

8.4 Law of Tort

This allows one person to sue another for a wrong that another has been committed. It is mainly concerned with providing compensation for personal injury and damage to property but also protects other interests such as reputation and personal freedom. Examples of actions in tort include:

- Trespass to the person (assault and battery) and false imprisonment, i.e. covering much of the same areas as criminal law.
- Negligence – if a person is owed a duty of care by another, breach of that duty lays the carer potentially open to a civil action. A person who takes on board the care of another owes her/him a duty of care. If the carer fails to act as a reasonable carer would have done, she/he has broken that duty of care. If this breach causes the injury/loss of which the person is complaining, there is potentially a negligence claim.

8.5 Public Interest Disclosure Act 1998

This Act came into force in July 1999. The Act amends employment legislation so that employees are protected against dismissal and other adverse action if they make complaints or public disclosures about malpractice. Such matters include allegations that the employer is putting the environment at risk, breaking the law or putting customers or employees at risk. Workers do not have protection if they 'go public' without first raising the matter internally with the employer, unless the worker can show that they believe raising the matter this way would be ineffective, would lead to a cover-up or would result in retribution.

8.6 The Data Protection Act 1998

This Act came into force in March 2000 and amongst other things, extends a person's rights to see files held on him/her by Social Service departments, removing blanket confidentiality relating to third parties named in files. Permission should be sought from third parties prior to disclosure of information about them, however Social Services can disclose the information involving third parties without their consent if this is considered 'reasonable in all the circumstances', i.e. after considering any duty of confidentiality, any steps taken to obtain consent, whether a person is capable of giving consent and any express refusal. Local Authorities can refuse access to records in very limited circumstances. One example would be if the disclosure would prejudice the social worker from carrying out his/her job by causing serious harm to the physical or mental health of the service user or another person identified in the records. In the context of adult protection confidential information may be shared, between agencies, in the best interests of the vulnerable adult(s). It is important to inform and share with the vulnerable adults information that empowers them and enables them to make decisions for themselves. However, if sharing information involves disclosure of confidential information, advice from the Legal Section should be obtained before disclosure is made.

8.7 The Sex Discrimination Acts 1975 and 1986

This Act makes it unlawful to discriminate on the grounds of gender and introduces two forms of discrimination – direct and indirect discrimination.

8.8 The Race Relations Act 1976

This Act makes discrimination on the grounds of race illegal. Race is defined in terms of colour, race, nationality or ethnic or national origins. The Act uses the terms of direct and indirect discrimination and introduces the third category – victimisation. This means treating a person less favourably because that person has made a complaint of discrimination or has acted as a witness in this connection, or intends to do so.

8.9 The Disability Discrimination Act 1995

This act creates new rights for people with disabilities. It makes it unlawful to discriminate against a disabled person in employment, or in relation to access to goods, services, transport and education.

8.10 The Special Educational Needs & Disability Act 2001

This Act introduces rights for disabled people in education.

8.11 'No Secrets' – March 2000

'No Secrets' is a Department of Health guidance document requiring the development and implementation of local multi-agency policies and procedures to protect vulnerable adults from abuse. The guidance is supported by a range of other initiatives and is issued under Section 7 of the Local Authority Social Services' Act 1970. **It is upon this guidance that the Herefordshire Multi-Agency Policy and Procedures for The Protection of Vulnerable Adults from Abuse is based.**

8.12 The Human Rights Act 1998

The Human Rights Act incorporates most, but not all, of the European Convention of Human Rights into UK law, enabling claims to be brought in UK courts by individual victims against public bodies. The Act makes it unlawful for a public body to act (by commission or omission) in a way that is incompatible with Convention Rights (see below). In many respects, the Act underpins adult protection work, particularly in the context of an individual who is in receipt of a service.

