

A REVIEW OF THE ADULT SAFEGUARDING FRAMEWORK IN NORTHERN IRELAND, THE UK, IRELAND AND INTERNATIONALLY

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Executive Summary

National and international trends indicate a need for specialist legislation for the protection of adults at risk of harm.

A dramatic increase in the number of reported cases of adult abuse, the current review of safeguarding policy and procedures and proposed creation of mental capacity legislation have created an expectation for legislative reform. Whilst the need for change is broadly supported, the excellent groundwork in developing the current policy and protocols and the quality of professional interventions is acknowledged.

The current definition of ‘vulnerable adults’ used in Northern Ireland does not reflect other national and international definitions and should be replaced with a definition that includes the concepts of ‘human rights’, ‘violation of trust’ and ‘risk of harm’.

A human rights approach to adult abuse involves the promotion of legal and civil rights, prevention of discrimination and abuse and the empowerment of people who are at risk of harm. Legislative reform offers an opportunity to reprioritise the provision of services across the prevention- protection spectrum, establish measurable outcome objectives and the allocation of funding and resources accordingly.

A complex range of criminal, civil and other powers and duties to support the practice of adult safeguarding exist in Northern Ireland; however, many of these measures are underused by practitioners in Northern Ireland and across other jurisdictions reviewed. This mismatch between the existence of and the actual use of legislative powers, may be attributed to a lack of awareness, to barriers to exercising existing laws, or to result from ageist attitudes towards the need for prosecution.

It could be the case that an interventionist response to incidents low level of abuse may result in further trauma and abuse to the adult concerned and the inappropriate use of social care and policing services and personnel resources. Specialist adult legislation must strike a balance between safeguarding against harm and respecting the wishes of people with the capacity to decide whether they want to go through a safeguarding process. Legislative reform could articulate the principles and scope of safeguarding, together with direction on appropriate response pathways.

Abuse of vulnerable adults occurs across the community, within health and social care services and institutional contexts and response pathways will vary according to context. For example, instances of low level institutional abuse may be appropriately addressed through the systematic assessment and monitoring of care standards and culture, and concerted efforts to provide service users and residents of institutions with avenues to raise grievances/concerns and protect their rights.

Health and social care professionals require clear criteria for intervention, well defined response pathways together with guidance on the use of complex legal powers such as home access and

the removal of adults at risk of serious harm. Assessment of the potential of adult abuse must be a routine element of the adult single assessment tool and process.

Financial abuse (NIASP 2012) is the second most prevalent form of abuse in Northern Ireland and as such, requires specific legislative attention, with particular attention to the use of Enduring Powers of Attorney and changes likely to be introduced through the Mental Capacity Bill.

The establishment of a centralised adult safeguarding authority similar to the Safeguarding Board for Northern Ireland (Child Protection) model requires consideration for the delineation of roles and responsibilities, involvement and collaboration of key partners and the standardisation of procedures across Trusts.

A systematic approach to the collection of data and statistics on the prevalence and nature of reported cases of adult protection would inform policy, services and future research.

Given the complexity of adult abuse, the general public and professionals require clear direction, support and advice to increase awareness of the different forms of abuse together with knowledge on how to stop and prevent abuse. The provision of adult mediation, advocacy and information services and a central referral hotline and process should be reflected in future in any policy, outcome measures and legislative reform.

In conclusion it is the review teams view that legislative reform alone/on its own wouldn't be appropriate to address all issues raised by health professionals, services and older people, carers and families. Non legal solutions to the gaps and issues identified require a further review. The provision of a comprehensive guide to the law in relation to the protection of older people should also be considered. The adoption of a human rights approach promotes greater service user involvement and recognition of the diverse cultural, social and political needs of older people in relation to informed policy and legislative reform.

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Table of legislation

Australia

Guardianship and Administration Act 1990 (Western Australia)

Aged Care Act 1997 (Commonwealth)

Family Violence Protection Act 2008 (Victoria)

England

National Assistance Act 1948

Mental Health Act 1983

Mental Capacity Act 2005

Protection of Freedoms Act 2012

Care Bill 2013

Ireland

Protection of Persons Reporting Child Abuse Act 1998

Northern Ireland

Criminal Law Act (Northern Ireland) 1967

Mental Health (Northern Ireland) Order 1986

Police and Criminal Evidence (Northern Ireland) Order 1989

Public Interest Disclosure (Northern Ireland) Order 1998

Family Homes and Domestic Violence (Northern Ireland) Order 1998

Criminal Evidence (Northern Ireland) Order 1999

Health and Personal Social Services Act (Northern Ireland) 2001

Health and Personal Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003

Safeguarding Vulnerable Groups (Northern Ireland) Order 2007

Sexual Offences (Northern Ireland) Order 2008

Health and Social Care (Reform) Act (Northern Ireland) 2009

Commissioner for Older People Act (Northern Ireland) 2011

Protection of Freedoms Act 2012 (in part)

Scotland

Adult Support and Protection (Scotland) Act 2007

Adults with Incapacity (Scotland) Act 2000

Wales

Mental Health Act 1983

Mental Capacity Act 2005

Social Services and Well-being (Wales) Bill 2012

1. Introduction

Recent developments in adult protection in Scotland and England and Wales have raised questions as to the need for legislative reform in Northern Ireland. Although the Northern Ireland framework for adult protection has combined a regional policy and protocol with existing legislation, the Scottish Adult Support and Protection (Scotland) Act 2007 offers a new direction. In order to inform wider public debate, the Commissioner for Older People in Northern Ireland has commissioned the following review of adult safeguarding in Northern Ireland and adult protection legislation across the UK, Ireland and selected states of the USA and Australia. This review considers gaps and issues in current legislation and concludes with a series of key messages specifically on adult protection legislation, together with an overview of factors potentially facilitating or acting as a bar to legislative change. The authors of this report envisage that the material presented will be used for broader consultation on adult protection legislation in Northern Ireland.

1.2. Methodology of the Review

A team of academics from the Queen's University Belfast, the University of Ulster and an employed research assistant were commissioned to undertake this review. Over a six week period between October and November 2013 the team completed the following tasks, including:

A desk top review of the current position of adult protection in Northern Ireland, summarising existing policies, protocols and reports.

Consultation with stakeholders (i.e. police, social workers, organisational leads, non-government bodies representing the interests of older people, lawyers, older people, carers (see Acknowledgements)) second bracket required or square brackets as to the key issues and gaps in adult protection legislation from their professional perspectives.

A national and international comparison of adult protection policy and legislative strategies relating to the key issues identified. The jurisdictions of Scotland, Wales and England were selected given current trends and developments in adult protection across the UK, whilst selected states of the USA and Australia were included to highlight different approaches to adult protection.

An international literature review was undertaken to identify published research on the effect and operation of legislation in relation to elder abuse. As well as the joint British and Irish adult safeguarding web resource (SAaRiH), the following bibliographic databases were searched: Medline, PsycInfo, SCOPUS and Social Care Online. The following search terms were used, adapted to the particular indexing system on each database: (adult protection OR elder abuse OR elder mistreatment OR elder neglect OR vulnerable adult*) AND (law OR legislate* OR statute*).

The development of key messages for adult protection legislative reform in Northern Ireland

Contact with stakeholders for feedback on the identified key issues and gaps and messages proposed was undertaken (See Acknowledgments).

A general leaflet on adult abuse and protection for the public, including older people was developed (See Appendix 1).

The review was informed by ethical and governance principles. The research team wish to acknowledge the contribution of [the] COPNI and key stakeholders listed in the Acknowledgements. It is envisaged that the evidence summarised and the key principles outlined in this report will facilitate wider public consultation, beyond the limited brief and timeframe of this review.

2. Northern Ireland

2.1 Context of adult protection in Northern Ireland

The introduction of a framework for safeguarding vulnerable adults in 2006, an ageing demographic profile and a significant increase in the number of reported cases of adult abuse have contributed to public debate on adopting a single unifying bill for adult protection in Northern Ireland. From the outset it should be clarified that legislation is only one option in a range of policy, community, education and resource strategies which would help to address the oppression, exploitation and discrimination of vulnerable adults. Legislation by itself is not a panacea to guaranteeing safeguarding in each and every situation.

Nor should the responsibility of adult protection be confined to social care and the criminal justice services alone. In order to achieve respect for basic human rights for those most vulnerable in society, the emphasis on safeguarding and protection must be balanced with a commitment to the prevention of abuse and the building of capacity and resilience within individuals and communities. The following section summarises the framework of adult protection in Northern Ireland and the key issues pertaining to the debate for unifying legislation.

2.1.1 Framework of adult protection in Northern Ireland

The current Northern Ireland framework for the protection of older people from abuse consists of a range of statutes, policies, and guidance. In addition, there are bodies and organisations with particular and general responsibilities for safeguarding. Northern Ireland, as a country and distinct legal jurisdiction of the United Kingdom (UK) has been influenced by a national policy initiative and community care structure. Unlike the Republic of Ireland (ROI) and other international jurisdictions, the adult protection focus has been much wider than older people and encompasses vulnerable adults regardless of age. Northern Ireland does not use the term 'elder abuse'. The Northern Ireland model of service provision is generalist in scope (not specifically

age-related) with an emphasis on risk and protection¹ and a reliance on reporting and investigation protocol and the monitoring of professional practice².

Since elder abuse policies were first introduced in the Health and Social Care (HSC) sector in NI in the early 1990s there has been a growing awareness that a wide range of adults are at risk of harm from abuse, exploitation or neglect. An increasingly sophisticated understanding of the nature and extent of this abuse has developed with consequent improvements in the ways in which individuals and organisations respond to abusive situations. This is reflected in the continuing evolution of policy in relation to adult safeguarding.³

A series of documents have been published since 2003 outlining a range of policies and procedures which determine the scope and nature of adult safeguarding practice in NI:

- *The Protocol for the Joint Investigation of Alleged and Suspected Cases of Abuse of Vulnerable Adults* (2003, revised 2009), which provides procedural guidance for health and social care and criminal justice professionals, and stipulates that they should work together to support adult victims of neglect, abuse or exploitation;
- *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, the use of Special Measures, and the Provision of Pre-Trial Therapy (Northern Ireland)* (2003, revised 2010 and 2012) Guidance on interviewing victims and witnesses of crime, including those who fit the definition of vulnerable adult;
- *Safeguarding Vulnerable Adults: Regional Adult Protection Policy and Procedural Guidance* (2006) which provides procedural guidelines and sets minimum requirements for statutory sector organisations;
- *Safeguarding Vulnerable Adults: A Shared Responsibility* (2010, revised 2012), which provides detailed advice and procedural guidance for voluntary and community sector organisations on how to recognise and respond to situations of alleged or suspected abuse.

There are a range of policies in place to shape the strategic direction of safeguarding practice in line with the current procedural guidance. In March 2010 the Department of Health Social Services and Public Safety and the Department of Justice/Northern Ireland Office (NIO) jointly published 'Adult Safeguarding in Northern Ireland: Regional and Local Partnership Arrangements' (2010), from which the NI Adult Safeguarding Partnership (NIASP) was established. The primary function of the NIASP is to develop the strategic direction of safeguarding practice in NI. The NIASP is comprised of representatives from the statutory, voluntary, independent, and community sectors. The NIASP recently issued a Strategic Plan for 2013-2018 (2013) which sets out a vision of the shape and scope of adult safeguarding services in Northern Ireland over the next 5 years. The underpinning principle of this strategy is to promote a rights-based, empowering and person-centred approach which encourages consent

¹ Taylor, B. J. & Donnelly, M, 'Professional perspectives on decision making about the long-term care of older people', *British Journal of Social Work* 35/5 (July, 2006), pp. 807-26.

² Killick, Campbell and Taylor, Brian J, Professional decision making on elder abuse: Systematic narrative review. *Journal of Elder Abuse and Neglect*, 21 (2009), pp. 211-238.

³ See the Northern Ireland Adult Safeguarding Partnership Strategic Plan 2013-2018. http://www.hscbusiness.hscni.net/pdf/N_I_A_S_P_Strat_2013-18.pdf

driven practice and promotes partnership with the wider public. The introduction and implementation of this strategy demonstrates both the commitment to safeguarding vulnerable adults and the growing maturity and sophistication evident in safeguarding practices.

Five Local Adult Safeguarding Partnerships (LASP's) with diverse membership seek to implement the NIASP guidance at a local level. These forums facilitate local working arrangements, promoting a community based response to safeguarding and motivating a range of organisations to contribute to the safeguarding agenda.

The HSC Trusts have in place Safeguarding Vulnerable Adults Forums that comprise senior managers from appropriate directorates and programmes of care. These monitor the implementation of the Vulnerable Adult procedures and policies within each Trust.

The Programme for Government 2011-15 of the Northern Ireland Executive contains a 'Key commitment' to introduce 'a package of measures aimed at improving Safeguarding Outcomes for Children and Vulnerable Adults'. In addition, one of the foci of Priority 3 of the Programme is on 'reducing the incidences, and impacts, of domestic and sexual violence and abuse, elder abuse and harm directed to other vulnerable groups, wherever it occurs and whoever is responsible'.

2.1.2 Definition of 'vulnerable adult' in Northern Ireland

There is not currently a single definition of 'vulnerable adult' in the Northern Ireland policy framework. The definition below is from the leaflet entitled 'Adult Abuse: Recognising adult abuse and what to do about it – Guidance for Staff', published by the Northern Ireland Office and the Department of Health, Social Services and Public Safety in 2009:

'A vulnerable adult is any person aged 18 years or over who is, or may be, unable to take care of him or herself or who is unable to protect him or herself against significant harm or exploitation. This may be because he or she has a mental health problem, a disability, a sensory impairment, is old and frail, or has some form of illness. Because of his or her vulnerability, the individual may be in receipt of a care service in his or her own home, in the community or be resident in a residential care home, nursing home or other institutional setting.'

Another definition is provided in the 'Safeguarding Vulnerable Adults: Regional Adult Protection & Policy Procedural Guidance' (2006):

'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.'⁴

⁴ 'Safeguarding Vulnerable Adults: Regional Adult Protection & Policy Procedural Guidance', (HSCB, 2006), p. 10.

However the definition of vulnerable adults has been amended by the Protection of Freedoms Act (2012) to identify the activities provided to any adult which, if any adult requires them, will mean that the adult will be considered vulnerable at that particular time. Adults are no longer to be labelled as ‘vulnerable’ because of the setting in which the activity is received, nor because of the personal characteristics or circumstances of the adult receiving the activities. There is no longer a requirement for a person to carry out the activities a certain number of times before they are engaging in regulated activity. Any time a person engages in the activities set out by the Department of Health, they are engaging in regulated activity. This relates to the definition of vulnerable adult within the vetting and barring scheme

Section 3 (1) of the Safeguarding Vulnerable Groups (NI) Order 2007 also defines a ‘vulnerable adult’ for its purposes as:

A person is a vulnerable adult if they have attained the age of 18 and are:

- (a) in residential accommodation,
- (b) in sheltered housing,
- (c) receiving domiciliary care,
- (d) receiving any form of health care,
- (e) detained in lawful custody,
- (f) by virtue of an order of a court under supervision by a probation officer,
- (g) receiving a welfare service of a prescribed description,
- (h) receiving any service or participates in any activity provided specifically for persons who fall within paragraph (9),
- (i) having payments made to them (or to another on his behalf) in pursuance of arrangements under section 8 of the Carers and Direct Payments Act (Northern Ireland) 2002 (c. 6), or
- (j) requiring assistance in the conduct of his own affairs.

