

NORTHERN IRELAND ADULT SAFEGUARDING PARTNERSHIP



“GUIDELINES ON POTENTIAL
LEGAL ISSUES SURROUNDING
VULNERABLE ADULTS”

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This Handbook provides a broad overview of the law affecting the area of safeguarding vulnerable adults. It is intended to provide general guidance to practitioners on possible legal options available for consideration. It is not intended to constitute legal advice on specific cases and should not be relied upon in lieu of consultation with a solicitor.

CONTENTS

	Page
1. Introduction	2
2. Definitions	4
3. Human Rights	6
4. Information Sharing	10
5. Physical Abuse and Intimidation	13
6. Sexual Abuse and Domestic Violence	17
7. Psychological Abuse Including Cyber-Bullying and Intimidation	23
8. Financial Abuse	27
9. Neglect, Self Neglect and Self Harm	29
10. Gaining Entry into a Vulnerable Adult's Home	33
11. The Inherent Jurisdiction of the High Court	34
12. Vulnerable Adults in the Court Process	37

1. INTRODUCTION

Adult Safeguarding is a continually developing area of practice that is both complex and challenging for practitioners.

At present, the legal framework related to safeguarding adults from abuse is fragmented. While there is no single statute or piece of legislation that can be brought to bear in protecting adults at risk of harm from abuse, exploitation or neglect, it should not be assumed that there are no legal powers to intervene in a situation where an adult is at risk.

It is vitally important that practitioners are not only fully aware of the entirely appropriate constraints on practice imposed by the law, but also of the full extent to which the law supports interventions which aim to keep adults safe from harm, and ensures that the rights and best interests of an adult at risk are upheld at every stage of decision making. It should also be borne in mind that potential powers to support safeguarding activity may rest, not only with Health and Social Care (HSC) organisations, but also with partner organisations such as the Police Service of Northern Ireland (PSNI), Local Councils, the Social Security Agency (SSA) or the Northern Ireland Housing Executive (NIHE). It is important, therefore, that partner organisations are aware of their legislative and regulatory powers which can appropriately be brought to bear, individually or collectively, to safeguard adults at risk; and of the powers of other organisations such as the Regulation and Quality Improvement Authority.

This Handbook seeks to bring together some of the key pieces of legislation relevant to adult safeguarding activity. It provides information about supportive civil and criminal legislation that has been built up over many years. It is primarily a reference tool, designed to point practitioners to the potentially most helpful legislation, and assist them in making informed decisions about the most appropriate way to help ensure that an adult in need of protection is kept safe from harm.

Every person referred to Adult Safeguarding Services is an individual with a unique history and set of personal circumstances. Unfortunately, some situations may remain intractable, that is, there may be no solution at, or in, law, and practitioners will always have to rely on sophisticated assessments of complex situations, and the associated risks, to guide and support their decision making.

It is, therefore, crucial that practitioners consult with their legal advisors to identify the most appropriate way to access the full protection of the law for the individual adult at risk as part of that assessment process. In turn, legal advisors need to strive to seek out remedies that the law affords to safeguard adults at risk, which may include bringing test cases of existing Statute. It will also be important to consider the need to help adults at risk to access independent advocacy services and their own legal advice.

The law does develop from time to time, both by bringing forward new legislation and by developing understanding of current legislation, for example through Judicial Review processes. The Handbook will be revised at least annually, and up-dated in line with relevant new developments.

The key pieces of legislation are presented thematically to facilitate practitioner access. However, it **should not** be construed that the identified Statute is applicable only in the context in which it is presented.

2. DEFINITIONS

These definitions are taken from social care practice, and are not legal terms or definitions.

Vulnerable Adult

For the purposes of Adult Safeguarding, the definition of a vulnerable adult is:

A person aged 18 years or over who is, or may be, in need of community care services, OR is resident in a continuing care facility by reason of mental or other disability, age or illness, OR who is, or may be, unable to take care of him or herself, OR unable to protect him or herself against significant harm or exploitation.

Adults who are or may be in need of community care services are:

Adults whose independence and wellbeing would be at risk if they did not receive appropriate health and social care support, irrespective of whether or not those needs are being met by services. They include adults with physical, sensory and mental impairments and learning disabilities, howsoever those impairments have arisen; e.g. whether present from birth or due to advancing age, chronic illness or injury. They also include informal carers, family and friends who provide personal assistance and care to adults on an unpaid basis, recipients of direct payments and individuals who otherwise fund their own health and social care needs.

Abuse

Abuse is the physical, psychological, emotional financial or sexual maltreatment or neglect of a vulnerable adult by another person. The abuse may be a single act or repeated over a period of time. It may take one form or a multiple of forms. The lack of appropriate action can also be a form of abuse. Abuse can occur in a relationship where there is an expectation of trust and can be perpetrated by a person/persons, in breach of that trust, who have influence over the life of a dependant, whether they be formal or informal carers, staff, or family members or others. It can also occur outside such a relationship.

Significant Harm

Includes not only ill-treatment (including sexual abuse and forms of ill-treatment which are not physical), but also the impairment of physical, intellectual, emotional, social or behavioural development. Significant harm may include the degree, extent, duration and frequency of harm.

3. HUMAN RIGHTS

How does the Human Rights Act 1998 affect vulnerable adults?

The Human Rights Act 1998 plays a core role in protecting the rights of vulnerable adults.

This Act makes it unlawful for a Public Authority to act in a way which is incompatible with the European Convention on Human Rights (ECHR), unless an Act of Parliament meant that it could not have acted differently.

When a UK Judge interprets any legislation, he/she must interpret it in a way which is compatible with the ECHR. If this is not possible, a Judge does not have the power to override the legislation, but instead issues a declaration of incompatibility. This declaration does not make the legislation invalid, but an individual still has recourse to then take the case to the European Court of Human Rights in Strasbourg.

Against whom can a vulnerable adult enforce their human rights?

