



National Centre for the Protection Of Older People



NATIONAL CENTRE FOR THE PROTECTION OF OLDER PEOPLE (NCPOP)

Review 3, November 2009

Elder Abuse and Legislation in Ireland



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November 2009

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ACKNOWLEDGEMENTS

The authors gratefully acknowledge the expert advice of Mrs Patricia T. Rickard-Clarke, Law Reform Commissioner, The Law Reform Commission and Professor Denis Cusack, Professor of Forensic and Legal Medicine, The UCD School of Medicine and Medical Science in relation to the production of this report.

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1. Introduction

Elder abuse has been increasingly recognised as a concern in Ireland in recent years. Following the publication, in 1998, of an exploratory study entitled *Abuse, Neglect and Mistreatment of Older People* (O'Loughlin & Duggan 1998), a Working Group on Elder Abuse (WGEA) was established to provide advice and recommendations on what was required to effectively and sensitively address the issue. The report of the Working Group on Elder Abuse, *Protecting Our Future*, published in 2002, recommended a formal national review of policy and procedures on elder abuse, and a number of changes to legislation and legal procedures necessary to protect older people. In June 2003, the Law Reform Commission, an independent statutory body charged with keeping the law under review and making practical proposals for its reform, published a Consultation Paper on Law and the Elderly, which also made provisional recommendations concerning legal mechanisms for the protection of older people.

Historically, there have been no specific laws in place in Ireland to protect older individuals from abuse (NCAOP 1998). Although there remains no legislation explicitly dealing with elder abuse, there are various laws that may be used to address the issue, both in terms of protecting those older people who may be at risk of abusive behaviours, and in terms of prosecuting those responsible for abuse, mistreatment or neglect. Elder abuse can occur in many forms, including: physical, sexual, psychological, financial, and discriminatory abuse, or neglect. Depending on the type of abuse and the circumstances surrounding it, a diverse range of general laws in relation to domestic violence, crime or tort, for example, may be applied in the same way as they would for cases involving people of any age (NCAOP 1998; Law Reform Commission 2003).

This report outlines some of the legislation most relevant to elder abuse currently on the statute books in Ireland. Legislation addressing human rights, mental capacity and mental health, domestic violence, health and social care regulation, protected disclosure, nursing home subvention, equality and age discrimination, and financial regulation are included. Criminal and civil laws are described as they apply to prosecution in cases of abuse. The absence of relevant laws in certain areas is also highlighted.

2. Human Rights Legislation

Human rights refer to a wide array of civil, political, economic, social and cultural rights, some of which are pertinent to elder abuse. These include rights to life,

liberty and security of person; equality, freedom from discrimination and freedom from cruel, inhuman or degrading treatment (United Nations 1948). These rights are contained in the constitution and some national legislation in Ireland, as well as within international conventions, covenants, treaties and agreements.

2.1 Human Rights Commission Act, 2000 & 2001

The Human Rights Commission, proposed under the 1998 Good Friday Agreement, was set up in 2001 to promote and protect human rights in Ireland. The *Human Rights Commission Acts 2000 and 2001* detailed the powers and functions of the Commission, and defined human rights as:

- (a) The rights, liberties and freedoms conferred on, or guaranteed to, persons by the Constitution, and
- (b) The rights, liberties or freedoms conferred on, or guaranteed to persons by any agreement, treaty or convention to which the State is a party.

2.2 The Constitution – Bunreacht na hÉireann, 1937

The Irish constitution provides the basic framework for the legal rights of people of all ages in Ireland. A number of articles, listed below, have been identified as particularly relevant to elder abuse (O'Loughlin & Duggan 1998).

40.3.1	The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
40.3.2	The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.
40.4.1	No citizen shall be deprived of his personal liberty save in accordance with law.
41.1.1	The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.
41.1.2	The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.
45.4.1	The State pledges itself to safeguard with special care the economic interests of the weaker sections of the community, and where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged (Directive Principle of Social Policy).

Figure 1 Relevant articles from Bunreacht na hÉireann, 1937

2.3 European Convention on Human Rights Act, 2003

The *European Convention on Human Rights Act, 2003* gave effect to the Council of Europe treaty, and the *European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*. Under this legislation, individuals can enforce their ECHR rights in the Irish courts. The ECHR is the only international human rights treaty that has been incorporated into domestic law in Ireland (Scullion *et al.* undated).

3. Mental Capacity and Mental Health Legislation

Although the majority of older people are physically and mentally healthy, the elderly are often regarded as a vulnerable group with many similarities to other groups such as those with intellectual disabilities, mental health problems and physical disability (O’Keeffe *et al.* 2007). Dementia, cognitive dysfunction and depression have been identified in the literature as risk factors for elder abuse (Halphen *et al.* 2009). Elder abuse is therefore often considered in the context of laws concerning mental capacity and mental health.

In a legal context, ‘capacity’ refers to a person’s ability to make decisions with legal consequences. In Ireland, once a person reaches 18 years old, they are presumed to have the legal capacity required to make decisions affecting their own lives¹ (Law Reform Commission 2005). Laws concerning capacity are intended to protect all those persons who are believed to have limited decision-making abilities (Law Reform Commission 2005). The existing mental capacity legislation is incorporated primarily in the *Lunacy Regulation (Ireland) Act* of 1871 and the *Powers of Attorney Act 1996*. Under these laws, two possibilities exist for substitute decision-making when an individual is deemed unable to make their own decisions: the Wards of Court system and Enduring Powers of Attorney.

3.1 Wards of Court

The Wards of Court system is intended to protect the property and welfare of a person who is deemed to be incapable of managing his or her own affairs (Courts Service 2003). It is the main legal mechanism available for substitute decision-making in Ireland (Law Reform Commission 2003). The Wardship system is not

¹ Under Section 23 of the *Non-Fatal Offences Against the Persons Act 1997* a person over the age of 16 years is considered to have the capacity to consent to surgical, medical and dental treatment. However, the legislation does not address whether or not a minor has the capacity to refuse treatment.

confined to older people and applies to all persons who do not have legal capacity. However, the Office of Wards of Court indicate that 75-80% of the total number of people brought into Wardship are made Wards of Court because of 'senile dementia' or some other mental infirmity associated with old age (Law Reform Commission 2003).