However, there are many potential problems with these definitions:

- Being in receipt of community services is incidental, it does not create risk in itself;
- Definitions are too broad and thus do not sustain as effective safeguarding practice as a more specific definition would;
- Definitions contradict one another;
- They do not necessarily reflect the growing emphasis at international level and in other jurisdictions on the protection of human rights of older people; and
- They do not reflect an emerging consensus on betrayal of trust as being an essential part of older people’s experience of abuse.

2.1.3 Key stakeholders

With the acceptance that safeguarding vulnerable adults is a shared responsibility, guidance for voluntary, community and independent sector organisations was issued by Volunteer Now in 2010. The ‘Safeguarding Vulnerable Adults- A Shared Responsibility’ defines standards for practice across a range of organisational activities. All community, independent and voluntary

organisations are encouraged to adhere to these minimum standards.

The range of stakeholders involved in protecting older people from abuse can be seen in the diverse membership of the Northern Ireland Adult Safeguarding Partnership, which includes:

- The Health and Social Care Board;
- The Health and Social Care Trusts;
- The Police Service of Northern Ireland;
- The Public Health Agency;
- The Northern Ireland Housing Executive;
- The Social Security Agency;
- The Red Cross;
- Women's Aid;
- Victim Support Northern Ireland; and
- a further 12 voluntary sector organisations, including care providers.

Unlike the Safeguarding Board for Northern Ireland for children the NIASP has no legislative framework.

In practice however, whilst there is much evidence for shared responses and cooperation across sectors and amongst all key stakeholders, issues around information sharing are felt to be, at times, problematic: this applies to both referrals to the statutory organisations and feedback from them to the other sectors. Furthermore, it is the view of the research team there is also an acknowledgement that service user engagement (including service users, carers and family members) is limited at both a policy formation level and in safeguarding work itself. A diverse range of professional groups (including, police, legal, nursing, medical, social work, social care and financial) have a key responsibility to ensure that specific codes of practice promote the protection of vulnerable adults.

2.1.4 Northern Ireland Legislation related to the protection of older people from abuse

Older people are protected by the criminal law in the same way as other people from theft, rape or assault. There are also many pieces of legislation beyond the criminal law which are also relevant to safeguarding older people from abuse. The current legal context in Northern Ireland is outlined in *Safeguarding Vulnerable Adults: Regional Adult Protection Policy and Procedural Guidance* (2006). Whilst it is not possible to provide an exhaustive list of potentially relevant legislation here, some of the most relevant legislation is as follows:

The Criminal Law Act (Northern Ireland) 1967

Section 5 of the Criminal Law Act (Northern Ireland) 1967 creates an obligation on citizens, if they suspect a serious offence has been committed, to provide the police with any information they may have which is likely to help to secure the arrest, prosecution or conviction of a suspect within a reasonable period. The section does provide for the possibility of a 'reasonable excuse' not to provide such information and this would be determined on a case by case basis, with a

clear possibility of defending conduct which is well-established good practice in health and social care.

The Mental Health (Northern Ireland) Order 1986

The Mental Health (NI) Order 1986 covers the assessment, treatment and rights of people with a 'mental disorder' which is defined as 'mental illness, mental handicap and any other disorder or disability of mind'. The Order sets out the criteria and process whereby a person may be compulsorily admitted to hospital and, subject to further criteria being met, treated without his or her consent. The Order contains provisions for compulsory powers of guardianship which enable the welfare of an individual to be provided for in the community. Article 121 of this Order provides for an offence of ill treatment or willful neglect of someone in hospital or a nursing home who is being treated for a mental disorder. Article 129 of this Order provides for the searching for and removal from premises of a person believed to be suffering from a mental disorder if they are or have been ill-treated or neglected or they are unable to care for themselves and they live alone. It is difficult to quantify the use of Article 129, It appears that in practice the sole use of this article, is utilised in order to gain access to an individual who is suffering from a mental disorder and requires assessment for hospital admission.

Article 107 (1) requires [of] a HSC Trust to notify the Office of Care and Protection, a Division of the High Court in Northern Ireland where the Trust is satisfied that any person within its area is incapable because of a mental disorder, of managing his or her financial affairs and no other arrangements have been made. The Office of Care and Protection, (Patients Section), commonly known as OCP, has the responsibility for the administrative work associated with Part VIII of the Mental Health Order. OCP performs a similar role to that of the Office of the Public Guardian in England and Wales and in Scotland. Responsibility for the management of the property and affairs of people in Northern Ireland who, through mental disorder, are incapable of managing their own financial affairs is vested in the High Court under the provisions of Part VIII of the Mental Health (Northern Ireland) Order 1986. The provisions of the current mental health order are subject to change with the forthcoming health welfare and finance bill.

The Police and Criminal Evidence (Northern Ireland) Order 1989

Codes of Practice issued to the PSNI under the Police and Criminal Evidence (Northern Ireland) Order 1989 state that a person of any age suspected of being mentally disordered or otherwise mentally vulnerable and detained by police must have the support of an 'appropriate adult'. The appropriate adult can be a parent, relative or guardian or someone experienced in dealing with mentally disordered or mentally vulnerable people. The Northern Ireland Appropriate Adult Scheme can provide a trained person to ensure that the individual is supported and that they fully understand the process during their period in police detention. Article 19 of the Order gives the police the power to enter premises to issue a warrant or to carry out an arrest for certain offences, including for the purpose of 'saving life or limb' (art. 19 (e)).

The Public Interest Disclosure (Northern Ireland) Order 1998

The Public Interest Disclosure (NI) Order 1998 protects most workers who ‘whistle blow’ about wrongdoing in their place of work, from suffering detriment from their employer for doing so. The Order sets out a list of situations, which would include an employee disclosing abusive behavior or practices, there should be no detriment to them. Such situations would include criminal behaviour or where there is a breach of the duty to protect the health and safety of individuals.

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 Family Homes and Domestic Violence (NI) Order consolidates the law on domestic violence and occupation of the family home. Under this legislation, a Non-Molestation Order can be issued to prevent the perpetrator from threatening or using violence against the victim. A perpetrator can also be forced to leave and stay away from a property by an Occupation Order so as to protect a victim.

The Human Rights Act 1998

The Human Rights Act 1998 incorporates most of the European Convention on Human Rights (ECHR) into the domestic law of the UK. It allows individuals to go to court to seek redress if they believe that their rights under the [European Convention on Human Rights] (ECHR) have been violated by a public authority. Section 145 of the Health and Social Care Act 2008 extended the coverage of the Human Rights Act to residents in residential care and nursing homes where their care has been contracted for by HSC Trusts. Some of the rights protected by the Human Rights Act are particularly relevant to safeguarding older people from abuse and include:

- Article 2 Right to Life;
- Article 3 Prohibition of Torture;
- Article 4 Prohibition of Slavery and Forced Labour;
- Article 5 Right to Liberty and Security;
- Article 6 Right to a Fair Trial;
- Article 8 Right to Respect for Private and Family Life;
- Article 14 Right not to be discriminated against with respect to ECHR rights; and
- First Protocol - Article 1 Protection of Property

Some of the rights, such as the article 8 [right to private and family life], are ‘qualified’ rights which means they are limited by public interest considerations such as prevention of crime, protection of health, and the protection of the rights and freedoms of others. Such a qualified right can legitimately be interfered with, if such a purpose is being served in a proportionate manner. Others can only be ‘limited’ in specific circumstances, such as Article 5 Right to liberty which can be limited on the basis of ‘unsound mind’.

The Criminal Evidence (Northern Ireland) Order 1999

The Criminal Evidence (NI) Order 1999 introduced a range of special measures to assist vulnerable and intimidated witnesses to give their best evidence in criminal proceedings. Examples of such special measures include: wigs and gowns might be removed, a victim of crime can apply to have their ‘evidence in chief’ in the form of a video recorded statement, or they can provide their evidence whilst screened from the accused.

The Health and Personal Social Services Act (Northern Ireland) 2001

The Health and Personal Social Services Act (Northern Ireland) 2001 (the 2001 Act) established the Northern Ireland Social Care Council (NISCC) to regulate the social work profession and other social care workers. All social care workers must be on the NISCC Register. NISCC must promote high standards of conduct and practice and can refuse entry to the Register or can remove a social worker/social care worker from the Register for misconduct.

The Health and Personal Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003

The Health and Personal Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003 (the 2003 Order) is part of a framework designed to raise the quality of services provided to the community and tackle issues of poor performance in health and social care provision. Among other matters, the 2003 Order has:

- Established the Regulation and Quality Improvement Authority (RQIA) as an independent body, with overall responsibility for monitoring, regulating and reporting on the quality of health and social care services delivered in Northern Ireland;
- Given RQIA responsibility for and powers to regulate a wide range of care services including many services (establishments and agencies) which had previously been unregulated and many services delivered by the Health and Social Care sector as well as services delivered by the voluntary, community and independent sectors; and
- Introduced a common system of regulation based on Minimum Standards set out by the Department of Health and Social Services and Public Security (DHSSPS), and supported by a programme of registration and inspection.

The Safeguarding Vulnerable Groups (Northern Ireland) Order 2007

The Safeguarding Vulnerable Groups (NI) Order 2007 established new safeguarding arrangements aimed at strengthening protection for children and vulnerable adults in workplace situations.

Key features of the new arrangements include:

- The establishment of the Independent Safeguarding Authority (ISA), which will maintain lists of individuals barred from working with children and vulnerable adults on the basis of harm or risk of harm;

- A requirement for organisations to make a check against the barred list(s) before offering a position of regulated activity to an employee/volunteer;
- A requirement for employers, professional registration bodies and inspection authorities to refer relevant information to the ISA; and
- Offences for not meeting the requirements created by the legislation.

The Forced Marriage (Civil Protection) Act 2007

A forced marriage is a marriage where one or both people do not or cannot consent to the marriage, this includes where physical force or emotional pressure have been used. The Act seeks to assist victims of forced marriage, or those threatened with forced marriage. A person threatened with forced marriage can apply to court for a ‘Forced Marriage Protection Order’. The Order will contain provisions to prevent the forced marriage from taking place, or to protect a victim of forced marriage from its effects.

The Sexual Offences (Northern Ireland) Order 2008

The Sexual Offences (NI) Order 2008 provides a legislative framework for sexual offences, including offences against people with a mental disorder, as defined in the Mental Health (NI) Order 1986. Articles 43-46 relate to offences against people who are unable to legally consent to sexual activity because of a mental disorder. Articles 47 to 50 provide added protection for those who have capacity to consent but might be vulnerable to exploitation through inducement, threats or deception. The Order also sets out clear parameters for people working with vulnerable adults and sets strong penalties for offenders. Articles 51 – 57 contain new offences for people who are engaged in providing care, assistance or services to vulnerable adults. Under the Order, any sexual activity between a care worker (which includes doctors, nurses and social workers) and a person with a mental disorder is prohibited whilst that relationship of care continues, whether or not the victim appears to consent and whether or not they have the legal capacity to consent. Friends or family members who provide care, assistance or services to the vulnerable adult also fall within the scope of the Order.

The Health and Personal Social Services (Northern Ireland) Orders and the Health and Social Care (Reform) Act (Northern Ireland) 2009

The Health and Personal Social Services (NI) Order 1972 (the 1972 Order) as amended by the Health and Personal Social Services (NI) Order 1991, the Health and Personal Social Services (NI) Order 1994 and the Health and Social Care (Reform) Act (NI) 2009 (the Reform Act 2009) are key pieces of legislation governing the provision of health and social care in Northern Ireland. Article 37 (as specified in Schedule 6) of the 1972 Order permits the removal to suitable premises of persons in need of care and attention who are:

1. suffering from grave or chronic disease or, being aged, infirm or physically incapacitated, are living in insanitary conditions; and
2. are unable to devote to themselves, or to receive from persons with whom they reside, or from persons living nearby, proper care and attention.

Although relevant to safeguarding older people, no case where this power was actually used has been identified.

Commissioner for Older People Act (Northern Ireland) 2011

The Commissioner for Older People Act (Northern Ireland) 2011 legislates for the powers and duties of the Commissioner. The Act defines older people as aged 60 and over. The Commissioner may in exceptional circumstances intervene at her discretion in relation to people aged 50 or over and is also permitted to assist in respect of a person who has died or who for some reason is unable to act for him/herself. The Commissioner's legal powers include the power to conduct investigations for the purpose of any of her functions.

In summary, this framework lays out the rights of vulnerable adults to protection, health and care and to be free from exploitation, abuse, neglect and other forms of human rights violations envisaged in the diverse range of legislation.

2.1.5 Prevalence of abuse in Northern Ireland

The *UK Study of Abuse and Neglect of Older People Prevalence Survey Report* (June 2007) reported on the prevalence of abuse by each UK country. The one year prevalence estimate for Northern Ireland was 2.0%.⁵ Levels of abuse can be much higher in specific groups of older people; for instance, a study of elder abuse in people with dementia (older than 65 years & living at home) in Northern Ireland found abuse in 37% of cases.⁶

Information provided by HSCB on safeguarding referrals from the Programme of Elderly Care for the period April 2012 – March 2013 and consequent activities is provided in Table 1 below. The definition used is that contained in the regional guidance.⁷ The data is recorded by adult safeguarding teams with the Health and Social Care Trusts and is returned to the Health and Social Care Board on a monthly basis. In this period 2064 referrals were made on behalf of older people through the Elderly Care programme. Overall this was 36% of the total number of referrals. A small percentage (5.2%) of the referrals resulted in 'achieving best evidence cases'.⁸ A quarter (25%) of new referrals were 'screened out'. Just under half of the referrals involved 'single agency investigations'.

⁵ <http://www.nidirect.gov.uk/adultawstaff.pdf>, acc. 16/10/13.

⁶ Compton, SA, Flanagan P, Gregg W, 'Elder abuse in people with dementia in Northern Ireland: prevalence and predictors in cases referred to a psychiatry of old age service', *Int J Geriatr Psychiatry* 1997 Jun 12(6): 632-35.

⁷ 'Safeguarding Vulnerable Adults: Regional Adult Protection & Policy Procedural Guidance', (HSCB, 2006), p. 10.

⁸ For further information on the nature such cases, see "Achieving best evidence in criminal proceedings: Guidance on interviewing victims and witnesses, the use of special measures, and the provision of pre-trial therapy, (Department of Justice NI, January 2012).

Table 1: Northern Ireland: Referrals and Follow-up Activity between 1/04/2011 to 31/03/2012⁹

Source: NIASP

| Programme of Care 4 (Elderly care) | |
|---|------|
| Total No. of Referrals | 2064 |
| No. of new referrals screened out | 514 |
| No. of investigations commenced in period | 1507 |
| No. of initial Strategy discussions | 1437 |
| No. of case conferences | 423 |
| No. of Single Agency Investigations | 1093 |
| No. of Joint Protocol Investigations | 342 |
| No. of 'Achieving Best Evidence' Cases | 145 |
| No. of 'Achieving Best Evidence' Interviews | 108 |
| No. of Care & Protection Plans implemented ¹⁰ | 1309 |
| No. of Protection Plans reviewed within 10 working days ¹¹ | 711 |
| No. of Cases closed to Adult Safeguarding | 786 |

A wide range of categories of abuse were also reported by the Trusts to the Board through Elderly Care as presented in Table 2 below. However, the spread of categories is not the same as for under other programmes of care. For instance, for people with a learning disability physical abuse is much higher (1,517) and financial abuse much lower (73) than for older people.

