



**A Strategy
for Recognising, Preventing and Dealing
with the Abuse of Older and Vulnerable People**

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1. What do we mean by abuse?

1.1 Abuse takes many forms- physical, sexual, emotional, psychological including neglect, abandonment or isolation, and financial. Any or all of these forms of abuse may be perpetrated as the result of deliberate intent, negligence or ignorance.

1.2 The term 'elder abuse' originated in the USA, but has no legal status, no clear definition and would not always be recognised.

Action on Elder Abuse defines abuse 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".

'No Secrets Guidance on Developing and Implementing Multi-Agency Policies and Procedures to Protect Vulnerable Adults from Abuse' the Government's Adult Protection Policy for Local Authorities in England and 'In Safe Hands' in Wales, applies to all adults and not just elderly people. It defines abuse in terms of vulnerability as:

"A vulnerable person is one 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"

The definition has limitations because it only includes those who are or may be in need of community care services.

The Commission on Equality and Human Rights, defines the term as follows:

"... Abuse may consist of a single or repeated act. It may be physical, verbal or psychological. It may be an act or omission of an act or may occur when a vulnerable person is persuaded to enter into a financial or sexual transaction to which he or she has not consented or cannot consent. Abuse can occur in any relationship and result in significant harm and exploitation of the person subjected to it".

The lack of a clear definition can make it harder for the individual to identify whether another person is being abused.

2. The risk factors for the abused

Abuse occurs for many reasons and the causes are not fully understood. The following risk factors have been identified as being associated with physical and psychological abuse: -

- Those abused usually have fewer social contacts than those who were not abused.

- A history of poor quality long-term relationships between the abused and the abuser.
- A pattern of family violence exists. The person who abuses may have been abused as a child, not necessarily by the person being abused.
- The person who abuses is dependent upon the person abused for accommodation, financial and emotional support.
- The person who abuses has a history of mental health problems, personality disorder, and drug or alcohol problems.

3. Identifying abuse

3.1 The prevalence of elder abuse is unknown. Evidence submitted to the Parliamentary Health Select Committee on Elder Abuse in 2004, estimated that about 5% of the elderly population in the community suffer verbal abuse and up to 2% were the victims of physical or financial abuse. The Committee estimated that in the region of 500,000 people per annum are subject to acts of admitted abuse, however this is likely to be the tip of the iceberg because the abuse may be hidden, ignored and generally swept under the carpet. These figures cover all types of abuse.

3.2 Former Master Lush on the BBC programme Real Lives in 2004 suggested that in the region of 100,000 unregistered Enduring Powers of Attorney (EPAs) may be used to perpetrate financial abuse and between 10-15% of registered EPAs are used as vehicles of abuse. The difficulty in identifying this kind of abuse arises because there is no direct supervision or accountability of attorneys and there is no record of how many unregistered EPAs exist.

3.3 Abuse occurs in many settings and can be difficult to identify, particularly as there is a fine line between poor practice and abuse. Identifying these boundaries can be difficult. Advisers need to be alert to the potential and to take steps to ensure prevention and where it has happened or is happening, take steps to deal with the issues.

3.3 The difficulties in identifying and dealing with abuse are complex but include:

- Fear of further abuse and the ramifications, such as dependence on the abuser and jeopardy of care
- Fear they will not be believed
- The abused person does not recognise the action as abuse
- Trauma suffered as a result of the abuse
- Embarrassment to admit abuse
- Secrecy of the perpetrator
- Cultural and language barriers

- Lack of knowledge and training by professionals involved in care, and so may fail to identify, report and act
- Lack of reporting and recording incidents of abuse by the abused and those caring for them

3.4 The main types of abuse can be identified as follows: -

Physical abuse

Typical examples of physical abuse would include hitting or slapping, burning pushing, restraining or giving too much medication or the wrong medication.

Indicators of physical abuse

The individual may present one or more of the following: -

- ▶ Cuts, lacerations, puncture wounds, open wounds, bruises, welts, discoloration, black eyes, burns, fractures, broken bones and skull fractures
- ▶ Untreated injuries in various stages of healing or not properly treated
- ▶ Poor skin condition or poor skin hygiene
- ▶ Dehydration and/or malnourished without illness- related cause
- ▶ Loss of weight
- ▶ Soiled clothing or bed
- ▶ Broken eyeglasses/frames, physical signs of being subjected to punishment or signs of being restrained
- ▶ Inappropriate use of medication, overdosing or under dosing
- ▶ A person telling you they have been hit, slapped kicked or mistreated

Psychological abuse

The client may be subjected to behaviour, which is frightening, blaming, ignoring or humiliating a person.

Indicators of psychological abuse

- ▶ Helplessness
- ▶ Hesitation to speak openly
- ▶ Implausible stories
- ▶ Confusion or disorientation
- ▶ Anger without apparent cause
- ▶ Sudden changes in behaviour
- ▶ Emotionally upset or agitated
- ▶ Unusual behaviour (sucking, biting, or rocking)
- ▶ Unexplained fear
- ▶ Denial of a situation
- ▶ Extremely withdrawn and none communicative or responsive
- ▶ A person telling you they are being verbally or emotionally abused

Financial

Evidence will be found to demonstrate the illegal or unauthorised use of a person's property, money, pensions or other valuables.

Indicators of financial abuse

- ▶ Signatures on cheques, etc, that do not resemble the person's signature or signed when the person cannot write
- ▶ Any sudden changes in bank accounts, including unexplained withdrawals of large sums of money by a person accompanying the holder of the account
- ▶ The sudden inclusion of additional names on the person's bank accounts. These individuals may be unrelated to the older person
- ▶ Abrupt changes to or creation of wills
- ▶ The sudden appearance of previously uninvolved relatives claiming their rights to the person's affairs and possessions
- ▶ The unexplained sudden transfers of assets to a family member or someone outside the family
- ▶ Numerous unpaid bills, overdue rent, care home bills, public utilities bills etc when there is someone who is supposed to be paying his bills for them
- ▶ Unusual concern by someone that an excessive amount of money is being expended on the care of the person
- ▶ Lack of amenities such as TV, personal grooming items, appropriate clothing items, that the person should be able to afford
- ▶ The unexplained disappearance of funds or valuables such as art, silverware, jewellery
- ▶ Deliberate isolation of the person from their friends and family, resulting in the carer alone having total control

Sexual

For example forcing a person to take part in any sexual activity without his or her consent, irrespective of the relationship.

Indicators of sexual abuse

- ▶ Bruises around the breasts or genital area
- ▶ Unexplained venereal disease or genital infections
- ▶ Unexplained vaginal or anal bleeding
- ▶ Torn, stained or bloody underclothing
- ▶ A person tells you that they have been sexually assaulted or raped

Neglect

This may be demonstrated by for example where person is deprived of food or clothing or comforts or essential medication.

