss any concerns about an individual;
- all professionals are able to use their expert judgment to put the individual's needs and personal outcomes at the centre of the system so that the right solution can be found for them; and
- all professionals work in a multi-agency and co-operative way to safeguard and promote an adult at risk's well-being and regularly review progress against the outcomes set out in care and support plans.¹⁴

7. Professional conduct issues for legal advisers

7.1 The legal adviser is an important safeguard for a client who is at risk of abuse. The legal adviser can ensure the client:

- wants to enter into the proposed transaction;
- is free from the undue influence of others;
- has the necessary mental capacity;
- understands the purpose, nature, effect, and consequence of any proposed transaction.

The adviser can advise on and draft legal documents which contain appropriate safeguards to reduce the risk of abuse, and provide relevant advice to their legally appointed agent, such as a deputy or attorney who is acting on behalf of the client, to avoid the risk of abuse. The legal adviser may also become aware of information or circumstances, which raise a reasonable suspicion or knowledge of abuse or neglect.

7.2 The following may help legal advisers manage any suspicion of abuse:

¹³ para 14.11, CSSG.

¹⁴ Para 4, Volume 6 of Part 7.

- Keep alert to situations where there is a risk of abuse.
- Abuse is often ‘hidden’; so do not always take the situation at face value.
- The abuse may be done at the hands of the client’s attorney or deputy, with whom the adviser has formed a professional relationship, and there is a risk the adviser may lose objectivity about the wrongdoings and simply accept any justification given.
- The adviser should handle the matter with care and sensitivity, as the client may not be prepared to follow advice due to fear or shame.
- The client may not like or indeed may be unwilling to admit abuse by others, for example, in relation to financial abuse, being sold a driveway or double-glazing or roof repairs or an unsuitable item.
- The client may need additional help and support, both emotionally and practically. Consider support from advocacy groups and support from the NHS and/or local authority’s Adult Safeguarding Team.
- Abuse may start by being unintentional and the abuser may rationalise the abuse, for example using the client’s money for their benefit, as an advancement of their inheritance entitlement; as reward or payment for for the burden that they carry in looking after the client, or a belief the client would give them permission if they were capable of consenting.
- Client’s may not like airing their ‘dirty linen in public’ and may rectify abuse by internal management, for example amending their will or making gifts to non-abusers to equalise their estate distribution.
- The client may be subject to different forms of abuse and the solution may involve a number of public bodies and/or legal proceedings.
- Consider obtaining the client’s advance consent to disclose confidential information to safeguarding bodies in situations where the client is not in a position to safeguard themselves or their property (see page 43-44 of this guidance).

The Solicitor’s Professional Role

7.3 Solicitors must remember that they must have regard to the Solicitors’ Regulation Authority’s Code of Conduct 2011, in particular they must:

- act in the client’s best interests.¹⁵ This will require the adviser to identify who is the client, and to whom they owe a duty of care. Under common law, the duty of care is higher in cases where a professional is appointed as an attorney or deputy. The client will usually be the donor (whether mentally capable or incapable) in the case of an Enduring or Lasting Power of Attorney or the person referred to as ‘P’ in Court of Protection cases, unless they are separately represented.
- Consider, ascertain and record whether the client has the necessary capacity to give instructions and undertake the specific transaction. The Mental Capacity Act 2005 governs the assessment of mental capacity, but reference should also be made to the common law, as to the information which the client would be expected to understand to enter into the relevant legal transaction:
 - Making a will - *Banks v Goodfellow* [1870] LR 5 QB 549
 - Revoking a will - *Re Sabatini* 1970 114 SJ 35
 - Making a gift - *Re Beaney* (1978) 2 All ER 595
 - Make a Lasting Power of Attorney - *Re Boar* (Court of Protection, 19.2.2010); *Re Collis* (Court of Protection, 27.10.2010)

¹⁵ SRA Code of Conduct 2011, Principle 4.

- Capacity to revoke an Enduring Power of Attorney (Re KJP [2016] EWCOP 6)
 - Capacity to revoke a Lasting Power of Attorney (SAD and ACD v SED [2017] EWCOP 3)
 - Getting married - In the Estate of Park deceased [1953] 3 W.L.R. 1012; Sheffield City Council v E [2004] EWHC 2808 (Fam); Re DMM [2017] EWCOP 33
 - Conducting legal proceedings - Masterman Lister v Jewell [2003] 3 All ER 162; Dunhill v Burgin (No.2) [227] [2014] UKSC 18
 - Consenting to medical treatment - Re C (adult refusal of treatment) [1994] 1 All ER 819; Montgomery v Lanarkshire Health Board [2015] UKSC 11
 - Managing property and financial affairs - White v Fell [1987] Unreported and Masterman Lister v Jewell [2003] 3 All ER 162; A,B,C v X & Y [2012] EWCHC 2400
- In taking instructions and during the course of the retainer, the adviser should have proper regard to the client's mental capacity or other vulnerability, such as incapacity or duress.¹⁶ Consider whether the client is making the decision freely and of their own volition and that they are not being subjected to fraud, pressure or undue influence. You should not act for a client where there are reasonable grounds for believing that the instructions are affected by duress, undue pressure or undue influence without satisfying yourself that they represent the client's true wishes.¹⁷ This could be achieved by carrying out a risk/ benefit analysis at the outset so that the client understands the risks and the benefits of what they are doing and the consequences of the steps they are taking.

8. Preventing financial abuse by an attorney

8.1 Regard should be had to the Law Society's Practice Notes for Solicitors on the making of Lasting Powers of Attorney (May 2018), Making Gifts of Assets (October 2018), Financial Abuse (June 2013) and Meeting the Needs of Vulnerable Clients (July 2015).

Advise on suitability of attorney

8.2 When advising and drafting lasting powers of attorney, advisers are in a position, to build in protection for the client. Simply advising a donor to choose an attorney who is trustworthy, is not sufficient. The proposed attorney might be disorganised, not good with money, indecisive, challenging, self-serving, domineering, or easily influenced by others, which impacts on their ability to make good decisions. The adviser should ask sufficient questions to establish whether the attorney will be a good decision maker. The appointment of a sole attorney provides more scope for abuse than a joint or several appointment, yet a joint and several appointment also provide a greater opportunity for exploitation than a joint appointment due to there being less accountability.

8.3 A power of attorney is relatively easy to make and very easy to abuse or misuse. Attorney's who misuse or abuse their powers, may not see they are doing anything wrong and may justify their actions, for example say that the donor agreed they could have money or would if they had mental capacity. They may seek to justify unauthorised larger gifts as being an acceleration of their eventual inheritance or as recompense for the sacrifice they

¹⁶ Indicative Behaviour 1.6.

¹⁷ Indicative Behaviour 1.28.

have made for the donor. This is often because the attorney does not fully understand their role or how they are meant to make decisions. As it is not possible to know whether a power will be abused, advisers should discuss the risk and suggest appropriate safeguards.

Lasting Power of Attorney or Deputy?

8.4 In some cases, the outcome for the client may be better were the Court of Protection to appoint a deputy, rather than the client making a Lasting Power of Attorney, because of the supervision given by the Office of the Public Guardian and the Court's usual requirement for a security bond to protect against a defaulting property and affairs deputy. This may be particularly relevant where the client has a history of being exploited or where their relevant relationships are dysfunctional.

8.5 Paragraph 4.1 of the Law Society's Practice Note on Lasting Powers of Attorney states,

'There may be situations where a deputyship (once the person has lost capacity) could be viewed as being more appropriate and protective than the creation of an LPA. This may be advisable, for example:

- *where the assets are more substantial or complex than family members are accustomed to handle and there is no suitable professional to appoint as attorney*
- *in cases where litigation may lead to a substantial award of damages for personal injury.'*

Check capacity and undue influence

8.6 Advisers need to be careful when receiving instructions for Lasting Powers of Attorney, if they receive those instructions from a third party or where they are acting for a donor who has previously been unknown to them. Third party instructions must be confirmed by the donor. Always see the client alone for at least part of the interview to identify capacity and that the power is what the client wants and is being made free from the influence of others. This is independent to the role of the certificate provider in the power, but will overlap when the adviser is also acting as such.

8.7 If the client is unknown to the adviser or they have not seen the client for a long while, take some time to talk about wider issues, which can provide context, to be sure the client has the necessary capacity and they are not acting under the undue influence or pressure of another. If mental capacity is in doubt, it may be appropriate to involve medical practitioners to assist with ascertaining capacity.