The *Lunacy Regulation (Ireland) Act* of 1871, together with Order 67 of the *Rules of the Superior Courts* 1986, set out criteria and procedures for making a person a 'Ward of Court'. Section 22(2) of the *Courts (Supplemental Provisions) Act* 1961, and Section 2(3) of the *Courts Act* 1971 subsequently conferred jurisdiction on the Circuit Court in "lunacy matters". However the Circuit Court jurisdiction was limited to cases where the property of the prospective ward was no more than six thousand five hundred euro in value or the income there from was not in excess of three hundred and seventy-five euro per annum (Law Reform Commission 2003). Responsibility for the operation of the Wards of Court system in Ireland therefore now effectively rests with the President of the High Court, and the day-to-day administration of the system is carried out by the Registrar and staff of the Office of Wards of Court (Courts Service 2003).

Applications for Wardship are most commonly submitted by family members, but they may be initiated by anyone (Courts Service 2003). If for example, a nurse knows of a patient who is not competent and who may be at risk of abuse, the nurse can recommend that the hospital or the Health Service Executive (HSE) apply to the High Court to make that patient a Ward of Court (INO 2004). In order to make an individual a Ward of Court the person must be declared, on the basis of medical evidence, to be of unsound mind and incapable of managing his or her person or property. The court must also be satisfied that it is necessary for the protection of the person or their property, or that there is some benefit to the respondent in being taken into Wardship. (Courts Service 2003; Law Reform Commission 2003). A proposed Ward must be notified of the Wardship application in person and is entitled to object by notifying the Registrar in writing (Courts Service 2003). In practice, however, there are very few objections to Wardship proceedings (Law Reform Commission 2003).

In the event of a person being made a Ward of Court, the judge usually appoints a 'committee' to act on behalf of the Ward. The committee may be one or more persons, often a family member, who is assigned responsibility for the ward's personal care and assisting the court in managing the financial affairs of the ward

(Courts Service 2003; Law Reform Commission 2003). Being made a Ward of Court effectively removes a person's legal right to make any decisions about their person or property, and confers on the Court, decision-making power over all matters relating to their person and estate. A Wardship order is usually of indefinite duration (Law Reform Commission 2005). A person who has been made a Ward of Court cannot enter a binding contract, cannot marry, cannot independently institute or defend legal proceedings, cannot buy or sell property, or have a bank account. Under the Wardship system, a person is also not considered to have legal capacity to consent to medical treatment. If however, the High Court is satisfied that the individual has the necessary capacity to do so, a Ward of Court may be allowed to make a will (Law Reform Commission 2005).

3.2 Enduring Powers of Attorney

In September 1989, the Law Reform Commission recommended the introduction of a system of Enduring Powers of Attorney (EPA) in Ireland. The *Powers of Attorney Act 1996* established such a system, allowing an individual to put a plan in place in the event of loss of capacity in the future. The EPA procedure permits the appointment of an individual or trust corporation to act as an attorney in a decision-making capacity on behalf of the individual (Law Reform Commission 2005). The EPA system may be particularly useful for people with recurring mental illness or progressive conditions such as dementia. It can provide an alternative to being made a Ward of Court and has the advantage of giving decision-making power to an attorney personally chosen by the individual should they lose capacity (Law Society's Law Reform Committee 1999). However, the EPA system is limited to situations where a person, known in this context as the donor, has both the foresight and the necessary capacity to initiate the procedure (Law Reform Commission 2005).

There are two stages to an EPA. Firstly, the document must be executed when the person has sufficient capacity to do so. There is no specific statutory test of capacity outlined in the Act but the *Enduring Powers of Attorney Regulations 1996* required the EPA to include: a statement by a medical practitioner that the donor had the mental capacity to understand the effect of creating the power, with the assistance of explanations; and a statement by the donor that they have read and understood certain information about the effect of creating an EPA. A statement by a solicitor is also required to confirm that, after interviewing the donor and making any necessary inquiries, he or she is satisfied that the donor understood the effect of creating the EPA and there is no reason to believe that

the document is being executed as a result of fraud or undue pressure (Law Reform Commission 2003). At this stage the EPA has no real legal consequence. The EPA does not come into effect until it is registered by an application to the Registrar of Wards of Court if and when the donor becomes or is becoming mentally incapacitated (Law Reform Commission 2003).

According to the 1996 *Powers of Attorney Act*, the appointed attorney may be responsible for the property, financial and business affairs, and personal care decisions of the donor. In creating an EPA the donor may specify whether the attorney will have general or limited authority over different aspects of his or her affairs. There are however, also restrictions on the extent to which an EPA can grant power to an attorney. For example, unless there is a specific provision to the contrary, the attorney may not make gifts of the donor's property. Personal care decisions are required to be made in the person's best interests and authority in this respect does not extend to health care decisions (Law Reform Commission 2003).

3.3 *Mental Capacity Bill, 2008*

Both the Law Reform Commission (2003, 2005, 2006) and the Working Group on Elder Abuse (2002) have made extensive recommendations for the reform of legislation surrounding mental capacity and elder abuse; and the establishment of new substitute and assisted decision-making structures for all adults who lack capacity. This, together with international commitments regarding human rights, prompted the publication of a new draft scheme of *Mental Capacity Bill* in 2008. The proposed bill, which has yet to be introduced into law, incorporates many of the recommendations made in the Law Reform Commission's 2006 report *Vulnerable Adults and the Law*. It would also give effect to two international Conventions: the UN Convention on the Rights of Persons with Disabilities and the Hague Convention on the International Protection of Adults (Department of Justice, Equality and Law Reform 2008a). The bill is based on a set of guiding principles, including a presumption of capacity unless otherwise established.

Guiding principles of the Mental Capacity Bill 2008

- It shall be presumed unless the contrary is established that a person has capacity.
- No intervention is to take place unless it is necessary having regard to the needs and individual circumstances of the person, including whether the person is likely to increase or regain capacity.
- A person shall not be treated as unable to make a decision unless all practicable steps to help him or her to do so have been taken without success.
- A person is not to be treated as unable to make a decision merely because he or she makes an unwise decision.
- Any act done or decision made under this Act must be done or made in the way which is least restrictive of the person's rights and freedom of action.
- Due regard must be given to the need to respect the right of a person to his or her dignity, bodily integrity, privacy and autonomy.
- Account must be taken of a person's past and present wishes, where ascertainable.
- Account must be taken of the views of any person with an interest in the welfare of a person who lacks capacity, where these views have been made known.
- Any act done or decision made under this Act for or on behalf of a person who lacks capacity must be done or made in his or her best interests.