Part 1 - The Convention: Rights and Freedoms

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 (subject to a UK derogation relating to Northern Ireland)
Article 6	Right to a fair trial
Article 7	No punishment without law
Article 8	Right to respect for private and family life
Article 9	Freedom of thought, conscience and religion
Article 10	Freedom of expression
Article 11	Freedom of assembly and association
Article 12	Right to marry
Article 14	Prohibition of discrimination
Article 16	Restriction on political activity of aliens
Article 17	Prohibition of abuse of rights
Article 18	Limitation on use of restrictions on rights

Part 2 - The First Protocol

Article 1	Protection of property
Article 2	Right to education (subject to a UK reservation)
Article 3	Right to free elections

Part 3 - The Sixth Protocol

Article 1	Abolition of the death penalty
Article 2	Death Penalty in time of war

Articles that are likely to be most relevant to Adult Protection work are detailed below. However, the following guidance is not intended to give comprehensive information about the context of the Act, but is offered simply as a means of helping to interpret the relevance of the Act in relation to adult protection work. Advice from the Legal Department must always be sought if it is thought that a challenge could be made under the Act.

There is a very useful Department of Health website that aims to keep up to date with cases drawing on the Articles of the Convention:

<http://www.doh.gov.uk/humanrights/casestudies.htm>

The Convention Rights

Article 2: Right to life

This convention appears most relevant in medical settings, particularly in relation to issues such as abortion, life-saving operations and end-of-life decisions, but it will also cover cases of neglect and suspicious deaths of people who are in care. Delay in approving funding for care, where this is seen to have a potentially life-threatening effect on the well-being of an individual, may be considered as a breach of this article.

Article 3: Prohibition of torture

This article states that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. The overall treatment of individuals and the conditions in which they live should be examined, along with any failure to take action to prevent cruelty. In assessing whether there has been a breach, it would be relevant to look at not only the severity of the treatment but also if it has occurred more than once or been part of a pattern of abuse. The level of mistreatment would need to be severe to be considered under this Article.

Article 5: Right to liberty and security

Detention under the Mental Health Act can bring this Article into play. Deferred discharge and delays in convening Mental Health Review Tribunals could certainly lead to problems.

Article 6: Right to a fair trial

This Article guarantees a right to a fair and public hearing before an independent tribunal within a reasonable time whenever a person's civil rights and obligations are being determined. This covers courts and tribunals and may well cover some internal hearings or regulatory procedures. The 'independence' of the internal organisations could therefore be subject to scrutiny, eg. the General Medical Council's Health Committee and Conduct Committee.

Article 8: Right to respect for private and family life, home and correspondence

Health and Social Services inevitably have an impact on people's private and family life. A public authority may only interfere with the exercise of this right in accordance with the law and in so far as is necessary in the interests of public safety, the prevention of disorder or crime, or for the protection of health or morals. It may also be deemed a breach of an individual's rights when a decision is made, under Adult Protection procedures, to separate an individual from their family or carer. This Article could also be used to argue that local authorities have a positive duty to support family life, not just a duty to refrain from interfering with it. So if an older person, for example, indicates that they need support to stay in their own home, but such support is not forthcoming until an emergency situation arises, it might be argued that their rights to respect for private and family life have been breached.

9. Common Law

Common Law has arisen through custom and practice through the ages.

It allows for intervention, without consent, to save life or avoid serious physical harm based upon the principle that the action is reasonable and can be justified as immediately necessary for the purpose of saving life or serious physical harm. Conversely, failure to act in circumstances of the utmost gravity could be deemed negligent.

If an adult patient is temporarily unable to give consent, a doctor may give treatment under the doctrine of implied consent, or the doctrine of necessity. If there is a lack of mental capacity and the patient is detained compulsorily under the Mental Health Act 1983 then Section 62 permits a doctor to give urgent treatment, without the patient's consent, for a condition which the patient is detained and where consent would otherwise be required.

Where there is any conflict between Common Law and Statute Law, Statute Law prevails.

REMINDER: THE LAW IS COMPLEX AND CONSTANTLY CHANGING. IT IS ALSO VAST. THE ABOVE IS INTENDED FOR GUIDANCE ONLY. AN ATTEMPT HAS BEEN MADE TO INCLUDE INFORMATION ON THE MOST LIKELY PIECES OF LEGISLATION TO BE USED IN CASES OF ADULT ABUSE, HOWEVER, IT WOULD NOT BE PRACTICABLE TO INCLUDE INFORMATION ON EVERY LAW THAT COULD POSSIBLY BE INVOKED. IT IS THUS ESSENTIAL TO ALWAYS SEEK THE GUIDANCE OF THE LEGAL DEPARTMENT.