The Human Rights Act 1998 requires Public Authorities to act compatibly with the ECHR. A Public Authority includes a body which exercises functions which are of a public nature. The Human Rights Act 1998 only governs those actions of a private body which are of a public nature. For example, Section 145 of the Health and Social Care Act 2008 extended the coverage of The Human Rights Act 1998 to residents in residential care and nursing homes where their care has been contracted for by HSC Trusts.

Such residents in care, therefore, now have the power in certain circumstances to take a private provider to Court under The Human Rights Act 1998 if the provider is in breach of the resident's human rights.

What Human Rights are engaged?

In particular:

Article 2: Right to Life

Everyone's right to life is protected by law. This implies a positive and a negative duty.

There is the negative duty to prohibit the act of unlawfully and intentionally taking another person's life. There is also the positive duty to take appropriate steps to preserve life.

Article 2 will also be engaged in circumstances where an individual's life is known (or ought to be known) to be at a real and immediate risk but the state fails to take reasonable steps to avoid that risk.

Article 3: Prohibition of Torture

Everyone has the absolute right not to be subjected to torture or to inhuman or degrading treatment or punishment.

Article 3 will be engaged, for example when maintaining a vulnerable adult's dignity whilst providing care and treatment.

Article 4: Prohibition of Slavery and Forced Labour

Everyone has the absolute right not to be treated as a slave or to be required to perform forced or compulsory labour.

Article 4 will be engaged, for example when someone is being forced to work without suitable recompense.

Article 5: Right to Liberty and Security

Everyone has the right to liberty and security of the person unless it is in accordance with procedure and prescribed by law.

Article 5 will be engaged, for example when a patient is detained under The Mental Health (Northern Ireland) Order 1986.

The European Court of Human Rights in Strasbourg has held that to be lawful such a detention must:

- be based on medical opinion;
- be a confinement for a mental disorder;
- continue only for as long as the mental disorder persists;
- be in accordance with the law – in Northern Ireland this would be with The Mental Health (Northern Ireland) Order 1986.¹

¹ Practitioners also need to have regard to DHSSPS: Deprivation of Liberty Safeguards (DOLS) - Interim Guidance available at: <http://www.dhsspsni.gov.uk/revised-circular-deprivation-of-liberty-safeguards-october-2010.pdf>

The Public Authority must carefully consider the person's right to liberty and be satisfied that there is no lesser option which is available that would achieve the aim in question.

Article 6: Right to a Fair Trial

Everyone has the right to a fair trial.

When the Hearing occurs, it must in general be:

- before an independent and impartial tribunal or court;
- within a reasonable time;
- in public;
- fair.

Article 8: Right to Respect for Private and Family Life

Everyone has the right to respect for his/her private and family life, his/her home and his/her correspondence.

This right may be interfered with where it is in accordance with the law, where there is a defined legitimate aim and it is necessary and proportionate. In other words the Public Authority should be satisfied that there is no lesser option available which would achieve the aim in question, other than the interference.

A Public Authority must have regard for an individual's Article 8 right when it is, for example considering detention or Guardianship of a vulnerable adult under The Mental Health (Northern Ireland) Order 1986. Consideration should be given to the proximity of the placement location to the individual's relatives and friends.

Article 9: Right to Freedom of Thought Conscience and Religion

Everyone has the right to freedom of thought, conscience and religion. There are certain limitations on this right where it is prescribed by law and in the interests of public safety.

This Article requires one to strike a balance between a person's private rights and the needs of other individuals or society as a whole.

An example of this Article in practice would be accommodating a vulnerable adult's right to practice his/her religious beliefs.

Article 10: Right to Freedom of Expression

Everyone has the right to freedom of expression and the right to receive and impart information.

An example of this would be ascertaining a patient's or service user's wishes or feelings with respect to his/her care and providing the patient or service user with information in this regard.

Article 14: Prohibition of Discrimination

Article 14 guarantees the delivery of all the rights in the ECHR without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

First Protocol – Article 1 Protection of Property

A person has the right to the peaceful enjoyment of their possessions. Public Authorities cannot usually interfere with things people own or the way they use them, except in specified limited circumstances. In the vulnerable adult context, this has implications for the prevention of financial abuse.

First Protocol – Article 2 Right to Education

No person will be denied the right to education. Vulnerable adults, therefore, have the same right to education as everyone else. This has implications, for example, for adults with learning difficulties in terms of their right to sex education.

4. INFORMATION SHARING

When providing services to vulnerable adults, practitioners may become aware of information which impacts on the safety and wellbeing of the vulnerable adult or other persons. The practitioner may have to consider whether it is necessary to share this information with another individual who may be at risk or another agency connected with the vulnerable adult or person to whom the information relates.

The information that should be shared, or whether the information should be shared at all, will vary according to the individual circumstances of each case.

As a general guide, The Human Rights Act 1998 provides that each individual has a right to privacy and, therefore, confidences should be respected. However, Article 8 Rights (Right to Respect for Private and Family Life) are qualified, and therefore can be interfered with in specified circumstances. It would have to be shown that: the interference had a clear legal basis; the *aim* of the interference was either national security, public safety, protection of the economy, prevention of crime, the protection of health or morals or the protection of the rights and freedoms of others; it was necessary (and not just reasonable) to interfere with your rights for one of the permitted reasons; and that the interference was proportionate, going only as far as was required to meet the aim.

The Data Protection Act 1998, sets out that information can be shared with other people in certain circumstances:

- A) Schedule 2 (4) of the Act sets out that the data can be shared “where it is necessary to protect the vital interests of the data subject”. *This condition only applies to situations of life or death.*
- B) Schedule 2 (5)(d) of the Act sets out that data can be shared “for the exercise of any other functions of a public nature exercised in the public interest by any person”.

There are certain exemptions within The Data Protection Act 1998 which provide that information may be shared where it is for the purpose of the prevention or detection of crime or the capture or prosecution of offenders.

It is essential that any decisions with respect to sharing information are taken at an appropriately senior level and are carefully recorded setting out clearly the reasons for sharing or not sharing the information.

Practitioners should seek advice and assistance from their organisation's Data Protection Officer initially who may then in turn seek legal advice or contact the Information Commissioner's Office (ICO).