Indicators of neglect

- ▶ Dirt, faecal or urine smell, or other health and safety hazards in the person's living environment whether in their own home or in a care home
- ▶ Rashes, sores, lice, inadequate clothing
- ▶ The person is malnourished or dehydrated
- ▶ The person has untreated medical conditions
- ▶ Poor personal hygiene
- ▶ The withholding of medication or over medication
- ▶ Lack of assistance with the eating and drinking
- ▶ Unsanitary and unclean conditions

Indicators of caregivers abuse

- ▶ The cared for person may not be allowed to speak for themselves, or see others, without the presence of the caregiver and (suspected abuser) being present
- ▶ Attitudes of indifference or anger towards the cared for person, or the obvious absence of assistance
- ▶ Family member or carer blames the cared for person (e.g. accusation that the incontinence is a deliberate act)
- ▶ Aggressive behaviour (threats, insults, harassment) by the caregiver towards the cared for person
- ▶ Previous history of abuse or exploitation by others
- ▶ Inappropriate display of affection by the caregiver
- ▶ Flirtations, coyness, etc, which might be indicators of inappropriate sexual relationships
- ▶ Social isolation from family, or isolation or restriction on the activity of the cared for person by the caregiver
- ▶ Conflicting accounts of incidents by family, supporters or the cared for person
- ▶ Inappropriate or unwarranted defensiveness by the caregiver
- ▶ Indications of unusual confinement (closed off in the room; tied to furniture; changing routine activity)
- ▶ Obvious absence of assistance or attendance
- ▶ Previous history of abusive behaviour

4. Abuse and discrimination

Abuse can be linked to disability discrimination. There have been a number of high profile cases, such as the case of Fiona Pilkington who killed herself and her learning disabled daughter, following nearly ten years of abuse by local youths. The inquest heard evidence of failings to tackle the matter within the police, education and social care systems. The Disability Discrimination Act 1995 (as amended) makes it unlawful for a public authority to discriminate against a disabled person when carrying out its functions and could be used to ensure public authorities act when abuse is identified.

5. Abuse and human rights

5.1 Under the Human Rights Act 1998, which in the main applies to public bodies, such as local authorities and the NHS the European Convention on Human Rights has been enshrined in UK law. In particular:

- Article 2 – ‘Everyone’s right to life shall be protected by law’.
- Article 3 – ‘No one shall be subjected to ... inhuman or degrading treatment’.
- Article 5 – ‘Everyone has the right to liberty and security of person’: The ‘lawful detention of ... persons of unsound mind’ is allowed for but everyone who is deprived of his liberty by detention shall be entitled to have the lawfulness tested by a court and to compensation if it was unlawful.
- Article 6 – ‘In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’.
- Article 8 – ‘Everyone has the right to the right to respect for his private and family life, his home and his correspondence’.
- Article 1 First Protocol – ‘Every ... person is entitled to the peaceful enjoyment of his possessions’.
- Article 14 – ‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race ... religion ... property, birth or other status’.

5.2 The Commission on Equality and Human Rights extensively promote human rights and provide useful advice and guidance, which may assist advisers.

6. A general overview of the perpetrator of abuse

6.1 The abuser may be an informal carer such as a relative, friend, associate or neighbour, or a person acting in a paid capacity, such as a professional involved in care in the person’s own home, in a care home or day centre or by the person’s professional adviser. The abusers could hold a position of trust, such as being an attorney or deputy. They could be a trade or sales person.

6.2 Abuse may have occurred due to neglect, an omission to act or as a deliberate and premeditated act. The deliberate abuser is one who sets out deliberately to abuse the vulnerable adult and may have access to information, which opens up opportunities for abuse, such as bank accounts, correspondence and other personal information. Sometimes it may be the result of desperation due to lack of support from others, such as relatives, the NHS and/or Social Services, for example, where the caring role places undue pressure upon the carer who takes out their frustration on the cared for person.

7. Professional conduct issues for legal advisers

7.1 It is important to recognise the following issues:

- The adviser should handle the matter with care and sensitivity, as the client may not be prepared to take your advice due to the nature of the abuse.
- Clients do not like or indeed may be unwilling to admit abuse by others, for example, in relation to financial abuse, being sold a driveway or double-glazing or roof repairs or an unsuitable item.
- The client may need additional help and support, both emotionally and practically. Consider support from advocacy groups and support from the NHS and/or Social Services Department. All local authorities have vulnerable adults' procedures in place to deal with abuse in accordance with the Department of Health's 'No Secrets' and The National Assembly of Wales 'In Safe Hands' Guidance. All local authorities have Adult Protection Officers, who will involve multi agency teams in place to tackle cases as they come to their attention.
- Abuse is often "hidden"; so do not always take the situation at face value.
- Consider where there are risks for abuse.
- Abuse may start by being unintentional and the abuser may rationalise the abuse, for example using the person's money for their benefit as an advancement of their entitlement.
- People do not like airing their 'dirty linen in public' and may rectify abuse by internal management, for example amending their will or making gifts to non-abusers to equalise their estate distribution.

7.2 The Solicitor's Professional Role

Advisers must remember that they have to have regard to the Solicitors Code of Conduct 2007, in particular they must:

► identify who the client is and to whom they owe their duty of care and so act in their best interests (**r.1.04**). Under common law, the duty of care is higher in cases where a professional is the attorney or deputy. The client will usually be the donor (whether mentally capable or incapable) in the case of an EPA or LPA and 'P', sometimes referred to as the 'Patient' in Court of Protection cases, unless they are already separately represented.

► Consider, ascertain and record whether the client has the necessary capacity to give instructions and undertake the specific transaction.

- Making a will - Banks v Goodfellow [1870] LR 5 QB 549
- Revoking a will – Re Sabatini 1970 114 SJ 35
- Making a gift - Re: Beaney (1978) 2 All ER 595
- Contracting a marriage – In the Estate of Park deceased [1954] P 89
CA : Sheffield City Council v E and Another Times Law Reports Jan 5 2005

- Conducting legal proceedings – Masterman Lister v Jewell [2003] 3 All ER 162
- Consenting to medical treatment – Re C (adult refusal of treatment) [1994] 1 All ER 819
- Managing property and financial affairs - White v Fell [1987] Unreported and Masterman Lister v Jewell [2003] 3 All ER 162

► Consider whether the client is making the decision freely and of their own volition and that they are not being subjected to fraud, pressure or undue influence (**r. 2.01**).

One way in which this can be done is simply by carrying out a risk/ benefit analysis at the outset so that the client understands the risks of what they are doing and the benefits and the consequences of the steps they are taking. This is a very simple analysis and does not require the adviser to take very sophisticated steps but it can prevent problems.

8. Preventing financial abuse by an attorney

8.1 Regard should be had to the Law Society's Practice Notes for Solicitors on the making of Lasting Powers of Attorney (LPAs) (September 2007) and Making Gifts of Assets (July 2009).

8.2 Advisers are in a position, particularly in relation to financial abuse, to build in protection for the client, when advising and drafting documents. The advice given must to be tailor-made to each client's circumstances and needs.