⁹ The numbers in this table do not add up neatly for a number of possible reasons. There may already be an investigation underway or the adult may have chosen to withdraw their complaint. In addition, the figures relate to a period of time, rather than to a point in time—some related activities may fall outside the reporting period. For example, a referral may be made on 31 March (end of reporting period) but investigation start on 1 April (a new reporting period).

¹⁰ This is the number of care and protection plans in place on 31 March, not the total number put in place during the period covered by the report.

¹¹ The Board asks the Trusts to undertake an initial review of the Protection Plan within 10 days to ensure that any emergency plans are still required and are working/amended as necessary, and to ensure that the service user is fully informed as to progress, planning etc. There are further reviews as the case progresses.

Table 2: Northern Ireland: Categories of abuse identified between 1/04/2011 to 31/03/2012
Source: Northern Ireland Adult Safeguarding Partnership

| Category of abuse | Elderly Care |
|--------------------------|---------------------|
| Physical | 940 |
| Financial | 498 |
| Psychological/Emotional | 273 |
| Neglect | 141 |
| Sexual | 113 |
| Institutional | 53 |
| Total | 2018 |

There are increasing numbers of adult protection referrals. In 2011-12 the total number of referrals was 3586, an increase of 1650 or 85% on the previous year. Almost half of adult protection referrals relate to people over the age of 65 (48%).¹² In 2012-13 the total number of referrals received by adult safeguarding services was 5724, an increase of 59% on the year before, with 36% being made on behalf of older people.¹³ A significantly high (47%) percentage of referrals involved physical abuse making it the most frequently occurring type of abuse. Financial abuse is the second highest recorded form of abuse. The Southern Trust recently reported a 65% increase in number of reported cases of financial abuse over the same period.¹⁴ Correlation between different forms of abuse is not recorded.

The NIASP Report comments that: ‘prevalence research on the levels of abuse of older people suggests that the actual level of abuse is approximately 2% of the population or 5274 individuals.’ This large disparity in numbers between expected levels of abuse and cases actually dealt with suggests that there are many cases of abuse which go unreported by services. Additional instances of abuse of older people will have been reported through other programmes of care such as mental health, but these statistics are not disaggregated with respect to age.

¹² NIASP Annual Report 1 April 2011 to 31 March 2012, p. 52.
<http://www.hscboard.hscni.net/NIASP/Publications/Annual%20Report%202011-2012%20-%20PDF%20338KB.pdf>, accessed 18 Oct 13.

¹³ NIASP Annual Report 1 April 2011 to 31 March 2012, p. 24 & 26.
<http://www.hscboard.hscni.net/NIASP/Publications/Annual%20report%202012%20-%202013%20-%20PDF%20591KB.pdf>

¹⁴ Hegarty, D. and McKnight, Y. Financial Abuse Presentation at NIASP/NIASW Shared Learning Event.

Table 3: New Referrals involving Regulated Facilities/Services 2012-2013
Source NIASP

Table 3 below provides a comparison of new referrals for investigations received by statutory agencies. Elderly Care experienced the highest number of new referrals between 2012 and 2013. The majority of Elderly Care referrals (n= 238) came from nursing homes, 109 from domiciliary, and 92 from residential homes.

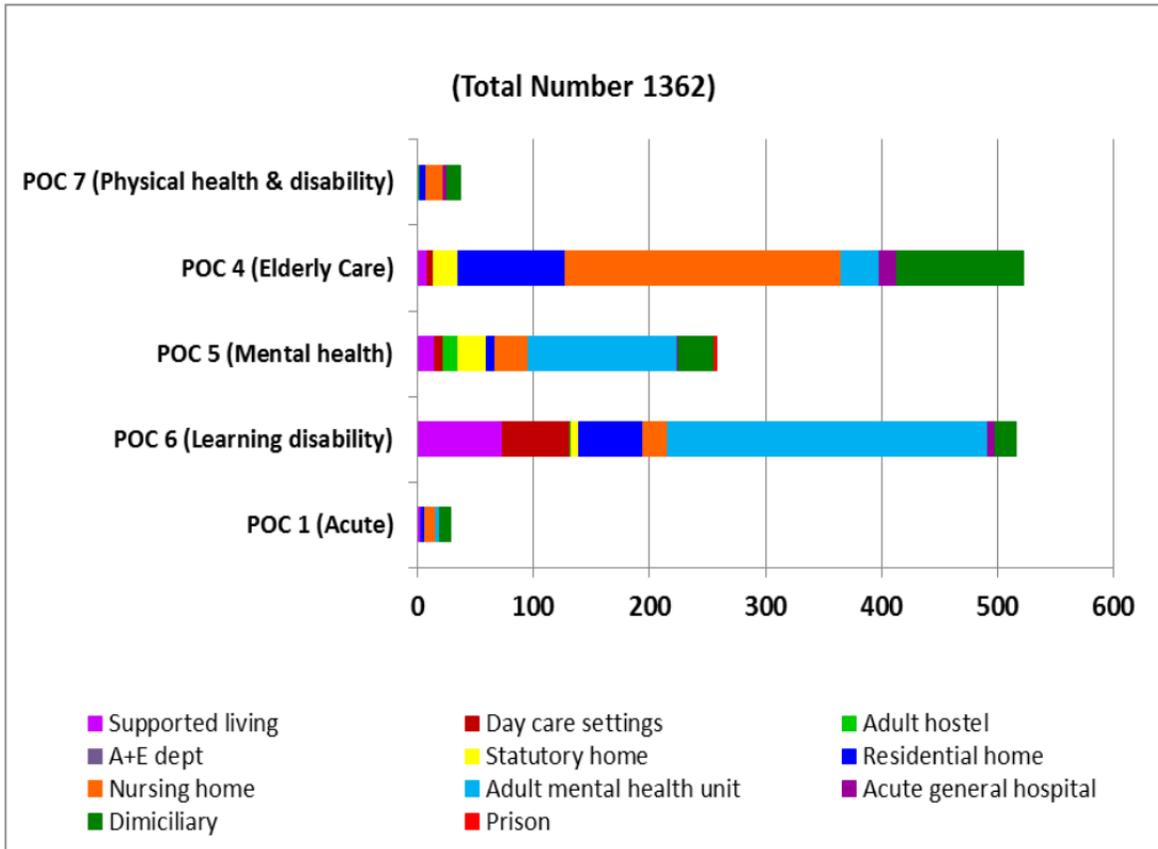


Table 4: Office of Care and Protection Patient Caseload 2008 – 2013
Source: Office of Care and Protection

| Caseload Categories | 2008 | 2009 | 2010 | 2011 | 2012 | 2013* | % Increase 2008 - 2013 |
|---|-------------|-------------|-------------|-------------|-------------|--------------|-----------------------------------|
| Total New Patient Referrals | 746 | 794 | 804 | 827 | 788 | 1000 | +34% |
| Enduring Power of Attorney applications received | 291 | 304 | 358 | 494 | 510 | 680 | +134% |
| Live Full Controller Orders at 31 December each year | 1359 | 1493 | 1583 | 1655 | 1702 | 1713 | +25% |

**2013 is the projected figure based on cases received to date.*

Table 4 provides information from the Office of Care and Protection, Northern Ireland which indicates a significant increase in referrals and applications for powers of attorney and appointment of full time controllers for adults.

2.1.6 Current Developments Northern Ireland

A new comprehensive and detailed cross-departmental Policy Statement on Adult Safeguarding is currently in preparation by DHSSPS and will be consulted on in the near future.

A Northern Ireland Mental Capacity Bill is at an advanced stage of drafting and is expected to enter the NI Assembly in January 2015 and to become law in spring 2016. The Bill will apply to those older people who lack the capacity to make a particular decision and it will provide safeguards for such a person, including a statutory duty to provide access to an advocate. The Bill will also define offences of ill treatment or neglect of a person lacking capacity and unlawful detention of a person lacking capacity.

The NIASP Strategic Plan (2013-2018) presents a range of proposals to improve adult safeguarding provision over the next five years. This includes the implementation of seven strategic priorities in the area of: leadership, public awareness and prevention, access to services, effective interventions, the service users' experience, and training and governance. Some of these proposals have already been initiated; for example the Northern Health and Social Care Trust has commenced a pilot scheme to consider the possibility of offering family group conferencing in response to safeguarding issues. Additionally, discussions around the possibility of specialist postgraduate training and targeted research have begun.

From a more general perspective, Northern Ireland has a unique and exemplary tool for the health and social care assessment of older people, the Northern Ireland Single Assessment Tool

(NISAT).¹⁵ This tool is designed to coordinate specialist assessments by the whole range of professionals in any setting to provide a holistic assessment that will facilitate coordinated care and good communication between professionals. Any development or utilisation of a tool to assess elder abuse or some aspect of it would fit readily within this framework.

2.2 Issues for consideration

The following section identifies key issues and gaps surrounding safeguarding vulnerable adults and legislation with a focus on older people.

2.2.1 Defining the term ‘Vulnerable Adult’ and Defining Abuse

The current framework does not operate under a single definition of vulnerable adult and different interpretations exist. Currently the term ‘vulnerable adult’ is defined as someone ‘in need of community care services’. However what is meant by community care services is open to interpretation. An example of this lack of clarity is whether someone in receipt of community occupational therapy or podiatry should be considered as receiving a community care service. The current definition does not adequately conceptualise the issue nor include any reference to individual human rights. It is not entirely clear whether self-harm, self-neglect and wilful neglect are covered.

2.2.2 Determining Thresholds

A discrepancy exists as to determining the threshold of abuse and ensuring consistency, within and across directorates and Trusts. This is perhaps more obvious in scenarios involving ‘low level abuse’. For example, should an issue relating to a vulnerable adult be dealt with as a safeguarding issue, a quality of care or governance issue, or be addressed under risk management procedures? The disparity of views is seen in the example of ‘acts of omission’ such as mismanagement of medication or where a home care worker fails to visit an older person to provide a meal. The question is should either of these be addressed under the safeguarding processes? The appropriate response pathway might vary depending on whether a prevention or protection safeguarding response is needed. There are reports from voluntary sector practitioners who work across Trusts that thresholds for reporting appear to vary considerably. Some social work teams appear to tolerate a considerable degree of risk while others appear to take a more proactive approach when working with safeguarding issues—sometimes it can depend on the team leader/ working culture within the team.

2.2.3 Financial Abuse

There is an acknowledgement that issues relating to financial abuse are potentially very complex and require a high level of expertise in determining thresholds of what is and isn’t abuse or a crime. The statistics provided by the Office of Care and Protection indicate a growing demand for financial administration services. It can also be difficult to determine the proportionality of a

¹⁵ B. Taylor, 2012. ‘Developing an integrated assessment tool for the health and social care of older people’, *British Journal of Social Work* 42 (7), pp. 1293-1314.

response. For example, misuse of a resident's mobility allowances to fund generic transport may or may not be understood by a resident as constituting financial abuse.

2.2.4 Prosecution

Only a very small percentage of vulnerable adult investigations which are managed under the Joint Protocol (i.e. where a crime is thought to have taken place) actually get to court (as demonstrated by the figures in Table 3). There is a concern that in the absence of a significant likelihood of prosecution, there are limited alternative measures which ensure the safety or well-being of the vulnerable adult. However, successful prosecution may result in punishment without effective protection.

2.2.5 Confusion as to Information and Rights

The current framework could be confusing for vulnerable adults, their carers and the public in general. Of paramount concern is that the relevant pieces of legislation covering the rights and protection of vulnerable adults are found in such a diffuse form that it could prevent vulnerable adults from effectively accessing information concerning their rights. This diffusion could also prevent practitioners and managers tasked with the care, support and protection of vulnerable adults from interpreting their duties, responsibilities and powers available to them in an effective manner. Also of concern is the lack of a single publically recognisable point of contact for information or advice, other than the police. This is also problematic in that Public Protection Units are relatively small with few Adult Protection Officers available within these units.

2.2.6 Powers and Duties

There are a range of powers and duties in other jurisdictions which either do not [all] exist in Northern Ireland, exist in a fragmented way across a range of statutes, or a combination of both of these situations. This makes it unclear to both older people and professionals which powers, duties and rights actually exist with respect to safeguarding older people from abuse.

2.3 Summary

The current model of adult protection in Northern Ireland involves a complex framework of policy, partnership, procedures, protocols and related legislation which is used by professionals across the jurisdictions of health, social care and criminal justice. The number of reported cases has significantly increased over recent years and this trend is expected to continue, placing increased demands on current resources.

Concerns raised in this brief consultation with key personal include:

- The limitations of the current data sources suggest the need for further study.
- Issues as to the definition of vulnerability, thresholds for intervention
- The proportionality of the response,
- Development or adoption of professional assessment tools,

- Limitations to investigating financial abuse,
- Limited use of prosecution,
- Lack of comprehensive statistics and
- Limited public awareness of rights and how the process works.

This list of concerns highlights challenges within the current framework, which could be addressed through policy or protocol, legislation, alternative strategies or resources or combinations of these options.

3. Other UK and International Jurisdictions Relevant to Northern Ireland

3.1 Introduction

The World Health Organisation definition of abuse of older people¹⁶ involves neglect (isolation, abandonment and social exclusion) violation (of human, legal and medical rights) and deprivation (of choices, decisions, status, finances and respect). A human rights approach to adult protection is not solely about safety and protective legislation but should involve prevention, empowerment and the social inclusion of older people. This section of the report summarises a rapid review of elder abuse legislative frameworks, policy and practice in England, Scotland, Wales, and Republic of Ireland, and selected states of the USA and Australia. The findings of this review are presented under the six key issues relating to legislative reform in Northern Ireland as identified in the previous section: definitions of ‘vulnerable adult’ and ‘abuse’; determining thresholds; financial abuse; prosecution; confusion as to information and rights; and statutory powers and duties. This comparative process demonstrates the different ideological approaches to adult protection, reflecting the cultural and political context of each jurisdiction, and provides new insights as to how an approach based on human rights could possibly be achieved in Northern Ireland.

3.2 Defining the Terms ‘Vulnerable Adult’, ‘Abuse’ and ‘Neglect’

3.2.1 England

The Department of Health ‘No secrets’ guidance¹⁷ followed the Law Commission¹⁸ in adopting the definition of a ‘vulnerable adult’ as someone:

‘who is or may be in need of community care services by reason of mental or other disability, age or illness; and 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.’

¹⁶ World Health Organisation, ‘Missing Voices: views of older persons on elder abuse’, (WHO, 2002).

¹⁷ ‘No secrets: Guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse’, pp. 8-9.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/194272/No_secrets__guidance_on_developing_and_implementing_multi-agency_policies_and_procedures_to_protect_vulnerable_adults_from_abuse.pdf

¹⁸ Law Commission, ‘Who decides?: making decisions on behalf of mentally incapacitated adults’, 1997.

More recently in England the term ‘adult at risk’ has come to replace ‘vulnerable adult’ to shift the emphasis (and by implication responsibility) away from the adult onto those who pose a risk to the adult.¹⁹ This trend is further reflected in Article 42 (1) of the English Draft Care Bill 2013 which reads:

This section applies where a local authority has reasonable cause to suspect that an adult in its area (whether or not ordinarily resident there):

- (a) has needs for care and support (whether or not the authority is meeting any of those needs);
- (b) is experiencing, or is at risk of, abuse or neglect; 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.