The ICO has produced useful data sharing checklists which provide a step-by-step guide through the process of deciding whether or not to share personal data. These checklists, one of which relates to "systematic data sharing"; the other to "one off requests" can be accessed through:

http://www.ico.gov.uk/for_organisations/data_protection/topic_guides/data_sharing.aspx

The checklists are designed to be used alongside the "Data Sharing Code of Practice" which can also be accessed through:

http://www.ico.gov.uk/for_organisations/data_protection/topic_guides/data_sharing.aspx

Further guidance on information sharing and confidentiality can be found in:

1. The **Code of Practice on Protecting the Confidentiality of Service User Information (DHSSPS, 2012)** which provides support and guidance for all those involved in health and social care, concerning decisions about the protection, use and disclosure of service user information. The Code of Practice notes that uses or disclosures of identifiable service user information are only justifiable where:
 - the service user has given his/her consent; or
 - there is a statutory requirement to use or disclose the information; or
 - the balance of public and private interests favours disclosure. In such situations there must be a substantial public interest favouring disclosure which outweighs both the private interests of the individual and the public interest in safeguarding confidentiality.

The Code of Practice can be accessed at:
<http://www.dhsspsni.gov.uk/confidentiality-code-of-practice0109.pdf>

2. **Information Sharing Guidance for Practitioners and Managers**, which can be accessed at:
<http://www.education.gov.uk/publications/eOrderingDownload/00807-2008BKT-EN-March09.pdf>
3. **Information Sharing: Further Guidance on Legal Issues**, which can be accessed at:
http://www.education.gov.uk/publications/eOrderingDownload/Info-Sharing_legal-issues.pdf

Given the highly sensitive and confidential nature of the information in question, specific legal advice should be sought on individual cases where there is any doubt as to whether information should be shared.

5. PHYSICAL ABUSE AND INTIMIDATION

Physical Abuse (General)

Note: The Police should always be contacted to deal with any immediate danger.

Where there is a reasonable suspicion that a criminal offence may have occurred, it is the responsibility of the Police to investigate and make a decision about any subsequent action. The Police should therefore always be consulted about criminal matters.

Failure to disclose to the Police any information about a “relevant offence” as set out in Section 5 of The Criminal Law Act (Northern Ireland) 1967 is in itself a crime.

Certain types of behaviour can be linked with criminal offences. For example:

Actions causing physical harm could be offences under the Offences Against the Person Act 1861 (“the OAPA 1861”). Other types of offences that may be covered under this legislation include misuse of medication to manage behaviour or inappropriate restraint.

Abuse within the Home

The Family Homes and Domestic Violence (Northern Ireland) Order 1998

Domestic Violence includes threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional), occurring between adults who are or have been intimate partners or family members.

The main purpose of The Family Homes and Domestic Violence (Northern Ireland) Order 1998 is to consolidate the law on domestic violence and occupation of the family home.

Under this Order, a Non-Molestation Order can be issued to prevent the perpetrator from threatening or using violence against the victim.

A perpetrator can be forced to leave and stay away from a property so as to protect a victim by an Occupation Order.

The Mental Health (Northern Ireland) Order 1986

This legislation provides for an application for a Guardianship Order.

The Protection from Harassment (Northern Ireland) Order 1997

This legislation provides that a person shall not pursue conduct which amounts to harassment of another person. The Court may grant an Injunction against the harasser or imprison him/her.

Physical Abuse perpetrated by Care Workers

1. Criminal Route

The Criminal Law provisions outlined above are available for use.

Mental Health (Northern Ireland) Order 1986

Under Article 121 of this Order it is an offence for hospital or nursing home staff to ill-treat or wilfully neglect a patient in a hospital or nursing home whether they are receiving treatment as an inpatient or an outpatient.

Similarly, Article 121 makes it an offence for any individual to ill-treat or wilfully neglect a patient who is for the time being subject to his/her Guardianship under this Order or otherwise in his/her custody or care (whether by virtue of any legal or moral obligation or otherwise). For example it would be an offence for a care worker to mistreat a service user subject to Guardianship.

2. Civil Route

Various civil legal proceedings can be taken against providers of services. These include 'Judicial Review' of public bodies, and also claims such as negligence, trespass to the person and false imprisonment. People can use these remedies to sue for financial compensation for the wrong.

These civil wrongs can be directly relevant to safeguarding and may constitute an alternative or additional remedy to any criminal case.

Anti-social Behaviour from Neighbours

1. Criminal Route

Anti-social Behaviour (Northern Ireland) Order 2004

Anti-social behaviour orders (ASBOs) can be used to stop anyone aged 10 or over from harassing, causing alarm or distress to other people who are not part of their household. Applications for ASBOs can be made by: the PSNI, Councils and NIHE. The PSNI should always be contacted to deal with any immediate danger.

2. Civil Route

Role of the NIHE

If the anti-social behaviour occurs in NIHE properties, contact should be made with the NIHE as it has a range of non-statutory interventions including:

- Mediation;
- Warning Letters;
- Acceptable Behaviour Contracts.

The NIHE also has recourse to Neighbourhood Wardens. The NIHE may also take legal action in the following ways:

Anti-social Behaviour (Northern Ireland) Order 2004

The NIHE may apply to the Magistrate's Court if a resident has acted in a manner that caused or is likely to cause harassment, alarm or distress to one or more persons not of the same household as the resident in question and an ASBO is necessary to protect relevant persons from further anti-social acts.

The Housing (Northern Ireland) Order 1988 Article 7A

This allows the NIHE to treat persons as ineligible for housing assistance if they have been guilty of unacceptable behaviour.

The Housing (Northern Ireland) Order 1981 Article 22A

This allows the NIHE to treat persons as ineligible for an allocation of housing if they have been guilty of unacceptable behaviour.

The Housing (Northern Ireland) Order 1983 Article 25

The legislation provides that the NIHE may apply to the Court for an order for repossession of a dwelling house when certain grounds have been met. These grounds include the tenant being guilty of causing or being likely to cause a nuisance or annoyance to a person residing in the locality or in certain incidents of domestic violence.