8.3 Lasting Power of Attorney or Deputy?

In some cases the outcome for the client may be better were the Court of Protection to appoint a deputy, rather than the client making a LPA, because of the supervision given by the Office of the Public Guardian (OPG) and the Court's usual requirement for a security bond to protect against a defaulting deputy. This may be particularly relevant where the client has a history of being exploited or where his relevant relationships are dysfunctional.

8.4 Check capacity and undue influence

Advisers need to be careful when receiving instructions for LPAs, if they receive those instructions from a third party or where they are acting for a donor who has previously been unknown to them. Third party instructions must be confirmed by the donor. Always see the client alone for at least part of the interview to identify capacity and that the power is what the client wants and is being made free from the influence of others.

If the client is unknown to you or you have not seen them for a long while, take some time to talk about wider issues to be sure the client has the necessary capacity and they are not acting under the undue influence or pressure of another. If in doubt, it is advisable to involve medical practitioners to assist with ascertaining capacity.

8.5 Insert restrictions and conditions in the power

Consider when drafting the power building in protection by way of consents, approvals and supervision so that there is accountability and external supervision. Letters of wishes or guidance contained in the power, which sets out a framework for the attorney to act, may help to prevent abuse.

Accounts

A condition in the power to have the accounts checked by a third party will provide accountability. If accounts are not rendered in accordance with the condition, then an application could be made for cancellation of the power on the grounds that the attorney is exceeding his authority and is not acting in the donor's best interests. Checking accounts is a service that the legal practice could undertake.

8.6 Check suitability of attorney

It may be appropriate for the probity of the attorney to be investigated with enquiries made about whether the attorney has the requisite skills to manage the affairs. The appointment of a sole attorney provides more scope for abuse than a joint or several appointment, yet a joint and several appointment also provide a greater opportunity for exploitation than a joint appointment due to there being less accountability.

8.7 Provide information on the limitation of the power

The donor and the attorney should be given information, ideally in writing about the limits of the power, in particular that they are not authorised to make medical and welfare decisions under a property and financial affairs LPA and the limited power to make gifts and financial provision for others.

8.8 Record and track the use of the power

The adviser should confirm the circumstances in which a LPA is to be used, so that the power can be released to the attorney at that point. Although the power could contain a condition to this effect, it may cause practical administrative problems, as third parties would have to satisfy themselves that the condition was fulfilled on each occasion the power needed to be used. Only provide certified copies when the power is to be used and keep a record and track of where they are, in order to detect and prevent potential misuse.

9. Preventing abuse by the professional attorney

9.1 In cases where a professional has been appointed, develop a practice wide policy of monitoring and auditing files on a regular basis, by someone who is not involved with the case.

9.2 Use the practice's accounts' department to draw up cheques and present audited accounts.

9.3 Discourage, where possible a single or an unqualified member of staff from being a sole Attorney- use joint or joint and several appointments instead.

9.4 Make clear that in the event of anyone being found to have abused their power and taken advantage of their position as an attorney that the matter will be referred to the Police and the Solicitors Regulations Authority or other professional regulatory body and that internal disciplinary proceedings will result.

10. Dealing with abuse in the person's own home

10.1 Abuse can be hidden, particularly where there is one to one dependence on carers, where supervision is weak and there is little or no contact with others who might otherwise pick it up. Detection may be poor if the various agencies involved in providing care do not communicate with each other.

10.2 Abuse may be identified by the professionals involved in contact, for example a social worker during a community care assessment, (which for older people should be part of the Single Assessment Process in England or the Unified Assessment Process in Wales), an Independent Mental Capacity Advocate appointed under the Mental Capacity Act 2005 or a Court of Protection General Visitors.

10.3 Regulated care providers

For those in receipt of social services assistance, there should be a review by social services three months after the start of service provision and at least annually thereafter. For extremely vulnerable clients more frequent review may be necessary. The review by social services should identify inappropriate care packages. Often the first indication of abuse may be the issue of raising complaints about service delivery that may expose abuse. Alert social services by contacting the local authority Monitoring Officer and make a formal complaint (see below at 11).

Abuse by a paid carer can be dealt with in a similar manner as complaints in care homes, albeit the complaint should be made to the care agency. The carer's fitness for employment will relate in part to Criminal Records Bureau (CRB) and Vetting and Barring (V&B) (formerly POVA) checks by the Independent Safeguarding Authority. A complaint can also be made to the Care Quality Commission (see 11.6 below for more details).

10.4 Independent unregulated care providers

Day care services and personal assistants employed directly are unregulated. The individual will need to be confronted directly and if necessary the police called to investigate. The relevant social services department should also be alerted.

Advisers may be able to prevent abuse by considering contracts and terms of employment as well as carrying out CRB and V&B checks and setting up supervision systems, particularly in relation to financial management. Advisers should ensure that adequate references are followed up. Direct employment of those who have left agencies and have poor track records or about whom there may be suspicions, is inherently risky.

11. Dealing with abuse in care homes

11.1 The Regulatory Authority for Care Homes

The Care Quality Commission (CQC) registers and inspects all health and social care provision in England and ensures they meet national minimum standards. The Care and Social Services Inspectorate Wales has similar functions for care homes and domiciliary services in Wales.

Service providers are required to notify the CQC of events, which could be indicative of unacceptable occurrences, which might amount to abuse. This includes incidents, which give rise to serious injury or death, events which adversely affect the well being (this is a very widely interpreted obligation) or safety of the service user and allegations of misconduct by the registered person or anyone who works in the home.

The national minimum standards place requirements on the service provider to protect the service user from abuse.

The requirements include: -

- ▶ Protection from physical, financial or material harm, psychological or sexual abuse, neglect, discriminatory abuse or self-harm, inhumane or degrading treatment, through deliberate intent, negligence or ignorance in accordance with written policies.
- ▶ Putting robust procedures in place to respond to suspicions or evidence of abuse or neglect and passing these concerns to CQC in accordance with the 'No Secrets/In Safe Hands Guidance and the Public Interest Disclosure Act 1998.
- ▶ Follow up action in relation to all allegations or incidents of abuse.
- ▶ Staff who are considered to be unsuitable to work with vulnerable adults are to be referred for placement on the Vetting and Barring Register (formerly the Protection of Vulnerable Adults Register (POVA)) and this is to be recorded on the Inspection Report.
- ▶ Policies and practices to be in place so that physical and/ or verbal aggression by service users is understood and dealt with appropriately.
- ▶ Policies to be in place to protect abuse of service users financial affairs.
- ▶ Complaints procedures are in place and made known including a requirement that written information should be provided to all service users for referring a complaint to the registering authority at any stage should the complainant wish to do so.

Formal inspections are limited to once every three years, although without notice visits can be made at any time, particularly if concerns have been raised about a care home. Reporting poor standards and/or suspected abuse will trigger other inspections which can be very effective in limiting abuse and getting rid of the perpetrators.