GUIDANCE NOTES

1. The Commission for Social Care Inspection and Adult Protection

- The CSCI has a stated role to investigate complaints against registered services and a duty to report to the Secretary of State on the range and quality of regulated services. The CSCI is likely to receive a steady stream of complaints about registered services, which fall within the adult services' remit. These complaints will range from those which can be easily resolved at local level, ie. by the registered person, to those which may necessitate a major investigation possibly involving the police and other professionals. In some instances, this may develop into an adult protection or a criminal investigation.
- It is not feasible for the CSCI to investigate all complaints, which might be referred to it. It can only look into those complaints which relate to the fitness of registered persons and/or their adherence to legal requirements and national minimum standards.
- As a general rule the CSCI will be concerned about matters which relate to the overall service being provided, rather than with issues relating to individual service users. In this latter respect, local care managers/social workers who have an interest because they are 'funding' the service user are more likely to be involved in investigating the complaint in the first instance (accepting that some service users are private fee payers). There will always be exceptions to these situations and thus it will be essential that the joint working protocols between the CSCI and its professional partners within other organisations make clear when such situations would warrant direct involvement in the inspection of concerns or allegations.
- Through regulation, the Commission will seek to ensure that service providers meet their obligation to satisfy themselves of the suitability of employees. The CSCI, under the provisions CSA 2000 Part VII, has the power to report a care worker to the Secretary of State when that person is considered unsuitable to work with vulnerable adults. The Secretary of State will keep a list of such persons.

Key Pointers for considering when Joint investigations involving CSCI Officers may be appropriate:

- The concern or allegation is about a serious matter including all the forms of abuse identified elsewhere within this procedure.
- Where service users are considered to be harmed or at risk of harm through persistent failure of a registered service to provide adequate care.
- Where there is concern that national minimum standards and regulatory requirements are consistently being flouted in a way which harms service users.
- Where there are concerns about the 'fitness' of a person to be registered.
- Where there are emerging patterns from a series of previous complaints and an indication that a registered person is not effectively operating an internal complaints procedure.
- Where any of the above circumstances call for the expertise of professional colleagues and the responsible sharing of information in order to assess the level of risk to vulnerable adults and to determine appropriate actions to ensure their protection.

2. Issues of Consent

Referral of personal information to Social Services or Police should, wherever possible, be made with the consent of the vulnerable adult involved. The situation is the same in respect of the referral for medical treatment/examination. Under normal circumstances all adults are considered capable of making decisions about all aspects of their daily life, including medical treatment and examinations. Good practice dictates that decisions are made with people and not for them. If, initially, consent is withheld, every effort should be made to obtain this consent, explaining why it is in the best interests of the individual and possibly others also. Information needs to be given in appropriate ways using simple language, pictures, signs and symbols where necessary. However, consent must be given voluntarily without being put under any duress or undue influence.

A referral can only be made without the individual's consent in the following situations:

- This can occur when the vulnerable adult is not deemed to have the capacity to give informed consent. This would only be decided in the same way as any issue of capacity, involving a multi-agency assessment including health professionals and a doctor. Remember that capacity to consent is always assessed in relation to a specific context. A person may have the capacity to consent in one situation but not in another.
- It can also occur when the decision is made to override the wishes of the individual in the public interest. This is where the benefits to the individual, or others, are thought to outweigh the person's interests in keeping the matter confidential and to do so could result in serious harm or the prevention of the detection of a serious crime. This decision should be explained to the individual. Again, such a decision would only be made by a multi-agency group.

Any disagreement or concerns over issues of consent should be referred to the Legal Department.

No-one can give consent on behalf of another

3. Medical Examinations

A medical examination may be necessary to establish the need for any medical treatment and/or to secure forensic evidence. If it has not already happened it should be discussed at the Strategy Discussion to avoid delay.

As in all things the needs and wishes of the victim are paramount. Any likely distress to the victim must be considered.