The Housing (Northern Ireland) Order 2003 Article 26

The NIHE or a Registered Housing Association may apply to the County Court or High Court for an Injunction prohibiting a person from engaging in conduct which is likely to cause a nuisance or annoyance to a person residing in NIHE or Housing Association accommodation.

Role of the Local Council

The Local Council may also be contacted in relation to anti-social behaviour. Many Councils have appointed Community Safety Co-ordinators.

Under The Anti-social Behaviour (Northern Ireland) Order 2004, the Local Council has the same powers as the NIHE to apply to the Court for an ASBO.

In cases of noise pollution, the Council has powers under The Pollution Control and Local Government (Northern Ireland) Order 1978 to serve Notices requiring an abatement of the nuisance on the person responsible for the nuisance. For night time noise, the Council also has powers under The Noise Act 1996 to investigate and serve warning notices.

6. SEXUAL ABUSE AND DOMESTIC VIOLENCE

The Sexual Offences (Northern Ireland) Order 2008

The Sexual Offences (Northern Ireland) Order 2008 seeks to consolidate sexual offences law in Northern Ireland into one statute and modernise, strengthen and harmonise the body of offences and penalties with England and Wales.

Articles 43-57 of the Order deal with offences committed against persons with a mental disorder. These Articles apply in cases where the victim is unable to agree to the sexual activity because of a mental disorder which impedes their choice (43-46) or it might appear that the victim had agreed to the sexual activity but because of a mental disorder which makes them vulnerable to inducements, threats or deceptions (47-50) or because they are in a relationship of care (51-54), their consent was not or could be deemed not to have been freely given. However, it is important to appreciate that where a person with a mental disorder is able to consent freely to sexual activity, they have the same rights to engage in consensual sexual activity as anyone else. It is also important to note that where a person with a mental disorder did not consent to the sexual activity, there are other offences such as rape, sexual assault etc. which also apply.

"Mental disorder" is defined in Article 2(9) as having "the meaning given by Article 3 of The Mental Health (Northern Ireland) Order 1986" In that Order, mental disorder means "mental illness, mental handicap and any other disorder or disability of mind".

Offences against persons with a mental disorder impeding choice:

Articles 43-46 deal with offences where the victim is unable to refuse to engage in or to watch a sexual activity because of, or for a reason related to, a mental disorder. It is a requirement of these offences that the offender knew or could reasonably have been expected to know that the victim had a mental disorder and that because of it he/she was likely to be unable to refuse.

Inducements etc. to persons with a mental disorder:

Articles 47-50 deal with offences where the victim is persuaded to engage in or watch a sexual act by means of an inducement offered or given, a threat made or a deception practised for that purpose. In these

offences, there is no need to prove that the victim is unable to refuse. An inducement might be promising the victim presents of anything from CDs to a holiday, a threat might be stating that a member of the victim's family might be hurt and a deception might be suggesting that the victim would get into trouble if he/she does not engage in sexual activity, or persuading him/her that it is expected that friends should engage in sexual activity. The offence requires that the offender knew or could reasonably have been expected to have known that the victim had a mental disorder.

Care workers for persons with a mental disorder:

Articles 51-54 deal with the situation where a care worker involves someone in his care, who has a mental disorder, in sexual activity. In these offences any sexual activity between the care worker and the person with the mental disorder is prohibited whilst that relationship continues. For these offences, therefore, the apparent consent of the victim is only an issue in as much as it may absolve the defendant from a non-consensual offence such as rape or sexual assault.

Article 55 defines a relationship of care for the purposes of Articles 51 to 54. An example of a relationship covered by paragraph (2) is where A is a member of staff in a care home and B is a resident there. An example of a relationship covered by paragraph (3) is where A is a receptionist at the clinic that B attends every week. Paragraph (4) covers any situation where A provides care, assistance or services to B in connection with B's mental disorder. An example of a relationship covered by paragraph (4) is where A takes B on outings every week or treats B for his learning disability with complementary therapies in B's own home. In all cases, A must have, or be "likely to have", regular face to face contact with B. The "likely to have" limb is to cover persons who provide care to B in these situations from day one of their involvement with B.

Sexual Abuse in the Context of Domestic Violence:

Domestic Violence includes threatening behaviour, violence or abuse (psychological, physical, sexual financial or emotional), occurring between adults who are or have been intimate partners or family members.

The Family Homes and Domestic Violence (Northern Ireland) Order 1998

The main purpose of the Order is to consolidate the law on domestic violence and occupation of the family home.

Under the legislation, a Non-Molestation Order can be issued to prevent the perpetrator from threatening or using violence against the victim.

A perpetrator can be forced to leave and stay away from a property by an Occupation Order so as to protect a victim.

Harassment (including Sexual Harassment)

Protection from Harassment (Northern Ireland) Order 1997

This Order sets out that there are two types of harassment – harassment without fear of violence (Article 3), and harassment with the fear of violence (Article 6).

Article 3 of this Order states that:

1. A person shall not pursue a course of conduct:
 - (a) which amounts to harassment of another; and
 - (b) which he knows or ought to know amounts to harassment of the other.
2. For the purposes of this Article, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.
3. Paragraph (1) above does not apply to a course of conduct if the person who pursued it shows:
 - (a) that it was pursued for the purpose of preventing or detecting crime;
 - (b) that it was pursued under any statutory provision or rule of law or to comply with any condition or requirement imposed by any person under any statutory provision; or
 - (c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

Article 6 of the Order deals with harassment accompanied by the fear of violence:

A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him/her shall be guilty of an offence if he/she knows or ought to know that his/her course of conduct will cause the other so to fear on each of those occasions.

For the purposes of this Article, the person whose course of conduct is in question ought to know that it will cause another to fear that violence will be used against him/her on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause the other so to fear on that occasion.

It is a defence for a person charged with an offence under this Article to show that:

- (a) his/her course of conduct was pursued for the purpose of preventing or detecting crime;
- (b) his/her course of conduct was pursued under any statutory provision or rule of law or to comply with any condition or requirement imposed by any person under any statutory provision; or
- (c) the pursuit of his course of conduct was reasonable for the protection of himself or another or for the protection of his/her or another's property.