11.2 Identifying risk before moving into the care home

Advisers need to anticipate a move into a care home by setting up a protective framework in relation to financial matters, checking care contracts and keeping full records of assets and personal possessions at the start of occupancy. A trial period at the home is useful to see how things are run and quality of care given. Talking to other residents and their families can also be helpful as can speaking to social services about their experience with a particular home.

The care home's Inspection Reports for a couple of years, may highlight problems, for example whether or not the home has a reputation for poor practice or has reported staff to the Vetting and Barring register or former POVA register for abuse. The home should undertake a Criminal Records Bureau (CRB) check prior to employing staff.

11.3 Action to take on detecting abuse

On suspicion or detection of abuse, complain to the proprietor of the home. The home may remove, dismiss or prevent the perpetrator from being in the home. They may also decide to call the police to investigate. If the internal complaints procedure does not provide the required solution it may be necessary to report the matter directly to the CQC, who will investigate and take appropriate action.

At the same time contact the local Social Services Department, the NHS and the Primary Care Trusts (PCT)/ Local Health Board (LHB) who may place residents and commission care in the care home.

11.4 Charities such as Age UK (formerly Help the Aged, and Age Concern) and the Alzheimer's Society at local level may offer advocacy support and help in presenting complaints.

11.5 If the abuse occurred as a result of another resident or visitor, the home may still have some responsibility, particularly if they knew of the risk and failed to take action to avoid the abuse from happening.

11.6 Social services complaints

Where the care is being provided by social services, a complaint can also be made using the local authority complaints procedure. Social services should provide the complainant or their representatives details of how to complain. The Local Authority Social Services and National Health Services Complaints (England) Regulations 2009 have simplified the complaints process. In Wales, the Social Services Complaints Procedure (Wales) Regulations 2005 set out a more complex process.

The complaint should be made in writing within twelve months of the incident forming the basis of the complaint or within twelve months of becoming aware of the circumstances about which you want to complain. In exceptional circumstances these time limits may be waived.

If after going through the complaint's procedure, the desired outcome has not been reached, the complaint can be pursued through the Local Government Ombudsman.

11.7 Complain to perpetrator's regulatory body

The General Social Care Council is the regulatory body for all those working in social care in England, who are required to undergo continuing professional development annually in order to stay on the register and to comply with professional standards. A complaint can be made concerning the registered perpetrator. The Care Council for Wales is the Welsh equivalent body.

11.8 Death in a Care Home

All deaths in care homes have to be notified to the CQC. The information submitted must include details of the circumstances of death. Records of deaths may indicate trends and could potentially identify areas of abuse. GPs who are called into care homes to certify death are in a position to observe whether anything untoward has happened. Advisers who have concerns about the death of a client should consider contacting the CQC or the GP concerned.

The Births and Deaths Registration Act 1953 imposes a requirement on the doctor who last attended the deceased to issue a medical certification of death. This has the potential to identify abuse but Dr Harold Shipman highlighted the potential for abuse of the system of certification. This is of greater concern where the resident's GP or GP's relatives own and run the care home in which they live.

12. Dealing with abuse in the NHS

12.1 A complaint can be made using the NHS complaint's procedure. In England see the Local Authority Social Services National Health Service Complaints (England) Regulations 2009SI 2009/309. Complaints in the NHS: the Welsh Assembly Government published a Guide to Handling Complaints in Wales, which builds on Directions, in April 2003. The Patient Advice and Liaison Services, based in local hospitals in England or Community Health Councils in Wales can provide information about the NHS complaint's procedure.

12.2 The complaint should be made in writing within twelve months of the incident forming the basis of the complaint or within twelve months of becoming aware of the circumstances about which you want to complain. In exceptional circumstances these time limits may be waived. The complaint will be dealt with at local NHS level, including any investigation. In Wales, in the event that a local complaint does not provide the desired outcome, the complaint can be made to the Independent Review Secretariat.

12.3 The Independent Complaints Advocacy Services have been set up in every PCT to provide an advocacy service for those making a formal complaint about NHS services. These are in the main run through Citizens Advice Bureau but for exact details see: www.dh.gov.uk/complaints/advocacyservicelists.htm

12.4 If after going through the NHS complaint's procedure, the desired outcome has not been reached, the complaint can be pursued through the Health Service Commissioner, also known as the Ombudsman.

13. Remedies for financial abuse by the attorney

13.1 Donor with mental capacity

If the donor has mental capacity, he should revoke the power by a **Deed of Revocation**. The donor's capacity to revoke the power is determined by:

- (1) who the attorney is, or who the attorneys are — and, if more than one, whether they were appointed to act jointly or jointly and severally.
- (2) what authority they have.
- (3) why it was necessary or expedient to revoke the power; and
- (4) the foreseeable consequences of revoking the power.

(Re S, unreported 13.3.97)

In addition to this the donor should notify the attorney. With a registered LPA, the donor must also notify the Public Guardian (**reg 21 of Lasting Powers of Attorney, Enduring Power of Attorney and Public Guardian Regulations 2007 (SI 2007/1253)** (the LPA regs). It is advisable to also notify any third party organisation that has had notification of the power, such as a bank.

Revocation may be very difficult if the donor is frightened of the ramifications and should be dealt with sensitively. The adviser owes a duty of confidentiality, which must not be breached. It is prudent to obtain the client's consent in writing to proceed.

13.2 The donor without mental capacity

Notwithstanding the loss of mental capacity, the adviser continues to owe the donor a duty of confidentiality (**r.4 Solicitors Code of Conduct**). However, as he must always act in the client's best interest, this would allow the adviser to do such acts to safeguard the client's assets (**r.1.04 Solicitors Code of Conduct**).

13.3 If the donor is in receipt or needs to be in receipt of community care services or disabled, report concerns to the Vulnerable Adults Team in social

services. They may organise an assessment and put into place suitable measures.

13.4 Where appropriate, speak to the Professional Ethics Help Line of the Solicitors Regulation Authority on Tel: 0870 606 2577 and keep a file note of any discussion.

13.5 If the abuse concerns another professional reporting the matter to the Managing Partner in the practice concerned.

13.6 Investigation by the OPG

The adviser can report the matter to The Office of the Public Guardian's Investigation Unit, which has power to investigate financial concerns about registered powers (**regs 46, 47 & 48, LPA Regs**). This may involve requesting a Court of Protection Visitor to see the donor and/or the attorney to investigate concerns (**reg 44 LPA Regs**). LPAs are not valid until registered so the Public Guardian has no investigative functions until then.

13.7 Revocation of registered EPAs

If an EPA has been registered it can only be revoked with the confirmation of the court (Sch 4, para 10 (c), Mental Capacity Act 2005 (MCA)). There is no automatic revocation of the EPA by the donor subsequently making a LPA (*Re E (Enduring Power of Attorney) [2000] 1 FLR 882*): *In the matter of Cloutt (Court of Protection) (Reported ACTAPS Journal October 2008)*.