Where the individual has capacity to give informed consent to a medical examination this must be obtained. If the individual refuses to give consent and the examination/treatment is thought to be in his/her best interests, time should be taken to explain this carefully **but without exercising any form of duress or influence.**

People do have the right to refuse medical intervention and if consent is not given such procedures could be viewed as an assault. Therefore, extreme caution is urged.

Where a vulnerable adult is not competent to give informed consent, treatment or examination may still be possible if it is thought to be in their overall 'best interests' of the individual. This is wider than just the individual's best medical interests.

In considering consent issues it is good practice, when appropriate, to consult with close relatives, if the vulnerable adult is happy for this. But it must be remembered that **a close relative cannot give consent.**

Ideally, a specialist doctor familiar with questioning techniques in accordance with Achieving Best Evidence should be used; eg. a police surgeon. Good practice would involve a prior consultation with the vulnerable adult's GP. None of this may be possible in an emergency situation.

In considering consent issues, the doctor needs to be advised of all the views and legal opinions and the decision whether or not to proceed will be his/hers. Where difficult decisions arise, perhaps stemming from conflicting opinions, the Police can consult with the Crown Prosecution Service to establish whether or not it is safe to proceed.

NB. A valuable source of reference is to be found at:

www.doh.gov.uk/consent

4. Place of Residence

Where a person lives outside of Herefordshire but Herefordshire retains responsibility for the placement, the adult protection procedures of the local authority where the person resides are the ones that should be followed.

Where a person lives in Herefordshire but where an outside placing authority retains responsibility for their placement, Herefordshire's adult protection procedures will apply.

Instances of abuse of someone placed in Hereford by another authority should be supported through the process by a social worker from the placing authority.

People placed by Hereford in another area should be allocated a Hereford social worker to support them through the process.

Any placing authority should ensure that the provider has arrangements in place, through its service specifications, that fit comfortably with their own procedures for the protection of vulnerable adults.

In either instance, the CSCI in both areas should be notified.

- The authority where the abuse occurs will have responsibility for coordinating the adult protection arrangements.
- The placing authority will retain its duty of care to the individual and responsibility for long-term care.
- The Commission for Social Care Inspection in both areas should be informed of any allegations of abuse and consequently involved in any investigation.

5. Confidentiality

'No Secrets' recognises that there are circumstances when it is necessary to share information. Summarising the principles set out in the Caldicott Committee's Report on the review of patient-identifiable information, 'No Secrets' confirms:

- Information will only be shared on a 'need to know' basis when it is in the best interests of the service user.
- Confidentiality must never be confused with secrecy.
- Informed consent should be obtained wherever possible but it may be necessary to override this when people are left at risk by the failure to share information.
- It is inappropriate for agencies to give assurances of absolute confidentiality to anyone involved in an adult protection case.

Decisions concerning who needs to know are taken on a case by case basis and will never be taken by an individual but will be taken by the Strategy Discussion or at the Strategy Meeting.

It is important to remember that information given, or disclosed, to a member of staff belongs to the agency and not the staff member.

If confidentiality is broken then who decided and the reasons behind that decision should be recorded on file.

Principles of confidentiality designed to protect the management interests of an organisation must never be allowed to operate against the interests of an individual. In this instance, there would be a duty to make a full disclosure in the public interest.

Any disclosure of personal information must be in accordance with the Data Protection Act 1998, where this applies.

Refer to the following information sharing protocol for further details.

5.1 Information Sharing Protocol

Confidentiality: The Context

1. The Governing Guidance Document 'No Secrets' recognises that there are circumstances in which it will be necessary to share confidential information.
2. Summarising the principles set out in the Caldicott Committee's Report on the Review of Patient -Identifiable Information, 'No Secrets' states that:
 - Information will only be shared on a 'need to know basis' when it is in the best interest of the service user.
 - Confidentiality must never be confused with secrecy.
 - Informed consent should be obtained but if this is not possible and others are at risk it may be necessary to override this requirement.
 - It is inappropriate for agencies to give assurances of absolute confidentiality in cases where there are concerns about abuse, particularly in situations when other people may be at risk.
(*'No Secrets', 5.7, Page 24*)
3. Decisions about who needs to know and what needs to be known should be taken on a case by case basis.
(*'No Secrets', 5.7, Page 24*)
4. 'No Secrets' states that the principles of confidentiality designed to protect the management interests of an organisation must never be allowed to conflict with those designed to promote the interest of the service user. 'If it appears to an employee or person in a similar role that such confidentiality rules may be operating against the interests of the adults then a duty arises to make full disclosure in the public interest'.
(*'No Secrets', 5.8, Page 24*)
5. In certain circumstances, it will be necessary to exchange or disclose personal information, which will need to be done in accordance with the Data Protection Act 1998 where this applies.
(*'No Secrets', 5.9, Page 24*)