Include restrictions and conditions (instructions) in the power

8.8 When drafting the power, consider including a condition in the power to have the accounts checked by, or copies of all financial transactions provided to a third party, such as an accountant, solicitor, relative or friend would provide accountability and transparency. Notifying a third party after registration with details of the Office of the Public Guardian dovetails with such a clause. If accounts or records are not rendered in accordance with the condition, then a concern could be raised with the Office of the Public Guardian, who could investigate¹⁸ and make a Court application for cancellation of the power on the grounds that the attorney is exceeding their authority and is not acting in the donor's best interests. Including a provision which sets out the attorney's powers of

¹⁸ See Regs 46,47 & 48 of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007.

investment, can also prevent the attorney from making loans and investments where they may benefit to the detriment of the donor. See SFE's Precedents for Lasting Powers of Attorney on sfe.legal.

Include guidance (preferences) in the power

8.9 Guidance contained in the power, which sets out a framework for the attorney to make decisions may help to prevent abuse, such as expressly requiring the attorney to support and consult the donor, take into account the donor's views, and name the people with whom the attorney should consult. This is a prompt for the attorney to follow the guidance and provides a clear baseline against which the attorney's actions can be judged. See SFE's Precedents for Lasting Powers of Attorney on sfe.legal.

Provide information on the operation and limits of the power to make gifts

8.10 The donor and the attorney should be given information, about how to make decisions under the power, in particular the limited power to make gifts. An attorney cannot use the power to make larger gifts when the donor has mental capacity, as s.12 of the Mental Capacity Act 2005 does not state that it only applies when the donor lacks mental capacity. Including reference to the limit power to make gifts may keep the attorney in check, and can raise a 'red flag' to third parties, such as financial institutions who may notice larger gifts being made. See SFE's Precedents for Lasting Powers of Attorney on sfe.legal.

Advise on when the power is to be used

8.11 The donor will need to be advised about when the power can be used. Professionals may feel they should act as a gatekeeper to the operation of the power, but this might become a barrier to decision making at a critical time.

8.12 A property and financial affairs Lasting Power which does not limit when the attorney can act, can be used as soon as the power has been registered with the Office of the Public Guardian. The attorney would be able to make decisions when the donor has mental capacity and, if and when the donor lacks mental capacity. If requested, there is no legal basis to prevent the attorney from having a copy, as the power forms the property and affairs which belong to the donor and which the power authorises the attorney to manage. However, it is best practice to first write to the donor, in case the donor does not yet want the attorney to act. See the joint Guidance published by the Solicitors Regulation Authority, The Law Society and Legal Services Ombudsman.¹⁹

8.13 In the event the power contains a condition that the power is only to be used when the donor lacks mental capacity to make a financial decision, the attorney must establish this condition has been met, before he or she can act under the power. Inclusion of such a clause will often create administrative problems as evidence is sought, and delay decision making.

9. Preventing abuse by a professional attorney

9.1 In cases where a professional has been appointed, develop a practice wide policy of monitoring and auditing files on a regular basis, by someone who is not involved with the case.

¹⁹ <https://www.sra.org.uk/solicitors/code-of-conduct/guidance/guidance/Access-to-and-disclosure-of-an-incapacitated-persons-will.page>.

9.2 Ensure that the deputyship or attorney account is managed by the deputy or attorney through a designated account. The practice's client account should not be used as a bank account for the client, as others may be able to access funds and it is contrary to advice from the Solicitors Regulation Authority.²⁰

9.3 Discourage, where possible a single or an unqualified member of staff from being a sole attorney- use joint or joint and several appointments instead.

9.4 If the professional is to act with a lay attorney, ensure that copies of all financial statements are seen and ensure the lay attorney understands the need to consult with the professional attorney when making significant decisions.

9.5 Make clear that in the event of anyone being found to have abused their power and taken advantage of their position as an attorney that the matter will be referred to the Police and the Solicitors' Regulation Authority or other professional regulatory body and that internal disciplinary proceedings will result.

10. Dealing with abuse in the person's own home

10.1 Abuse can be hidden, particularly where there is dependence on a caregiver, where supervision is weak and there is little or no contact with others who might otherwise raise concerns. Detection may be poor if the various agencies involved in arranging care do not communicate with each other.

10.2 Abuse may be identified by professionals involved, for example, a GP, a social worker during a care and support assessment, an Independent Mental Capacity Advocate appointed under the Mental Capacity Act 2005²¹ or a Court of Protection General Visitor.²²

Regulated care providers

10.3 For those in receipt of local authority's social services assistance, there should be a periodic review of the person's care and support needs by social services. The review by social services should identify inappropriate care packages. Often the first indication of abuse may be the issue of raising complaints about service delivery that may expose abuse. Alert social services by contacting the local authority's Monitoring Officer, the Adult Safeguarding Officer and/or make a formal complaint to social services (see below at 11.12-13). In addition, including those who have independently arranged their care, a complaint can be made to the care agency, the Local Government and Social Care Ombudsman, and/or the Care Quality Commission (CQC)/ Care Inspectorate Wales (CIW) (see 11.1-11.5 below for more details).

10.4 Caregivers employed by registered care providers will be subject to a Disclosure and Barring Service (DBS) check, which undertakes searches of police records and, in relevant cases, barred list information. Abuse by such a caregiver, may necessitate notification to the DBS and the CQC/CIW to prevent future abuse.

Independent unregulated care providers

²⁰ <https://www.sra.org.uk/solicitors/guidance/warning-notice/Improper-use-of-client-account-as-a-banking-facility--Warning-notice.page>.

²¹ ss.35-41 MCA 2005.

²² s.61 MCA 2005.

10.5 Day care services and personal assistants employed directly are unregulated. The individual will need to be confronted directly and if necessary the police called to investigate. The relevant local authority social services department and the Adult Safeguarding Officer should also be alerted as others may be affected.

10.6 Advisers may be able to prevent abuse by considering contracts and terms of employment as well as carrying out a DBS check and setting up supervision systems, such as in relation to financial management. Advisers should ensure that adequate references are followed up. Direct employment of those who have left agencies and have poor employment track records or about whom there may be suspicions, is inherently risky.

See also 11.8 -11.11 below for other action to be taken.

11. Dealing with abuse in care homes

The Regulatory Authority for Care Homes

11.1 The Care Quality Commission (CQC) registers and inspects all health and social care provision in England and ensures they operate within fundamental standards of quality and safety. The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014²³ set out the fundamental standards of quality and safety expected from service providers of regulated activities such as care homes. These are set out in Regulations 9 to 20a and are supported by compliance guidance.

11.2 Service providers are required to ensure service users are protected from abuse and improper treatment.²⁴ Providers must have a zero-tolerance approach to abuse, unlawful discrimination and restraint, which includes neglect; subjecting people to degrading treatment; unnecessary or disproportionate restraint; and inappropriate deprivation of liberty.

11.3 The CQC expect service providers to:

- Take action to identify and prevent abuse from happening in a service.
- Respond appropriately when it is suspected that abuse has occurred or is at risk of occurring.
- Ensure that Government and local guidance about safeguarding people from abuse is accessible to all staff and put into practice.
- Make sure that the use of restraint is always appropriate, reasonable, proportionate and justifiable to that individual.
- Only use de-escalation or restraint in a way that respects dignity and protects human rights, and where possible respects the preferences of people who use services.
- Understand how diversity, beliefs and values of people who use services may influence the identification, prevention and response to safeguarding concerns.
- Protect others from the negative effect of any behaviour by people who use services.
- Where applicable, only use Deprivation of Liberty Safeguards (see 16.13 below) when it is in the best interests of the person who uses the service, in accordance with the Mental Capacity Act 2005.

11.4 The Care Inspectorate Wales (CIW) has similar functions to ensure care homes and domiciliary services in Wales meet national minimum standards that place requirements on the service provider to protect the service user from abuse. The requirements include:-

²³ SI 2014/2936 as amended by 2015/64.

²⁴ Reg 13, 2014 Regulations.

- Protection from physical, financial or material harm, psychological or sexual abuse, neglect, discriminatory abuse or self-harm, inhumane or degrading treatment, through deliberate intent, negligence or ignorance in accordance with written policies.
- Putting robust procedures in place to respond to suspicions or evidence of abuse or neglect and passing these concerns to CIW in accordance with Part 7 of the Social Services and Well-being (Wales) Act 2014's Code of Practice and the Public Interest Disclosure Act 1998.
- Follow up action in relation to all allegations or incidents of abuse.
- Staff who are considered to be unsuitable to work with vulnerable adults are to be referred for placement on the DBS list and this is to be recorded on the Inspection Report.
- Policies and practices to be in place so that physical and/ or verbal aggression by service users is understood and dealt with appropriately.
- Policies to be in place to protect abuse of service user's financial affairs.
- Complaints procedures are in place and made known including a requirement that written information should be provided to all service users for referring a complaint to the CIW at any stage should the complainant wish to do so.