The policy definition of abuse with respect to safeguarding adults in England is:

‘a violation of an individual’s human and civil rights by any other person or persons which results in significant harm.’²⁰

Such abuse might consist of a single act or repeated acts. It could also be a failure to act (neglect). A single individual might be subject to multiple forms of abuse: for example, being neglected and financially abused. The definition of ‘abuse’ recognises that abuse ‘is about the misuse of power and control that one person has over another’ and thus is particularly possible where there are relationships of ‘dependency’.²¹

3.2.2 *Wales*

The Welsh Assembly Guidance ‘In Safe Hands’ (2000)²² specifies that:

‘A vulnerable adult is a person over 18 years of age who is or may be in need of community care services by reason of mental or other disability, age or illness and who is or may be unable to take care of himself or herself, or unable to protect himself or herself against significant harm or serious exploitation.’

This definition is the same as was adopted in England and was taken from the same Law Commission source²³, as was the definition of ‘abuse’ used in the Guidance:

‘Abuse is a violation of an individual’s human and civil rights by any other person or persons which results in significant harm.’

¹⁹ See ‘Protecting adults at risk: London multi-agency policy and procedures to safeguard adults from abuse’, Adult Services SCIE Report 39, 2011.

²⁰ DH, 2000

²¹ Protecting adults at risk, 2011: 7-8.

²² See also: ‘Wales Interim Policy & Procedures for the Protection of Vulnerable Adults from Abuse’, First Version: November 2010, Second Version – January 2013; commissioned by the four Adult Protection Fora.

²³ Law Commission, ‘Who decides?: making decisions on behalf of mentally incapacitated adults’, 1997.

There is no reference to human rights in the current definition of abuse in Northern Ireland. It is also noteworthy that the definition treats ‘abuse’ as being ‘significant harm’ resulting from ‘violations’ (which in the context of human rights could be acts or omissions) on the part of another person or persons. It thus does not include self-neglect or self-harm. A human rights based approach, with its strong focus on the balancing of competing rights, is also helpful where the perpetrator of the abuse or suspected abuse is also a vulnerable adult and/or the victim of further abuse.

The Welsh Assembly is currently considering the Social Services and Well-being (Wales) Bill 2012, clauses 104-18 of which deal with the provision of a statutory framework for safeguarding, which there has not previously been in Wales.²⁴ In Clause 104 (1), the Bill provides a definition of an ‘adult at risk’ as an adult who:

- (a) Is experiencing or is at risk of abuse or neglect;
- (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.

3.2.3 Scotland

Scotland is currently unique in Britain and Ireland in that the Adult Support and Protection (Scotland) Act 2007 is a statute making provision for the purposes of protecting adults.²⁵ Within the Scottish context the concept of ‘harm’ is preferred rather than ‘abuse’. The Act makes use of the general concept of ‘adult at risk of harm’ as the ‘gateway’ into the Act; ‘adult’ meaning ‘an individual aged 16 or over’²⁶. In many other jurisdictions, the adult is used to mean 18 years and over. The concept of ‘vulnerability’ does enter in the third criterion used to determine if someone is an ‘adult at risk’. The definition of an adult at risk of harm in the Act is quite broad, with three criteria which all have to be met.

- (1) “Adults at risk” are adults who:
 - (a) are unable to safeguard their own well-being, property, rights or other interests;
 - (b) are at risk of harm; and
 - (c) because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected.²⁷

²⁴ For the text of the Bill, see: <http://www.assemblywales.org/bus-home/bus-business-fourth-assembly-laid-docs/pri-ld9181-e.pdf>. See also the Explanatory Memorandum at: <http://www.assemblywales.org/bus-home/bus-business-fourth-assembly-laid-docs/pri-ld9181-em-e.pdf>.

²⁵ For the text of the Adult Support and Protection (Scotland) Act 2007 and its Explanatory Notes, see <http://www.legislation.gov.uk/asp/2007/10/contents>. The Code of Practice can be found at: <http://www.scotland.gov.uk/Resource/Doc/259161/0076850.pdf>

²⁶ Adult Support and Protection (Scotland) Act 2007, 53 (1).

²⁷ Adult Support and Protection (Scotland) Act 2007, 3 (1).

A person can be an ‘adult at risk of harm’ through the actions of others or if ‘the adult is engaging (or is likely to engage) in conduct which causes (or is likely to cause) self-harm’.²⁸ ‘Conduct’ includes neglect and other failures to act.²⁹ ‘Harm’ is also defined in the Act:

‘harm’ includes all harmful conduct and, in particular, includes:

- (a) conduct which causes physical harm;
- (b) conduct which causes psychological harm (for example: by causing fear, alarm or distress);
- (c) unlawful conduct which appropriates or adversely affects property, rights or interests (for example: theft, fraud, embezzlement or extortion);
- (d) conduct which causes self-harm.³⁰

3.2.4 Republic of Ireland

In the Republic of Ireland the definition of elder abuse outlined by the Working Group on Elder Abuse³¹ is based on that adopted by the WHO (2002), where elder abuse is described 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 or violates their human and civil rights.’³²

The specification of ‘where there is an expectation of trust’ accords with recent research on the central place of betrayal of relationship and the psychological dimensions of abuse from the perspective of older people themselves.³³ This also accords with the use of professional discretion about what constitutes abuse which requires investigative measures.³⁴ The definition excludes self-neglect and crimes or abuse committed by strangers, although this appears to be a

²⁸ Adult Support and Protection (Scotland) Act 2007, 3 (2) (b).

²⁹ Adult Support and Protection (Scotland) Act 2007, 53 (1).

³⁰ Adult Support and Protection (Scotland) Act 2007, 53 (1).

³¹ The role of the Working Group (2002) was to advise the Minister for Health on what is required to address effectively and sensitively the issue of elder abuse in general, as well as particular incidences of elder abuse. More specifically, it was to make recommendations in relation to each of the following matters: definitions and terminology; identification and screening procedures; assessment protocols and procedures; management of sensitive information; recording and reporting procedures; inter-agency communications and referral practices; intervention mechanisms and procedures to evaluate their impact; any necessary changes in legislation and legal procedures; training of relevant staff in statutory, voluntary and private sectors; and the need for appropriate structures to deal with elder abuse. Report of the Working Group on Elder Abuse, p. 14.

³² World Health Organisation, *Missing Voices: Views of Older Persons on Elder Abuse*, (Geneva, WHO, 2002).

³³ Begley E, O’Brien M, Carter-Anand J, Killick C and Taylor B (2012) Older people’s views of support services in response to elder abuse in communities across Ireland. *Quality in Ageing*, 13(1), 48-59; Carter-Anand J, Begley E, O’Brien M, Taylor BJ & Killick C (2013) Conceptualising elder abuse across local and global contexts: Implications for policy and professional practice on the island of Ireland. *The Journal of Adult Protection*, 15(6), 280-289 ; Taylor BJ and Killick CJ (2011) Factorial survey of professional judgements on identification and reporting of elder abuse (conference abstract). *Medical Decision Making*, 31(1) E11-E53, number 131 ; Taylor BJ, Killick C, O’Brien M, Begley E & Carter-Anand J (in press) Older people’s conceptualisation of elder abuse and neglect. *Journal of Elder Abuse and Neglect*, [doi:10.1080/08946566.2013.795881].

³⁴ Killick C and Taylor BJ (2012) Judgments of social care professionals on elder abuse referrals: A factorial survey. *British Journal of Social Work*, 42(5), 814-832.

consequence of the terms of reference of the Working Group on Elder Abuse, rather than a principled decision.³⁵ There is currently no definition of vulnerable adult/elder abuse in legislation in Ireland.

3.2.5 Australia

Australia has never had a ‘system’ of adult protection, rather a slowly evolving range of services provided within particular social policy arenas. Australian States and Territories have developed protocols and guidelines for best practice in responding to actual and suspected cases of elder abuse.

In the state of Victoria elder abuse prevention and response guidelines for action 2012-14’ were adopted from the Australian Network for the Prevention of Elder Abuse (ANPEA):

‘Any act occurring within a relationship where there is an implication of trust, which results in harm to an older person. Abuse may be physical, sexual, financial, psychological, and social and/or neglect.’³⁶

3.2.6 United States

The Older Americans Act 1965 (as amended in 2006) sets out Federal government objectives regarding older people, including ‘protection against abuse, neglect, and exploitation’. It provides a set of relevant definitions:

The term “abuse” means the wilful:

- (A) infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm, pain, or mental anguish; or
- (B) deprivation by a person, including a caregiver, of goods or services that are necessary to avoid physical harm, mental anguish, or mental illness.³⁷

The term “neglect” means—:

- (A) the failure of a caregiver ... or fiduciary to provide the goods or services that are necessary to maintain the health or safety of an older individual; or
- (B) self-neglect.³⁸

³⁵ ‘Protecting our Future: Report of the Working Group on Elder Abuse’, (HSE, 2002), p. 25. Accessed 30/10/13, available at: <http://www.dohc.ie/publications/pdf/pof.pdf?direct=1>

³⁶ ‘Elder abuse prevention and response guidelines for action 2012-14’, (State of Victoria Department of Health, 2012), p. 1.

³⁷ Older Americans Act 1965 (as amended in 2006), Section 102 (1). The Act is contained within Chapter 35 of Title 42 of the US Code and is available at: <http://www.law.cornell.edu/uscode/text/42/chapter-35>.

³⁸ Older Americans Act 1965 (as amended in 2006), Section 38.

3.3 Determining Thresholds and Appropriateness of Response

3.3.1 England

The ‘No secrets’ guidance from the Department of Health provides considerations in deciding on whether to intervene, with reference to:

- The vulnerability of the individual;
- The nature and extent of the abuse;
- The length of time it has been occurring;
- The impact on the individual; and
- The risk of repeated or increasingly serious acts involving this or other vulnerable adults.³⁹

There is not currently a statutory framework in England against which the appropriateness of a particular intervention can be assessed. However, at a local level detailed guidance has been developed.⁴⁰

3.3.2 Scotland

Scotland’s broad definition of an adult at risk of harm means that the onus is on professional judgement as opposed to publicly stated benchmarks. The Adult Support and Protection (Scotland) Act 2007 Code of Practice states: “The list in the definition is not exhaustive and no category of harm is excluded simply because it is not explicitly listed. In general terms, behaviours that constitute ‘harm’ to others can be physical (including neglect), emotional, financial, sexual or a combination of these. Also, what constitutes serious harm will be different for different persons.”⁴¹ The Scottish Government’s proposed amendments to the guidance, published for consultation in August 2013⁴², seek[s] to clarify a number of points but do[es] not provide prescriptive definitions and therefore continues to support the role of professional judgement and the view that personal circumstances combine in complex ways to create an ‘adult at risk of harm’. Clarification points include the difference between unable and unwilling to safeguard, fluctuations over time mean there is not a ‘once and for all ruling’ on who is or is not an adult at risk, substance misuse, young people leaving care and the settings in which harm can take place.

³⁹ ‘No secrets: Guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse’ (2002), pp. 12-13.
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/194272/No_secrets__guidance_on_developing_and_implementing_multi-agency_policies_and_procedures_to_protect_vulnerable_adults_from_abuse.pdf

⁴⁰ See for example the Nottingham Safeguarding Adults Board Thresholds and Guidance for referrers (2013). Available at:

<https://www.nottinghamshire.gov.uk/caring/adultsocialcare/backgroundsupport/safeguardingadults/procedure-and-guidance/>

⁴¹ The Adult Support and Protection (Scotland) Act 2007 Code of Practice (2009), p. 13.

<http://www.scotland.gov.uk/Publications/2009/01/30112831/0>

⁴² Scottish Government (2013) Consultation Proposed revisions to the Adult Support & Protection Code of Practice See pages 26-28 at <http://www.scotland.gov.uk/Publications/2013/08/6723/downloads#res430464>

In addition the principles stated in sections 1 and 2 [stated] of the Act are designed to inform [how] practitioners how to undertake their work, including the assessment of whether the person meets the criteria. The principles state that any intervention under the Act must benefit the person and be the least restrictive option; and practitioners must have regard to the wishes of the person and the views of others. The person should be supported to participate as fully as possible, [that] the adult [is] should not be treated less favourably than someone not so affected by disability, and the [adults] abilities, background and characteristics of the adult must be taken into account.

3.3.3 Wales

The Social Services and Wellbeing (Wales) Bill 2013 which is currently in the Welsh Assembly, does not in its current form provide any statutory clarification of thresholds for specific interventions or pathways of response.

Detailed guidance is provided by the Welsh Government in ‘In Safe Hands: Implementing Adult Protection Procedures in Wales’ (2002).⁴³ The considerations in this document relevant in assessing whether the threshold has been reached for a particular response with respect to a victim of abuse, are based on a concept of ‘significant harm’. They include:

- Is the person being ill-treated?
- Is there an impairment of or deterioration in physical or mental health?
- Is there an impairment of development?
- Is it a random act of violence or did it occur in an ongoing relationship?
- Is the perpetrator in a position of authority?⁴⁴

The Guidance also articulates considerations with respect to an alleged abuser:

The agency's role, powers and duties to the alleged abuser will vary and the action they will need to take will depend on whether the alleged abuser is:

- a member of staff, proprietor or service manager;
- a member of a recognised professional group, such as a doctor, accountant, clergy or counsellor;
- a volunteer or member of a community group such as a church or social club;
- another service user;
- a spouse, relative or member of the person's social network;
- someone who is also a carer in their own right;
- a neighbour, member of the public or stranger.⁴⁵

⁴³ ‘In Safe Hands: Implementing Adult Protection Procedures in Wales’ (2002).

⁴⁴ ‘In Safe Hands: Implementing Adult Protection Procedures in Wales’ (2002), p. 16.

⁴⁵ ‘In Safe Hands: Implementing Adult Protection Procedures in Wales’ (2002), p. 17.

The appropriateness of an intervention will also be determined by the setting in which the abuse has occurred. For instance, day centres, residential or nursing home, domiciliary settings, and/or family and home relationships.

3.3.4 Republic of Ireland

The World Health Organisation (2002) definition⁴⁶ is used in the Republic of Ireland and requires that there be ‘an abuse of trust’. This makes this model more focused, and arguably more meaningful and useful, than the UK definition which specifically allows for actions outside of trusting relationships to be included in vulnerable adult protection procedures. The definition may make it easier for people to identify the most appropriate response pathway. The key criterion for referral involves abuse of trust, and thus is perhaps clearer in scope.

The Report of the Working Group on Elder Abuse⁴⁷ recommended that legislation was needed to protect both members of the public and health and social care staff from negative consequences of reporting abuse or suspected abuse. It was suggested that this might take the form of provisions similar to those in the Protection of Persons Reporting Child Abuse Act 1998, which provides a general protection from civil liability in certain circumstances i.e.:

‘A person who, apart from this section, would be so liable shall not be liable in damages in respect of the communication, whether in writing or otherwise, by him or her to an appropriate person of his or her opinion that’:

- (a) a child has been or is being assaulted, ill-treated, neglected or sexually abused, or;
- (b) a child’s health, development or welfare has been or is being avoidably impaired or neglected, unless it is proved that he or she has not acted reasonably and in good faith in forming that opinion and communicating it to the appropriate person.⁴⁸

Providing this kind of statutory protection from civil liability for persons reporting suspected or actual abuse of adults would help to address issues of informal thresholds for reporting being too high as a result of anxiety about personal consequences of reporting on the part of both staff and members of the public.