Confidentiality: The Procedure

6. Decisions about sharing information need to be taken on a case by case basis. Therefore, before you share information you need to ask yourself the following questions:
 - a). Do I have the permission of the abused person to disclose personal information?
If not,
 - b). Do I have the legal power to disclose this information?
 - c). Is there a duty to protect the wider public interest; are other people at risk?
 - d). Am I proposing to share information with due regard to both common and statute law?
 - e). Do I have the correct level of seniority to disclose this information?
7. The sharing of information **must** always be discussed with a senior manager and/or Legal Services Adviser.
8. All decisions made in terms of withholding or sharing information **must** be recorded.
9. **Service user as perpetrator**
If it is assessed that the service user continues to pose a threat to other service users then this should be included in any information that is passed onto service providers.
(*'No Secrets', 6.18, Page 30*)

Confidentiality: Good Practice Guidelines

10. While papers and records belong to the agency, the information belongs to the abused person. The views and wishes of the abused person will **normally** be respected when sharing the information they give us.
11. There will be circumstances when a duty to protect the wider public will out-weigh the responsibility to any one individual.
12. Decisions to share information about the abused person **must** be made by the agency and not any member of staff acting on their own.
13. Agencies should ensure they have clear guidelines for when the duty to protect the wider public outweighs their responsibility to protect the abused person's rights to confidentiality.
14. Staff must never confuse confidentiality with secrecy.
15. Information given to an individual member of staff, or agency representative, belongs to the agency **not** that member of staff.

16. The abused person, and when relevant their carers, must be advised why and with whom information will be shared.
17. Information must be shared on a **need to know basis** only.
18. Information will be shared only for the purpose of providing care or for the protection of the abused person.
19. Information given to an agency must only be used for the purpose for which it was intended.
20. If confidentiality is broken **who decided** and **why the decision was taken** should be recorded on the file.
21. All exchange or disclosure of personal information needs to be in accordance with the Data Protection Act 1998, where this applies.
(*'No Secrets', 5.9, Page 24*)

6. Multi-Agency Public Protection Arrangements (MAPPA)

There is a system now in place across the whole of England and Wales called MAPPA (Multi-Agency Public Protection Arrangements). This has been established as a result of government legislation to improve public safety. Multi-Agency Public Protection Panels are made up of a number of agencies to manage the risk of convicted sex offenders and other individuals who are believed to pose a risk of causing serious harm to others. In West Mercia, there is a steering group responsible for the delivery of these arrangements locally. It includes senior representatives from Police, Probation, Youth Offending Teams, Health, Commission for Social Care Inspection and Prisons.

It may be that as a result of an Adult Protection investigation there remain concerns that the perpetrator could be likely in future to cause serious harm to others in the community. In this instance, a referral across to MAPPA may be appropriate. This can be discussed at the Strategy Meeting and a referral made through the **Adult Protection Co-ordinator** based at Grange Court, Pinsley Road, Leominster, Herefordshire, HR6 8NL - **Tel: (01432) 261533**.

Support Organisations

We are fortunate in Herefordshire in having two comprehensive local directories of support organisations. Both of these directories are free of charge. However, it is important to remember that almost as soon as such a list is published it becomes out of date and inaccurate in parts. Websites will, as a matter of course, be more up to date than printed directories.