(Department of Justice, Equality and Law Reform 2008b)

Figure 2. Guiding principles of the Mental Capacity Bill 2008

The bill outlines a new statutory framework governing decision making on behalf of people who lack capacity, and also makes some amendments to the *Powers of Attorney Act 1996*. One of the most significant features of the bill is the shift in the conception of capacity to a more functional and enabling approach, in line with current international best practice, with a focus on the least restrictive alternative. Capacity will in future be considered in a time and issue-specific manner. The new bill provides for the establishment of an independent Office of Public Guardianship to replace the existing Wards of Court system, and ensure a more effective and appropriate system to protect both the personal welfare and financial affairs of people with impaired capacity. The Bill also makes it an offence, punishable by imprisonment or fine, for a donee of an enduring Power of Attorney, a personal guardian, or a person responsible for the care of an individual lacking capacity, to ill-treat or wilfully neglect the incapacitated person (Department of Justice, Equality and Law Reform 2008b).

Finally, the Law Reform Commission (2009), in their recent *Consultation Paper Bioethics: Advance Care Directives*, recommended that legislation on advance care directives also be incorporated into the proposed *Mental Capacity Bill*. This legislation would allow adults to refuse medical treatment including life-sustaining treatment, to plan what future medical interventions they would not want and to nominate a health care proxy to carry out their wishes in the event they become

incapacitated. This proposal is in line with a *Draft Recommendation on Principles Concerning Continuing Powers of Attorney and Advance Directives for Incapacity* published by the Council of Europe in April 2009.

3.4 Mental Health Act, 2001

The *Mental Health Act 2001* replaced the majority of the provisions of the *Mental Treatment Act 1945*, the *Mental Treatment Act 1953*; the *Mental Treatment (Detention in Approved Institutions) Act 1961*; the *Mental Treatment Act 1961* and the *Health (Mental Services) Act 1981*. It established a modern legislative framework within which persons with a mental disorder may be admitted, detained and treated involuntarily in compliance with international standards and obligations. However, the mental health legislation does not include any provisions to protect a mentally disordered adult who is either at risk of, or, being abused, exploited or neglected.

Under the current legislation, the wards of court or powers of attorney systems may be utilised in some circumstances where a person's capacity is diminished due to a mental health problem. However, a mentally disordered adult is not automatically assumed to have lost their legal capacity. The Government's 1995 White Paper, *A New Mental Health Act* proposed the introduction of an Adult Care Order to protect such vulnerable people. An Adult Care Order would allow for the removal of an individual from their residence to a place of safety based on evidence that the person suffers from a mental disorder, that there are reasonable grounds to believe that they have suffered or are at risk of abuse, neglect or exploitation, and that the subject requires care or protection which they would be unlikely to receive except under a care order (Law Society's Law Reform Committee 1999).

Both the Working Group on Elder Abuse (2002) and the Law Reform Commission (2003) recommended the introduction and full implementation of Adult Care Orders as proposed in the government White Paper. The WGEA (2002) also recommended that future mental health legislation should include provision to protect older people with temporary impaired capacity, such as delirium, from abusive situations. Subsequently however, the Law Reform Commission's (2006) recommendations have been incorporated into the guardianship scheme in the draft *Mental Capacity Bill 2008* which allows for a once-off intervention order to be made where an adult lacks the capacity to make a particular decision but where they continue to have some capacity and guardianship is not necessary.

Although the introduction of this legislation may be useful for the protection of older people with a mental health problem little consideration appears to have been given to the interface between mental capacity and mental health legislation.

4. Domestic Violence Legislation

While adults who lack capacity may be particularly vulnerable to abuse, exploitation or neglect, elder abuse is not confined to individuals who do not have legal capacity. Many victims of elder abuse are quite capable of looking after their own affairs (INO 2004). However, there are no specific legal provisions to protect an older person who is legally competent but is considered to be at risk (Law Reform Commission 2003). If elder abuse occurs within a domestic relationship then the general domestic violence legislation may apply (NCAOP 1998).

4.1 Domestic Violence Act, 1996

Family Law (Miscellaneous Provisions) Act, 1997

Domestic Violence (Amendment) Act, 2002

Prior to 1996, domestic violence legislation in Ireland was based on the *Family Law (Maintenance of Spouses and Children) Act 1976*, applied only to spouses and was generally employed only in cases of physical abuse (NCAOP 1998). The *Domestic Violence Act 1996* and its subsequent amendments provided a legal basis for the protection of anyone in a domestic relationship where their safety or welfare (both physical and psychological) is threatened by the behaviour of another person in the home (Watson & Parsons 2005). Protection is provided by means of four types of court orders which restrict or forbid certain types of behaviour and/or prohibit entry to the applicant's home (Watson & Parsons 2005).

4.1.1 Barring Order

A Barring Order prevents an abusive person, known as the respondent, from entering or residing in the home of the victim of abuse for a specified time period, up to a maximum of three years (Watson & Parsons 2005). It may also prohibit the abusive person from using or threatening to use violence against the applicant, molesting or putting the person in fear, or watching or besetting a place where the applicant lives (NCAOP 1998).

4.1.2 Interim Barring Order

Applications for a Barring Order must be made on notice to the alleged abuser (NCAOP 1998). Under the provisions of the 2002 amendment, however, in exceptional cases where there is believed to be an immediate risk of significant harm, an application may be made *Ex-Parte*, meaning without notice to the respondent, for an Interim Barring Order valid for 8 working days, pending the hearing of an application for a barring order (Watson & Parsons 2005).

4.1.3 Safety Order

A Safety Order similarly prohibits the respondent from using, or threatening to use violence against the applicant, molesting or putting the applicant in fear. However, it differs from a Barring Order in that it does not require the alleged abuser to leave the family home, if he or she normally lives there (Watson & Parsons 2005). A Safety Order can be granted for up to five years by the District Court and is renewable for a further five years (NCAOP 1998).