These are criminal offences. However, one may also seek damages or an Injunction against the harasser in the Civil Court.

Forced Marriage

A forced marriage is a marriage where one or both people do not (or, in the case of some vulnerable adults, cannot) consent to the marriage and duress is involved. Duress can include physical, psychological, financial, sexual and emotional pressure.² A marriage can be considered as forced not merely on the grounds of threats of physical violence to the victim, but also through threats of physical violence to third parties (e.g.

² "Right to Choose: Statutory Guidance for dealing with forced marriage" can be accessed at: <http://www.dfpni.gov.uk/right-to-choose-forced-marriage.pdf>

the victim's family), or even self-violence (e.g. a marriage procured through threat of suicide).

The Forced Marriage (Civil Protection) Act 2007 seeks to assist victims of forced marriage, or those threatened with forced marriage, by providing civil remedies.

The centrepiece of the Act is the Forced Marriage Protection Order. A person threatened with forced marriage can apply to the Court for a Forced Marriage Protection Order. The Order can contain whatever provisions the Court finds would be appropriate to prevent the forced marriage from taking place, or to protect a victim of forced marriage from its effects. It may include such measures as confiscation of passport or restrictions on contact with the victim.

A person who violates a Forced Marriage Protection Order is subject to contempt of Court proceedings and may be arrested.

The Sexual Offences Act 2003

The Sexual Offences Act 2003 introduced a number of new civil preventative orders, including:

Notification Order:

Notification Orders and Interim Notification Orders are intended to protect the public from the risks posed by sex offenders who have been convicted, cautioned, etc for sexual offences committed overseas.

The Chief Constable may apply to a Magistrate's Court for an Order against an offender who resides in Northern Ireland. In addition, the Chief Constable may apply for a Notification Order if he believes that the offender is in, or is intending to come to Northern Ireland.

Sexual Offences Prevention Orders (SOPO)

Sexual Offences Prevention Orders (SOPO) and Interim SOPOs are intended to protect the public from the risk posed by sex offenders by placing restrictions on their behaviour. The SOPO and Interim SOPO also require the offender to register their details with the Police.

A SOPO can either be made:

- by a Court when it deals with the defendant following a conviction for an offence listed in Schedule 3 or 5 of The Sexual Offences Act

2003, or a finding that he is not guilty of such an offence by reason of insanity or that he/she is under a disability but has done the act charged in respect of the offence;

- on application made to the Magistrate's Court by the Chief Constable in respect of a defendant with a previous conviction for an offence listed in Schedule 3 or 5 or a finding that he/she is not guilty of such an offence by reason of insanity or that he/she is under a disability but has done the act charged, or a caution received in respect of the offence.

To secure an SOPO, the Police will need to establish there is reasonable cause to believe that a SOPO is necessary to protect the public or individual members of the public, from serious sexual harm.

Risk of Sexual Harm Order (RSHO)

A Risk of Sexual Harm Order (RSHO) can be applied for by the Chief Constable against any person thought to pose a sexual risk to children aged under 17.

It is not necessary for the defendant to have a prior conviction for a sexual offence. The Court can make a RSHO if it is satisfied that it is necessary for the purpose of protecting children generally or any individual child from harm from the defendant.

7. PSYCHOLOGICAL ABUSE INCLUDING CYBER-BULLYING AND INTIMIDATION

In cases where a vulnerable adult is being harassed or bullied by way of text messages, internet communications, telephone calls or by letter, the PSNI should be contacted as, under the legislation set out below, the person sending the communications may be guilty of an offence.

The Protection from Harassment (Northern Ireland) Order 1997

Under this Order, the vulnerable adult may seek an Injunction, together with damages, in the County Court or High Court restraining the defendant from pursuing any conduct which amounts to harassment. The Order sets out that there are two types of harassment, namely harassment without fear of violence (Article 3) and harassment with the fear of violence (Article 6).

Harassment without fear of violence:

- (1) Under Article 3 of this Order, a person shall not pursue a course of conduct:
 - (a) which amounts to harassment of another; and
 - (b) which he knows or ought to know amounts to harassment of the other.
- (2) For the purposes of Article 3, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.
- (3) Paragraph (1) above does not apply to a course of conduct if the person who pursued it shows:
 - (a) that it was pursued for the purpose of preventing or detecting crime;
 - (b) that it was pursued under any statutory provision or rule of law or to comply with any condition or requirement imposed by any person under any statutory provision; or
 - (c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

Harassment with the fear of violence:

- 1 Under Article 6 of the Order a person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him/her shall be guilty of an offence if he knows or ought to know that his/her course of conduct will cause the other so to fear on each of those occasions.
- 2 For the purposes of this Article, the person whose course of conduct is in question ought to know that it will cause another to fear that violence will be used against him/her on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause the other so to fear on that occasion.
- 3 It is a defence for a person charged with an offence under this Article to show that:
 - (a) his/her course of conduct was pursued for the purpose of preventing or detecting crime;
 - (b) his/her course of conduct was pursued under any statutory provision or rule of law or to comply with any condition or requirement imposed by any person under any statutory provision; or
 - (c) the pursuit of his/her course of conduct was reasonable for the protection of himself/herself or another or for the protection of his/her or another's property.

These are criminal offences. However, one may also seek damages or an Injunction against the harasser in the Civil Court. A Solicitor should be contacted to act on the vulnerable adult's behalf when pursuing the civil route. In this regard you may also wish to consider Chapter 12 of this Handbook, "Vulnerable Adults in the Court Process".

The Malicious Communications (Northern Ireland) Order 1988

Article 3 creates an offence of sending letters etc with intent to cause distress or anxiety as follows:

- 1 Any person who sends to another person:
 - (a) a letter or other article which conveys:

- (i) a message which is indecent or grossly offensive;
 - (ii) a threat; or
 - (iii) information which is false and known or believed to be false by the sender; or
- (b) any other article which is, in whole or part, of an indecent or grossly offensive nature,

is guilty of an offence if his purpose, or one of his purposes, in sending it is that it should, so far as falling within sub - paragraph (a) or (b), cause distress or anxiety to the recipient or to any other person to whom he/she intends that it or its contents or nature should be communicated.