3.3.5 Australia

The protection of adults at risk of harm is primarily a state police and emergency services responsibility. For example Victoria Police have responsibilities under Victoria’s family violence laws. The Victorian Family Violence Protection Act 2008 (section 8) defines ‘family member’ broadly to include people the person in question ‘regards ... as being like a family member’, which can include carers.

⁴⁶ World Health Organisation, Missing voices: views of older persons on elder abuse, (WHO, 2002).

⁴⁷ Protecting our future: Report of the Working Group on Elder Abuse, (Health & Safety Executive, Dublin, 2002).

⁴⁸ Protection of Persons Reporting Child Abuse Act 1998, Section 3 (1). Accessed 30/10/13, available at: <http://www.irishstatutebook.ie/1998/en/act/pub/0049/index.html>

The Act (section 5) includes as ‘family violence’:

- (a) behaviour by a person towards a family member of that person if that behaviour:
 - (i) is physically or sexually abusive; or
 - (ii) is emotionally or psychologically abusive; or
 - (iii) is economically abusive; or
 - (iv) is threatening; or
 - (v) is coercive; or
 - (vi) in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person’.⁴⁹

Commonwealth funded Age Care Assessment Teams (ACATs) operating across all states of Australia have a role in investigating cases of elder abuse in the community⁵⁰. ACATs provide comprehensive assessment of the restorative, physical, medical, psychological, cultural and social dimensions of care, and provide a choice of appropriate services to meet their needs; and provide information and refer clients to services that are appropriate and available (including facilitating access to broader community services, mental health or disability services) to meet their needs and preferences. ACATs have formal protocols to facilitate inter-agency referrals, the allocation of responsibility for case coordination and reporting cases of suspected or actual abuse.

Approved providers of health and care services are required under the Aged Care Act 1997 to report to the police and the Commonwealth Department of Health incidents involving alleged or suspected reportable assaults. Compulsory reporting and protection requirements are outlined under the Aged Care Act 1997. The report must be made within 24 hours of the allegation, or when the approved provider starts to suspect a reportable assault. The compulsory reporting requirements are one part of an approved provider's responsibilities under the Aged Care Act 1997⁵¹ to provide a safe and secure environment. A reportable assault as defined in the Act (section 63–1AA) means:

- unlawful sexual contact with a resident of an aged care home;
- or
- unreasonable use of force on a resident of an aged care home.

This definition captures assaults ranging from deliberate and violent physical attacks on residents to the use of physical force on a resident. The legislation allows limited circumstances where there is discretion not to report.

These relate to:

⁴⁹ Family Violence Protection Act 2008 (Victoria), available at: http://www.austlii.edu.au/au/legis/vic/consol_act/fvpa2008283/

⁵⁰ Australian Government Department of Health Aged, Care Assessment Program: Operational Guidelines 2002.

⁵¹ Aged Care Act (Australia) 1997.

- alleged assaults that are perpetrated by residents with an assessed cognitive or mental impairment; and
- subsequent reports of the same or similar incident.

Under the Aged Care Act 1997 (the Act) and User Rights Principles 1997 the Office of Aged Care Quality and Compliance (OACQC) is responsible for ensuring the quality and accountability of Australian Government subsidised aged care services. The Office manages national programmes that seek to:

- ensure the safety and security of people in aged care services;
- promote good practice in delivery of aged care;
- enhance the skills and availability of the aged care workforce; and
- ensure the financial security of aged care residents.

The fundamental principle underlying the Residential Aged Care Advocacy Services Program is that: "difficulty in personally exercising rights should not mean that those rights no longer apply.

Rather it means that some effective method of assisting the person to exercise their rights must be found, advocacy being one example.

Part 4.2 of the Aged Care Act 1997 and the User Rights Principles 1997 recognise that a person's rights are not diminished when they move into a residential aged care facility and set out a number of user rights and related provider responsibilities including a Charter of Residents' Rights and Responsibilities.

This Charter is a statement of the rights and responsibilities of older people in approved residential facilities and includes 'the right to have access to advocates and other avenues of redress.' The Charter also recognises that older people have the responsibility to respect the rights and needs of other people within the residential care service.

The User Rights Principle 1997, under the Aged Care Act 1997 also recognises that a person's rights are not diminished when they are receiving a Community Aged Care Package and sets out rights that older people have when receiving a package of care.

The OACQC is responsible for the Aged Care Complaints Scheme, the Community Visitors Scheme and the National Aged Care Advocacy Programme. The Aged Care Complaints Scheme provides a free service for anyone to raise their concerns about the quality of care or services being delivered to people receiving aged care services subsidised by the Australian Government.⁵²

⁵² Australian Government Department of Health, Compulsory Reporting Guidelines For Approved Providers of Residential Aged Care 2013

3.3.6 United States

As an example of United States (U.S.) practices to assist persons at risk of abuse, Pennsylvania's Older Adults Protective Service Act (OAPSA)⁵³ (first adopted in 1988) requires that agency investigations must be initiated within 72 hours of receipt of the report of suspected harm.⁵⁴ The type of investigation, including whether a face-to-face visit is required, depends on the level of suspected harm. For example, an emergency report must be investigated with a face-to-face visit within 24 hours. This is triggered by information showing a person is: "at imminent risk of death or serious physical harm."⁵⁵ Agencies have greater discretion on whether a face-to-face visit is necessary, based on classification of a report as "priority" or "non-priority." As a practical matter, research conducted in the United States has shown that careful training on classification and investigation of reports of suspected abuse is key to a reliable protective services system.⁵⁶

3.4 Financial Abuse

3.4.1 England

Clause 42 (3) of the English Care Bill 2013 underlines that 'abuse' includes financial abuse:

- (3) "Abuse" includes financial abuse; and for that purpose "financial abuse" includes:
- (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.

The government gives a reason for highlighting 'financial abuse' in this way as "the term 'abuse' in other legislation does not usually include financial abuse", although it is unclear to which legislation this refers.⁵⁷ Clarification in a statute of what constitutes financial abuse could be helpful. In particular, clarification that 'misuse' is a form of abuse and provision of examples in an associated code of practice would undoubtedly be helpful in identifying and dealing appropriately with this kind of abuse of older people. Having a legislative basis would also serve to prevent abuse through its utility in provision of clear and unambiguous information to older people, carers and professionals, including staff working in the financial sector.

⁵³ Pennsylvania Older Adult Protective Services Act, 35 P.S. §§ 10225.101 through 10225.5102, with regulations contained at Title 6, Pennsylvania Code §§ 15.1-to 15.161. (current as of 2013).

⁵⁴ 35 P.S. § 10225.303 (Investigations of report of need for protective services).

⁵⁵ 6 Pa. Code § 15.42 (administrative regulation on standards for initiating and conducting investigations).

⁵⁶ Elisia Gatemen Kupris, "Protection of our Elderly: A Multidisciplinary Collaborative Solution for Alaska," 30 Alaska Law Rev. 47, 53 (June 2013) (describing geographical problems, as well as need for enhanced training for investigators due to rise of reports of abuse).

⁵⁷ 'The Care Bill explained: Including a response to consultation and pre-legislative scrutiny on the Draft Care and Support Bill', (May 2013), para. 105.

3.4.2 Scotland

Financial abuse is not explicitly defined in the Adult Support and Protection (Scotland) Act 2007 or the Act's Code of Practice (Scottish Government 2009)⁵⁸. In addition the Scottish Government's (2013) proposed revised draft guidance⁵⁵ for this statute does not seek to further define this. Investigating harm may vary from the site in which it is taking place: institutional care and in the community. The power to access records, including financial records, under section 10 of the Adult Support and Protection Act has helped council officers with the investigation of potential or actual financial abuse through staff being able to access bank transaction records.⁵⁶ However whilst there has been no formal research undertaken in this area, there is a general view arising from practitioners and managers that they need more support to address this and for the wider community to be more aware. To this end, the Scottish Government have made financial abuse one of its adult support and protection priorities for this year and a multi- agency working group is currently exploring detection and responses.⁵⁹ They will report their findings in 2014.

3.4.3 Wales

The Welsh Government has issued guidance which clarifies that 'financial or material abuse' includes 'theft, fraud, pressure around wills, property or inheritance, misuse or misappropriation of benefits'.⁶⁰ It also proposes a 'working definition' as: 'Any theft or misuse of a person's money, property or resources, by a person in a position of, or expectation of trust to a vulnerable person, constitutes financial abuse.' It is a wider-ranging policy definition which includes 'theft or misuse of money, property, possessions and insurance, gaining money or possessions by threat, persuasion or exploitation and blocking access to assets and extortion.' The Guidance also provides a set of possible indicators of financial abuse such as:

- sudden, unexplained or inappropriate withdrawals from bank and savings accounts;
- signatures on cheques, etc., that do not resemble the person's signature, or signed when a person cannot write;
- power of attorney given, or recent changes or creation of a will, when the person is incapable of making such decisions;
- unusual concern by a caregiver that an excessive amount of money is being expended on the care of the person;
- inadequate money to pay bills, overdue rent, disappearing pension;
- lack of amenities, such as TV, appropriate clothing, personal grooming items that the person can well afford;
- missing personal belongings such as art, silverware or jewelry;
- deliberate isolation, by a caregiver (formal or informal) in person's finances; or
- deterioration in health/hygiene through not able to access own money.

⁵⁸ Adult Support and Protection Act (Scotland) 2007, section 10.

⁵⁹ For more detail on this and the other four priority work streams see

<http://www.scotland.gov.uk/Topics/Health/Support-Social-Care/Adult-Support-Protection/National-Priorities>

⁶⁰ 'In Safe Hands: Implementing Adult Protection Procedures in Wales' (2002), p. 15 & 41-42.

Further detailed guidance on financial abuse is provided in the 2003 Update to 'In Safe Hands'.⁶¹

There is not currently specific statutory provision in Wales relating to financial abuse. However, the policy approach outlined above is reflected in the Social Services and Wellbeing (Wales) Bill 2013 which states that 'financial abuse' includes:

- (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;⁶²

3.4.4 Australia

Section 6 of The Family Violence Protection Act 2005 in the state of Victoria provides a statutory definition of 'economic abuse' and provides illustrative examples within the statute:

6. Meaning of economic abuse

For the purposes of this Act, economic abuse is behaviour by a person (the first person) that is coercive, deceptive or unreasonably controls another person (the second person), without the second person's consent i.e.:

- (a) in a way that denies the second person the economic or financial autonomy the second person would have had but for that behaviour; or
- (b) by withholding or threatening to withhold the financial support necessary for meeting the reasonable living expenses of the second person or the second person's child, if the second person is entirely or predominantly dependent on the first person for financial support to meet those living expenses.

Examples include:

- coercing a person to relinquish control over assets and income;
- removing or keeping a family member's property without permission, or threatening to do so;
- disposing of property owned by a person, or owned jointly with a person, against the person's wishes and without lawful excuse;
- without lawful excuse, preventing a person from having access to joint financial assets for the purposes of meeting normal household expenses;
- preventing a person from seeking or keeping employment;
- coercing a person to claim social security payments;
- coercing a person to sign a power of attorney that would enable the person's finances to be managed by another person;
- coercing a person to sign a contract for the purchase of goods or services;

⁶¹ 'In Safe Hands: Implementing Adult Protection Procedures in Wales' (2002), pp. 112-21. Examples of practice with respect to financial abuse are included in the Appendices, pp. 122-86.

⁶² Social Services and Wellbeing (Wales) Bill 2013, section 166 (1).

- coercing a person to sign a contract for the provision of finance, a loan or credit;
- coercing a person to sign a contract of guarantee;
- coercing a person to sign any legal document for the establishment or operation of a business.⁶³

It is clear that the emphasis in the Australian definition of ‘economic abuse’ is strongly on the presence of coercion.

Across Australia the cornerstone of adult protection is the use of guardianship and administration measures. Guardianship is the appointment of a person (i.e. a ‘guardian’) to make decisions for an adult with a disability (i.e. the ‘represented person’) when they are unable to do so. All adults over the age of 18 years, regardless of disability, are entitled to make their own decisions. This is the case unless, when they were competent, they appointed a person to be their guardian under the enduring power of guardianship and have now lost capacity to make the types of decisions they appointed the enduring guardian to make for them. Alternatively, a guardianship order can be obtained by making an application [for guardianship] to the Guardianship List of the Victorian Civil and Administrative Tribunal (VCAT). VCAT then hears the matter and, if necessary, appoints a guardian to make specific types of decisions. The guardian makes decisions about the represented person’s lifestyle, such as where they live and who can have access to them, according to the terms of the order. The guardian’s decisions have the same legal force as if the person had made them themselves. Where there is no suitable family member or friend who can act as guardian, VCAT can appoint the Public Advocate as an independent statutory guardian.

Guardianship may be considered as an option when there is:

- a need for somebody with legal authority to make decisions in the best interests of a person with a decision-making disability;
- unresolved conflict between family members and/or primary care providers about the person's best interests; and
- concern that the person may be at risk of neglect, exploitation or abuse.

The appointment of a guardian is a measure of last resort and not necessary when informal arrangements can ensure the best interests of the person with a decision-making disability are being met. For example, appointment of a substitute decision-maker is not needed when:

- a person with a decision-making disability is able to manage and maintain a reasonable quality of life for themselves;
- an enduring guardian has been appointed, who is acting in the best interests of the person
- the person is being adequately supported and cared for by others;
- there are no personal or family conflicts about the person's care and support needs; and

⁶³ Family Violence Protection Act 2008. Accessed 30/10/13, available at: http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/vic/consol_act/fvpa2008283/s6.html?stem=0&synonyms=0&query=finance

- there are no major problems or issues that are posing an immediate or imminent threat to the person's quality of life.

Administration is the appointment of a person (i.e. an ‘administrator’) to make financial and legal decisions for an adult with a disability (i.e. the ‘represented person’) when they are unable to do so. An administrator can be someone appointed by the Victorian Civil and Administrative Tribunal (VCAT) to make financial and legal decisions for an adult who cannot make their own decisions. Administration is an important way to protect the finances and assets of people who cannot make reasonable decisions for themselves. In emergency situations, VCAT can make a temporary administration order at very short notice for up to 21 days.

3.4.5 United States

Regulations under Pennsylvania’s Older Adults Protective Service Act 1988 (OAPSA) provide that county agencies “shall” have access to any records relevant to the investigation or service plan for the older adult.⁶⁴ If the older adult cooperates with the investigation, the agency will typically obtain written permission of the individual to access records such as hospital records or financial records. If the individual does not provide written consent, the agency can petition a court for access if it appears denial was due to “incompetence, coercion, extortion or justifiable fear of future abuse, neglect, exploitation or abandonment.”⁶⁵ As a practical matter, access to banking records can be complicated if banks assert privacy rights of the individual, sometimes requiring analysis of state or federal banking laws, which may have exceptions to privacy “to the extent necessary to protect against or prevent actual or potential fraud, unauthorized transactions, claims, or other liability.”⁶⁶

Some other US states have also created specific measures to address financial abuse. Under California law, financial institutions are mandatory reporters of suspected financial abuse.⁶⁷ Florida law specifies that any “bank, savings and loan, or credit union officer, trustee or employee who knows, or has reasonable cause to suspect, that a vulnerable adult has been or is being . . . exploited shall immediately report such knowledge or suspicion to the central abuse hotline” and the law imposes potential criminal penalties on statutory reporters who fail to make required reports.⁶⁸ Florida courts have interpreted this law as not permitting a victim of abuse to sue a financial institution that failed to make a required report.⁶⁹ An open question in the US is whether state laws targeting abuse should require “vulnerability” as a factor; however, at least one review of state laws targeting elder abuse urges caution in drafting elder-victim sanctions for “financial abuse” of the elderly, warning that “the focus of legislation addressing financial abuse should be on the vulnerable, not the elderly.”⁷⁰

⁶⁴ 6 Pa. Code § 15.62 (Access to records).