4.1.4 Protection Order

A Protection Order is a temporary intervention to protect an applicant while a decision is being made by the court as to whether to grant a Barring or Safety Order. Applications are made *Ex Parte* and may be granted only until a decision is reached on the application for a Barring or Safety Order. The effect of a Protection Order is similar to that of a Safety Order. It does not bar the alleged abuser from the home but orders that the respondent not use or threaten to use violence against, molest or put the applicant in fear (NCAOP 1998).

Once any of these Orders have been granted and the abusive individual has been made aware of its existence, it is a criminal offence to breach the Order. The Gardaí have power to arrest, without warrant, anyone they have reasonable cause to believe has violated a domestic violence order (NCAOP 1998; Watson & Parsons 2005). Under the 1996 Act, a £1,500 fine and/or a twelve month prison sentence can be imposed by the District Court for violations of these orders (Office of the Tánaiste 1997).

In order to apply for protection under the domestic violence laws, an applicant must come within one of the following categories: married or co-habiting couples, parents where the respondent is their child and is over the age of 18, or anyone who is living with the respondent where the relationship is not based primarily on a contract. The Health Service Executive may also initiate applications for a

Safety Order or Barring Order on behalf of an at risk individual who may be deterred or prevented from doing so through fear or trauma (Office of the Tánaiste 1997). There are several additional conditions and exceptions to these criteria of who may apply and for which type of orders. For example, to apply for a safety order the applicant must have been living with the respondent for an aggregate period of six months during the past year, in order to apply for a barring order they must have been living together for a minimum of six of the previous nine months. It is not possible to get a barring order if the abusive person has greater ownership rights to the property, and an applicant cannot seek a barring order against the spouse of an adult child living with him or her (NCAOP 1998). It is also not possible to obtain an order against a person employed to care for an older person, whether in the home or in a residential institution, due to the contractual nature of the relationship.

If any of the above criteria are met, domestic violence legislation may apply in circumstances involving elder abuse in the community. However, according to the Law Reform Commission (2003), this legislation is more commonly used by or on behalf of spouses and children and does not seem to have been widely used by or on behalf of vulnerable older people.

As an alternative to those court orders available under the domestic violence legislation, a court order, known as an 'injunction', may be sought to either prohibit the doing of a specified act (prohibitory injunction) or to compel a person to perform a certain act (mandatory injunction). A *quia timet* injunction can be sought to curtail anticipated or future wrongful conduct. An injunction may be wider in scope than a Barring or Safety Order and can be applied in many different circumstances, and for any period of time at the discretion of the court (usually the Circuit Court or the High Court). It is, however, more complex and expensive than the Court Orders covered by domestic violence legislation and applicants usually require legal assistance (NCAOP 1998).

5. Criminal Law

In common with domestic violence, there is no criminal offence of 'elder abuse'. In many cases however, abuse may constitute a criminal offence. In these circumstances there are no special provisions for older people as distinct from other victims of abuse. Offences against older people are dealt with in criminal law in the same way as offences against any other person. Actions that may give rise to criminal prosecution include physical assault, sexual assault and rape,

harassment, theft, and fraud or other forms of financial exploitation (WGEA 2002). Decisions to prosecute and what charges are brought forward rest with the Director of Public Prosecutions (DPP) (NCAOP 1998).

5.1 Non-Fatal Offences Against the Person Act, 1997

The *Non Fatal Offences Against the Person Act (NFAOP) 1997* applies to crimes of assault, threats to kill, coercion, harassment (including stalking), endangerment or false imprisonment. The Act criminalises three types of assault: assault, assault causing harm and assault causing serious harm (Watson & Parsons 2005). 'Harm' is defined within the act as meaning, "harm to body or mind and includes pain and unconsciousness" (NFAOP Act 1997: Section 1). By this definition, the law may therefore extend to psychological and emotional abuse as well as physical abuse. This act is particularly relevant in cases where the abuser and the victim are not living together and domestic violence legislation does not apply.

5.2 Criminal Law Act, 1997

Section 4 of the *Criminal Law Act 1997* gives the Gardaí power of arrest without warrant any person believed to be guilty of committing or having committed an offence punishable by 5 years or more imprisonment. This includes offences of assault causing actual bodily harm, and may, for example, be applicable to instances of physical abuse (Office of the Tánaiste 1997).

5.3 Criminal Law (Rape) Act, 1981

Criminal Law (Rape) (Amendment) Act, 1990

The offence of Rape under the *Criminal Law (Rape) Act 1981* is inclusive of rape, attempted rape, aiding, abetting, counselling and procuring rape or attempted rape, and incitement to rape. Both men and women can be prosecuted under this law and the maximum sentence is life imprisonment. *The Criminal Law (Rape) (Amendment) Act 1990* also introduced laws on sexual assault, formerly known as indecent assault; and aggravated sexual assault, involving serious violence, threat of violence, or resulting in injury, humiliation or degradation of a grave nature to the person assaulted (Watson & Parsons 2005). Section 5 (1) of the 1990 Act also abolished the marital exemption in relation to rape. Prior to this, it was not possible to prosecute a man for raping his wife.

5.4 Criminal Law (Sexual Offences) Act, 1993

There are specific provisions in Ireland for sexual offences involving people with mental impairment, which may in some cases apply to older people. Following the

publication of the Law Reform Commission's *Report on Sexual Offences Against the Mentally Handicapped* in 1990, the *Criminal Law (Sexual Offences) Act 1993* was introduced making it an offence to engage or attempt to engage in acts of sexual intercourse or buggery with a person who is "mentally impaired" unless this occurs within marriage (Law Reform Commission 2006). This law replaced Section 4 of the *Criminal Law (Amendment) Act 1935* which stipulated that a person who had sexual intercourse with a woman or girl with knowledge at the time that she was "an idiot, or an imbecile or is feeble-minded" could be sentenced to up to two years in prison (Law Reform Commission 2005). Under the 1993 Act, 'mentally impaired' was defined as a person suffering from a disorder of the mind, whether through mental disability or mental illness, which is of such a nature or degree as to render the person incapable of living an independent life or of guarding themselves against serious exploitation (Law Reform Commission 2005). This law may have the effect of making it a criminal offence for two 'mentally impaired' people to have a sexual relationship outside of marriage.