- 2 A person is not guilty of an offence by virtue of paragraph (1)(a)(ii) above if he/she shows:
- (a) that the threat was used to reinforce a demand which he/she believed he/she had reasonable grounds for making; and
 - (b) that he/she believed that the use of the threat was a proper means of reinforcing the demand.
- 3 In this Article references to sending include references to delivering and to causing to be sent or delivered.
- 4 A person guilty of an offence under this Article shall be liable, on summary conviction, to a fine not exceeding level 4 on the standard scale.

This offence covers letters, writing of all descriptions and electronic communications.

The Communications Act 2003

Section 127 of this Act covers the improper use of public electronic communications network. It provides out that:

- 1 A person is guilty of an offence if he/she:
- (a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or
 - (b) causes any such message or matter to be so sent.

- 2 A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he/she:
 - (a) sends, by means of a public electronic communications network, a message that he knows to be false;
 - (b) causes such a message to be sent; or
 - (c) persistently makes use of a public electronic communications network.

- 3 A person guilty of an offence under this section shall be liable, on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both.

- 4 Sub-sections (1) and (2) do not apply to anything done in the course of providing a programme service (within the meaning of The Broadcasting Act 1990).

8. FINANCIAL ABUSE

If a crime is suspected the Police should be contacted in the first instance.

The Theft Act (Northern Ireland) 1969

Under this Act theft is defined as a person dishonestly appropriating property belonging to another with the intention of permanently depriving the other of it. It should be noted that under the Act, the appropriation is not regarded as dishonest if the person appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it.

The Mental Health (Northern Ireland) Order 1986

Article 107(1) of the Order imposes a duty, delegated from the HSC Board, on a HSC Trust to notify the **Office of Care and Protection** where it is satisfied:

- (a) that any person within its area is incapable *by reason of mental disorder* of managing and administering his/her property and affairs;
- (b) that any powers of the Court under Article 98 or 99 ought to be exercised with respect to the property or affairs of that person; and
- (c) that arrangements on their behalf have neither been made nor are being made.

Article 107 imposes a similar duty:

- (i) on any person carrying on a nursing home, a residential care home or private hospital where he/she is satisfied that the similar conditions set out in Article 107(2) are met with regard to any person within his/her care; and
- (ii) as amended by The Health and Social Care (Reform) Act 2009 on the Regulation and Quality Improvement Authority where it is satisfied that similar conditions set out in Article 107(3) are met with regard to any person.

The High Court can then appoint a Controller to do all such things in relation to the property and affairs of the referred person as the Court orders or directs him/her to do.

If there is disagreement as to who should act as Controller, the High Court Master can order that the **Official Solicitor** be appointed as a Controller. The Official Solicitor acts for people who, because they lack mental capacity and cannot properly manage their own affairs, are unable to represent themselves and no other suitable person or agency is able and willing to act.

Power of Attorney and Enduring Power of Attorney

A Power of Attorney is a legal document which gives someone the authority (an Attorney) to take actions or make decisions on another person's behalf in relation to finance and property matters only. The person handing over the power (the donor) *must have capacity* in order to appoint the attorney. Power of Attorney is automatically revoked by mental incapacity.

An Enduring Power of Attorney will continue in the event of the donor becoming mentally incapable of managing their own affairs.

However, where the donor becomes mentally incapable the Enduring Power of Attorney must be registered at the High Court, with the Office of Care and Protection, in order to remain effective.

Again, one has to have capacity in order to make an Enduring Power of Attorney and be mentally capable of understanding what an Enduring Power of Attorney is.

If a Vulnerable Adult is considering appointing an Attorney, it is absolutely essential that they seek their own legal advice as careful consideration must be given to the range of powers relating to property and finance matters given to the Attorney and the implications of those powers.

9. NEGLECT, SELF NEGLECT AND SELF HARM

Neglect – Withholding the Necessities of Life

When a carer is considered to be withholding the necessities of life from a vulnerable adult and negotiation fails, the following options should be considered:

1. Guardianship under The Mental Health (Northern Ireland) Order 1986

In order to be made subject to Guardianship the vulnerable adult has to satisfy the following criteria:

- (a) he/she is suffering from mental illness or severe mental handicap of a nature or degree which warrants his/her reception into Guardianship; and
- (b) it is necessary in the interests of the welfare of the patient that he/she should be so received.

2. Removal under Article 129 of The Mental Health (Northern Ireland) Order 1986

An officer of a HSC Trust or the HSC Board may apply to a Justice of the Peace for a warrant for a Police Constable accompanied by a Medical Practitioner to enter, if need be by force, any premises specified in the warrant and remove a vulnerable adult to a place of safety if there is reasonable cause to suspect that the vulnerable adult is believed to be suffering from a mental disorder, **and**

- (a) has been, or is being, ill-treated, neglected or kept otherwise than under proper control; or
- (b) being unable to care for himself/herself, is living alone

3. Article 121 of The Mental Health (Northern Ireland) Order 1986

Makes it an offence for any person who being an officer on the staff of or otherwise employed in a hospital, private hospital or nursing home to ill-treat or wilfully neglect a patient in a hospital or nursing home whether they are receiving treatment as an inpatient or an outpatient. Similarly, it is an offence for any individual to ill-treat or wilfully neglect a patient who is for the time being subject to his/her Guardianship under this Order or otherwise in his/her custody or

care (whether by virtue of any legal or moral obligation or otherwise).

Self Neglect – Living in Insanitary Conditions

When a vulnerable adult is found to be living in insanitary conditions, the following options may be considered.

1. Use of Article 37 of The Health and Personal Social Services (Northern Ireland) Order 1972 which sets out the arrangements to be made in accordance with Schedule 6 to that Order for the purposes of securing the necessary care and attention for persons (other than persons in respect of whom a warrant may be issued under Article 129 of The Mental Health (Northern Ireland) Order 1986) who:
 - (a) are suffering from grave chronic disease or, being aged, infirm or physically incapacitated, are living in insanitary conditions; and
 - (b) are unable to devote to themselves, or to receive from persons with whom they reside, or from persons living nearby, proper care and attention.

