

Appendix 1: Legislation

Care Act 2014

Under Section 42 of the Care Act, a local authority has a duty to make enquiries itself or cause others to make enquiries in cases where it has reasonable cause to suspect that an adult:

- has needs for care and support (whether or not the local authority is meeting any of those needs)
- is experiencing, or at risk of, abuse or neglect
- as a result of those care and support needs is unable to protect themselves from either the risk of, or the experience of, abuse or neglect.

A safeguarding enquiry may not necessarily result in what is typically considered to be a 'safeguarding response', such as an investigation by the police or a health and social care regulator, but it could result in other action to protect the adult concerned, such as providing a care and support package for either or both the adult and their carer.

Under the Care Act, there is no express legal power of entry or right of unimpeded access to the adult. However, where necessary, local authorities can apply to the courts or seek assistance from the police to gain access in certain circumstances under existing powers.

Gaining access to an adult who may be at risk of harm

The following legal powers may be relevant, depending on the circumstances:

- If the person has been assessed as lacking mental capacity in relation to a matter relating to their welfare: The Court of Protection has the power to make an order under Section 16(2) of the MCA relating to a person's welfare, which makes the decision on that person's behalf to allow access to an adult lacking capacity. The Court can also appoint a deputy to make welfare decisions for that person.
- If an adult with mental capacity, at risk of abuse or neglect, is impeded from exercising that capacity freely: the inherent jurisdiction of the High Court enables the Court to make an order (which could relate to gaining access to an adult) or any remedy which the Court considers appropriate (for example, to facilitate the taking of a decision by an adult with mental capacity free from undue influence, duress or coercion) in any circumstances not governed by specific legislation or rules.
- If there is concern about a mentally disordered person: Section 115 of the MHA provides the power for an approved mental health professional (approved by a local authority under the MHA) to enter and inspect any premises (other than a hospital) in which a person with a mental disorder is living, on production of proper authenticated identification, if the professional has reasonable cause to believe that the person is not receiving proper care.
- If a person is believed to have a mental disorder, and there is suspected neglect or abuse: Section 135(1) of the MHA, a magistrates court has the power, on application from an approved mental health professional, to allow the police to enter premises using force if necessary and if thought fit, to remove a person to a place of safety if there is reasonable cause to suspect that they are suffering from a mental disorder and
 - (a) have been, or are being, ill-treated, neglected or not kept under proper control, or
 - (b) are living alone and unable to care for themselves.

Power of the police to enter and arrest a person for an indictable offence:

Section 17(1)(b) of PACE

Common law power of the police to prevent, and deal with, a breach of the peace.

Although breach of the peace is not an indictable offence the police have a common law power to enter and arrest a person to prevent a breach of the peace.

- If there is risk to life and limb: Section 17(1)(e) of PACE gives the police the power to enter premises without a warrant in order to save life and limb or prevent serious damage to property. (This represents an emergency situation and it is for the police to exercise the power).

Mental Capacity Act 2005

This act established important principles including:

Principle 1: Self-determination and informed consent. There is a presumption that vulnerable adults will take their own decisions and that support, assistance, services and sometimes major intervention for an individual will be on the basis of that person's informed consent.

Principle 2: Proportionality and least restrictive intervention. Assistance and intervention should be based on a 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.

A person must be assumed to have capacity unless it is established that he lacks capacity. A person is unable to make a decision for himself if he is unable:

- To understand the information relevant to the decision
- To retain that information
- To use or weigh that information as part of the process of making the decision, or
- To communicate his decision whether by talking, using sign language or any other means.

An inability to satisfy any one of these four conditions would render the person incapable.

Under section 2 of the Mental Capacity Act 2007 under **Best Interest** the decision maker must:

- a) Consider whether it is likely that the person will at some time have capacity in relation to the matter in question.
- b) Permit and encourage the person to participate as fully as possible in any act done for him and any decision affecting him.
- c) Consider the person's past and present wishes and feelings [and, in particular, any relevant written statement made by him when he had capacity.]
- d) Consider the beliefs and values that would be likely to influence his decision if he had capacity, and the other factors that he would likely to consider if he were able to do so.
- e) Take in to account, if it is practicable and appropriate to consult them, the views of:
 - i. anyone named by the person as someone to be consulted on the matter in question or in matters of that kind.
 - ii. anyone engaged in caring for the person or interested in his welfare.
 - iii. any donee of a Lasting Power Of Attorney granted by the person
 - iv. any deputy appointed for the person by the court.