5.5 Criminal Damage Act, 1991

Abusive individuals may damage or destroy a victim's belongings as a tactic of control (Watson and Parsons 2005). The *Criminal Damage Act 1991* makes it illegal to intentionally or recklessly damage property, or to threaten to damage property, which is defined as "property of a tangible nature, whether real or personal, including money and animals that are capable of being stolen, and data" (Criminal Damage Act 1991: Section 1).

5.6 Criminal Justice (Theft and Fraud Offences) Act, 2001

The *Criminal Justice (Theft and Fraud Offences) Act 2001* may be useful in establishing criminal proceedings to prosecute abuse related to stealing, robbery or other related offences. This legislation applies to theft, whereby a person dishonestly appropriates property without the consent of its owner and with the intention of depriving its owner of it; deception to make a gain or causing loss to another individual, and robbery or assault with intent to robbery. Robbery is considered a more serious offence than stealing and may be punishable by imprisonment for life. A person is guilty of robbery if he or she steals, and immediately before, or at the time of doing so, and in order to do so, uses force on any person, or puts or seeks to put, any person in fear of being subjected to force. Section 59 of the *Criminal Justice (Theft and Fraud Offences) Act 2001* also imposes an obligation to report to a member of the Garda Síochana suspicions

that an offence involving theft, fraud or other related offences may have been committed.

6. Civil Law

As well as prosecutions under criminal law, elder abuse may also lead to civil proceedings. The key difference between criminal and civil cases is often the involvement of the Garda Síochana in criminal cases (Lynch and Partners 2009). Criminal actions are brought by the State and may result in punishment such as imprisonment, while civil actions tend to be brought by individuals who have been wronged and are seeking financial compensation. Many laws of tort, defined as a civil wrong, may be applicable in circumstances of abuse, while contract laws may provide remedies for financial elder abuse. In some instances, there may be a degree of overlap in the application of contract and tort laws (NCAOP 1998).

6.1 Negligence or Neglect

Liability for negligence may only be considered if the person accused can be established to have had a duty of care to an older person, which they have breached and which has resulted in harm to the older person. Neither statutory nor common law in Ireland imposes such duty on adult children to care for their parents or other adult relatives. In the case of professional carers, however a duty of care may be more easily implied and action taken. The law also assigns liability to an institution for any tort committed by a health or social care profession in the scope of their employment (NCAOP 1998).

6.2 Wrongful Interference

Psychological or emotional abuse, due to their intangible nature, may be more difficult to remedy legally. However, an action for wrongful interference may be taken for conduct which either intentionally or recklessly causes severe emotional distress (NCAOP 1998).

6.3 Duress and Undue Influence

Duress implies the removal or suppression of free will in such a way as to negate an individual's consent to a contract. Duress may be associated with a degree of force or threatening behaviour, or it can be related to financial or emotional blackmail. For example, where an older person is pressured into entering a contract on the basis of a threat to commit them to an institution if they do not agree to the contract. In extreme circumstances, where duress may be proven, a contract may be considered void. Undue influence may occur where a person's

free will is subverted through inducements, persuasion or some other means (NCAOP 1998). Agreements entered into under undue influence or which amount to improvident bargains can be declared invalid by law but these provisions are rarely used in practice. Proving undue influence may be difficult and older people who have been subjected to undue influence are unlikely to be in a position to challenge it (Law Reform Commission 2003).

6.4 Misrepresentation, Deceit and Injurious Falsehood, and Negligent Misrepresentation

Misleading information provided in a pre-contractual situation, whether fraudulently, innocently, or through negligence, may be considered a misrepresentation. If it can be proven that there has been a fraudulent misrepresentation, where the accused was aware that information given was false, an action for damages for deceit and/or an action to rescind the contract may be taken. Negligent misrepresentation may arise where there is a contractual or fiduciary relationship between two parties and one party fails to exercise due care in representing information that may be relied upon in a person's decision to enter into a contract. Victims of negligent misrepresentation may seek damages in court (NCAOP 1998).

7. Reporting Abuse

There is no specific law in Ireland requiring a person to report suspicions or cases of elder abuse (INO 2004). According to the Working Group on Elder Abuse (2002) there is no persuasive evidence to suggest the benefits of such a requirement for older people at risk of abuse, and their report *Protecting Our Future* recommended that mandatory reporting legislation should not be introduced on the basis that it may in fact prevent people from seeking help due to fears over the legal or cultural consequences for both the abuser and the victim. However the WGEA (2002) did argue that legislation was urgently required to protect individuals who report concerns about elder abuse in good faith. Such provisions are available for those reporting concerns about child abuse under the *Protection of Persons Reporting Child Abuse Act 1998* which provides protection against a defamation lawsuit, for example, following a report of child abuse (INO 2004). According to O'Dwyer and O'Neill (2008), there are major concerns within Ireland over methods of reporting concerns about elder abuse, and fear and anxiety about the potential negative consequences of making formal or written allegations of abuse. The Irish Nurses Organisation (2004), for example, asserted that despite the absence of specific criminal or contractual law

requirements to report elder abuse, an abused person or family member could sue a nurse for negligence if the nurse failed to report elder abuse despite having reasonable suspicions about ongoing abuse or about the risk of future abuse.

7.1 Health Act, 2007: Part 14, Section 103

Section 103 in Part 14 of the *Health Act 2007* introduced an amendment to Part 9A of the *Health Act 2004* to provide legal safeguards for people who want to report serious concerns about standards of safety or quality in Irish health and social care services. This law came into effect on 1st March 2009 and allows for “protected disclosure” to an appropriate body or person, where the disclosure is made, in good faith and on reasonable grounds, and refers to any improper conduct which raises a significant danger to public health or safety. This legislation offers protection to “whistleblowers” against civil liability and penalisation by an employer (HIQA 2009). The law covers employees of a “relevant body”, such as the HSE, or professionals who provide services for or on behalf of the HSE; however, it does not specify whether protected disclosure applies to employees of private domiciliary care agencies, voluntary organisations providing home care, or professional carers employed on an individual basis (Law Reform Commission 2009).