13.8 Unregistered EPAs

The Public Guardian has no function in respect of unregistered EPAs. If the attorney of an unregistered EPA is not prepared to register the power and so enable a challenge to be made, then an application to the Court should be made for the appointment of a financial deputy. Evidence of the existence of the EPA and that the donor lacks mental capacity to manage his property and affairs is required. The attorney will need to be served with notice of the application. The Court will resolve the matter as appropriate. This could be by ordering the attorney to register the power or the removal of the attorney and/or revocation of the power.

13.9 Court of Protection orders for revocation of power/ or removal of attorney

The Public Guardian can make an application for the removal of the attorney or the revocation of the power, if concerns are warranted (**reg 43 LPA Regs**). A third party can also make an application to the Court on the basis that the attorney is unsuitable (EPA) or not acting in the best interests of the donor (LPA). The Court can make an order appointing a deputy instead.

13.10 Other orders of the Court of Protection

The Court has wide power to deal with the consequences of abuse, which could include:

- Order prohibiting a named person from having contact with the victim (**s.17 (1) (c) MCA**).

- Order enabling another person to bring proceedings on behalf of the victim for example, for recovery in the civil court, this may involve claims of fraud, coercion, undue influence, lack of capacity, and breach of fiduciary duties (**s.18 (1)(k) MCA**).
- Residency orders (**s.17 (1)(a) MCA**).
- The appointment of a deputy (**s16 (2)(b) MCA**).
- Contact orders (s17 (1)(b) MCA).

13.11 High Court orders

The High Court can also make freezing injunctions to prevent money or property being disposed of, search orders to allow access to the perpetrator's home or workplace to search for documents. Injunctions can also be obtained to prevent the perpetrator from leaving the country. A person acting as litigation friend of the mentally compromised victim can also apply to the High Court for recovery of funds.

14. Remedies for financial abuse by others

14.1 Investigation of deputies by the OPG

The OPG when supervising Court appointed deputies, can investigate, identify abuse and deal with abuse, which can include an application to the Court of Protection for the removal and replacement of the deputy. The Court can order that any security bond be paid to remedy the loss. The Court can also make appropriate orders as set out in 13.10 above.

14.2 Criminal offences

Any person who gains unauthorised access to the person's finances and takes assets belonging to another can be charged with various criminal offences, including theft. Section 4 of the Fraud Act 2006 makes it a criminal offence where a person intentionally and dishonestly takes advantage of his position. The police should be contacted and a complaint made.

It may be possible for the police to recover the money, as the funds will be crime proceeds.

14.3 State pensions and allowance decisions

It may be necessary to involve the Department of Works and Pensions, (DWP) particularly if the perpetrator is an appointee or agent or third party acting under a mandate set up with a bank or other financial organisation. These should be cancelled and the organisations made aware of the position. The DWP Fraud Investigation Unit should be contacted and their advice sought. Banks and other financial organisations also have fraud investigations teams.

14.4 Civil remedies

13.11 above may also apply.

15. Remedies for physical and sexual abuse

15.1 Criminal proceedings

Slapping, hitting, pushing, shoving and administering any kind of physical damage to a vulnerable person amounts to assault and battery and is therefore a matter for the police and the inspection bodies. A wide range of criminal charges can be brought against the perpetrator. In particular, common assault, sexual assault, rape, actual and grievous bodily harm and murder or manslaughter charges.

It is imperative, to obtain evidence as soon as the abuse has been identified. It may be helpful to obtain photographs of any injuries, which have been incurred as the result of the abuse. In practice, it may be difficult to obtain a medical report from the victim's own medical practitioner if he cares for both the perpetrator and the victim or may feel insufficiently qualified to prepare such a report. In any event the local police surgeon is likely to be involved and should be able to provide evidence.

If the perpetrator is convicted, the court can make an order for compensation, which unlike the civil system is based on ability to pay and so may be low.

15.2 Criminal Injuries Compensation

Victims of violent crimes can apply to the Criminal Injuries Compensation Authority for payment of compensation. It does not matter that a prosecution was not brought or that the perpetrator could not be held responsible if he was suffering from a mental disorder. The claim must be brought within 2 years from the date of the incident and any responsible person on behalf of a victim who is mentally disabled can make a claim.

15.3 Compensation in the civil courts

Under the civil law of trespass to the person, (which encompasses assault and battery); it is possible for the victim to sue for compensation. Trespass to the person is a wrong committed against the personal security or personal liberty of one person to another. The act must be either intentional or negligent and without the victim's consent. It is also possible to claim compensation for any personal injury suffered.

15.4 Injunctions under the common law

Obtain a common law injunction to stop future abuse and/or stop a person entering the victim's home. They cannot be used to exclude a person who has a right to occupy the property and there is no power of arrest for breaching this type of injunction.

15.5 Injunction from the Court of Protection

The Court of Protection has power in **s.17 (1)(c) MCA** to grant an injunction, which may stop future abuse by stopping the perpetrator from entering the victim's home. They cannot be used to exclude a person who has a right to occupy the property. The Court has power to include a penal notice (**s.47 (1) MCA**). See also 13.10 above for other orders, which the Court may make.

15.6 Harassment Injunctions

Under the Protection from Harassment Act 1997 the police can arrest and charge a person for harassment. Harassment includes, nuisance phone calls, stalking, threats, excessive noise etc and covers any behaviour which causes 'alarm' or 'distress'. Alternatively an 'Anti-Harassment Injunction' may be obtained from the County or High Court. Compensation for 'anxiety', 'distress', 'alarm' or financial loss can be made at the same time.

15.7 Domestic Injunctions

The Family Law Act 1996 enables an injunction to be granted excluding the abuser from the home and restraining conduct. Breaches can be dealt with by a fine or imprisonment. If there is cause it is possible to obtain an interim injunction without giving notice to the abuser, pending a final hearing. Injunctions can be obtained against 'associated persons', defined in s.62 (3) as people who:

- are or have been married to each other;
- are or have been cohabitants (defined as a man and a woman, not married to each other by living together as husband and wife);
- have lived in the same household (other than one of them being the other's tenant, lodger, boarder or employee). This does not therefore include those in lesbian and gay relationships and those sharing a house;
- are relatives (this is defined to include most immediate relatives)
- have agreed to marry (evidence by a written agreement, the exchange of a ring, or a witnessed ceremony);
- in relation to a child (they are both parents, or have or have had parental responsibility for a child);
- are parties to the same family proceedings (other than under Part IV of the Act, but excluding the local authority).

15.8 Over Medication

The over and inappropriate medication of elderly people, particularly with anti-psychotic medication is a matter of serious concern, if it is used as a tool for behavioural management and may amount to abuse. The administration of this type of medication poses a particular risk to elderly people and the lack of training in the administration of these drugs particularly by unqualified staff is worrying. The Alzheimer's Society believe that the over-prescription of neuroleptic drugs is a common form of physical abuse which is often used to sedate the elderly with dementia in hospitals and care homes.