⁶⁵ 6 Pa. Code § 15.62 (c) (When access to records is denied).

⁶⁶ See e.g., Federal Banking Regulation 12 C.F.R § 216.15, known as Regulation P.

⁶⁷ Cal. Welfare & Institutions. Code Ann. §15610.30.1 (effective January 2, 2012).

⁶⁸ Florida Statutes. §§ 415.111 and 415.1034 (effective as of July 1, 2002).

⁶⁹ *Mora v. South Broward Hospital District*, 710 Southern .2d 633, 634 (Florida District Court of Appeals 1998).

⁷⁰ Carolyn L. Dessin, “Financial Abuse of the Elderly: Is the Solution Part of the Problem,” 34 *McGeorge Law Review* 267, 321 (Winter 2003).

3.5 Prosecution

3.5.1 England

Section 44 of the Mental Capacity Act 2005 defines an offence of ill-treatment or willful neglect by those who have care of a person who lacks capacity or is reasonably believed to lack capacity.⁷¹ Section 127 of the Mental Health Act 1983 defines an offence of ill-treatment or neglect of in-patients or out-patients by staff, managers or someone who is acting as the patient's guardian.⁷²

In England a specialist NGO is calling for the creation of 'a criminal charge of elder/adult abuse'.

The extent of abuse and neglect uncovered in hospitals and care homes has caused anxiety and outrage throughout the UK. Current systems and law have been insufficient to deter abuse, and too often those few perpetrators who reach the courts have sentences that the public consider too lenient. We are therefore seeking a new criminal charge of elder/adult abuse to cover circumstances where an adult uses their relationship or position to cause or allow an older person or dependent adult to suffer unnecessary physical pain or mental suffering, or injures their health, or steals, defrauds or embezzles their money or property is sort.⁷³

3.5.2 Scotland

In Scotland, abuse or the harming of an adult is not currently a criminal offence. There are however offences of ill treatment and wilful neglect in both the mental health and capacity legislation.⁷⁴

3.5.3 Wales

In Wales Section 44 of the Mental Capacity Act 2005 defines an offence of ill-treatment or willful neglect by those who have care of a person who lacks capacity or is reasonably believed to lack capacity.⁷⁵ Section 127 of the Mental Health Act 1983 defines an offence of ill-treatment or neglect of in-patients or out-patients by staff, managers or someone who is acting as the patient's guardian.⁷⁶

⁷¹ <http://www.legislation.gov.uk/ukpga/2005/9/section/44>

⁷² <http://www.legislation.gov.uk/ukpga/1983/20/section/127>

⁷³ Action on Elder Abuse, 'Care Bill 2013: Briefing Paper'.

<http://www.elderabuse.org.uk/Documents/Legislation/AEA%202013%20Short%20Briefing%20Adult%20Safeguarding.pdf> Accessed 24/10/13.

⁷⁴ See section 315 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (available at <http://www.legislation.gov.uk/asp/2003/13/section/315>) and section 83 of the Adults with Incapacity (Scotland) Act 2000 (available at <http://www.legislation.gov.uk/asp/2000/4/section/83>).

⁷⁵ <http://www.legislation.gov.uk/ukpga/2005/9/section/44>

⁷⁶ <http://www.legislation.gov.uk/ukpga/1983/20/section/127>

3.5.4 Australia

There are no special statutes to cover the neglect, mistreatment, or abuse of older people in any State or Territory in Australia.

3.5.5 Republic of Ireland

An Assisted Decision-Making (Capacity) Bill 2013 has now been presented by the government in Ireland and it includes an offence of wilful neglect or ill treatment of a person who comes under the Bill by anyone who is playing a support role as defined by the Bill.⁷⁷ The Bill makes no explicit reference to ‘abuse’ as such.

3.5.6 United States

In most states within the U.S., there is no separate crime for “elder abuse,” including financial abuse or exploitation. Thus, while states have adopted protective service laws defining such wrongs for purposes of public intervention and offering of specific services to the victim, there may be no directly analogous crime to charge against a perpetrator.

In Pennsylvania, for example, where there is suspicion that a caretaker or other person has engaged in an act or course of conduct against an older adult or an older adult's resources, without the informed consent of the older adult (or with consent obtained through misrepresentation, coercion or threats of force), even though that conduct is defined as “exploitation” in the protective services law, a prosecutor would have to determine whether the conduct falls into one or more of the following general crimes:

- Theft by unlawful taking or disposition (18 Pa. C.S.A. § 3921)
- Theft by deception (18 Pa. C.S.A. § 3922)
- Receiving stolen property (18 Pa. C.S.A. § 3925)
- Theft by failure to make required disposition of funds received (18 Pa. C.S.A. § 3927)
- Access device fraud (18 Pa. C.S.A. § 4106)
- Misapplication of entrusted property and property of government or financial institutions (18 Pa. C.S.A. § 4113)
- Securing execution of documents by disposition (18 Pa. C.S.A. § 4114)
- Identify theft (18 Pa. C.S.A. § 4120)

Pennsylvania does, however, authorise enhanced sentencing for certain criminal convictions if the perpetrator is less than sixty and the victim is over sixty. For example, a crime of aggravated assault against an elderly person is subject in Pennsylvania to a mandatory minimum sentence of two years.⁷⁸ By comparison, some states have adopted “elder specific” crimes. California has

⁷⁷ The offence is defined in section 113. It is likely that other provisions of the Bill address some of the legislative reforms called for by the ‘Protecting our Future’ report. Accessed 30/10/13, the full text of the Bill is available at: <http://www.oireachtas.ie/documents/bills28/bills/2013/8313/b8313d.pdf>.

⁷⁸ 42 Pa.C.S.A. § 9717(a).

adopted special provisions for “crimes against elder or dependent adults.”⁷⁹ The state of Georgia has made “the abuse, neglect or exploitation of any disabled adult or elder person ... unlawful” and subject to criminal sanctions.⁸⁰

3.6 Information and Rights

Article 10 of the European Convention on Human Rights, which is directly applicable in the UK through the Human Rights Act, protects the right to freedom of expression which also includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or in print. The concept of freedom of expression, in this respect, is considered to be inseparably linked with the right to freedom of information which is not only indispensable for equipping older people with necessary tools to actively participate in public debates, but also imperative for the effective control of public bodies.⁸¹

Information and advocacy services to older people are provided by a diverse range of government and non-government organisations throughout the United Kingdom. The Scottish Independent Advocacy Alliance provides a free confidential helpline which provides information, advice and support to victims and others who are concerned about or have witnessed abuse. Action on Elder Abuse (AEA) work to protect, and prevent the abuse of, vulnerable older adults and provide a central help line. Having a specific statute on the protection of vulnerable adults or older people provides greater focus for information provision.

3.6.1 USA

In the U.S., the Elder Justice Act (EJA) was enacted in 2009/10 as part of the Affordable Care Act (also known as ‘Obamacare’) to promote national reporting and coordinated training and enforcement to address elder abuse, neglect and exploitation. As of 2013, however, the implementation of the EJA has not been funded. Failure to adopt a consistent and coordinated approach to elder abuse in the U.S. has been described as a ‘national disgrace’.⁸²

As further evidence of concern and confusion over rights and information, in the U.S. there has been an attempt to create uniform protections regarding the use of Powers of Attorney for agents who handle financial assets. As of 2013, 13 states have adopted some portion of the uniform laws, but in other states there often has been debate over whether tighter rules designed to reduce the likelihood of abuse make it unreasonably difficult for properly-behaving agents and fiduciaries to handle finances in timely and appropriate ways.

⁷⁹ Cal. Penal Code § 368(a).

⁸⁰ Ga. Code Ann. §§ 30-5-3 and 30-5-8.

⁸¹ Onder Bakircioglu, “Freedom of Expression and Hate Speech” 2008 (16) *Tulsa Journal of Comparative & International Law* 1-50.

⁸² B. Lindberg, C. Sabatino, R. Blancato, ‘Bringing National Action to a National Disgrace: the History of the Elder Justice Act’, *NAELA Journal* (Spring, 2011) vol. 7, pp. 105-19.

In the U.S., concern over the roles of fiduciaries (including agents under Powers of Attorney, court-appointed guardians, and authorized third-party representatives to receive federal benefits), has led to promotion of informal guidelines.⁸³

3.6.2 Australia

Current Australian interventions in response to elder abuse tend to follow an advocacy model with strong foundations in empowerment and human rights. Australia does have a ‘national disability abuse and neglect hotline’, and it functions as essentially a referral service to state and territory emergency services, government service providers and associated complaints bodies.⁸⁴

The Office of the Public Advocate (OPA) is an independent statutory body established by the Victorian State Government, works to protect and promote the interests, rights and dignity of people with a disability.⁸⁵ It has a similar but wider scope to that of the COPNI. The OPA provides a number of services to achieve this vision and to meet legislative requirements outlined in the Guardianship and Administration Act 1986.⁸⁶ These services include:

- Advice Service: an advice and information service for enquiries about matters including powers of attorney, guardianship, and consent to medical/dental treatment;
- Advocate/Guardian Program: statutory guardianship to Victorians who cannot make decisions for themselves, support to private guardians, and last resort advocacy for people with a disability; and
- Community Guardian Programme: a program for volunteers who are appointed by the Public Advocate to act as independent guardians for Victorians with a disability.
- Community Visitors Programme: a programme for volunteers who work with OPA to help protect and advocate for the rights of people with a disability, visiting Victorian accommodation facilities for people with a disability or mental illness;
- Independent Third Person Program: a programme for volunteers who assist people with a cognitive disability or mental illness during interviews or when making formal statements to Victoria Police;
- Research and Policy: a team of researchers that work to support OPA’s systemic advocacy activities, focusing on issues of concern relating to people with disabilities. It aims to generate research which can be used to improve the lives of people with disability;
- Education and Training: providing information sessions and training for professional groups, addressing issues such as powers of attorney and medical consent.
- Media and Communications: providing information and corporate messages that support OPA’s work. The unit manages the OPA website, OPA publications and other communication tools, media enquiries. The OPA provides last resort advocacy

⁸³ These are available to download from the Consumer Financial Protection Bureau at <http://www.consumerfinance.gov/blog/managing-someone-elses-money/>.

⁸⁴ National Disability Abuse and Neglect Hotline (Australia) at <http://www.disabilityhotline.net.au/about-the-hotline/>.

⁸⁵ Office of Public Advocate, Victoria at <http://www.publicadvocate.vic.gov.au/about-us/>.

⁸⁶ Guardianship and Administration Act (Victoria) 1987.

that focuses on the best interests of the person with a disability who is at risk of abuse, exploitation or neglect.

3.7 Powers and Duties

3.7.1 England

A similar range of legislation is relevant to safeguarding in England as in Northern Ireland.⁸⁷ There is not currently an English statute with the specific purpose of safeguarding adults. However, work is at an advanced stage on the Care Bill 2013, clauses 42-47 of which set out the first ever statutory framework for adult safeguarding in England.⁸⁸ These clauses require local authorities to ensure enquiries are made into allegations of abuse or neglect. Key stakeholders are calling for a range of changes to the Bill which they consider offers insufficient protection in its current form. These changes include:

- a statutory power to gain access to a potential victim in their home;
- a statutory duty on agencies to notify local authorities if they believe an adult may be at risk of abuse; and
- a criminal charge of elder/adult abuse.⁸⁹

Clause 46 of the Care Bill 2013 abolishes the power in England (which exists under section 47 of the National Assistance Act 1948) of local authorities to remove persons in need of care from their home.

Under the Access to Health Records Act 1990 an older patient or service must give consented for information on their Health and Social Care record to be disclosed to someone other than the clinical team, unless the other person has power of attorney or there is some other clear justification for disclosure.

Healthcare professionals can disclose information from the records of an incapacitated patient (following the Mental Capacity Act 2005), either when it is in the patient's best interests, or where there is some other lawful reason to do so.

3.7.2 Scotland

The Adult Support and Protection Act (Scotland) 2007 (ASPSA) contains a range of powers and duties, including:

⁸⁷ See 'Safeguarding Adults: A National Framework of Standards for good practice and outcomes in adult protection work', ADSS 2005: 52.

⁸⁸ For an overview of the key provisions, see M. Mandelstam (2013), *Safeguarding Adults and the Law*, London, Jessica Kingsley, pp. 49-56.

⁸⁹ Action on Elder Abuse, 'Care Bill 2013: Briefing Paper'.

<http://www.elderabuse.org.uk/Documents/Legislation/AEA%202013%20Short%20Briefing%20Adult%20Safeguarding.pdf> Accessed 24/10/13.

- Councils have a duty to make inquiries about an individual's well-being, property or financial affairs where the council knows or believes that the person is an adult at risk and that it may need to intervene to protect him or her from being harmed;
- Councils have a duty to consider providing appropriate services, including independent advocacy, to support adults where an intervention under the Act is considered to be necessary;
- Council officers are authorised to carry out visits, conduct interviews or require health, financial or other records to be produced in respect of an adult at risk;
- Public bodies are required to co-operate with local councils and with each other, where harm is known or suspected;⁹⁰
- Public bodies or officers must advise the relevant council if they know or believe that a person is an adult at risk and that action needs to be taken in order to protect that person from harm; and
- A council can apply to the Sheriff for ‘a Protection Order’ with respect to an adult at risk of harm which can be:
 - for assessment of the adult through private interview or medical examination.
 - for removal of the adult where there is a likelihood of serious harm if not moved.
 - for banning the subject of the order from being in a specified place.⁹¹

The ASPSA power of a ‘council officer’ to request an interview with an adult who might be a risk and to request to see them privately has been valued to practitioners.⁹² Such an interview cannot be imposed. Social workers may request police to facilitate voluntary access where a third party is blocking access. If this failed then this was a higher level of serious risk of harm can be proven to a sheriff (equivalent of judge), an assessment order or removal order can be made, and a warrant of entry enforceable by the police can be gained at the same time. These powers to impose one or more of the three types of protection orders were rarely used in the first two years of the Act’s operation:

- Assessment order: applied 1 granted 0.
- Removal order: applied 3 granted 2.
- Banning order: applied 40 granted 40.⁹³

The second Biennial Report notes an increase in the total number of protection orders as outlined in the previous paragraph from 40 to 137.

However it also notes that the statistics gathered are not reliable due to variances in recording at local level. The Report goes on to state that “Although only a broad estimate at best, the data also

⁹⁰ These public bodies include: the Mental Welfare Commission for Scotland; the Care Commission; the Public Guardian; all councils; chief constables of police forces; the relevant Health Board; and any other public body or office holder that Scottish Ministers specify.

⁹¹ For a more detailed summary of the powers and duties under the Act, see <http://www.scotland.gov.uk/Publications/2008/07/10140804/1>

⁹² Mackay, K., Notman, M., McNicholl, J., Fraser, D., McLaughlan, C. and Rossi, S (2012) ‘What difference does the Adult Support and Protection (Scotland) 2007 make to social work service practitioners’ safeguarding practice?’ *Journal of Adult Protection*, Vol. 14 No. 4, pp.197 – 205.