11.5 In England, inspections are undertaken once every 30 months, for homes evaluated as 'outstanding' or 'good'. Homes that 'require improvement' are inspected every 12 months and homes that are 'inadequate' are inspected every 6 months. In Wales, inspections are annual. In addition to these inspections, without notice visits can be made at any time, if concerns have been raised about a care home. Care Homes are required by their 'duty of candour' to notify the CQC or CIW if there has been an incident of abuse or neglect in the home.

Identifying risk before moving into the care home

11.6 Advisers need to anticipate a move into a care home by setting up a protective framework in relation to financial matters, checking care contracts and keeping full records of assets and personal possessions at the start of occupancy. A trial period at the home is useful to see how things are run and quality of care given. Talking to other residents and their families can also be helpful.

11.7 The care home's Inspection Reports, (available from the CQC or CIW websites), may highlight problems, for example whether or not the home has a reputation for poor practice. The care home should undertake a DBS check prior to employing staff.

Action to take on detecting or suspecting abuse

11.8 On suspicion or detection of abuse, complain to the manager and proprietor of the home. The home may remove, dismiss or prevent the perpetrator from being in the home. They may also decide to call the police to investigate. If the internal complaints procedure does not provide the required solution it may be necessary to report the matter directly to the CQC in England or CIW in Wales, which should take appropriate action.

11.9 At the same time contact the local authority's social services department, the NHS and the local Clinical Commissioning Group in England or Local Health Board in Wales who may place residents and commission care in the care home.

11.10 Charities, such as Age UK and the Alzheimer's Society at local level may offer advocacy support and help in presenting complaints.

11.11 If the abuse occurred as a result of another resident or visitor, the home should take action to avoid the abuse from reoccurring.

Social services complaints

11.12 Where the care is being provided by social services, a complaint can also be made using the local authority complaints' procedure. Social services should provide the complainant or their representative's details of how to complain in accordance with the Local Authority Social Services and National Health Services Complaints (England) Regulations 2009. In Wales, the Social Services Complaints Procedure (Wales) Regulations 2014 apply. These are similar but not identical to the English Regulations. It is to be read alongside, '*A guide to handling complaints and representations by local authority social services*' published in 2014.

11.13 The complaint should be made in writing within twelve months of the incident forming the basis of the complaint or within twelve months of becoming aware of the circumstances about which you want to complain. In exceptional circumstances these time limits may be waived.

11.14 If after going through the care home or local authority's complaint's procedure, the desired outcome has not been reached, the complaint can be pursued through the Local Government and Social Care Ombudsman for England or Public Services Ombudsman for Wales.

Complain to the perpetrator's regulatory body

11.15 The Health and Care Professions Council is the regulatory body for the majority of professionals working in health and social care in England, who are required to undergo continuing professional development annually in order to stay on the register and to comply with professional standards. Social Care Wales is the Welsh equivalent body. Doctors and nurses are separately regulated by the General Medical Council and the Nursing and Midwifery Council. A complaint can be made concerning the registered perpetrator.

Surveillance recordings

11.16 Covert surveillance (such as hidden cameras or audio recording equipment) or overt surveillance (such as visible CCTV cameras) may be the only practical way to ensure safety or quality of care. Consent should be obtained from the person being cared for, particularly as there is a risk that this may impact on their dignity and privacy. For those who lack capacity to consent, a decision to use surveillance recordings should be made in their best interests under the Mental Capacity Act 2005. The CQC has published guidance to help care providers operate within the law.²⁵ See also the Code of Practice published by the Surveillance Camera Commissioner.²⁶

²⁵ <https://www.cqc.org.uk/guidance-providers/all-services/using-surveillance-information-service-providers>

²⁶ <https://www.gov.uk/government/organisations/surveillance-camera-commissioner>

Death in a Care Home

11.17 All deaths in care homes have to be notified to the CQC²⁷ or the CIW.²⁸ The information submitted must include details of the circumstances of death. Records of deaths may indicate trends and could potentially identify areas of abuse. GPs who are called into care homes to certify death are in a position to observe whether anything untoward has happened. Advisers who have concerns about the death of a client should consider contacting the CQC/CIW or the GP concerned.

11.18 The Births and Deaths Registration Act 1953 imposes a requirement on the doctor who last attended the deceased to issue a medical certification of death. This has the potential to identify abuse. Whether this operates as a safeguard is debatable where the resident's GP or GP's relatives own and run the care home in which they live.

12. Dealing with abuse in the NHS

12.1 A complaint can be made using the NHS complaint's procedure. In England, the Local Authority Social Services National Health Service Complaints (England) Regulations 2009²⁹ should be followed. The National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011³⁰ applies to complaints in Wales. The Patient Advice and Liaison Services, (PALS) based in local hospitals in England or Community Health Councils in Wales can provide information about the NHS complaint's procedure, and may also act as a conduit for complaints.

12.2 The complaint should be made in writing within twelve months of the incident forming the basis of the complaint or within twelve months of becoming aware of the circumstances about which you want to complain. In exceptional circumstances these time limits may be waived. The complaint will be dealt with at local NHS level, including any investigation.

12.3 Local authorities in England have a statutory duty to commission independent advocacy services to provide support for people making, or thinking of making, a complaint about their NHS care or treatment. Arrangements vary between local authority areas. In Wales, this function is carried out by the Community Health Council.

12.4 If after going through the NHS complaint's procedure, the desired outcome has not been reached, the complaint can be pursued through the Parliamentary and Health Service Ombudsman in England or the Public Services Ombudsman in Wales.

13. Dealing with concerns about a forced marriage

13.1 If a person does not consent or lacks capacity to consent to a marriage, that marriage is to be viewed as a forced marriage. The Anti-Social Behaviour, Crime and Policing Act 2014³¹ make it a criminal offence in England and Wales to force a person to marry. Furthermore, compelling, inciting or facilitating a person with impaired capacity to engage in sexual activity without consent is an offence under the Sexual Offences Act 2003.

²⁷ Reg 16 CQC (Registration) Regulations 2009.

²⁸ Schedule 3, para 22, The Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017.

²⁹ SI 2009/309.

³⁰ SI 2011/704 W.108.

³¹ s121.

13.2 A forced marriage protection order can be sought under section 4A of the Family Law Act 1996,³² which makes provision for protecting those at risk of being forced into marriage and offers protection for those who have already been forced into marriage. It is a criminal offence to breach a forced marriage protection order.³³ If the adviser has any concern that a person may be subject to a forced marriage or planned forced marriage, they should obtain advice and support from the Forced Marriage Unit by telephoning 020 7008 0151 (Monday to Friday: 09.00 to 17.00) or out of hours: 020 7008 1500 (ask for the Global Response Centre) or email: fmufco.gov.uk. For further information see *The Forced Marriage and Learning disabilities: Multi-Agency Practice guidelines*.³⁴

13.3 If the person lacks capacity to consent to the marriage, an application can also be made to the Court of Protection for a declaration that the person lacks mental capacity to marry and to consent to sexual relations and if necessary, an order to restrain family members from arranging a marriage for the person or prevent that person being taken overseas for the purpose of a marriage. This application is usually made by the person's local authority.

14. Remedies for financial abuse by an attorney

Donor with mental capacity

14.1 If the donor has mental capacity, they should revoke the power by a Deed of Revocation. The donor's capacity to revoke the power is determined by their understanding:

- (1) who the attorney is, or who the attorneys are;
- (2) what authority they have;
- (3) why it was necessary or expedient to revoke the power;
- (4) the reasons the donor originally made the power; and
- (5) the foreseeable consequences of revoking the power.³⁵

14.2 In addition to this the donor should notify the attorney. With a registered Lasting Power of Attorney, the donor must also notify the Public Guardian.³⁶ Unlike a registered Enduring Power of Attorney, (see 14.9 below) it is not necessary to seek confirmation by the Court of Protection for the donor to revoke a registered Lasting Power of Attorney. It is advisable to also notify any financial organisations that are aware of the power.

14.3 Revocation may be very difficult if the donor is frightened of the ramifications and should be dealt with sensitively. The adviser owes a duty of confidentiality, which must not be breached. It is prudent to obtain the client's consent in writing to proceed.

14.4 Both civil (see 14.10 & 14.16 below) and criminal (see 15.2-15.4 below) remedies may be available. It may also be appropriate to involve social services (see 6.1-6.14 above).

³². Section 4a of the 1996 Act was inserted by the Forced Marriage (Civil Protection) Act 2007.

³³. s.120, The Anti-social Behaviour, Crime and Policing Act 2014.

³⁴. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/35533/fm-disability-guidelines.pdf

³⁵ Capacity to revoke an Enduring Power of Attorney (Re KJP [2016] EWCOP 6): Capacity to revoke a Lasting Power of Attorney (SAD and ACD v SED [2017] EWCOP 3).

³⁶ Reg 21 of Lasting Powers of Attorney, Enduring Power of Attorney and Public Guardian Regulations 2007 (SI 2007/1253).