Mental Health Issues

One directory, called **Directions**, gives information about mental health services in Herefordshire. This has been produced in partnership by the various local organisations involved in mental health services. Services are mainly listed by type rather than by organisation reflecting the mix of service provision for anyone seeking help with a mental health difficulty. If you would like a copy of **Directions**, please contact the Adult Protection Co-ordinator on (01432) 261533. More up-to-date information is available on the Herefordshire Mental Health website at: www.herefordshirementalhealth.info

Disability Issues

The other directory of support organisations is the **DIAL Resource Book**. DIAL (Disablement Information Advice Line) now renamed **ABLE** (Access to Benefits Leisure and Employment) offers a comprehensive array of advice on:

- Income and benefits
- Equipment, aids and appliances
- Leisure activities, holidays and travel
- Access and mobility
- Welfare rights and legislation
- Housing, accommodation and care
- Education and employment
- Rehabilitation and training
- Voluntary organisations and their work
- Local welfare services
- Personal relationships and sexual problems
- Information about specific impairments

The service is available by telephone, fax, writing, email, internet or by personal visit. If you would like a copy of the Resource Book you can find out how to obtain one by telephoning ABLE on (01432) 277770 or the Adult Protection Co-ordinator on (01432) 261533.

ABLE – Address: The Warehouse
Coningsby Street
Hereford, HR1 2DY

Tel: (01432) 277770

Fax: (01432) 356626

E-mail address: info@herefordshire-dial.co.uk

Website: www.herefordshire-dial.co.uk

Support Organisations with a Particular Interest in Adult Abuse

Organisation	Purpose
<p>Action on Elder Abuse Astral House 1268 London Road London SW16 4ER Tel: (020) 8764 7648 www.elderabuse.org.uk Helpline: (0808) 8088 8141</p>	<p>Works towards preventing abuse in old age by raising awareness, education, promoting research and the collection and dissemination of information. Provides a confidential helpline service for anyone concerned with the abuse of older people and emotional support for those involved.</p>
<p>Ann Craft Trust Centre for Social Work University of Nottingham University Park Nottingham NG7 2RD Tel: (0115) 951 5400 www.anncrafttrust.org</p>	<p>National organisation dedicated to the protection from abuse of adults and children with a learning disability. Works with staff in the statutory, independent and voluntary sectors offering information and advice, support and training.</p>
<p>PAVA (Practitioner Alliance Against Abuse of Vulnerable Adults) PO Box 4670 Bournemouth BH6 3BL Email: pavauk@pavauk.org.uk www.pavauk.org.uk</p>	<p>Through collaboration with practitioners in the statutory, voluntary and private sectors PAVA strives to develop practice-based interventions through inter-agency local networks. Promotes problem-solving on key issues and lobbying at both national and local levels.</p>
<p>POPAN (Prevention of Professional Abuse Network) 1 Wyvil Court Wyvil Road London SW8 2TG Tel: (020) 7622 6334 Support Line: (0845) 4500 300 www.popan.org.uk</p>	<p>Supports people who have been abused by health or social care professionals. Works towards prevention of abuse through training and awareness raising.</p>

Organisation	Purpose
<p>Public Guardianship Office Archway Tower 2 Junction Road London N19 5RQ Customer Services: (0845) 330 2900 EPA Helpline: (0845) 330 2963 Accounts Helpline: (0845) 330 2964 www.guardianship.gov.uk</p>	<p>Provides financial protection services for clients not able to manage their own finances and support to the families/receivers.</p>
<p>Respond 3rd Floor 24-32 Stephenson Way London NW1 2HD Helpline: (0808) 808 0700 www.respond.org.uk</p>	<p>Offers advice and support for people with learning disabilities, families, professionals and carers involved in issues of abuse.</p>
<p>VIA Values into Action Oxford House Derbyshire Street London E2 6HG Tel: www.viauk.org</p>	<p>Campaign group for people with learning disabilities. Supports and promotes self-advocacy, rights and choice for all. Has produced some useful publications covering topics such as crime and harassment, better access to justice and keeping safe.</p>
<p>Voice UK PO Box 238 Derby DE1 9NJ and: College Business Centre Uttoxeter New Road Derby DE22 3WZ Tel: (0870) 013 3965 www.voiceuk.clara.net</p>	<p>Support and action group for people with learning disabilities who have been abused. Provides counselling, advice and other services</p>