⁹³

suggests that around one in every 12 investigations results in a protection order, although the figures are influenced heavily by one Area Protection Committee (Angus) which reports to have issued 79 protection orders (most of these are banning orders and renewals) bracket missing to close were counted in over the past two years. If Angus is removed from the figures, the ratio becomes one protection order for every 27 investigations.”⁹⁴

Angus is a small area/ committee for Scottish local authorities so this suggests a rather puzzling geographical variation even with renewals being counted that requires further research. Another question is about effectiveness. Paul Comley, the Scottish National Coordinator for Adult Support and Protection, undertook a scoping exercise across Scotland about key issues states that:”Adult Protection Committee representatives have raised an issue with there being no offence attached to the breaching of a Banning Order. There is a concern that perpetrators will come to realise this and what is believed to be the most widely used statutory element of the Act will become ineffective.”⁹⁵

In addition each local authority has a statutory duty to establish a multiagency committee under Section 42. Adult Protection Committees (APCs) are responsible for coordinating, monitoring and reviewing the adult support and protection work within their own area. There is a requirement within the Scottish Government’s (2009) guidance also for service user and carer involvement in their work and for an independent convenor.⁹⁶ Another expectation within this guidance is that APCs should gain feedback from service users and carers who had experienced ACP interventions as part of their monitoring and review processes.

Under ASPSA social workers involved in the investigative process have legal access to health and social care records however in practice this access is determined by the view of hospitals and nursing care personal.

3.7.3 Wales

There is currently no specific legislation in Wales to address situations of the abuse of vulnerable adults.⁹⁷ However, the Welsh Assembly is intending to legislate in this area through the relevant clauses of the Social Services and Well-being (Wales) Bill⁹⁸, which contain a range of provisions, including:

- a requirement that local authorities make enquiries, or ask others to do so, where they suspect that an adult is at risk of abuse or neglect;

⁹⁴ Ekosgen (2013) Adult Support and Protection in Scotland, A detailed review of the 2010-2012 Biennial Reports, January 2013, Edinburgh: Scottish Government, pp. 9-10.

⁹⁵ Comley, P. (2012) Adult Support & Protection: A report to Scottish Government around emerging issues and themes, Stirling: WithScotland, p. 4. Also Mackay et al 2011 and 2012 provide examples of these orders being used.

⁹⁶ Scottish Government (2009) The Adult Support and Protection (Scotland) Act 2007 Part 1: Guidance for Adult Protection Committees, see <http://www.scotland.gov.uk/Publications/2009/01/06115617/0>.

⁹⁷ For an overview of the legal context for adult protection in Wales, see ‘In Safe Hands: Implementing Adult Protection Procedures in Wales’ (2000), pp. 76-89.

⁹⁸ For the text of the Bill, see: <http://www.assemblywales.org/bus-home/bus-business-fourth-assembly-laid-docs/pri-ld9181-e.pdf>. See also the Explanatory Memorandum at: <http://www.assemblywales.org/bus-home/bus-business-fourth-assembly-laid-docs/pri-ld9181-em-e.pdf>.

- an ‘Adult Protection and Support Order’ which confers a power of entry to facilitate practitioners in speaking in private with adults suspected of being at risk of abuse;
- duties on relevant partner organisations to report to the local authority when they suspect that a person may be an adult at risk; and
- duties on relevant partners to cooperate and provide information to the local authority in the exercise of its safeguarding functions.

3.7.4 Republic of Ireland

There is currently no specific statute in the Republic of Ireland which aims to address issues in connection with the abuse of older people. Instead, a range of pieces of legislation are relied upon which is similar in scale and scope to that currently relied upon in Northern Ireland.⁹⁹

The Report of the Working Group on Elder Abuse¹⁰⁰ made several substantive recommendations with respect to legislation. Firstly, legislation was recommended to establish older people’s entitlement to core community care services. Secondly, [legislation] to provide for Garda access ‘in situations where there is a concern that elder abuse is taking place but where access is not available in order to get consent’.¹⁰¹ The recommendation recognised that it may be appropriate for health and social care staff to accompany the police, particularly at interview of the older person. However, it is noteworthy that this is a recommendation for a statutory police power, not for a power for health/social care staff. Legislation was also recommended to ‘protect both the public and health and social care workers who report elder abuse in good faith from any negative consequences’.¹⁰²

In addition, there were suggestions as to appropriate legal reform of legislation relating to mental health and mental capacity.

3.7.5 Australia

The Victoria Police have considerable powers under Victoria’s family violence laws. The Family Violence Protection Act 2008¹⁰³ enables police to protect vulnerable family members by utilising orders and notices through which alleged offenders can be removed from premises without waiting for criminal justice proceedings to take place. The key mechanisms of this act include Family Violence Safety Notices) and Family Violence Intervention Orders which are issued by Magistrates’ and Children’s Courts.

⁹⁹ For an overview, see ‘Elder abuse and legislation in Ireland’, (Dublin: NCPOP, 2009). Accessed on 30 October 2013, available at:

http://www.ncpop.ie/Year%201%20Reports/Year%201%20Reports%20New%20Cover/Microsoft%20Word%20-%20Irish%20Legislation%20new%20cover16_04_10.pdf

¹⁰⁰ Ref Group

¹⁰¹ ‘Protecting our Future: Report of the Working Group on Elder Abuse’, (HSE, 2002), p. 19. Accessed 30/10/13, available at: <http://www.dohc.ie/publications/pdf/pof.pdf?direct=1>

¹⁰² ‘Protecting our Future: Report of the Working Group on Elder Abuse’, (HSE, 2002), p. 20. Accessed 30/10/13, available at: <http://www.dohc.ie/publications/pdf/pof.pdf?direct=1>

¹⁰³ Family Violence Act (Victoria) 2008.

3.7.6 United States

All states in the U.S. have statutes providing for adult protective services. Although the state legislation is not uniform, all states have also created implementation systems whereby public authorities can:

- receive reports of suspected abuse, neglect or exploitation;
- offer services to potential victims; and
- under certain circumstances, take specific steps to intervene to protect the victim.

In some states, the services begin at a particular older age (usually starting at age 60), and thus often carry the label “Older Adult Protective Service” statutes. In other states, the protections are available to any “disabled”, “dependent,” “incapacitated” or “vulnerable” adult, without regard to age.

A good example of such state legislation is Pennsylvania’s Older Adults Protective Service Act (OAPSA) which was first adopted in 1988. Pennsylvania recently expanded protective services to adults “between 18 and 59 years of age who [have] a physical or mental impairment that substantially limits one or more major life activities.”¹⁰⁴ Historically in the U.S., protective services focused first on children, then older adults, and more recently on disabled or adults deemed otherwise “vulnerable” to abuse.

The core component of Pennsylvania’s OAPSA is requiring each county agency (i.e. either an Area Agency on Ageing or a contractor providing similar services) to receive and investigate reports of “older adults in need of protective services 24 hours a day, seven days a week (including holidays).”¹⁰⁵ Pennsylvania’s OAPSA targets abuse,¹⁰⁶ neglect or self-neglect,¹⁰⁷ exploitation,¹⁰⁸ and abandonment,¹⁰⁹ and in some instances the definitions differ from those under federal law.

¹⁰⁴ Pennsylvania Adult Protective Services Act, adopted effective April 7, 2011, at 35 P.S. §§ 10210.101 through 10225.312, including Section 10210.103 (defining “Adult”), supplementing Pennsylvania Older Adults Protective Service Act (OAPSA), at 35 P.S. §§ 1-225.302 through 10225.5102.

¹⁰⁵ 35 P.S. § 10225.302(b) (Receiving Reports).

¹⁰⁶ “Abuse” includes one or more of the following: “(1) The infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish. (2) The wilful deprivation by a caretaker of goods or services which are necessary to maintain physical or mental health. (3) Sexual harassment, rape or abuse. . . . No older adult shall be found to be abused solely on the grounds of environmental factors which are beyond the control of the older adult or the caretaker, such as inadequate housing, furnishings, income, clothing or medical care.” 35 P.S. § 10225.103 (Definitions).

¹⁰⁷ “Neglect” is the “failure to provide for oneself or the failure of a caretaker to provide goods or services essential to avoid a clear and serious threat to physical or mental health. No older adult who does not consent to the provision of protective services shall be found to be neglected solely on the grounds of environmental factors which are beyond the control of the older adult or the caretaker, such as inadequate housing, furnishings, income, clothing or medical care.” 35 P.S. § 10225.103 (Definitions).

¹⁰⁸ “Exploitation” is an “act or course of conduct by a caretaker or other person against an older adult or an older adult’s resources, without the informed consent of the older adult or with consent obtained through misrepresentation, coercion or threats of force, that results in monetary, personal or other benefit, gain or profit for the perpetrator or monetary or personal loss to the older adult.” 35 P.S. § 10225.103 (Definitions).

¹⁰⁹ “Abandonment” is the “desertion of an older adult by a caretaker.” 35 P.S. § 10225.103 (Definitions).

Persons making reports are treated as immune from civil or criminal liability, unless the report was made in bad faith or for a malicious purpose.¹¹⁰

Protective services may be initiated at the request of an individual in need, or because a third person makes a request for services or a report of suspected harm. An individual is entitled to consent to or reject services on a voluntary basis.¹¹¹ In the U.S., the freedom for older persons to reject services is both a matter of respect for individual autonomy (and a presumption of mental capacity) bracket left unclosed to make such decisions. These concepts are often set forth in the state legislation, and constitutionally protected by “due process” rights.¹¹²

A court order, either connected to a formal order of guardianship or an “emergency” (as defined by the OAPSA), is required before “involuntary” interventions are permitted.¹¹³ Under Pennsylvania’s OAPSA, an individual who is the focus of involuntary intervention is also entitled to a lawyer, including a court-appointed counsel as necessary?¹¹⁴ Pennsylvania’s OAPSA attempts to balance recognition of the individual’s right to autonomy with any need for protection, and thus Pennsylvania declares “it is not the purpose of this act to place restrictions upon the personal liberty of incapacitated older adults, but this act should be liberally construed to assure the availability of protective services to all older adults in need of them.”¹¹⁵ One central concern in the U.S., including in Pennsylvania, is whether older persons may be isolated, not only from the larger world, but from information about how to avoid or respond to abuse, including abuse by caregivers. The older person may avoid any report of abuse, fearing state intervention and as a result they may compel them to move from their home.

As of 1997, Pennsylvania makes it mandatory for certain employees or administrators of facilities to report suspected abuse to the appropriate agency and/or law enforcement officials.¹¹⁶ Facilities within the mandatory reporting obligations include domiciliary care homes, home health care agencies, long-term care nursing facilities, older adult day centres, and personal care homes.¹¹⁷ Where an employee is the suspected abuser, the facility is required to immediately implement a plan of supervision or suspension, and if criminal charges are filed, must prohibit the employee from having access to care recipients at the facility.¹¹⁸ Pennsylvania reports annually on its receipt of mandatory reports, according to types of reporting facility and type of injury.¹¹⁹

¹¹⁰ 35 P.S. § 10225.302 (Reporting; protection from retaliation; immunity).

¹¹¹ 35 P.S. § 10225.308 (Individual Rights).

¹¹² James H. Pietsch, “Elder Abuse and Laws to Protect Older Persons in Hawaii,” 16 Hawaii Bar J. 93 (2013)(describing Hawaii’s Adult Protective Services laws, amended in 2008, which do not expressly address “elder abuse,” but specify protections for “vulnerable” adults.)

¹¹³ 35 P.S. § 10225.307 (Involuntary Intervention by emergency court order).

¹¹⁴ 35 P.S. § 10225.307(c) (Right to counsel).

¹¹⁵ 35 P.S. § 10225.102 (Legislative Policy).

¹¹⁶ 35 P.S. § 10225.701 (Reporting by Employees).

¹¹⁷ 35 P.S. § 10225.103(definition of facility).

¹¹⁸ 35 P.S. § 10225.704 (Restrictions on employees).

¹¹⁹ 102 35 P.S. § 10225.302(b) (Receiving Reports).

In 1996, Pennsylvania amended OAPSA to require that employees of such facilities are subject to criminal history searches, and beginning in 1998, a history of specific criminal offences disqualified the individual from employment.¹²⁰ However, application of that employment bar was declared unconstitutional as applied to certain individuals, because it violated the employees' due process right to work, in a 2003 ruling by Pennsylvania's Supreme Court.¹²¹ Pennsylvania continues to mandate criminal background checks, with the Pennsylvania Department of Aging receiving and processing more than 8,500 applications in Fiscal Year 2010-11, of which 77 individuals were prohibited from employment. Over the 13 years since criminal background checks were mandated, Pennsylvania reports it has approved 99% of all applicants for employment.¹²²

Pennsylvania does not provide a private right of action for individuals under OAPSA. In other words, a victim of abuse, neglect, exploitation or abandonment cannot allege the statute as a specific ground for relief in a civil suit against a suspected violator. However, under the common law (non-statutory law) of Pennsylvania, a victim may be able to use the definitions of wrongs in OAPSA to support a claim for a "per se" tort.¹²³

4. Possibilities for Legislative Reform in Northern Ireland

For the convenience of the reader the following three Tables (7.8.9) outline key points in the debate for and against legislative reform.

4.1 Table 5: Rationale For and Against Legislative Reform

| Potential Considerations For: | Potential Considerations Against: |
|--|---|
| <ul style="list-style-type: none"> • Provides a unified definition of who should be protected. • Provides a unified definition of what exactly they should be protected from. • Provides additional powers for safeguarding older people from abuse. • Imposes additional duties to safeguard older people from abuse. • Helps to ensure parity of treatment for adult protection alongside child protection. | <ul style="list-style-type: none"> • May reduce the use of non-statutory approaches that tend to be more therapeutic, family-oriented and community-oriented in nature. • Relatively inflexible compared to policy measures in adapting to service and knowledge developments. • Relevant powers already exist under other laws and the introduction of a new statute would need to be carefully integrated with other statutory provision and repeal of |

¹²⁰ 35 P.S. §§ 10225.501-7508 (Criminal History for Employees).

¹²¹ Nixon v. Commonwealth, 839 A.2d 277 (Pa. 2003).

¹²² Pennsylvania Department of Aging, Pennsylvania OAPSA Report 2010-11, page 12, available at http://www.portal.state.pa.us/portal/server.pt/community/agency_publications/17894.