The donor without mental capacity

14.5 Notwithstanding the loss of mental capacity, the adviser continues to owe the donor a duty of confidentiality.³⁷ However, they must also always act in the client's best interest, which may allow the adviser to do such acts to safeguard the client.³⁸ At common law, the doctrine of 'necessity' enables any person to take action to prevent significant harm occurring where it is necessary to act. Under the Mental Capacity Act 2005,³⁹ any person taking action which relates to the care and treatment of a person who lacks mental capacity, provided it is in that person's best interests, is protected from liability. The Solicitors Regulation Authority are likely to treat a breach of confidentiality in such circumstances as justified.⁴⁰

14.6 If the donor is in receipt or needs to be in receipt of care and support services, concerns can be raised with the local authority's Adult Safeguarding Officer. They should organise an assessment of the person's needs and put into place suitable measures (see 6.1-6.14 above). This could result in the local authority applying for injunctive relief.⁴¹ (See 14.13-14.16 below). Both civil (see 14.10-14.16 below) and criminal (see 15.2-15.4 below) remedies may be available.

14.7 Where appropriate, speak to the Solicitors' Regulation Authority about ethical concerns on Tel: 0870 606 2555 and keep a file note of any discussion.

14.8 If the abuse relates to another professional, report the matter to the Compliance Officers for Legal Practice (COLPs) and Compliance Officers for Finance and Administration (COFAs) in the practice concerned.

Unregistered Enduring Power of Attorney (EPAs)

14.9 The Public Guardian has no function in respect of unregistered EPAs. If the attorney of an unregistered EPA is not prepared to register the power and so enable a challenge to be made, then an application to the Court of Protection should be made for the appointment of a financial deputy. Evidence of the existence of the EPA and that fact the donor lacks mental capacity to manage their property and financial affairs will be required. The attorney will need to be served with notice of the application. The Court will resolve the matter as appropriate. This could be by ordering the attorney to register the power or the removal of the attorney and/or revocation of the power. The cost of making an application in good faith is usually borne by the donor, although the Court has wide power to order the errant attorney pay the costs.⁴²

Investigation by the Office of the Public Guardian

14.10 The adviser can report concerns on a confidential basis, to the Office of the Public Guardian's Investigation Unit which has power to investigate concerns about registered Enduring or Lasting Powers.⁴³ (This may involve requesting a Court of Protection Visitor to

³⁷ Outcome 4.1 SRA Code of Conduct 2011.

³⁸ Principle 4 SRA Code of Conduct.

³⁹ s.5 MCA 2005.

⁴⁰ <https://www.sra.org.uk/solicitors/code-of-conduct/guidance/guidance/Access-to-and-disclosure-of-an-incapacitated-persons-will.page>

⁴¹ s222, Local Government Act 1972).

⁴² Court of Protection Rules 2017, r.19.2 and r.19.5.

⁴³ Regs 46, 47 & 48, of Lasting Powers of Attorney, Enduring Power of Attorney and Public Guardian Regulations 2007.

see the donor and/or the attorney to investigate concerns.⁴⁴ A Lasting Power of Attorney is not valid until registered so the Public Guardian has no investigative functions until then.

Revocation of registered Enduring Power of Attorneys (EPAs)

14.11 If an EPA has been registered, it can only be revoked with the confirmation of the Court of Protection.⁴⁵ There is no automatic revocation of an EPA by a donor subsequently making a Lasting Power of Attorney (LPA),⁴⁶ although making a property and financial affairs LPA in the same terms but appointing a different attorney, may, by a declaration from the Court of Protection constitute revocation of an EPA by conduct.⁴⁷

Court of Protection orders for removal of attorney and/or revocation of power

14.12 If concerns are warranted, the Public Guardian can make an application, in respect of a registered power, for the removal of the attorney and/or the revocation of the power.⁴⁸ A third party can also make an application to the Court on the basis that the attorney is unsuitable (Enduring Power of Attorney) or is not acting in the best interests of the donor, or has exceeded their authority (Lasting Power of Attorney). The Court can also make an order appointing a deputy where the power has been revoked. The cost of making an application for a deputy, is usually borne by the donor.⁴⁹ The Court will usually order an errant attorney to pay the costs of a successful application for the attorney's removal.⁵⁰

Other orders of the Court of Protection

14.13 The Court has wide power to deal with the consequences of abuse, which could include:

- Requiring a deputy or attorney acting under a registered power to provide documents or things in their possession, render accounts and produce records.⁵¹
- An order prohibiting a specified person from having contact with the abused person.⁵² As the Court of Protection can only make an order in respect of a decision which the incapacitated person could make themselves, but for their mental incapacity, the order cannot be used to exclude a person who has a right to occupy the abused person's property. In such cases, an alternative jurisdiction may provide the desired outcome.
- An order enabling another person to bring proceedings on behalf of the abused person for example, for recovery in the civil Court, this may involve claims of fraud, coercion, undue influence, lack of capacity, and breach of fiduciary duties.⁵³

Reg 44 Lasting Powers of Attorney, Enduring Power of Attorney and Public Guardian Regulations 2007, s58 (1)(d)&(f) Mental Capacity Act 2005⁴⁴

⁴⁵ Sch 4, para 10 (c), Mental Capacity Act 2005.

⁴⁶ Re E (Enduring Power of Attorney [2000] 1 FLR 882.

⁴⁷ Re Boar, 19th February 2010, Decision of SJ Lush, Court of Protection (unreported): In the matter of Clouff (Court of Protection) (Reported ACTAPS Journal October 2008).

⁴⁸ Reg 43, Lasting Powers of Attorney, Enduring Power of Attorney and Public Guardian Regulations 2007.

⁴⁹ Court of Protection Rules 2017, r.19.2.

⁵⁰ Court of Protection Rules 2017, r.19.2 and r.19.5.

⁵¹ s.16(5), s.23(3)(a) & (b), or Schedule 4, para 16(2)(b)(ii) and (c), MCA 2005.

⁵² s.17 (1) (c) MCA 2005.

⁵³ s.18 (1)(k) MCA 2005.

- Residency orders.⁵⁴
- The appointment of a deputy.⁵⁵
- Contact orders.⁵⁶

14.14 The cost of making an application relating to the donor’s property and financial affairs, made in good faith is usually borne by the donor, although the Court has wide power to order the errant attorney to pay the costs.⁵⁷ In cases brought to safeguard the person, the local authority is usually the applicant, where the Court will not make an order for costs: hence the local authority bear the costs.⁵⁸

High Court orders

14.15 The High Court can also make freezing injunctions to prevent money or property being disposed of, search orders to allow access to the perpetrator’s home or workplace to search for documents. Injunctions can also be obtained to prevent the perpetrator from leaving the country. The donor with capacity or a person acting as litigation friend for the mentally incapacitated donor can also apply to the High Court for recovery of funds and setting aside a transfer of an asset, procured by undue influence, duress or fraud.

Inherent jurisdiction

14.16 The exercise of the High Court’s inherent jurisdiction may also be used to obtain appropriate orders, where the person is ‘vulnerable’, whether or not incapacitated by mental disorder or mental illness, or is reasonably believed to be, either: (i) under constraint; or (ii) subject to coercion or undue influence; or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent.⁵⁹ Munby J has described a ‘vulnerable adult’ (rather than defined) as *‘someone who, whether or not mentally incapacitated, and whether or not suffering from any mental illness or mental disorder, was or might be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation, or who was substantially handicapped by illness, injury or congenital deformity.’*⁶⁰

Criminal remedies

14.17 15.2 -15.4 below sets out criminal charges which the attorney could be charged with.

15. Remedies for financial abuse by others

Investigation of deputies by the Office of the Public Guardian

15.1 The Office of the Public Guardian when supervising Court appointed deputies, can investigate, identify and deal with abuse, which can include an application to the Court of Protection for the removal and replacement of the deputy. The Court can order that any security bond in place is ‘called in’ and paid to remedy the loss. This power extends after

⁵⁴ s.17 (1)(a) MCA 2005.

⁵⁵ s.16 (2)(b) MCA 2005.

⁵⁶ s.17 (1)(b) MCA 2005.

⁵⁷ Court of Protection Rules 2017, r.19.2 and r.19.5.

⁵⁸ Court of Protection Rules 2017, r.19.3.

⁵⁹ DL v A Local Authority [2012] EWCA Civ 253 .

⁶⁰ SA (Vulnerable Adult with Capacity: Marriage) (2006) 1 FLR 867.

the death of the incapacitated person.⁶¹ The Court can also make appropriate orders as set out in 14.13 above.