It has been identified that there are insufficient local prescribing guidelines in relation to powerful painkilling drugs; a lack of rigorous review of pharmacy data on high levels of prescribing on wards/care homes caring for the elderly; absence of supervision of prescribing and a lack of multidisciplinary assessment to determine care needs and medication. The Community Pharmacist may be called in to investigate this.

Health care records may be obtained under the Data Protection Act 1998, when requested by a deputy or attorney of a registered EPA or LPA or the written consent of the patient with capacity to enable the monitoring of the client's medication. Advance consent may be sought to do this when the LPA is prepared.

The Government's National Service Framework for Older People is helpful in that it recommends that all those over 75 years who receive prescriptions for more than four drugs at any one time should have an annual review of their prescriptions. Locally the PCTs should monitor these issues closely. Some GP practices do this for all their patients as a matter of good practice

If over medication is observed then make a complaint to the management and/or the inspection body concerned and if appropriate, the police and the local PCT/LHB.

15.9 Restraint

Whilst proportionate restraint is acceptable to prevent serious harm occurring to a vulnerable person, anything that exceeds this or amounts to a deprivation of the person's liberty without proper authority (such as detention under the Mental Health Act 1983; an order from the Court of Protection under s16A of the MCA; or authorisation under the Deprivation of Liberty Safeguards under Schedule A1 MCA) is unlawful.

Although medication is an artificial form of restraint, actual physical restraint of vulnerable people is also a serious issue. This could be by placement of furniture, physical confinement, electronic tagging and are unacceptable. It may also include locking people in their rooms and ignoring their needs. The use of cot sides is an action which can only take place if informed consent has been given and/or agreement reached with the family that they should be used. Other forms of restraint considered to have the potential to be considered criminal offences include: - restriction of liberty by locking someone in their room; Misuse of furniture or equipment including bedrails and Buxton chairs (chairs which restrain or restrict movement by the use of integral tables); unsafe or outmoded restraint practices which risk physical injury.

Such restraints may amount to the tortious act of negligence or trespass to the person and/or a criminal offence of assault and battery. See 15.3 above for available redress.

16. Remedies for psychological abuse

Due to its nature psychological abuse can be difficult to detect. It may be possible to obtain an injunction if it amounts to harassment and for criminal proceedings to be brought. See 15.4-15.7 above for suitable redress.

17. Remedies for neglect

Most of the interventions likely to occur within the abuse of neglect will involve the local authorities and the NHS.

17.1 Community care provision by Social Services

Section 47 of the NHS and Community Care Act 1990 requires local authorities to carry out assessments for people who may be in need of community care services or who are disabled. The assessment may be multi agency. Neglected adults will be entitled to an assessment irrespective of their own financial resources. It is unlikely that the neglected person will ask for an assessment and will rely heavily on 'whistle blowers' to alert of possible neglect. Service provision may be made where the individual qualifies under the local authority's eligibility criteria. The individual will be means tested to contribute towards the cost of the service.

17.2 Removal order under the National Assistance Act 1948 (the 1948 Act)

Section 47 of the 1948 Act as amended by the National Assistance (Amendment) Act 1951, authorises the local authority's 'Proper Officer', (who will usually be person from the Environmental Health Department) to remove a person to a place of care where such a person is:

- (i) Suffering from a grave chronic disease or, being aged, infirm, or physically incapacitated, is living in unsanitary conditions and
- (ii) Is unable to devote to him/herself, and is not receiving from other persons, proper care and attention and
- (iii) Refuses to go into hospital or an institution even though a bed is available.

Social services will be closely linked in the application, as will the person's GP. They must have tried without success to obtain the person's agreement to receive help and assistance.

The application is made by the Proper Officer in writing with medical support to the Magistrates Court certifying that they are satisfied after a thorough inquiry and consideration that it is necessary to remove the person from the premises in which they are residing because:

- (i) It is in that person's interests; or
- (ii) It is to prevent injury to the health of, or serious nuisance to other persons; or
- (iii) To prevent serious nuisance to other persons.

The order can last up to 3 months and is renewable with no right of appeal. Alternatively in an emergency it is possible to obtain immediate removal without giving notice to any person involved, which lasts only 3 weeks, provided it is established by the Proper Officer that it is in the person's interest (National Assistance Amendment Act 1951). As with less urgent applications

there is no appeal and it is doubtful if this procedure is compliant with the European Convention on Human Rights.

17.3 Section 48 duty to protect property under the 1948 Act

The local authority is under a duty to take reasonable steps to prevent or mitigate loss or damage to the person's property when they have been admitted to hospital, residential accommodation under s.21 or removed under s.47 powers. The local authority can enter the premises to take steps to protect it. Any reasonable expenses incurred in doing such are recoverable from the person concerned.

17.4 Entry and inspection of premises

Under s.115 of the Mental Health Act 1983 (the 1983 Act), an approved mental health professional can enter and inspect any premises (other than a hospital) occupied by a mentally disordered person, if they think that the person is not receiving proper care. They cannot use force to break in, and have no power under the 1983 Act to remove the person. If it is thought that removal is necessary then a warrant under s.135 (see 17.5 below) should be obtained. Anyone refusing entry to the approved mental health professional would be committing an offence under s.129 (obstruction).

17.5 Place of safety order of a person in a premises

Section 135 of the 1983 Act enables an approved mental health professional to apply to a magistrate for a warrant which will allow a police officer to enter premises where it is thought that a person who is suffering from a mental disorder is residing and:

- (i) They are being (or have been) ill-treated, neglected, or
- (ii) Not kept 'under proper control'; or
- (iii) They are living alone and unable to care for them self.

An approved mental health professional and a doctor should accompany the police officer that is to execute the warrant, which is valid for 28 days. They can break into the premises, if appropriate and where necessary remove the person and take them to a place of safety. A place of safety can be a police station, a hospital, a care home or other suitable place

The section lasts for up to 72 hours from the time that the person arrives at the place of safety. The person should be assessed during this period and once a decision is made as to the treatment or care required, then the section ceases. There is no right of appeal.

17.6 Place of safety of a person in a public place

Section 136 of the 1983 Act enables a police constable to remove a person to a place of safety, if he finds that person in a public place:

- (i) Who appears to be suffering from a mental disorder;
- (ii) Is in need of care and control; and
- (iii) It is in the interest of that person or for the protection of others for such removal.

Detention can be up to 72 hours, during which time an assessment would take place for any necessary arrangements for care to be made, with no right of appeal. Once this has been done the section ceases to be in effect.

17.7 Guardianship orders

The 1983 Act enables a guardianship order to be made (s. 7). To be received into guardianship the person must be suffering from a mental disorder of a nature or degree that warrants the order and it is necessary in the interests of the person, or for the protection of other people.

The order may specify:

- (i) Where the person lives;
- (ii) That the person attends a place or at a time for medical treatment, occupation, education, and training; or
- (iii) That a doctor, an approved mental health professional or anyone else the guardian specifies must have access to see the person (s.8).

The guardianship lasts for 6 months and is renewable for a further 6 months and then for a year at a time under s.20. There is a right of appeal to the Mental Health Review Tribunal.