Schedule 6 to the Order sets out that where a Social Worker has reason to believe that:

- in the interests of any such person that satisfies the criteria of (a) and (b) set out above, or for preventing injury to the health of, or serious nuisance to, other persons, it is necessary to remove such person from the premises in which he/she is residing;
- **and** the Social Worker has consulted with the person's GP and a HSC Trust Medical Officer, and the HSC Trust Medical Officer designated for the purpose has certified that an Article 37 removal is necessary, the Social Worker then may apply to the Court for the removal of the person.

The HSC Trust must serve three days notice of its intention to remove the person on his/her nearest known relative and on the manager of the premises that the person will be removed to.

The Court may then make an Order for the removal of the person to a suitable hospital or another place on hearing oral evidence. The

Court may order removal for three months. This period may be later extended upon application.

Any person who wilfully disobeys, or obstructs the execution of the Court Order will be guilty of an offence and shall be liable on summary conviction to a fine not exceeding level 1 on the standard scale.

2. Use of Article 129 of The Mental Health (Northern Ireland) Order 1986, under which an officer of the HSC Board, or of a HSC Trust or a constable may apply to a Justice of the Peace for a warrant authorising any constable accompanied by a Medical Practitioner to enter, by force if need be, a premises specified and to remove a person to safety, if there is reasonable cause to suspect that the person who is believed to be suffering from a mental disorder:

- (a) has been, or is being, ill-treated, neglected or kept otherwise than under proper control; or
- (b) being unable to care for himself/herself, is living alone,

with a view to the making of an application for compulsory admission to hospital or for reception into Guardianship.

3. Local Councils have powers under The Private Tenancies (Northern Ireland) Order 2006 to inspect private premises and serve notices of unfitness and disrepair on Landlords. One should contact the Environmental Health Department of the Local Council. If the premises are owned by the NIHE, it should be contacted in the same regard.

Self Harm

Self-harm occurs when an individual engages in any behaviour or activity that, directly or indirectly, can cause harm/serious harm to his/her physical, psychological or social well-being. Any or all of these types of behaviours may be caused as the result of deliberate intent, negligence or ignorance. Self-neglect or self-harm by an adult at risk will not necessarily require a protective investigation/intervention unless the situation involves a significant act of commission or omission by someone with responsibility for the person's care. However, if there is a failure to act or to act appropriately, this may amount to neglect and protective investigation/intervention should be considered or made. Other processes may be used to respond to self-neglect or self-harm,

such as health and social care assessments, the care management process, behavioural support or other therapeutic interventions.

10. GAINING ENTRY INTO A VULNERABLE ADULT'S HOME

Every effort must be made to negotiate access to the vulnerable adult with the person refusing that access. When this is not successful, the following options can be considered:

1. Contact the PSNI – The Police can force entry under The Police and Criminal Evidence (Northern Ireland) Order 1989 under Article 19(1)(e) for the purpose “of saving life or limb or preventing serious damage to property”.

2. Use of Article 129 of The Mental Health (Northern Ireland) Order 1986, under which an officer of the HSC Board, or of a HSC Trust or a constable may apply to a Justice of the Peace for a warrant authorising any constable accompanied by a Medical Practitioner to enter, by force if need be, a premises specified and to remove a person to safety, if there is reasonable cause to suspect that the person who is believed to be suffering from a mental disorder:
 - (a) has been, or is being, ill-treated, neglected or kept otherwise than under proper control; or
 - (b) being unable to care for himself/herself, is living alone,with a view to the making of an application for compulsory admission to hospital or for reception into Guardianship.

3. Application to the Magistrate’s Court – consideration should be given to applying to the Magistrate’s Court for an Order to remove the Vulnerable Adult to a suitable hospital or other place under Article 37 of The Health and Personal Social Services Order (Northern Ireland) 1972. In order to apply to the Court, the applicant must be satisfied that:
 - (a) the person is suffering from grave chronic disease or, being aged, infirm or physically incapacitated, is living in insanitary conditions; and
 - (b) is unable to devote to themselves, or to receive from persons with whom they reside, or from persons living nearby, proper care and attention.

11. THE INHERENT JURISDICTION OF THE HIGH COURT

A Vulnerable Adult is described within the case of A local Authority v MA, NA, SA (2006) as follows:

“In the context of the inherent jurisdiction I would treat as a vulnerable adult someone who, whether or not mentally incapacitated, and whether or not suffering from any mental illness or mental disorder, is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation, or who is deaf, blind or dumb, or who is substantially handicapped by illness, injury or congenital deformity. This, I emphasise, is not and is not intended to be a definition. It is descriptive, not definitive; indicative rather than prescriptive.”

The jurisdiction was first exercised in relation to issues of surgical, medical and nursing treatment, but it is now clear that it is exercisable not merely in relation to matters of that nature but also in relation to a wide range of other questions such as where they should reside, who they should see, the circumstances of such contact, publication of matters which are damaging to the vulnerable adult, forced marriages, etc.

In the above case, “SA” had been made a Ward of Court as a minor to protect her from an arranged marriage in Pakistan. This case dealt with the issue of whether the Court still had jurisdiction to protect her when she reached majority. SA did have capacity but was described as a Vulnerable Adult as she was profoundly deaf, had no speech or oral communication, had lost sight in one eye and had a borderline learning disability. She was only able to communicate through British Sign Language. She did wish to marry but the local authority was of the view that she may have been coerced into doing so by her parents.

Munby J stated:

“It would be unwise, and indeed inappropriate, for me even to attempt to define who might fall into this group in relation to whom the Court can properly exercise its inherent jurisdiction. I disavow any such intention. It suffices for present purposes to say that, in my judgment, the authorities to which I have referred demonstrate that the inherent jurisdiction can be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either (i) under constraint or (ii) subject to coercion or 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.”

The High Court therefore exercises a protective jurisdiction in relation to vulnerable adults just as it does in relation to Wards of Court.