Criminal offences

15.2 Any person who gains unauthorised access to the person's finances and takes assets belonging to another, or who dishonestly obtains benefits or provides false information to gain a financial advantage, can be charged with various criminal offences, including:

- theft;⁶²
- blackmail;⁶³
- forgery;⁶⁴
- obtaining property,⁶⁵ a service,⁶⁶ pecuniary advantage,⁶⁷ money transfer⁶⁸ or the execution of a valuable security by deception;⁶⁹
- dishonest representation for obtaining benefit;⁷⁰
- false accounting,⁷¹ for example, where a person destroys, defaces, conceals or falsifies accounts, records or documents with a view to gain or to cause loss to somebody else. It can extend to making use of these, when the person knows they may be misleading, false or deceptive.

15.3 Section 4 of the Fraud Act 2006 makes it a criminal offence where a person intentionally and dishonestly takes advantage of their position. In *R v TCJ* [2015] EWCA Crim 1276, the Court of Appeal held that by looking at the total value of withdrawals made by the attorney, compared with the reasonable sums which would have been incurred over specific periods to provide for the donor's needs, was evidence that the attorney could not have been acting honestly.

15.4 Section 76 of the Serious Crimes Act 2015 makes it a criminal offence where a person (the perpetrator) repeatedly or continuously engages in behaviour towards another person, that is controlling or coercive; and at the time of the behaviour, they are personally connected; and the behaviour has a serious effect on that person; and the perpetrator knows or ought to know that the behaviour will have a serious effect on the other person.

15.5 The police should be contacted, and a complaint made. It may be possible for the Court to order the recovery of stolen assets as proceeds of crime.

State pensions and allowance decisions

15.6 It may be necessary to involve the Department for Work and Pensions, (DWP) particularly if the perpetrator is an appointee or agent or third party acting under a mandate set up with a bank or other financial organisation. These should be cancelled, and the

⁶¹ Reg 37, Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007.

⁶² s.1(1) Theft Act 1968.

⁶³ s.21 Theft Act 1968.

⁶⁴ s.1 and s. 8 of the Theft Act 1968; s.1 the Forgery and Counterfeiting Act 1981 & s.4 & s.6 Identity Documents Act 2010.

⁶⁵ s.15(1) Theft Act 1968

⁶⁶ s.1(1) Theft Act 1978

⁶⁷ s.16 Theft Act 1968

⁶⁸ s.15A Theft Act 1968

⁶⁹ s.20(2) Theft Act 1968

⁷⁰ s.111(a) Social Security Administration Act 1992.

⁷¹ s.17 Theft Act 1968.

organisations made aware of the position. The DWP Fraud Investigation Unit⁷² should be contacted and their advice sought. Banks and other financial organisations also have their own fraud investigations teams.

15.7 Civil remedies

14.13 - 14.16 above may also be relevant.

16. Remedies for physical and sexual abuse

Criminal proceedings

16.1 Slapping, hitting, pushing, shoving and administering any kind of physical damage to a person amounts to assault and battery⁷³ and is therefore a matter for the police and if it takes place in a care setting, the CQC or CIW. An offence may be committed where the victim believes they will suffer physical harm, but are not actually harmed.⁷⁴ A wide range of criminal charges can be brought against the perpetrator. In particular, common assault,⁷⁵ sexual assault, rape,⁷⁶ actual and grievous bodily harm⁷⁷ and murder or manslaughter charges. It may also be the case that an organisation commits the offence of corporate manslaughter where it owes a duty of care, grossly breaches that duty because of how its activities are managed or organised, which result in a person's death.⁷⁸ Under section 5 of the Domestic Violence, Crime and Victims Act 2004, it is an offence to cause or to allow the death of a vulnerable adult, when a member of the household had either caused or allowed the death.

16.2 A Domestic Violence Protection Notice (DVPNs), which is an emergency non-molestation and eviction notice can be immediately issued by the police to a perpetrator, when attending to a domestic abuse incident. Because the DVPN is a police-issued notice, it is effective from the time of issue, giving the victim the immediate support they require in such a situation. Within 48 hours of the DVPN being served on the perpetrator, an application should be made by the police to a magistrates' Court for a Domestic violence protection order (DVPOs).⁷⁹ The perpetrator is effectively banned from returning to the victim's residence and from having contact with the victim for up to 28 days, allowing the victim time to consider their options and get the support they need.

16.3 If needed, the police can enter premises in order to save life or limb or prevent serious damage to property.⁸⁰

16.4 It is imperative, to obtain evidence as soon as any abuse has been identified. In the case of sexual abuse, to preserve evidence the victim should not wash and retain their clothes, until seen by the police surgeon. It may be helpful to obtain photographs of any injuries, which have been incurred as a result of the abuse. In practice, it may be difficult

⁷² Tel: 0800 854 400 - lines are open Monday to Friday 8.00am to 6.00 pm.

⁷³ s.47 of the Offences Against the Person Act 1861.

⁷⁴ ss.4, s.4A & 5 Public Order Act 1986; s.16 Offences Against the Person Act 1861,

⁷⁵ s.39 of the Criminal Justice Act 1988

⁷⁶ The Sexual Offences Act 2003.

⁷⁷ ss.18 and 20 of the Offences Against the Person Act 1861.

⁷⁸ The Corporate Manslaughter and Corporate Homicide Act 2007.

⁷⁹ Sections 24-33 Crime and Security Act 2010 and

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/224877/DV_Disclosure_Scheme_Guidance_-_REVISED_W.pdf

⁸⁰ s. 17 of the Police and Criminal Evidence Act 1984.

to obtain a medical report from the victim's own medical practitioner if they care for both the perpetrator and the victim or may feel insufficiently qualified to prepare such a report. In any event the local police surgeon is likely to be involved and should be able to provide evidence.

16.5 If the perpetrator is convicted, the Court can make an order for compensation, which unlike the civil system is based on ability to pay and so may be low.

Criminal Injuries Compensation

16.6 Victims of violent crimes can apply to the Criminal Injuries Compensation Authority for payment of compensation. It does not matter that a prosecution was not brought or that the perpetrator could not be held responsible because they were suffering from a mental disorder. The claim must be brought within 2 years from the date of the incident and any responsible person on behalf of a victim who is mentally incapacitated can make a claim.

Compensation in the civil Courts

16.7 Under the civil law of trespass to the person, (which encompasses assault and battery); it is possible for the victim to sue for compensation. Trespass to the person is a wrong committed against the personal security or personal liberty of one person to another. The act must be either intentional or negligent, and without the victim's consent. It is also possible to claim compensation for negligence and for the resulting injury suffered. A claim for damages may be made against a public body, where a person's human rights have been infringed by the public body when carrying out its functions, such as false imprisonment or an unlawful deprivation of the person's liberty.

Injunctions under the common law

16.8 Obtain a common law injunction to stop future abuse and/or stop a person entering the abused person's home. It cannot be used to exclude a person who has a right to occupy the property and there is no power of arrest for breaching this type of injunction. See also 14.16 above on the exercise of the High Court's inherent jurisdiction.

Orders from the Court of Protection

16.9 The Court of Protection has power⁸¹ to make an order, which may stop future abuse by making a contact order, which stops the perpetrator from entering the abused person's home. It cannot be used to exclude a person who has a right to occupy the property. The Court has power to include a penal notice.⁸² See also 14.13 above for other orders, which the Court may make. The local authority social services department, in the area in which the abused person resides, usually makes these applications as part of their safeguarding function. As such, the cost of making these applications are borne by the local authority.⁸³

Harassment or stalking injunctions

16.10 Under the Protection from Harassment Act 1997 (PHA 1997) the police can arrest and charge a person for harassment. Harassment includes, nuisance phone calls, stalking, threats, excessive noise etc and covers any behaviour which causes 'alarm' or 'distress'. Section 12 of the Domestic Violence, Crime and Victims Act 2004, provides the Court with

⁸¹ s.17 (1)(c) MCA 2005.

⁸² s.47 (1) MCA 2005.

⁸³ Court of Protection Rules 2017, r.19.3.

the power to make a restraining order even when a person has been acquitted, where the Court considers it necessary to do so to protect a person from ongoing stalking or harassment from the defendant. Stalking is also an offence. Section 2A (3) of the PHA 1997 sets out examples of acts or omissions which, in particular circumstances, are ones associated with stalking. For example, following a person, watching or spying on them or forcing contact with the victim through any means, including social media. Such offences could also be prosecuted under the Offences Against the Person Act 1861, the Sexual Offences Act 2003 and the Malicious Communications Act 1988.

16.11 Alternatively, an ‘Anti-Harassment Injunction’ may be obtained from the County or High Court (see also 14.15 and 14.16 above). Compensation for ‘anxiety’, ‘distress’, ‘alarm’ or financial loss can be made at the same time.