The Court of Protection can make an order under Section 16(2) of the MCA relating to a person who lacks capacity's welfare, which makes the decision on that person's behalf to allow a third

party (including local authority practitioners) access to that person. Failure to comply with an order of the Court of Protection could be a contempt of Court. The Court can attach a penal notice to the order, warning that failure to comply could result in imprisonment or a fine.

Mental Capacity Act Code of Practice

The Mental capacity act codes of practice guidance notes cover:

- Who should assess capacity?
- Whether the person has made an advance decision or given authority to someone else to make this decision.
- How to determine “Best Interest” and when to call a Best Interest meeting.
- The role and function of the Independent Mental Capacity Advocate.
- The role of the Court of Protection.
- The deprivation of Liberty Safeguards.

When assessing someone who self-neglects it is important to remember that when a person makes a decision which is unwise, inappropriate or places themselves at risk, this does not necessarily mean that they lack capacity to make that decision. Poor decision making alone does not constitute lack of capacity. The assessment of capacity must be based on the person’s ability to make a decision in relation to the relevant matter. In case of self-neglect where a person is repeatedly making decisions that place him/herself at risk and could result in preventable suffering or damage, an assessment of capacity should be undertaken.

When a vulnerable adult has been assessed under the Mental Capacity Act as lacking capacity, a referral to an Independent Mental Capacity Advocate will assist to ensure that any action taken is on the basis of the person’s best interest. The action taken should consider:

- The wishes, feelings, values and benefits of the person who has been assessed as lacking mental capacity.
- The views of family members, parents, carers and other people interested in the welfare of the person lacking capacity, if it is practical and appropriate.
- The views of any person who holds an Enduring Power of Attorney or a Lasting Power of Attorney.
- The views of any Deputy appointed by the Court of Protection to make decisions on the persons behalf.

Office of the Public Guardian

The OPG functions under the Mental Capacity Act to protect people lacking capacity and specifically to:

- set up and manage registers of lasting powers of attorney, of enduring powers of attorney and of court order appointed deputies
- supervise deputies
- send Court of Protection visitors to people who may lack capacity and to those acting formally on their behalf
- receive reports from attorneys and deputies
- provide reports to the Court of Protection
- deal with complaints about attorneys and deputies.

Clearly, these functions are directly relevant to safeguarding. The OPG has published a document outlining procedures and timescales to be followed in response to allegations, suspicions or reports of abuse of a vulnerable adult. It envisages that such concerns may be raised from a variety of sources (OPG, 2008).

Inherent jurisdiction of the High Court

'Inherent jurisdiction' is a term used to describe the power of the High Court to hear any case which comes before it unless legislation or a rule has limited that power or granted jurisdiction to some other court or tribunal to hear the case. This means that the High Court has the power to hear a broad range of cases including those in relation to the welfare of adults, so long as the case is not already governed by procedures set out in rules or legislation. It is 'common law' developed by the High Court to control the procedures before it and to stop any injustices arising from it being prevented from hearing any case.

It is not normally used in relation to people who lack capacity, because such cases are dealt with by the Court of Protection under the procedures established by the MCA. However, inherent jurisdiction may still be relevant to an adult lacking capacity if the matter and intervention required are not covered by the MCA; for example, when making a declaration of non-recognition of a marriage or depriving a person of their liberty for the purpose of enforcing physical treatment. It will also sometimes be necessary for a local authority to make an application to the High Court to ask the Court to exercise its inherent jurisdiction to protect an adult with mental capacity.

The order could in principle be directed against a third party and so relevant to a situation on which this guide focuses: the denial of access by a third party to a person suspected of experiencing, or at risk of, abuse or neglect.

Mental Health Act 2007

Sections of the mental health act may be applicable in cases of self-harm or self-neglect where the person is also suffering from a mental disorder.

In 2007 the term personality disorder, which may be present in cases of self-harm now comes under the definition of "mental disorder".

Section 135 Mental Health Act

Provides the authority to seek a warrant authorising a Police Officer to enter premises if it is believed that someone is suffering from a mental disorder, is being ill-treated or neglected or kept otherwise than under proper control anywhere within the jurisdiction of the court, or being unable to care for himself and is living alone in any such place.

This allows the Police Officer with a Doctor and approved Mental Health professional to enter the premises and remove the person to a place of safety for a period of up to 72 hours with a view to an application being made under part II of the Act, or other arrangements for their treatment or care. A place of safety may include a suitable registered care home.