7.2 Coroner’s Act, 1962 & 2005 Coroner’s Bill, 2007

The *Coroners Act 1962* and the *Coroner’s (Amendment) Act 2005* currently make up the principal legislation governing the Coroner Service in Ireland. Efforts to reform this legislation began in 2000 with the Report of the Coroners Review Group and were followed in 2003 by the publication of a Report of the Coroners Rules Committee. These reports reviewed all aspects of the Coroner Service, identifying issues that needed to be addressed and making recommendations for a comprehensive overhaul of the system. Many of these recommendations were incorporated in the *Coroner’s Bill 2007* which is currently at committee stage in the Seanad. The Bill proposes a list of reportable deaths, including a death in any public or private institution for the care of elderly or infirm persons, a death due to want of care, exposure or neglect, a death due to possible negligence, misconduct or malpractice, or any death in suspicious circumstances. Certain people, including those in charge any public or private institution or premises in which the deceased person was residing or receiving treatment or care at the time of his or her death will be obligated to report these deaths to the coroner.

8. Regulation of Health and Social Care Services and Staff

This section outlines legislation designed to protect older people from abuse in health or social care settings. This includes laws dealing with the quality and standards of care provided, and the staff responsible for caregiving.

8.1 Health Act, 2007

The *Health Act 2007* established a new system for the registration and inspection of residential services for older people, including for the first time both public and private sector nursing homes (Ahern *et al.* 2007). Prior to the introduction of the 2007 Act, the legal regulations for nursing home care in Ireland were set out in the *Health (Nursing Homes) Act 1990*, and the *Nursing Home (Care and Welfare) Regulations 1993*. This legislation set up a system of registration and monitoring operated by local health boards but applied only to private and voluntary nursing homes, specifically excluding from its definition "an institution managed by or on behalf of a Minister of the Government or a health board". The *Nursing Home (Care and Welfare) Regulations 1993* were intended to ensure that private sector nursing homes provided adequate and suitable care and accommodation for dependent persons and included requirements in relation to facilities for patients, safety, staffing levels and record keeping. According to Rickard-Clarke (2005), however, these regulations were inadequate, ambiguous and non-specific. In 1995, in an attempt to address the shortfall of existing legislation, the regulations were supplemented by a voluntary *Code of Practice for Nursing Homes*, outlining the best standards of nursing home care. However, the codes of practice could not be monitored or evaluated, nor legally enforced and, like the 1993 regulations, did not extend to public long-stay institutions (Murphy *et al.* 2006).

Part 2 of the *Health Act 2007* established the Health Information and Quality Authority (HIQA), an independent statutory body, charged with promoting safety and quality in the provision of health and personal social services by or on behalf of the HSE and private nursing homes, through the setting and implementing of quality standards based on best practice. Part 7 of the Health Act also provides for the establishment of the Office of the Chief Inspector of Social Services within the Health Information and Quality Authority to replace the Social Services Inspectorate which had been operating on a non-statutory basis since 1999. This legislation puts the Office of the Chief Inspector on a statutory footing and confers responsibility for registering and inspecting both public and private nursing homes to determine if they meet the standards set by HIQA. With effect from July 2009, services will only be permitted to operate if they are registered

by HIQA and they will be inspected regularly to ensure that a high level of care is maintained. The *Health Act 2007* makes it an offence, punishable by a fine of up to €5000 and/or 12 months imprisonment, to operate a nursing home without the appropriate registration, to knowingly make a false or misleading statement in connection with an application for registration, or to fail to comply with a duty imposed under the regulations or as a condition of registration. The *Health Act 2007 (Registration of Designated Centres for Older People) Regulations 2009* (S.I. 245) set out the process by which nursing homes are to be registered with the Chief inspector, and the relevant fees to be paid.

The *Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2009* (S.I. 236) also came into force in July 2009, to underpin the HIQA National Quality Standards for Residential Care Settings for Older People in Ireland, launched in March 2009. These regulations cover the maintenance, care, welfare and wellbeing of people in residential care settings; the physical environment, food and nutrition, staffing levels, record keeping and the general management of the centre. Of particular relevance in part 2: General Welfare and Protection (p. 4), the regulations state that the management must ensure that:

- “(a) all reasonable measures are taken to protect each resident from all forms of abuse, and
- (b) there is a policy on and procedures in place for the prevention, detection and response to abuse.”

The regulations also state that all necessary arrangements, including staff training, must be made to prevent residents being harmed, suffering abuse, or being placed at risk of harm or abuse. Any incident where a resident is harmed or suffers abuse must be recorded and appropriate action taken. Under the new regulations the Chief Inspector of Social Services must be notified of any allegation, suspected or confirmed abuse of any resident; and informed about the circumstances of the death of any resident under the age of 70.

The *Health Act 2007* has been criticised however, for failing to include provisions to regulate domiciliary care services for older people provided by both the private and public sector (Ahern *et al.* 2007). In 2008, 82% of elder abuse cases dealt with by the HSE occurred in the home (HSE 2009). According to the Law Reform Commission (2009) lack of regulation in the home care sector may increase the risk of abuse amongst older care recipients. Despite assertions that abuse in domiciliary settings is one of the most common types of abuse, there are

currently no legal provisions in respect of accreditation, minimum care standards or inspection of non-residential services (Rickard-Clarke 2005). The Law Reform Commission (2009) recently published a Consultation Paper entitled *Legal Aspects of Carers* to address the absence of a legislative framework for regulation of professional care services provided in the home, or domiciliary settings. The Commission recommends that the *Health Act 2007* be amended to extend the authority of HIQA and the Social Services Inspectorate (SSI) to include regulating and monitoring of professional domiciliary care providers. These recommendations also suggest building on existing HIQA standards for residential care, to create a set of standards tailored to the unique setting in which domiciliary care is provided.