17.8 Criminal proceedings for neglect by those providing care under the 1983 Act

Section 127 of the 1983 Act makes it a criminal offence to ill treat or wilfully neglects a patient receiving treatment, subject to a guardianship order or otherwise in his custody or care for treatment of a mental disorder in hospital or a care home by staff. Any proceedings required the approval of the Director of Public Prosecutions.

17.9 Criminal proceedings for neglect by those acting under the Mental Capacity Act 2005

Section 44 MCA created an offence of ill-treatment or neglect, which applies to three categories of people:

- Carers of a person who lacks mental capacity (this includes paid carers and informal carers such as relatives)
- The attorney of an EPA or LPA
- A deputy

The person will be guilty of an offence if he ill-treats or wilfully neglects the person they care for or are appointed to act for. Unfortunately the MCA does not give a definition of ill-treatment or wilful neglect.

Case law in respect of similar offences under the 1983 Act of mentally disordered persons gives some relevant guidance. The Court of Appeal has held that ill treatment and wilful acts of neglect under the 1983 Act are not to be equated and that they should appear as separate counts in an indictment and that this applies generally to the offence of ill-treatment or wilful neglect under the 1983 Act (see *R v Newington 1990 Court of Appeal*).

In Newington the Court of Appeal gave guidance on the requirements of the offence or ill treatment in the context of ill treatment of a mentally disordered person under section 127 of the 1983 Act. For a successful prosecution to occur it is necessary to prove:

1. Deliberate conduct by the accused which can properly be described as ill-treatment irrespective of whether or not damage or threatened to damage the victim's health; and
2. A guilty mind; either an appreciation by the accused that he or she was inexcusably ill-treating a person or recklessness as to whether he or she was inexcusably acting in this way.

The Court did not accept that violence would always amount to ill treatment as violence necessarily used for the control the patient would not amount to ill treatment.

'Wilful' neglect was held in the case of **R v Sheppard 1981 AC 394** by the House of Lords to mean 'deliberate'. As a matter of general principle it encompasses recklessness as well. Neglected is the objective state, which is not defined by the Act. Neglect could consist of an omission.

Any cases brought are triable either way. On summary conviction a maximum prison term of 12 months and/ or fine not exceeding a statutory maximum could be imposed. On conviction on indictment a maximum prison term of five years and /or fine could be imposed.

18. Problems of legal remedies

18.1 The cost of legal remedies

Using the civil court system can incur expense and this deters many people from using this method of intervention. Those on a low income, with little or no savings may qualify for legal support through legal aid but will still need to establish that there is a viable cause of action. An application for Legal Aid and subsequent action can be made on behalf of someone who lacks mental capacity. Many practices of solicitors have given up undertaking legal aid work due to the low levels of pay. Others may act on a contingency fee basis, for personal injury cases.

18.2 Court action can take time to get to a full hearing

One would need to seriously consider the effect of this on the person and their life expectancy.

18.3 Evidence must be established

It is imperative that sufficient evidence is obtained as soon as possible after the event of abuse. This may take the form of medical reports, photographic evidence, written records and statements from parties involved. Where a criminal act of abuse has occurred, consider involving the police.

Although a victim without capacity may pose evidential problems, it does not preclude them from having the protection of the law. An expert witness may be able to give evidence of physical or sexual abuse; Eyewitness's accounts may be able to provide corroborative evidence and the person may also give evidence.

In determining whether the person is competent to give evidence, the judge has to ascertain, if they understand what telling the truth is as well as being able to recall the facts. This may involve calling an expert witness, such as a psychologist. If the person suffers from dementia, but has lucid periods, it may be worthwhile obtaining written evidence in the form of an affidavit during a period of capacity supported by medical evidence as to capacity to make the statement.

18.4 What does the client want the outcome to be?

It is easy to assume, but it's not always the case, that the client wants intervention of some sort. They will usually want the abuse to stop but there may be repercussions. Counselling services may be needed. The client may decide to deal with the matter without legal redress by amending wills and gifts to rectify the position.

18.5 Is the perpetrator worth pursuing?

If compensation is the redress desired, does the perpetrator have any financial means to pay any court order made? In civil cases mentally disordered persons are liable to the same extent as sane persons, provided they have the state of mind required for liability in the particular tort. (*Morris v Marsden* (1952) 1 All ER). Even if the perpetrator is unaware that he may be committing a wrongful act, he may still be liable. However, if his acts are purely involuntary and automatic it cannot be litigated.

In criminal cases, the decision to prosecute a mentally disordered person depends if it is in the public interest. In such cases the court has wide sentencing powers.

19. Changing the culture

Abuse can be reduced by changing the culture: by raising awareness of the way in which vulnerable adults should be treated in the community and the standards of care to which they should be entitled.

Media coverage makes big inroads. Changes in the regulation of cold selling and door-to-door sales have been another way forward and awareness of fraud by 'prize offer' schemes helps to limit fraud. Contact Local Trading Standards Offices to limit these activities and to put in place 'STOP Orders'.

Advisers may be in a position generally to prevent abuse by offering awareness training to social workers, paid carers and care homes or get involved with the development of local vulnerable adults codes of practice. Report poor practice and abuse and encourage the family and /or the client to report adverse treatment.

20. Resources

Publications

The Law Society Practice Notes on Lasting Powers of Attorney and Making Gifts of Assets
Local Authority Circular LAC (2000) 7- No Secrets
In Safe Hands: Implementing Adult Protection Procedures in Wales, November 2009

Useful Contacts

Action on Elder Abuse
PO Box 60001
Streatham
SW16 9BY
Tel: 020 8835 9280
Help line: 080 8808 8141
Email: enquiries@elderabuse.org.uk
Web site: www.aea.org.uk

Age UK (formerly Age Concern and Help the Aged)

Astral House,
1268 London Road,
London SW16 4ER
Tel: 0800 009 966
Web site: www.ageconcern.org.uk

The Commission on Equality and Human Rights

Manchester

Arndale House,
The Arndale Centre,
Manchester,
M4 3AQ
Telephone 0161 829 8100 (non help line calls only)
Email: info@equalityhumanrights.com

London

3 More London,
Riverside Tooley Street,
London,
SE1 2RG
Telephone 020 3117 0235 (non help line calls only)
Email: info@equalityhumanrights.com

Cardiff

3rd floor,
3 Callaghan Square,
Cardiff,
CF10 5BT
Telephone 02920 447710 (non help line calls only)
Text phone 029 20447713
Email: wales@equalityhumanrights.com

Help line

England: 0845 604 6610
Wales: 0845 604 8810

Care Quality Commission National Correspondence

Citygate
Gallowgate
Newcastle upon Tyne
NE1 4PA
Tel: 03000 616161
Email: enquiries@ccq.org.uk
Web site: www.cqc.org.uk

Care and Social Services Inspectorate Wales

Cathays Park
Cardiff
CF10 3NQ
Tel: 01443 848450
Email: cssiw@wales.gsi.gov.uk
Web site: www.cssiw.org.uk