Injunctions against family members

16.12 The Family Law Act 1996 enables an injunction to be granted excluding the domestic abuser from the home and restraining conduct. Breaches can be dealt with by a fine or imprisonment. See also 16.2 above about Domestic Violence Protection Orders. If there is cause, it is possible to obtain an interim injunction without giving notice to the abuser, pending a final hearing. Injunctions can be obtained against ‘associated persons’, defined in section 62 (3) as people who:

- are or have been married or civil partners to each other;
- are or have been cohabitants (defined as a man and a woman, not married to each other by living together as husband and wife);
- have lived in the same household (other than one of them being the other’s tenant, lodger, boarder or employee). This does not therefore include those in lesbian and gay relationships and those sharing a house;
- are relatives (this is defined to include most immediate relatives)
- have agreed to marry (evidence by a written agreement, the exchange of a ring, or a witnessed ceremony);
- they have or have had an intimate personal relationship with each other which is or was of significant duration;
- they have entered into a civil partnership agreement (as defined by section 73 of the Civil Partnership Act 2004) (whether or not that agreement has been terminated);
- in relation to a child (they are both parents, or have or have had parental responsibility for a child);
- are parties to the same family proceedings (other than under Part IV of the Act, but excluding the local authority).

Restraint and Deprivation of Liberty

16.13 Whilst proportionate restraint is acceptable to prevent serious harm occurring to a person who lacks mental capacity, anything that exceeds this or amounts to a deprivation of the person’s liberty without proper authority (such as detention under the Mental Health Act 1983; an order from the Court of Protection under sections 16A, 15 or authorisation under the Deprivation of Liberty Safeguards under Schedule A1 of the Mental Capacity Act 2005) is unlawful.⁸⁴

⁸⁴ See Deprivation of Liberty Safeguard Code of Practice (Ministry of Justice, 2008).

16.14 Positive duties are also imposed on a local authority to protect vulnerable persons against interferences with liberty carried out by private persons.⁸⁵ As such, they must take reasonable steps to prevent (or seek Court authorisation for) a deprivation of liberty which they are aware of, or which they ought to be aware of. This includes investigating whether there is a deprivation of liberty, monitoring the situation if appropriate, and taking steps to end the deprivation of liberty (for example by providing additional support services) or, if that is not possible, bringing the matter to Court. However, the local authority must seek the assistance of either the Court of Protection or the High Court *‘before it embarks upon any attempt to regulate, control, compel, restrain, confine or coerce a vulnerable adult.’*⁸⁶

16.15 Actual physical restraint, including placement of furniture to prevent the person from leaving, physical confinement, and electronic tagging are unacceptable. It may also include locking people in their rooms and ignoring their needs. Cot sides should only be used, where appropriate, and with informed consent and/or agreement with those interested in the person’s welfare. Other forms of restraint with the potential to be considered criminal offences include: - restriction of liberty by locking someone in their room; misuse of furniture or equipment including bedrails and Buxton chairs (chairs which restrain or restrict movement by the use of integral tables); unsafe or outmoded restraint practices which risk physical injury.

16.16 Such restraints may amount to the tortious act of negligence or trespass to the person and/or a criminal offence of assault and battery. See 16.1, 16.7, 16.8, & 16.9 above for available redress.

Local Authority Assistance

16.17 See 6.1-6.14 above on the local authority’s duties to safeguard adults at risk of abuse or neglect.

Misuse of Medication

16.18 The inappropriate medication of vulnerable people, particularly with anti- psychotic medication is a matter of serious concern, if it is used as a tool for behavioural management and may amount to abuse.

16.19 There can be insufficient local prescribing guidelines in relation to powerful painkilling drugs; a lack of rigorous review of pharmacy data on high levels of prescribing on wards/care homes caring for older frail people; an absence of supervision of prescribing and a lack of multidisciplinary assessment to determine care needs and medication.

16.20 Health and social care records may be obtained under the Data Protection Act 2018, when requested by a welfare deputy or attorney of a registered Health and Welfare Lasting Power of Attorney or the written consent of the patient with capacity to enable the monitoring of medication. Attorneys acting under Enduring Powers or Property and Financial Affairs Lasting Powers have no express authority to access health and social care records, although advance consent may have been given when the power was prepared. The release of records may still be provided in respect of patients who lack mental capacity without their consent, if the health or social care body believe the release of the records would be in the patient’s best interest.⁸⁷

⁸⁵ *Stork v Germany* [2005] 43 EHRR 96; *Staffordshire CC v SRK* [2016] EWCA Civ 1317.

⁸⁶ See *Re BJ (Incapacitated Adult)* [2009] EWHC 3310 (Fam), [2010] 1 FLR 1373, at paras [21]-[22], and *Re Z (Local Authority: Duty)* [2004] EWHC 2817 (Fam).

⁸⁷ *S v Plymouth City Council* [2002] EWCA 388; Chapter 16 of the Mental Capacity Act 2005 Code of Practice.

16.21 If over medication is observed, make a complaint to the registered provider and/or the CQC/CIW (see 10.3, 11.1 and 11.4 above) and where appropriate, the local Clinical Commissioning Group in England or Local Health Board in Wales and the police.⁸⁸

Female Genital Mutilation (FGM)

16.22 FGM is illegal in the United Kingdom. The Female Genital Mutilation Act 2003 makes it a criminal offence to circumcise a female (unless it is for specific physical or mental health purposes). It also makes it an offence for UK nationals or permanent UK residents to carry out FGM abroad, or to aid, abet, counsel or procure the carrying out of FGM, even in countries where the practice is legal. The maximum penalty for committing or aiding the offence is fourteen years in prison.

16.23 Local agencies should be alert to the possibility of FGM where there are communities or individuals known to practice it.

Modern Slavery Act 2015

16.24 Modern slavery can include the exploitation of adults at risk through force, coercion, threat and the use of deception and human rights abuses such as debt bondage, deprivation of liberty and lack of control over one's labour. Exploitation may occur through prostitution and other types of sexual exploitation and through labour exploitation. The Modern Slavery Act 2015 makes such activity a criminal offence. Guidance has been issued and is available from the Modern Slavery Registry organisation.⁸⁹

17. Remedies for psychological abuse

17.1 Due to its nature psychological abuse can be difficult to detect. It may be possible to obtain an injunction if it amounts to harassment and for criminal proceedings to be brought. Humiliation, intimidation, emotional blackmail, verbal abuse and being shouted at may amount to harassment, alarm or distress and an offence under the Public Order Act 1986.⁹⁰ Harassment in a person in their own home may also be an offence under s.42A of the Criminal Justice and Police Act 2001.

17.2 Under the Malicious Communications Act 1988, those sending letters, electronic communication, or making telephone calls with intent to cause distress or anxiety are guilty of a criminal offence. Similarly, it is an offence under s.127 Communications Act 2003 to send a message which the perpetrator knows to be indecent, obscene, of a menacing character or grossly offensive for the purpose of causing annoyance, inconvenience or needless anxiety.

Injunctions against anti-social behaviour: Anti-Social Behaviour, Crime and Policing Act 2014

⁸⁸ Misuse of medication to manage behaviour can amount to an assault, false imprisonment, and the application of stupefying over-powering drugs with intent to commit indictable is an offence under s.22 of the Offence Against the Person Act 1861, poisoning with intent to injure, aggrieve or annoy under ss. 23 and 24 of the Offence Against the Person Act 1861, and/ or unlawfully administering medication under s.58 of the Medicines Act 1968.

⁸⁹ https://www.modernslaveryregistry.org/pages/reporting_guidance.

⁹⁰ ss.4,4A & 5.

17.3 A civil injunction under this Act may be made against a person aged 10 or over if the Court is satisfied, on the balance of probabilities (the civil standard of proof), that the person has engaged in, or is threatening to engage in, anti-social behaviour (such as bullying, gangs, noisy or abusive neighbours) and that the behaviour must be likely to cause harassment, alarm or distress (non-housing related anti-social behaviour); or conduct capable of causing nuisance or annoyance (housing-related anti-social behaviour); and just and convenient to grant the injunction to prevent anti-social behaviour. Various entities are entitled to apply for such injunctions, including a local authority, a housing provider, Transport for London, and the chief officer of police for a police area (s.5).

17.4 A criminal behaviour order (CBO) is an order made under Part 2 of the Anti-Social Behaviour, Crime and Policing Act 2014. A CBO can be issued following a conviction for any criminal offence in the Crown Court, a magistrates' court or a youth court. A CBO can prohibit the offender from doing anything described in the order or require the offender to do anything described in the order or both.

17.5 For a CBO to be made the court must be satisfied, beyond reasonable doubt, that the offender has engaged in behaviour that caused, or was likely to cause, harassment, alarm or distress to any person; and that the court considers making the order will help in preventing the offender from engaging in such behaviour

17.6 See 16.7-16.9 and 16.11 above for suitable civil redress, 16.10 for criminal redress, and for possible help from the local authority, see 6.1-6.14 above.