8.2 Health and Social Care Professionals Act, 2005

Medical Practitioners Act, 2007

Pharmacy Act, 2007

A number of new laws have also been introduced in recent years in relation to the regulation of health and social care professionals. The Health and Social Care Professionals Act 2005 established a system of statutory registration for health and social care professions. The legislation applies to the following 12 professions, with the possibility of the inclusion of others in the future: clinical biochemists, dietitians, medical scientists, occupational therapists, orthoptists, physiotherapists, podiatrists, psychologists, radiographers, social care workers, social workers and speech and language therapists. The Act stipulates that each profession will have a separate registration body whose duty it is to maintain a register of individuals recognised as competent to practice within that profession, to give guidance on ethical conduct, and to promote education and training. A Health and Social Care Council was established under the Act, one of its main functions being decision-making relating to disciplinary hearings and sanctions for professional misconduct.

The *Medical Practitioners Act 2007* also gave rise to changes in the regulatory system of the Medical Council to protect the public by promoting and enforcing high standards of professional conduct and professional education, training and competence among registered medical practitioners. The 2007 Act also reformed the procedure for addressing complaints and concerns about medical practitioners.

Similarly, the *Pharmacy Act 2007* provided for reformation of the regulatory system for pharmacists. The Act established a modern framework for the

Pharmaceutical Society of Ireland (PSI) and the pharmacy regulator; conferring responsibility for protecting and promoting the health and safety of the public, by maintaining a register of pharmacists and pharmacies, developing and enforcing codes of practice, processing complaints and conducting inquiries (PSI 2007).

9. Financial Support for Nursing Home Care

The following section describes the background to and the current legislation governing older people's entitlement to financial assistance to cover the cost of nursing home care.

9.1 Health Act (Nursing Homes) 1990

Nursing Home (Subvention) Regulations 1993

Health (Repayment Scheme) Act 2006

Health (Nursing Homes) (Amendment) Act 2007

Under the *Health (Nursing Homes) Act 1990* and the *Nursing Home (Subvention) Regulations*, persons accommodated in private nursing homes were entitled to apply to have the cost of their maintenance subvented by means of a grant from the Health Service, based on a means test and the applicant's level of dependency. The regulations also contained a provision that recipients of a subvention would retain some "pocket money" for their personal needs by excluding from the means test an amount equivalent to one fifth of the prevailing rate of the Non-Contributory Old Age Pension. An investigation by the Financial Ombudsman into nursing home subventions in 2001 identified a number of issues which the Law Reform Commission (2003) described as "in effect, financial abuse by the State against elderly people in long stay care" (p. 116). The Ombudsman reported two particular issues with the system of subvention in practice: the assessment of family members' income as means for the purpose of calculating the amount of subvention; and the reduction of the subvention payable as a result of counting the one-fifth disregard as means, both of which had the effect of reducing the rate of subvention the older person received.

From January 1997, this issue was resolved following intervention from the Ombudsman. However, despite the allocation of £4 million additional funding for arrears payments to those older people whose nursing home subventions had been incorrectly reduced, these payments do not appear to have been applied by the Health boards (Office of the Ombudsman 2001). The *Health (Repayment Scheme) Act 2006* introduced a scheme for the full repayment of any charges wrongfully imposed on persons in long term residential care prior to 2004.

Questions were also raised about the legal validity of the regulations and legislation, and the way in which they were introduced (Office of the Ombudsman 2001). The *Health (Nursing Homes) (Amendment) Act 2007* was intended to ensure that the existing Nursing Home Subvention Scheme for private nursing home care is grounded in primary legislation. This legislation, alongside national guidelines published by the Health Service Executive in 2007, set out procedures for the standardised implementation of the scheme nationally.

9.2 Nursing Home Support Scheme Act 2009

New legislation to replace the existing Nursing Home Subvention Scheme was recently signed into law (July 2009). The *Nursing Home Support Scheme Act 2009*, also known as the *Fair Deal Act*, is intended to make nursing home care more affordable for older people and to provide equal support for recipients of long-term residential care, whether they are in public, private or voluntary nursing homes. Under the new scheme, each person will make a contribution to the cost of his or her care, based on their means and the state will pay the balance. Those older people who already receive subventions under the earlier legislation may choose to continue with their existing arrangements if they so wish.

The *Nursing Home Support Scheme Act 2009 (Commencement) (Certain Provisions) Order 2009* (S.I. 256) enacted sections 40 and 41 of the Act in July 2009 to commence the definitions of “approved nursing home” and “long-term residential care services”, and to enable the National Treatment Purchase Fund to negotiate and agree prices with private nursing home owners for the purposes of the Nursing Homes Support Scheme.

The remaining provisions of the *Nursing Home Support Scheme Act 2009* came into effect in October 2009. In order to qualify for the nursing home support scheme, an older person must apply to undergo a care needs assessment and a financial assessment to determine the level of financial assistance they are entitled to. Under the scheme, each older person is required to contribute 80% of their income and 5% of the value of any assets per year. Where assets include land or property the individual may apply for a Nursing Home Loan, to defer the payment of this contribution until after their death.

If an individual lacks capacity, a list of specified persons, including, for example, a family member or a legal representative, are entitled to apply for the support

scheme on their behalf. In order to consent to the Nursing Home Loan on behalf of an older person who lacks legal capacity however, an application must be made to the County Registrar to be appointed a Care Representative.

10. Equality and Age Discrimination

10.1 *Employment Equality Acts, 1998 & 2004*

The *Employment Equality Act 1998* was introduced to promote equality and prohibit discrimination in employment on the ground of age, as well as on the basis of gender, marital status, family status, race, religion, disability, sexual orientation, and membership of the Traveller community. The Act was amended by the *Equality Act 2004* and together they are known as the *Employment Equality Acts 1998 and 2004*. Discrimination is described in the Act as the treatment of a person in a less favourable way than another person is, has been or would be treated in a comparable situation on any of these nine grounds (Equality Authority). The legislation is comprehensive and deals with employment issues such as access to employment, advertising, equal pay for work of equal value, conditions of employment, harassment, working conditions, training, promotion and dismissal. The 1998 and 2004 Act also allows positive action to facilitate the integration of people over the age of 50 or with a disability in employment (Equality Authority). However the Acts exempt from the legislation the setting of mandatory retirement ages by employers, and the exclusion of people over the age of 66 from the *Redundancy Payments Act 1967 to 2003* (O'Connor 2004).