Another example of the use of the High Court’s inherent jurisdiction is that of A Local Authority v DL (2011) EWHC 1022 (Fam). In this case a local authority applied for an Injunction to regulate the way adults live in their home. An elderly couple shared a home with their son who was in his fifties. The father did not have capacity and his case was dealt with separately by the Court. The mother and son both had capacity. The son is alleged to have been aggressive and physically violent towards his mother who is in her 90s and requires twice daily visits from health and social care professionals.

The behaviour by the son is described as follows:

“The local authority has documented incidents going back to 2005 which, it says, chronicle DL’s behaviour and which include physical assaults, verbal threats, controlling where and when his parents may move in the house, preventing them from leaving the house, and controlling who may visit them, and the terms upon which they may visit them, including health and social care professionals providing care and support for Mrs L. There have also been consistent reports that DL is seeking to coerce Mr L into transferring the ownership of the house into DL’s name and that he has also placed considerable pressure on both his parents to have Mrs L moved into a care home against her wishes.”

The mother had capacity to take proceedings herself but wished to preserve her relationship with her son and did not wish to take proceedings.

The Local Authority had considered a myriad of options, including taking criminal proceedings.

The Local Authority then applied to the High Court for an Injunction restraining the son from, inter alia, assaulting his parents, preventing them from receiving medical care and engaging in behaviour towards them that would be otherwise degrading or coercive. This was granted on an ex-parte basis and the matter was then referred for consideration of whether there was a proper lawful basis for the use of the inherent

jurisdiction of the High Court in this way. In consideration of the case of SA referred to above and a number of other authorities, the High Court did have jurisdiction.

The recent Northern Irish case of JR50 (2011) was concerned with a Judicial Review taken by a vulnerable adult who suffers from Cerebral Palsy. There was significant disagreement between the HSC Trust and the vulnerable adult's family as to his treatment and as a result the HSC Trust received the vulnerable adult into Guardianship.

The HSC Trust subsequently refused permission for the vulnerable adult's family to have unsupervised access to the vulnerable adult, or to remove the vulnerable adult from the care home. The vulnerable adult's family then sought a Judicial Review.

The Judge in the matter indicated that the HSC Trust was wrong in seeking to use Guardianship for this purpose, and was critical of the HSC Trust apparently using Guardianship in order to give itself 'an apparent legal casting vote' in a dispute with the family.

The Judge set out that, "Where there is an entrenched dispute between parties about the management of a vulnerable person, and where this dispute cannot be resolved by appropriate information sharing and genuine participative decision making, or if necessary by mediation, then the matter should be referred to the court for its guidance."

12. VULNERABLE ADULTS IN THE COURT PROCESS

Instructing a Solicitor:

In certain circumstances a vulnerable adult may require a Solicitor to act on his/her behalf, for example when taking an action under The Protection from Harassment Order (Northern Ireland) 1997, or The Family Homes and Domestic Violence (Northern Ireland) Order 1998; when appointing an Attorney or in an approach to a Mental Health Review Tribunal.

A list of solicitors within Northern Ireland together with their contact details can be found on the Law Society of Northern Ireland's website: <http://www.lawsoc-ni.org/solicitors-directory/>

There will be costs involved in instructing a Solicitor, and it should be considered whether a vulnerable adult may be entitled to legal aid.

Legal Aid:

Availability of legal aid is dependent upon the area of law that the legal problem falls under, the resources of the person who wishes to take legal action and the legal action they wish to take.

A Solicitor should be instructed to confirm whether a vulnerable adult is likely to receive legal aid for his/her case.

It is of note that since January 2011, a patient's resources are no longer taken into account when applying for legal aid with respect to Mental Health Review Tribunals. In most instances, a patient will therefore be eligible to receive legal aid for a Mental Health Review Tribunal.

A list of Solicitors who provide representation to legally aided persons can be found at <http://www.nilsc.org.uk/solicitors.asp?on=solicitors>

Assisting Victims and Appearing as a Witness

Victim and Witness Support:

Vulnerable and intimidated witnesses can receive support at all stages of the investigation. Four distinct roles or phases for witness support have been identified. They are:

1. Interview support: provided by someone independent of the Police, who is not a party to the case being investigated;
2. Pre-trial support: provided to the witness in the period between the interview and the start of any trial;
3. Court witness support: a person who may be known to the witness but who is not a party to the proceedings, has no detailed knowledge of the case or may have assisted in preparing the witness for their Court appearance; and
4. Post-trial support: agencies providing support have a key role in identifying current need; linking the witness to appropriate sources of information; helping the witness to understand the outcome of proceedings; and connecting witnesses to sources of relevant ongoing support.

Victim Support Northern Ireland is the charity which helps people affected by any type of crime. It provides emotional support, information and practical help to victims, witnesses and others affected by crime. Contact details can be found on the Victim Support website:

<http://www.victimsupportni.co.uk/support-in-your-area>

The Court Service also provides support and information can be found on its website:

<http://www.courtsni.gov.uk/enGB/Services/Support2VictimandWitnesses/>

Special Measures:

It has long been recognised that many people who are the victims of, or witnesses to crimes find the ensuing process of investigation and trial difficult and stressful. The Criminal Evidence (NI) Order 1999, as amended, introduced 'special measures', that is, measures which have been put in place to help vulnerable or intimidated witnesses give their best possible evidence in Court in criminal cases.

If a vulnerable adult is acting as a witness in a criminal case, the Public Prosecution Service may make an application that certain measures be put in place, such as screening, removal of wigs and gowns, etc.

The special measures for use at Court are subject to application to the Judge by the prosecution or defence before the trial.

While it is important to establish at an early stage whether the witness is likely to qualify for special measures, it should be noted that the need for such measures may change from the time of the investigation to the time of the trial. The effect of this is that witnesses might be eligible for more or less support as time goes on, depending on changes in their circumstances.

Special measures are not automatically available and are subject to the discretion of the Court.

Further information on special measures can be found at:

http://www.nio.gov.uk/achieving_best_evidence_in_criminal_proceedings_ni_guidance_for_vulnerable_and_intimidated_witnesses.pdf