Section 7 of the 2007 Mental Health Act – Guardianship

Application for guardianship is made by an approved Mental Health Professional or the person's nearest relative (as defined under the Act). Two Doctors must confirm that:

- The patient is suffering from a mental disorder of a nature or degree that warrants reception into guardianship and;
- It is necessary in the interests of the patient's welfare or for the protection of others.

The guardian must be a local social services authority, or person approved by the social services authority, for the area in which the proposed guardian lives.

Guardianship requires the:

- Patient to live at a place specified by the guardian

- Patient to attend places specified by the guardian for occupation, training or medical treatment (although the guardian cannot force the patient to undergo treatment) that a doctor, social worker or other person specified by the guardian can see the patient at home.

Environmental health legislation

Local authorities with environmental health responsibilities have powers to deal with public health problems, including as a last resort powers of entry to a dwelling. These powers are sometime relevant to vulnerable adults who may be subject to extreme self-neglect or neglect from other people, and where the consequence is that a public health issue has been created.

Public Health Act 1936

Under the Public Health Act 1936, local authorities have a duty to give notice to the owner or occupier of a dwelling to take certain steps to clean and disinfect a dwelling, and destroy vermin. The duty is triggered if the local authority believes the filthy and unwholesome state of the premises is prejudicial to health, or if the premises are verminous.

Sections 31-32 Public Health Act (1984)

Section 31 indicates that the occupier of a premises can be required to “cleanse and disinfect” the premises and to disinfect or destroy any unsanitary articles. If the occupier fails to comply, the local authority can take the necessary action and charge the occupier for doing so.

Section 32. The local authority can “cause any person to be removed to any temporary shelter or house accommodation provided by the authority”, with or without their consent, using reasonable force if necessary. If the person does not do what the notice requires, the local authority has the power to carry out the work itself and make a reasonable charge. The person is also liable to a fine.

If a person, or their clothing, is verminous, the local authority can remove him or her – with their consent or with a court order – for cleansing (Public Health Act 1936, Sections 83–86).

As a last resort the council has a power of entry to premises, using force if necessary. An order can be obtained from a magistrates’ court (Public Health Act 1936, Section 287).

Environmental Health Protection Act 1990

The Local Authority has a duty to investigate statutory nuisances as set out in s79 of the Act. Where satisfied a statutory nuisance exists the Local Authority must serve a notice imposing requirements. The act contains various powers to take action once inside the premises.

Crime & Policing Act 2014 (section 76-93) Part 4, Chapter 3 of the ASB Premises Closures

A closure order can subsequently be issued if the court is satisfied:

- that a person has engaged, or (if the order is not made) is likely to engage, in disorderly, offensive or criminal behaviour on the premises; or
- that the use of the premises has resulted, or (if the order is not made) is likely to result, in serious nuisance to members of the public; or
- that there has been, or (if the order is not made) is likely to be, disorder near those premises associated with the use of those premises, and that the order is necessary to prevent the behaviour, nuisance or disorder from continuing, recurring or occurring.

Housing Act 1985, as amended. Clause 14: Access

This legislation covers the right to force entry for essential maintenance of gas/ electricity facilities or to cut off supplies. It provides a right:

- to enter the property at any reasonable time to inspect and carry out any repairs, improvements or other works to the property or any adjoining property, including inspecting for pests and to carry out any treatment works that may be necessary, and for any purpose that ensures the conditions of tenancy are being adhered to, provided we give you at least 24 hours' written notice.
- In the event of an emergency to enter the property without notice by any necessary means.

Human Rights Act 1998

Article 8- Right to respect for private and family life

This states that everyone has the right to respect for his private and family life, his home and correspondence and that there shall be no interference by a public authority with the exercise of this right except in certain circumstances. Any intervention must accord with the law and be for a range of reasons which include public safety and the protection of health or for the protection of the rights and freedoms of others. However, Article 8 is a qualified right and has to be balanced against other laws designed to protect the individual and/or those around them.

Article 2 – Right to life

Article 2 is one of the most fundamental provisions in the European Convention on Human Rights. The state must never arbitrarily take someone's life and must also safeguard the lives of those in its care. In addition, the state must carry out an effective investigation when an individual dies following the state's failure to protect the right to life, or the use of force by government officials.

Article 5 - Right to liberty and security

This states that no one should be deprived of his liberty other than in accordance with the procedure prescribed by law or in a number of specified circumstances. One of the provisions relates to 'lawful detention for the prevention of the spreading of infectious diseases, of service users of unsound mind, alcoholics, drug addicts or vagrants' (5) (l) (e)