The General Social Care Council

Conduct Group
General Social Care Council
Myson House
Railway Terrace
Rugby
CV21 3HT
Tel: 01788 532 405
Email: conduct@gsc.org.uk
Web site: www.gsc.org.uk

Care Council for Wales

South Gate House,
Wood Street,
Cardiff
CF10 1EW
Tel: 029 2022 6257
Email: info@ccwales.org.uk
Web site: www.ccwales.org.uk

Independent Age

6 Avonmore Road
London
W14 8RL
Tel: 020 7605 4200
Web site: www.independentage.org.uk

Contact the Elderly

15 Henrietta Street
Covent Garden
London,
WC2E 8QG
Tel: 020 7240 0630
Email: info@contact-the-elderly.org.uk
Web site: contact-the-elderly.org.uk

The Alzheimer's Society

Gordon House
10 Greencoat Place
London SW1P 1PH
Tel: 020 7423 3500

Email enquiries@alzheimers.org.uk
Web site: www.alzheimers.org.uk

Counsel and Care

Twyman House
16 Bonny Street
London NW1 9PG
Tel: 0845 300 7585 (advice)
Web site: www.counselandcare.org.uk

The Court of Protection

Archway Tower
2 Junction Road
London
N19 5SZ
Tel: 0845 330 2900
Web site: www.hmcourts-service.gov.uk

The Office of Public Guardian

PO Box 15118
Birmingham
B16 6GX
Tel: 0300 456 0300
Web site: www.publicguardian.gov.uk

The Official Solicitor and Public Trustee

81 Chancery Lane
London
WC2A 1DD
Tel: 020 7911 7127
Web site: www.officialsolicitor.gov.uk

The Health Service Commissioner for England

Millbank Tower,
Millbank,
London
SW1P 4QP
Tel: 020 7217 4051
www.ombudsman.org.uk

The Public Service Ombudsman for Wales

1 Ffordd yr Hen Gae,
Pencoed,
CF35 5LJ
Tel: (01656) 641 150
Web site: www.ombudsman-wales.org.uk

Local Government Ombudsman

PO Box 4771
Coventry
CV4 0EH
Tel: 0300 061 0614 or 0845 602 1983
Email: advice@lgo.org.uk

The Independent Review Secretariat

Mid and West Wales

P O Box 2
Brecon

Powys LD3 0XR
Tel: 01874 712748

South Wales

P O Box 21
Cardiff CF10 2ZR
Tel: 029 2040 2262

North Wales

P O Box 125
Mold CH7 1WH
Tel: 01352 700227

Criminal Injuries Compensation Authority

Tay House
300 Bath Street
Glasgow
G2 4LN
Tel: (Freephone): 0800 358 3601
Web site: www.cica.gov.uk

This document has been prepared by Anne Edis, President of Solicitors for the Elderly and Caroline Bielanska, Chair of Solicitors for the Elderly for the benefit of members, the legal profession, and those interested in safeguarding the interests of vulnerable adults.

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**INFORMATION
FOR
AN ATTORNEY ACTING UNDER
A PROPERTY AND FINANCIAL
LASTING POWER OF ATTORNEY (LPA)**

What the lasting power allows you to do

A Lasting Power of Attorney made by a person (the donor) gives you power to deal with their financial affairs. You must only do such things as the power allows you to do. It does not give you power to make decisions such as where the donor should live or medical treatment they should have.

If you have been appointed with another person it may be that you have to deal with all matters together (a joint appointment); or it could be that you can act together or independently (joint and several appointment); or some decisions together and some independently (a hybrid appointment).

Can you use it immediately?

Once the power has been registered with the Office of the Public Guardian and provided there are no conditions or restrictions preventing you from acting at this point, you may use the power immediately. You should only do what the donor wants you to do and always act in their best interest. If there is a condition in the power which prevents you from using the power until the donor is becoming or has become mentally incapable of managing their financial affairs you will need to produce evidence of the donor's incapacity to third parties to accept your authority.

Following the Mental Capacity Act 2005 Principles and Code of Practice

When acting under the LPA you must follow the Principles set out in Mental Capacity and have regard to the Code of Practice. This means:

- You must assume that the donor can make their own decisions unless it is established that they cannot do so because they lack mental capacity.
- You must help the donor to make as many of their own decisions as possible.
- You must not treat the donor as unable to make the decision in question unless all practicable steps to help them to do so have been made without success.
- You must not treat the donor as unable to make the decision in question simply because the donor wishes to make a decision you consider is unwise.

- You must make decisions and act in the donor's best interests when they are unable to make the decision in question.
- Before you make the decision in question or act for, you must consider whether you can make the decision or act in a way that is less restrictive of the donor's rights and freedom but still achieves the purpose.

You must have regard to the Code of Practice, which you can obtain from the OPG web site www.publicguardian.gov.uk

What is in the donor's best interests?

Decisions as to what is or is not in a person's best interest is not always easy and you must consider all the relevant circumstances and in particular consider-

- The likelihood of the donor recovering in the foreseeable future and being able to make the decision;
- Involving the donor in the decisions so far as practical;
- the donor's past and present wishes and feelings;
- the donor's beliefs and values that would be likely to influence his/her decision if he/she had capacity;
- other factors that the donor would be likely to consider if he/she were able to do so;
- If practicable and appropriate, consult with carers, relatives and/or friends or others, such as another attorney or court appointed deputy who has an interest in the donor's welfare.

The limits of the power

The donor may have included restrictions or conditions in the power, which limit you from making gifts. If this is not the case, you may make gifts on customary occasions, such as Christmas presents, birthday presents and wedding presents provided it is for a friend or relative, (including yourself).

Gifts can also be made to a charity if the donor has made gifts to the charity in the past or if not, in the circumstances might be expected to make gifts to the charity.

However in all cases, the size of the gift must be reasonable in the circumstances and in relation to the size of the total value of the donor's assets. You should be cautious as the donor may need the asset in the future.

If you have any doubt or wish to make gifts not covered by the above and the power has been registered you should seek professional legal advice.

Operating a bank account

Banks and Building societies have different ways of dealing with attorney accounts. Some will allow you to continue to operate the donor's account whilst others will wish a new account to be opened. In the case of a spouse then a joint account may remain as such and operated as normal. If you operate the donor's account you should sign your usual signature and then add underneath your signature "as attorney". If you have to open a new account it should be opened in your name "as attorney for" followed by the

name of the donor. You will then only have to sign your usual signature to deal with the account.

You should not open an account in your name without identifying that it is an attorney account as this may cause problems with your own tax affairs.

Keeping accounts

The power may include a condition that you prepare and produce accounts every year to be checked by someone, such as a solicitor or an accountant. Even if the power does not say this, you have a duty to keep accounts. It is sensible to keep bank statements and retain all receipts in one place. This is because the Office of the Public Guardian could ask you to account for your dealings with the donor's money.