18. Remedies for neglect and self-neglect

Most of the interventions likely to occur within the abuse of neglect will involve the local authority and/or the NHS.

Care and Support arranged or provided by Social Services

18.1 See 6.1-6.14 above which sets out the local authority's safeguarding duties.

Entry and inspection of premises

18.2 Under section 115 of the Mental Health Act 1983, an approved mental health professional can enter and inspect any premises (other than a hospital) occupied by a mentally disordered person, if they think that the person is not receiving proper care. They cannot use force to break in, and have no power to remove the person. If it is thought that removal is necessary then a warrant under section 135 (see 18.3 below) should be obtained. Anyone refusing entry to the approved mental health professional would be committing an offence.⁹¹

Place of safety order of a person in a premise

18.3 Section 135 of the Mental Health Act 1983 enables an approved mental health professional to apply to a Magistrate for a warrant which will allow a police officer to enter premises where it is thought that a person who is suffering from a mental disorder is residing and:

⁹¹ s.129 Mental Health Act 1983.

- (i) They are being (or have been) ill-treated, neglected; or
- (ii) Not kept 'under proper control'; or
- (iii) They are living alone and unable to care for them self.

18.4 An approved mental health professional and a doctor should accompany the police officer that is to execute the warrant, which is valid for 28 days. They can break into the premises, if appropriate and where necessary remove the person and take them to a place of safety, for the purpose of making arrangements for the person's care and treatment. A place of safety can be a police station (in limited circumstances), a hospital, a care home or other suitable place. If appropriate, with agreement of the person or householder, and if safe to do so the person can be assessed in the premises and so does not always have to be removed.

18.5 The detention lasts for up to 24 hours from the time that the person arrives at the place of safety. The person should be assessed during this period and once a decision is made as to the treatment or care required, then the detention ceases. There is no right of appeal.

Place of safety of a person in a public place

18.6 Section 136 of the Mental Health Act 1983 enables a police officer to remove a person, without the need for a warrant, to a place of safety, which can be a police station (in limited circumstances), a hospital, a care home or other suitable place, (and if practical, in consultation with a mental health professional), if he finds that person in a public place, and the person:

- (i) Appears to be suffering from a mental disorder;
- (ii) Is in immediate need of care and control; and
- (iii) The police officer thinks it is necessary, in the interest of that person or for the protection of others for such removal.

18.7 Section 136 cannot be used if the mentally disordered person is in a private dwelling or the private garden or buildings associated with that place. Other than this exception, s.136 can be used in any other setting. The police officer may use force to enter any place where the power may be exercised. Detention can be up to 24 hours, during which time an assessment would take place for any necessary arrangements for care to be made, with the possibility of a 12-hour extension under clearly defined circumstances. There is no right of appeal.

Guardianship orders

18.8 The Mental Health Act 1983 enables a guardianship order to be made.⁹² To be received into guardianship the person must be suffering from a mental disorder of a nature or degree that warrants the order and it is necessary in the interests of the person, or for the protection of other people.

18.9 The order may specify:

- (i) Where the person lives;
- (ii) That the person attends a place or at a time for medical treatment, occupation, education, and training; or

⁹² s.7.

- (iii) That a doctor, an approved mental health professional or anyone else the guardian specifies must have access to see the person.⁹³

18.10 The guardianship lasts for 6 months and is renewable for a further 6 months and then for a year at a time under section 20. There is a right of appeal to the First-tier Tribunal (Mental Health) in England or Mental Health Review Tribunal for Wales.

Criminal proceedings by those providing care under the Mental Health Act 1983

18.11 Section 127 of the Mental Health Act 1983 makes it a criminal offence to ill-treat or wilfully neglect a patient receiving treatment, subject to a guardianship order or otherwise in his custody or care for treatment of a mental disorder in hospital or a care home by staff. Any proceedings required the approval of the Director of Public Prosecutions.

18.12 Ill treatment and wilful neglect are separate offences. The offence does not necessarily require that the ill treatment must have resulted in actual injury to the patient or at least have caused them unnecessary suffering or injury to health. Wilful neglect is a failure to act when a moral duty demands it, whereas ill treatment is a deliberate course of action.⁹⁴ The Court of Appeal has stated that there needs to be both an objective breach of a duty of care, and an element of subjective (that is, in the mind of the perpetrator) intention or recklessness.⁹⁵

Criminal proceedings by those acting under the Mental Capacity Act 2005

18.13 The offences of ill-treatment or neglect under section 44 Mental Capacity Act 2005, applies to three categories of people:

- Caregiver of a person who lacks mental capacity (this includes paid caregivers and informal caregiver such as relatives)
- The attorney of an Enduring Power of Attorney or Lasting Power of Attorney
- A deputy

18.14 It should be noted that under criminal law, the standard of proof is ‘beyond reasonable doubt’, however for section 44 offences, the prosecution must prove (1) to the criminal standard that the defendant ill-treated or wilfully neglected a person in his care, and (2) that on a ‘balance of probability’ that person was a person who at the material time lacked capacity, in accordance with section 2(4) Mental Capacity Act 2005.⁹⁶

18.15 The person will be guilty of an offence if they ill-treat or wilfully neglect the person they care for or are appointed to act for. The definition of ill treatment or wilful neglect is not defined in the legislation, but the Code of Practice,⁹⁷ provides that for a person to be found guilty of ill treatment, they must either have deliberately ill-treated the person, or been reckless in the way they were ill-treating the person or not. It does not matter whether the behaviour was likely to cause, or actually cause harm or damage to the victim’s health. The meaning of ‘wilful neglect’ varies depending on the circumstances, but usually means

⁹³ s.8.

⁹⁴ R v Newington [1990] 91 Cr App R 247.

⁹⁵ R v Salisu [2009] EWCA Crim 2702.

⁹⁶ R v Hopkins; R v Priest [2011] EWCA Crim 1513; Kurtz v R [2018] EWCA Crim 2743.

⁹⁷ Paragraph 14.25.

that a person has deliberately failed to carry out an act they knew they had a duty to do.⁹⁸ Actions or omissions, or a combination of both, which reflect or are believed to reflect the protected autonomy of the individual (where they have mental capacity) needing care do not constitute wilful neglect.⁹⁹

18.16 Although the principles governing offences of ill treatment and wilful neglect are identical, cases involving alleged ill-treatment do not appear to raise quite the same difficulties as cases of alleged wilful neglect, perhaps not least because evidence of ill-treatment is generally less elusive than evidence purporting to establish wilful neglect.¹⁰⁰

18.17 The Court of Appeal has found, neglect is wilful if a nurse or medical practitioner knows that it is necessary to administer specific treatment and deliberately decides not to carry out that treatment, which is within their power but which they cannot face performing. If the practitioner was acting at a time of stress, that would be a matter which the judge could take into account at the time of sentence.¹⁰¹

Ill treatment or wilful neglect by care worker

18.18 The Criminal Justice and Courts Act 2015 ss 20 and 21 provides that it is an offence for an individual who has the care of another individual by virtue of being a care worker to ill-treat or wilfully to neglect that individual.

18.19 Any cases brought are triable either way. On summary conviction, a maximum prison term of 12 months and/ or fine not exceeding a statutory maximum could be imposed. On conviction on indictment a maximum prison term of five years and /or fine could be imposed.

19. Problems of legal remedies

The cost of legal remedies

19.1 Using the civil Court system can incur expense and this deters many people from using this method of intervention. Those on a low income, with little or no savings may qualify for legal support through Legal Aid but will still need to establish that there is a viable cause of action. An application for Legal Aid and subsequent action can be made on behalf of someone who lacks mental capacity. Many practices of solicitors have given up undertaking legal aid work due to the low levels of pay. Others may act on a contingency fee basis, for personal injury cases.

Court action can take time to get to a full hearing

19.2 One would need to seriously consider the effect of this on the abused person and their life expectancy. The Court will attempt to accommodate the needs of the abused person. See Practice direction 3AA - 'vulnerable persons: participation in proceedings and giving evidence' in respect of the Family Procedure Rule.

Evidence must be established

⁹⁸ R v Sheppard 1981 AC 394.

⁹⁹ Ibid, Paragraph 18.

¹⁰⁰ Ligaya Nursing v R [2012] EWCA Crim 2521, paragraph 17.

¹⁰¹ R v Patel [2013] EWCA Crim 965.

19.3 It is imperative that sufficient evidence is obtained as soon as possible after the event of abuse. This may take the form of medical reports, photographic evidence, written records and statements from parties involved. Where a criminal act has occurred, consider involving the police.

19.4 Although a person without capacity may pose evidential problems, it does not preclude them from having the protection of the law. An expert witness may be able to give evidence of abuse; Eyewitness's accounts may be able to provide corroborative evidence and the victim may be capable of giving evidence. The Youth Justice and Criminal Evidence Act 1999 include a range of measures to support witnesses to give their best evidence, such as the use of screens around the witness box, the use of live-link, screens, evidence given in private, or recorded evidence-in-chief and the use of an intermediary to help witnesses understand the questions they are being asked and to give their answers accurately.

