

Chapter 14: The adult service user

1. Legislation relating to the abuse of adults has been categorized by Clements and Thompson in four different ways:

- (a) That which bars certain individuals from working with vulnerable people
- (b) That which involves setting up protocols and procedures to prevent abuse
- (c) That which imposes duties to act in a person's best interests and restricts the actions they can take in relation to people who lack capacity
- (d) That which might act as deterrent by criminalizing certain actions in relation to vulnerable adults.

Produce a table which sets out which legislation falls into which category. Which approach do you consider to be most effective?

This exercise is most effective if you work through the chapter and identify the focus of the relevant legislation yourself. We have started off the table for you:

Focus	Legislation	Strengths	Weaknesses
Barring legislation	Safeguarding Vulnerable People Act 2006		
Protocols and procedures	Care Standards Act 2000		
Acting in best interests	Mental Capacity Act 2005		
Criminal	Sexual Offences Act 2003		

Deciding which approach is best is difficult – probably we need all four approaches to try to protect vulnerable individuals. However the fact that people are still harmed and their liberty may be unnecessarily restricted indicates that perhaps law is not the only answer to the problem.

2. Fiona Adair is 55 and has early onset Alzheimer's. She is living with her 19 year old son Bill, having divorced her husband some years ago. She receives a teacher's pension, having retired early on health grounds, and the lowest rate of the care element of disability living allowance. She recently had a relationship with George but that ended with allegations that George had subjected her to violence. Her sister Lillian, who does not live locally, has contacted social services because she is concerned that Mrs Adair is at risk of exploitation. There is evidence that Bill is misusing her credit card to make internet purchases, that George has started visiting her again and may have access to her bank account, and that she is becoming increasingly at risk by leaving things on the stove and letting strangers into the house. Mrs Adair, George and Bill all tell you and Lillian that Mrs Adair is coping fine and this is none of your business. What should you do?

We have created this problem because it is both horribly realistic, and because we ourselves are challenged in approaching it. It is not easy. Where should you start?

The place to start tackling this horribly realistic and difficult problem is the Mental Capacity Act 2005. It contains basic principles to guide you. They are set out in the MCA at s.1: presume capacity not incapacity; help Fiona to make her own decisions; allow her, if she has capacity to make unwise decisions; act in her best interests; act in a way which minimises restrictions placed on Fiona.

Also bear in mind that you use the MCA on a decision by decision basis. Applying the above principles, Fiona herself will have capacity for some matters (at the easy end of the scale, whether she wants to talk to you or not, whether she needs food or sleep); but you may assess her as lacking capacity for making other decisions, either now or always – for example how to spend large sums of her money. You will need to check, when assessing her, whether – in relation to the particular decision – she understands the information, can retain it long enough, can use it to help her make a decision, and can communicate that decision. She must be helped in any way available to meet these tests. You should record the results of your assessment so that you are protected if you are criticized for making a wrong decision on capacity.

We say, here, ‘you’, but in fact each person playing any part in Fiona’s life has to apply exactly the same legal framework. You, as a professional, must do so explicitly.

If you conclude with regard to any of the decisions Fiona is facing that she lacks the capacity to make it then you must decide whether this is a short term problem or whether she may be able to make this decision later, without detriment to her best interests. If you end up making the decision for her, you must help her to participate in any way she can, take into account her present or previously expressed wishes, beliefs, values, and the views of other relevant people such as family, doctor, friends. Again, for any big decisions, record the steps you go through.

A trap you must recognize is not to permit relatives’ views to be treated with disproportionate weight. They form one part, a very important part, of the information you use, but if they conflict with what Fiona would have wanted for herself, taking into account her previous and present wishes and her values, and if the relatives’ wishes are not in Fiona’s best interests, you cannot allow them to predominate. If there is conflict, it can only be resolved, at great expense and with delay, by an application to the Court of Protection, who may have to appoint a Deputy to make Fiona’s decisions in certain defined circumstances.

Having explained the framework, we cannot provide the answer in definitive terms for Fiona. What are the decisions she can make, and what are the decisions she lacks capacity to make? Has she made a lasting power of attorney, which would give the decision-making power to an identified individual in relation to circumstances defined in that document?

Assuming there is no lasting power, has the time come to appoint a deputy? Or can matters be agreed between all parties likely to play a part in Fiona’s life as to who will be

able to decide what and when on her behalf? You will be aware that your own involvement cannot be full time? You can play a part in setting up the care and decision making arrangements, but you cannot be there to make the day to day decisions. The MCA gives you no greater powers, incidentally, than anyone else. Only attorneys or deputies have legal powers greater than others (unless of course the Mental Health Act is brought into play to detain Fiona or admit her to guardianship).

Bear in mind that if there is evidence of a criminal offence being committed, the police may have to be involved. Fiona is entitled to do unwise things with her money, but that does not mean she can be taken for a ride. If money is taken from her account, she either consents, because she has the capacity to make that decision, or someone acts in her best interests and not their own. Is Bill acting with her consent, or is he acting without consent, in which case is what he is doing with her money in her best interests? The same applies to George.

Is Fiona safe in her home? Should she be admitted to residential care for her own safety? Can she consent to such a course of action? If she is capable of consenting she is also capable of refusing consent, and that is the end of the matter, unless things are so bad that compulsory powers should be used under s.47 NAA because she lives in unhygienic conditions.

What of the complaint that this is none of your business? Do you have a statutory power or duty to get involved? The answer depends on whether she falls within one of the groups of people defined in legislation listed in LASSA Schedule 1. She is not elderly. But does she fall within s.29 NAA? Apply the definition in that section and decide if she is disabled.

3. John is 25 and lives in a residential home since a serious car accident left him brain damaged. He is unable to communicate other than through gestures. His parents would like him to have a further brain scan because they are convinced that brain surgery would alleviate his condition. John gets very agitated when he has to leave the care home, and when he is in confined spaces. Medical advice suggests that there is nothing to be gained from a further brain scan. The care home agrees to him having the further scan. Is their decision lawful?

This question was raised by one of Helen's students, so it is a real life problem. The important thing to remember here is it is John - an adult – whose best interests have to be protected, and those best interests are not necessarily protected by following the wishes of his parents. In these particular circumstances we would argue that it is not in John's best interests to have a further brain scan, as it causes him discomfort and it is unlikely that anything productive will emerge. This would suggest that the decision of the care home is unlawful, as they are obliged to act in the best interests of John.

4. Do you think there is a need to reform the Mental Capacity Act 2005? Give reasons for your answer

This question concerns the Deprivation of Liberty Safeguards within the legislation. There are a number of criticisms of the provisions, from the judiciary, barristers and the House of

Lords Legislative Scrutiny Committee (which also criticizes other elements of the Act, suggesting particularly that there needs to be better oversight of its operations). The Law Commission has made proposals to reform the DOLS, and gives an excellent explanation of the problems that they are concerned with. Read their proposals, and see what you think. There is no doubt it is not easy to reconcile the right to liberty with the need to protect vulnerable adults, but it needs to be attempted. Do you think there are problems in lawyers coming up with the answers rather than social workers? Having worked through all of the issues, you need to consider the legislative remedy. At the time of writing the amendments were still in the form of a bill and they were causing a lot of controversy. You will need to look at the final version of the Mental Capacity (Amendment) Bill to decide whether they are fit for purpose. Do you think that cutting the burden of local authorities has been more important than protecting vulnerable individuals?