10.2 *Equal Status Acts, 2000 & 2004*

The *Equal Status Act 2000* and its amendments in the *Equality Act 2004* compliments the *Employment Equality Act 1998* and extends legal protection against direct or indirect discrimination on any of the same nine grounds described above to the provision of goods and services, the disposal of property and access to education. The Act is based on the principle that everyone has an equal right to participate in society and should be treated on his or her own merit and not on the basis of stereotypes and prejudice. The Act prohibits victimisation, where an individual is treated less adversely as a consequence of having participated in processes under the legislation.

10.3 *Equality Act, 2004*

The *Equality Act 2004* amended both the *Employment Equality Act 1998* and the *Equal Status Act 2000*; and also ensured compliance with 3 EU Council Directives:

the *Race Directive* (2000/43/EC) concerning the equal treatment of persons irrespective of racial or ethnic origins, the *Framework Employment Directive* (2000/78/EC) establishing a general framework for equal treatment in employment, and the *Gender Equal Treatment Directive* (2002/73/EC) concerning the implementation of the principle of equal treatment for men and women with regard to access to employment, vocational training, promotion and working conditions (O'Connor 2004).

10.4 Disability Act, 2005

The *Disability Act 2005* defines a "disability" as a substantial restriction in the capacity of a person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment. (Department of Justice, Equality and Law Reform 2005a). According to the 2002 Census more than a third of people over 65 in Ireland live with a disability, representing 42% of the disabled population (NDA & NCAOP 2006). The provisions of the *Disability Act 2005* are intended to build on existing equality and human rights legislation (NDA & NCAOP 2006). The 2005 Act sets out a legislative framework to provide for the assessment of health and educational needs of people with disabilities and the allocation of resources for appropriate services. It establishes a basis for access to public buildings, services and information, and a system of appeals and enforcement relating to the non-provision of such services, as well as imposing a duty on public bodies to be pro-active in employing people with disabilities (Department of Justice, Equality and Law Reform 2005a). The Law Reform Commission (2006) also highlighted the *Disability Act 2005* considering it an important development which signals a new context within which future legislation relevant to persons with limited decision-making capacity could be considered.

10.5 The Civil Law (Miscellaneous Provisions) Act, 2008

The *Civil Law (Miscellaneous Provisions) Act 2008* abolished the upper age limit for eligibility to serve on a jury with effect from 1st January 2009. People over the age of 70 are now entitled to sit on a jury; however those over 65 years of age have a right to excuse themselves from jury service if they so wish.

11. Financial Regulation & Consumer Protection Legislation

There is no special provision in Irish law for the protection of older persons as consumers and with regard to financial services. Older people are thus protected

from financial abuse by the same legislation that applies to any other person (NCAOP 1998).

11.1 Central Bank and Financial Services Authority of Ireland Acts, 2003 & 2004

The *Central Bank and Financial Services Authority of Ireland Acts 2003 and 2004* provided for a reorganisation of the financial regulatory system. These Acts established the Irish Financial Services Regulatory Authority, and the office of the Financial Services Ombudsman to deal with consumer complaints regarding financial institutions. The legislation also included new reporting and auditing obligations for financial service providers, and greater powers for the Regulatory Authority to impose sanctions on financial services for failure to comply with regulatory requirements.

11.1.1 Consumer Protection Code 2006

The Financial Regulator developed a *Consumer Protection Code* in 2006 setting out general principles and rules that financial services providers must abide by. Some of these may be particularly pertinent for older people. For example, there is a common rule applying to all products and services which requires institutions to try and find out enough information about the consumer to understand their needs and only offer products or services that are suitable for that individual. The code also places an obligation on companies to warn a consumer about the risks involved in opening a joint account and about any safeguards that could be put in place. Many older people may open a joint account for convenience to allow caregivers access to their funds but this can increase the risk of financial abuse.

The code also incorporates provisions concerning "lifetime mortgages", a form of equity release which secures a loan on a consumer's home, where no repayments need to be made until the property is sold, or the owner of the property dies or permanently leaves the home (Law Reform Commission 2006). The Law Reform Commission noted in 2003 that "equity release" schemes are marketed primarily at those over 65 and highlighted the potential financial abuse arising from such schemes. The Commission expressed concern about potential for miss-selling of home reversion products, where a consumer sells part of their home in return for cash, which were not covered within the remit of the Financial Regulator (Law Reform Commission 2006). Since, February 2008, however, all companies providing lifetime mortgages or home reversion schemes must be authorised to do so (IFSRA 2008).

11.2 Consumer Protection Act, 2007

The *Consumer Protection Act 2007* established a National Consumer Agency (NCA), a statutory body intended to defend consumer interests by approving and promoting codes of practice and enforcing consumer legislation. This legislation updates legislation regarding false and misleading advertising, price control, and pyramid selling, amongst a wide range of unfair, misleading and aggressive commercial practices (NCA 2007). The Act also incorporates the provisions of a European Council directive on *Unfair Commercial Practices (Directive No. 2005/29/EC)*. This directive contains significant specific provisions dealing with individuals who may be susceptible to unfair commercial practices because of age, physical or mental infirmity or limited decision-making capacity. The directive also prohibits commercial practices involving the use of harassment, coercion, including the use of physical force, or undue influence, which may significantly limit a consumer's ability to make an informed decision (Law Reform Commission 2006).

11.3 Markets in Financial Instruments and Miscellaneous Provisions Act, 2007

The *Markets in Financial Instruments and Miscellaneous Provisions Act 2007 (MiFID Act)* puts the *EC Markets in Financial Instruments Directive (2004/39/EC)* into effect in Irish Law. This Directive outlines a comprehensive regulatory system covering investment services and financial markets in Europe and provides for the creation of an indictable offence under certain provisions of the MiFID Regulations. The legislation also brought all 'retail credit firms' and 'home reversion firms' within the regulatory system of the financial regulator.

11.4 Consumer Credit Act, 1995

The *Consumer Credit Act 1995* regulates most matters surrounding consumer credit, with the exception of Credit Unions. The legislation covers, for example, mortgages, bank loans, car loans, non-interest rate bank charges, money lending, pawnbroking and leasing agreements, as well as "independent intermediaries". The law contains provisions to ensure that credit agreements are provided in writing, that the borrower is fully aware of the terms of the loan, and that advertisements for credit give sufficient information (NCAOP 1998).

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