19.5 In determining whether the person is competent to give evidence, the judge has to ascertain, if they understand what telling the truth is as well as being able to recall the facts. This may involve calling an expert witness, such as a psychologist. If the person lives with dementia it may be worthwhile obtaining written evidence in the form of an affidavit during a period of capacity supported by medical evidence as to capacity to make the statement.

What does the client want the outcome to be?

19.6 It is easy to assume, but it is not always the case, that the client wants intervention of some sort. They will usually want the abuse to stop but there may be repercussions. Counselling and/or advocacy services may be needed. The client may decide to deal with the matter without legal redress, for example by amending wills and gifts to rectify the position.

Is the perpetrator worth pursuing?

19.7 If compensation is the redress desired, does the perpetrator have any financial means to pay any Court order made? In civil cases, mentally disordered persons are liable to the same extent as those with mental capacity, provided they have the state of mind required for liability in the particular tort.¹⁰² Even if the perpetrator is unaware that they may be committing a wrongful act, they may still be liable. However, if their actions are purely involuntary and automatic it cannot be litigated.

19.8 In criminal cases, the decision to prosecute a mentally disordered person depends if it is in the public interest. In such cases the Court has wide sentencing powers.

20. Prevention

20.1 Abuse can be reduced by changing the culture in which abuse occurs: by raising awareness of the way in which vulnerable adults should be treated in the community and the standards of care to which they should be entitled. Changes in the regulation of cold selling, door-to-door sales, internet and telephone sales all help,¹⁰³ and raising awareness of fraud by 'prize offer' schemes helps to limit scams and fraud. Community safety strategies run via local Trading Standards Offices may also limit these activities.

¹⁰² *Morris v Marsden* (1952) 1 All ER.

¹⁰³ The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 ((SI 2013/3134).

20.2 Advisers may be in a position to prevent abuse by giving robust advice to clients, by being aware of the risk of abuse or neglect, by providing training and relevant information to clients, attorneys, deputies, paid caregivers, care homes, and get involved with their local safeguarding team.

21. Resources

Publications

- The Law Society Practice Notes on Lasting Powers of Attorney, Making Gifts of Assets, Financial Abuse, and Advising Vulnerable Clients
- Chapter 14, Care and Support Statutory Guidance, Department of Health and Social Care
- Part 7 Code of Practice, Social Services and Well-being (Wales) Act 2014
- Social Care Institute for Excellence Report 50, Safeguarding adults at risk of harm: A legal guide for practitioners¹⁰⁴
- OPG Safeguarding Policy, July 2017¹⁰⁵
- Guidance issued by the Crown Prosecution Service (CPS) about prosecuting crimes against older people (CPS, 2008) ¹⁰⁶

Useful Contacts

Action on Elder Abuse

PO Box 60001
Streatham
SW16 9BY
Tel: 020 8835 9280
Help line: 080 8808 8141
Email: enquiries@elderabuse.org.uk
www.aea.org.uk

Age UK

Astral House
1268 London Road
London SW16 4ER
Tel: 0800 009 966
www.ageuk.org.uk

Age Cymru

Tŷ John Pathy
13/14 Neptune Court
Vanguard Way
Cardiff CF24 5PJ
Tel: 029 2043 1555
Email: enquiries@agecymru.org.uk

¹⁰⁴ <http://www.scie.org.uk/publications/reports/report50.pdf>

¹⁰⁵ <https://www.gov.uk/government/publications/safeguarding-policy-protecting-vulnerable-adults/sd8-opgs-safeguarding-policy>

¹⁰⁶ http://www.cps.gov.uk/publications/prosecution/older_people.html

The Commission on Equality and Human Rights

Manchester

Arndale House
The Arndale Centre
Manchester M4 3AQ
Telephone 0161 829 8100 (non help line calls only)
Email: info@equalityhumanrights.com

London

3 More London
Riverside Tooley Street
London SE1 2RG
Telephone 020 3117 0235 (non help line calls only)
Email: info@equalityhumanrights.com

Cardiff

3rd floor
3 Callaghan Square
Cardiff CF10 5BT
Telephone 02920 447710 (non help line calls only)
Text phone 029 20447713
Email: wales@equalityhumanrights.com

Help line

England: 0845 604 6610
Wales: 0845 604 8810

Care Quality Commission National Correspondence

Citygate
Gallowgate
Newcastle upon Tyne NE1 4PA
Tel: 03000 616161
Email: enquiries@cqc.org.uk
www.cqc.org.uk

Care and Social Services Inspectorate Wales

Cathays Park
Cardiff CF10 3NQ
Tel: 01443 848450
Email: CIW@wales.gsi.gov.uk
www.CIW.org.uk

The Health and Care Professions Council

Park House
184 Kennington Park Road
London SE11 4BU
Tel: 0845 300 6184
Web site: www.hpc-uk.org

Social Care Wales
South Gate House
Wood Street
Cardiff CF10 1EW
Tel: 0300 30 33 444
Email: info@socialcare.wales
Web site: www.socialcare.wales

Independent Age
6 Avonmore Road
London W14 8RL
Tel: 020 7605 4200
www.independentage.org.uk

Contact the Elderly
15 Henrietta Street
Covent Garden
London WC2E 8QG
Tel: 020 7240 0630
Email: info@contact-the-elderly.org.uk
www.contact-the-elderly.org.uk

The Alzheimer's Society
Devon House
58 St Katharine's Way
London E1W 1LB
Tel: 020 7423 3500
Email enquiries@alzheimers.org.uk
www.alzheimers.org.uk

Counsel and Care
Twyman House
16 Bonny Street
London NW1 9PG
Tel: 0845 300 7585 (advice)
www.counselandcare.org.uk

The Court of Protection
PO Box 70185,
First Avenue House,
42-49 High Holborn,
London WC1A 9JA
Tel: 0300 456 4600
www.gov.uk/Court-of-protection

The Office of Public Guardian
PO Box 16185
Birmingham
B2 2WH
Tel: 0300 456 0300
www.gov.uk/government/organisations/office-of-the-public-guardian

The Official Solicitor and Public Trustee

Victory House

30-34 Kingsway

London WC2B 6EX

Tel: Property and Affairs: 020 3681 2758

Tel: Healthcare and welfare: 020 3681 2751

www.gov.uk/government/organisations/official-solicitor-and-public-trustee

The Parliamentary and Health Service Ombudsman

Millbank Tower

Millbank

London SW1P 4QP

Tel: 020 7217 4051

www.ombudsman.org.uk

The Public Service Ombudsman for Wales

1 Ffordd yr Hen Gae

Pencoed CF35 5LJ

Tel: (01656) 641 150

www.ombudsman-wales.org.uk

Local Government and Social Care Ombudsman

PO Box 4771

Coventry CV4 0EH

Tel: 0300 061 0614 or 0845 602 1983

Email: advice@lgo.org.uk

Criminal Injuries Compensation Authority

Tay House

300 Bath Street

Glasgow G2 4LN

Tel: (Freephone): 0800 358 3601

www.cica.gov.uk

Annex



ADVANCE CONSENT TO SAFEGUARD YOU AND/OR YOUR PROPERTY

There might be a time in the future, when you are less able to protect yourself and/or your property because for example, you lack mental capacity or are vulnerable to abuse of trust, coercion, duress, manipulation, or undue influence from another person, or you may be unintentionally neglecting yourself.

Solicitors must not disclose confidential information without their client's consent. Confidential information includes records of meetings, advice provided and details of legal transactions.

Our legal practice is encouraging clients to consider whether to give consent to the disclosure of limited confidential information, which would allow your solicitor to take such steps as he or she considers is necessary and appropriate to safeguard you and/or your property.

The information disclosed would only be provided to people working in a professional capacity, for example those working in social, health, environmental health, housing, police, financial institutions, the Office of the Public Guardian and the Court of Protection.



**ADVANCE CONSENT
TO DISCLOSE CONFIDENTIAL INFORMATION**

I *[insert client's full name and address]* **give my consent to:**

[insert legal practice's name and address] (the legal practice) which includes any successive or amalgamated practice which has resulted in a change of its name or address:

1. To disclose any confidential information held or known in respect of me, to personnel working in social, health, environmental health, housing, financial institutions, the Office of the Public Guardian and the Court of Protection or other organisation which has a safeguarding role, for the purpose of protecting my interests, if it is reasonably believed that I am not in a position to safeguard myself and/or my property and harm may occur unless action is taken.
2. I understand that any confidential information disclosed will be limited to what is considered by the legal practice at the time to be necessary and appropriate.

Signed.....

Dated.....