¹²³ Katherine C. Pearson & Trisha E. Cowart, The Law of Financial Abuse and Exploitation at § 2.6, page 25 (Bisel, 2011).

| | |
|---|--|
| <ul style="list-style-type: none"> • Provides consistency of approach over time compared to policy measures alone. • Facilitates coordinated approaches amongst agencies. • Facilitates common training and greater understanding amongst relevant professionals. • Provides a clearer basis for public engagement on issues of abuse of older people. • Outlines objective standards for intervention. • Would help alleviate concern for reprisal from a subjective reporting. • In line with the World Health Organisation (2002) emphasis on human rights. | <p>redundant articles and sections.</p> <ul style="list-style-type: none"> • Further development of policies and procedures is still required, but might need to be put in a context of departmental regulations and guidance. • May create a cultural barrier where professional intervention is motivated by bureaucratic or legalistic duty of care rather than the primary support of individuals and families. • Required changes may be achieved through policy reform without the need for new legislation. • Privileges a legalistic ‘top-down’ approach at expense of individual service user empowerment. • Law alone does not address the complex issues faced by older people • Legal intervention may result in outcomes incongruent with the personal needs and wishes of older people • Law is a blunt tool for addressing complex social phenomena. |
|---|--|

4.2 Table 6: *Facilitators and Barriers to Changes to Northern Ireland Legislation to Protect Older People*

| Facilitators | Barriers |
|--|---|
| <ul style="list-style-type: none"> • Scotland has already felt the need to legislate for adult protection and both England and Wales are at an advanced stage of doing so. The Republic of Ireland is considering legislation. • Legislative measures to ensure adults are protected from abuse in the community are timely given the emphasis on community based care in the ‘<i>Transforming Your Care</i>’ policy agenda. • It would be useful to follow | <ul style="list-style-type: none"> • The impact of the proposed Northern Ireland Mental Capacity Bill on the management of vulnerable adults is untested and may have significant unknown implications for the drafting of new legislation. • The resourcing of new powers and duties may not be justified in the context of government financial austerity. • Significant costs will be incurred as the result of resourcing changes to professional and organisational |

| | |
|---|--|
| <p>England, Scotland and Wales in taking the opportunity to consolidate, clarify and extend safeguarding powers/duties through including legislative measures within new overall social care/welfare legislation.</p> <ul style="list-style-type: none"> • There is increased recognition of the need for greater safeguards to protect vulnerable adults within the international human rights frameworks at UN and European levels. • Increased awareness and statistical evidence of the growing prevalence of this issue. | <p>practice and culture.</p> <ul style="list-style-type: none"> • The lack of public awareness and debate on the need for legislative reform tends to be reinforced by limited media attention on adult abuse, compared to child abuse. |
|---|--|

The following table addresses specific issues of concern in Northern Ireland, raised in section 2 of this review. It summarises the possible statutory provisions identified from the review and stakeholder feedback, the current situation in Northern Ireland, examples from international jurisdiction and the considerations for and against reform. In the table the term ‘appropriate body’ and ‘services’ includes agencies such as the Health and Social Care Trusts, the Police Service of Northern Ireland, local Councils, the Social Security Agency, Quality, Improvement and Regulation Authority, Northern Ireland Housing Executive and so on. The term professional is used broadly to refer to health and social care professionals and workers.

4.3 Table 7: Elements to be considered for Future Legislative Reform

| | Possible Statutory Provision Example | Current NI Position | International Example | Considerations For | Considerations Against |
|---|---|---|--|---|---|
| 1 | Definition of person to be safeguarded. | Safeguarding Vulnerable Adults Policy and Procedural Guidance (2006) (definition of ‘vulnerable adult’) | Adult Support and Protection Act (Scotland) 2007 | Modernises general approach (e.g. to be human rights based or emphasis of abuse of trust). Ensures uniformity of service provision. Facilitates gathering of same statistics. | A tight definition could be relatively inflexible for implementation in particular cases. |

| | | | | | |
|----|--|--|---|---|---|
| | | | | Promotes shared understanding across agencies. Enables clearer communication amongst stakeholders | |
| 2. | Definition of harm and/or abuse. | Safeguarding Vulnerable Adults Policy and Procedural Guidance (2006)(notion of significant harm) Sexual Offences (NI) Order 2008 Articles 43 (sexual offences against people with a mental health disorder) Offences Against the Person Act 1861 Section 62 Human Rights Act (1998) Family Homes and Domestic Violence (NI) Order 1998 | Adult Support and Protection Act (Scotland) 2007 | Clarifies situation in which individuals should be safeguarded. Distinguishes safeguarding processes from criminal law processes. | Definition may not cover all relevant situations. Risks emphasising some forms of abuse to the neglect of others. |
| 3. | Clear definition of and response to financial abuse. | Safeguarding Vulnerable Adults Policy and Procedural Guidance (2006) (financial or material abuse) Court of Protection has powers to invoke and | Family violence Protection Act 2005 Administration and Guardianship Orders (Australia) | Ensures that cases of financial abuse are not overlooked compared to other forms of abuse which are perceived to be more serious | Definition may not cover all appropriate cases. |

| | | | | | |
|----|---|---|--|--|---|
| | | <p>revoke an Enduring power in the event of its abuse</p> <p>Mental Health (NI) Order 1986 Article 107 Protection from Harassment (NI) Order 1997 Article 6 (defines harassment with fear of violence) Theft Act (NI) 1968 (dishonest appropriation of property)</p> | | | |
| 4. | Duty on organisations to report suspected instances of abuse. | <p>Safeguarding Vulnerable Adults Policy and Procedural Guidance (2006) Protocol for the Joint Investigation of Alleged and Suspected Cases of Abuse of Vulnerable Adults (2003, revised 2009) Criminal Law Act (NI) 1967 (obligation of citizens to report if they suspect a <i>serious offence</i>)</p> <p>Mental Health (NI) Order 1986 Article 107(1) (Trust required to notify the</p> | California welfare and Intuitions Code, Aged Care Act 1997 Australian Approved Providers | Helps to ensure that possible cases of abuse are referred to the appropriate body. | May lead to over reporting of relatively minor incidents. |

| | | | | | |
|----|--|--|--|--|---|
| | | OCP of any person incapable of managing their financial affairs) (only applies to a person with a mental health disorder) | | | |
| 5. | Duty on appropriate body to make enquiries or conduct investigations. | Safeguarding Vulnerable Adults Policy and Procedural Guidance (2006) Achieving Best Evidence in Criminal proceedings: guidance on interviewing victims and witnesses, the use of Special Measures and the Provision of Pre-Trial Therapy (Northern Ireland) (2012) Safeguarding Vulnerable Adults: A Shared Responsible (2010)- Volunteer Now (pertaining to NGO's) | Adult Support and Protection Act (Scotland) 2007 Commonwealth Age Care Assessment Teams (Australia) | Ensures that action is taken when potential abuse is reported. Avoids cases being missed due to no clear lines of organisational responsibility and accountability within strongly multi-agency working. | Might compel allocation of resources in an inflexible manner. |
| 6. | Duty to provide appropriate services to an adult identified at risk of | Health and Personal Social Services (NI) Orders and the Health and Social Care | Adult Support and Protection Act (Scotland) 2007 | Helps to ensure provision of services which can mitigate risk of abuse and possibly thereby | Might compel allocation of resources in an inflexible manner. |

| | | | | | |
|----|---|--|--|--|--|
| | abuse. | (Reform) Act (NI) (2009) | | actually prevent abuse. | |
| 7. | Duty to cooperate. | Safeguarding Vulnerable Adults Policy and Procedural Guidance (2006) Public Interest Disclosure (NI) Order 1989 | Adult Support and Protection Act (Scotland) 2007 | Ensures that multi-agency working functions better as cooperation is a legal obligation on each relevant agency. | Interference with the right to privacy and confidentiality |
| 8. | Power to access a person at risk to determine if abuse is taking place. | Health and Personal Social Services (NI) Orders and the Health and Social Care (Reform) Act (NI) 2009 Article 37 (as specified in Schedule 6) of the 1972 Order) rarely used Mental Health Order (Northern Ireland) 1986 Article 129 (Trust or Board Officer may apply to a Justice of the Peace for a warrant) Guardianship (Article 18) Health and Personal Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order | Adult Support and Protection Act (Scotland) 2007 | Ensures that access to a vulnerable person at risk of abuse is not blocked by abuser. | Interference with right to private and family right under article 8 of ECHR may not always be proportionate in particular cases. |

| | | | | | |
|----|---|--|--|--|--|
| | | <p>2003 (inspect residential care homes and nursing homes based on care standards)</p> <p>General Police Powers</p> <p>Private Tenancies (Northern Ireland) Order 2006 (local councils have a right to inspect rented premises)</p> | | | |
| 9. | Power to enter a premise and/or remove a person at risk | <p>Mental Health (NI) Order 1986 Article 129 (applies to a person with a mental health disorder e.g. compulsory admission to hospital for assessment)</p> <p>Health and Personal Social Services (NI) Orders and the Health and Social Care (Reform) Act (NI) 2009 Article 37 (as specified in Schedule 6) of the 1972 Order)</p> <p>application to the Magistrates Court is rarely used</p> <p>Health and Personal Social</p> | Adult Support and Protection Act (Scotland) 2007 | Can protect a person with capacity who is vulnerable yet under sufficient duress or coercion as to not act to safeguard her/himself. | Disproportionate power which might rarely be used. |

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|-----|--|--|--|---|---|
| | | Services (Quality Improvement and Regulation) (NI) Order 2003 Article 4, 34 and 35 (power to investigate service provision) | | | |
| 10. | Power to ban person from being in a specified place. | Family Homes and Domestic Violence (NI) Order 1998 (Non-molestation and Occupation Order) (power to ban and remove alleged perpetrator when abuse is suspected) Police and Criminal Evidence (Northern Ireland) Order 1989 Article 26 (refers to power to arrest and detain) The Protection from Harassment Order (Northern Ireland) 1997 Protection of Children and Vulnerable Adults (Northern Ireland) Order 2003 (Vetting and Barring | Adult Support and Protection Act (Scotland) 2007 | Strong legal safeguard of arresting powers for breaches may provide an effective safeguard. | Disproportionate power which might rarely be used. No actual offence of breach that can be taken back to court. |

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|-----|--|--|---|--|--|
| | | <p>Scheme) Anti-Social Behaviour (Northern Ireland) Order 2004 The Housing (NI) Order 1988 Article 7A, Order 1981 Article 22A, Order 1983 Article 25, Order 2003 Article 26 (perained to housing services residents)</p> | | | |
| 11. | Power to access financial records. | Lasting Power of Attorney and Enduring Power of Attorney | Pennsylvania Older Adults Protective Service Act 1988 | Enables better identification of cases of abuse. | Interference with right to private and family right under article 8 of ECHR may not always be proportionate in particular cases. |
| 12 | Power to access health and social care records | Data Protection Act (1998) and Access to Health Records (Northern Ireland) Order 1993 (Information can be shared when joint care is provided, required to investigate complaints , or service user/patient consent is given) Trust Policy | Adult Support and Protection Act (Scotland) 2007 Pennsylvania Older Adults Protective Service Act 1988 | Facilitates the initial investigation process by designated safeguarding workers to undertake a holistic assessment . Prevents discretionary judgments as to disclosure of information | Issues of interpreting medical information and respecting patient confidentiality |

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|-----|---|---|--|---|--|
| 13. | Criminal charge of elder/adult abuse. | No criminal charge of elder abuse Article 121 of the Mental Health (Northern Ireland) Order 1986 | Proposal Action on Elder Abuse, England | Acts as greater deterrent of abuse. Easier to secure convictions and effective sanctions against abusers. | Adds nothing to existing criminal law provisions in relation to safeguarding issues. |
| 14 | Protection from civil liability for professionals and members of the public on reporting suspected adult abuse. | Public Interest Disclosure (NI) Order 1989 (criminal offences, miscarriages of justice, endangerments to health or safety of individuals) | Protection of Persons Reporting Child Abuse Act 1998 (Ireland) | Strongly encourages responsible reporting of concerns about abuse by professionals and public. | May be thought to license malicious reports. |

5. Conclusion

The ultimate test of an adult safeguarding framework is whether it creates a system that will recognize if an older person is being abused or neglected and ensure that immediate and appropriate action is taken in response. Legislation and policy should give older people equal access to the justice and protection system if they are being abused or neglected. An effective adult safeguarding framework should foster older people's sense of rights, empowerment and confidence. This review has reflected growing concerns as to specific issues relating to the effectiveness, efficiency and level of confidence in the current adult safeguarding legislative and policy framework in Northern Ireland. The comparison of current issues and gaps to practices and experiences across national and international jurisdictions highlight the following key messages for Northern Ireland.

- Many of the issues and gaps in the current framework could be addressed by policy reform, changes in protocol and/or increased funding and resources.
- Current definitions of 'vulnerable adult' and 'abuse' contained in the Northern Ireland adult safeguarding policy framework are confusing and increasingly outdated. In the countries reviewed the definition of elder abuse reflects the WHO definition involving the key notion of 'breach of trust' defining the injustice dimension of abuse. Reliance on social policy definitions and practitioner's interpretations of abuse may over time become diluted and unclear. The trend across other countries of the UK is towards replacing the term *vulnerable adult* with the concept of an *adult at risk*. Current definitions do not reflect a human rights approach or a commitment to prevention and empowerment. The introduction of legislation would offer an opportunity to revise the definition and ensure it aligns with other legislative developments, such as the Northern Ireland Mental Capacity Act.
- A clear statutory definition of financial abuse and a power to access financial records in the investigation of suspected or actual abuse have proved valuable in other jurisdictions. A statutory clarification of what constitutes financial abuse with respect to behaviour which is not a crime can enable professionals to act to protect vulnerable individuals.
- Clarification under the relevant legislation on professional's access to health and social care records and information in response to serious cases of concern.
- The model of adult protection reflected in the current policy framework is focused on protection resulting in a potential mismatch between appropriate responses to lower levels of abuse experienced. The current policy framework would benefit from the prioritisation of prevention and empowerment measures and strategies central to a rights-based approach to adult safeguarding. Overly-interventionist responses to low levels of abuse may result in further trauma or abuse to the adult concerned and the inappropriate use of scarce resources. On the other hand, minimalistic responses to serious cases can result in death. Safeguarding involves a continuum of responses from advice and information, to active support and advocacy and finally legal protection as a measure of last resort. Legislation may be effective in articulating the principles and scope of safeguarding, signposting the different avenues to achieve a person centred response (Health and Social Care legislation, Quality Legislation, Criminal Law etc).

- Current data on the prevalence and nature of adult abuse across Northern Ireland is inadequate for planning purposes. Each of the five Health and Social Care Trusts collects statistics on reported cases of abuse and interventions which are forwarded to the Health and Social Care Board. Each Trust offers different contact points for at risk adults seeking advice, depending on where they live. The establishment of a centralised statutory body responsible for the governance of adult safeguarding policies would offer improved monitoring and evaluating of service delivery and the development of outcome measures and strategies. A duty to collect and report data to such a statutory body could be introduced. The Safeguarding Board (Northern Ireland) Act 2011 passed in February 2011 provided the legislative framework for the creation of a new regional Safeguarding Board for Northern Ireland (SBNI) and offers a local example of what can be achieved with specialist legislation.
- The current emphasis on adult protection diverts attention and resources away from the development of innovative, proactive and preventive strategies for increasing older people's empowerment. Funding and resources tend to drift to protection rather than promoting human rights. A focus on protection does not sustain service user involvement to as great an extent as in a human rights based approach.

Professionals currently have some duties and powers under welfare legislation, particularly in the area of mental health. Also the criminal law includes requirements in relation to reporting crime. There are no duties and powers exercised in relation to accessing private premises to undertake an assessment or removing a vulnerable adult to a place of safety. This report has highlighted powers and duties for both professionals and organisations which are not in place in Northern Ireland. Experience has shown that professionals do not always make full use of all legal powers which are available, but this does not mean that the existence of the power is not effective. A similar paradox has been identified across national and international jurisdiction (Scotland; USA) where specific adult protection law exists. The limited use of legislative powers could be interpreted in a number of ways. Practitioners may use the existence of legislation indirectly, as a source of leverage to achieve a desired outcome; or it may indicate a disjuncture between the law and practitioner knowledge of the law. Statutory provision focusing specifically on protecting vulnerable adults from abuse would help to signpost the relevant statutes available to older people and professionals.

In conclusion the review findings suggest the need to consider legislative and policy reform, so as to further invest in adult protection and further promote the rights and empowerment of older people generally.

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